

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 25

Containing cases in which opinions were filed and orders
of dismissal entered, without opinion, between
August 25, 1964 and November 17, 1966

SPRINGFIELD, ILLINOIS
1969

(Printed by authority of the State of Illinois.)



PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section **18** of an Act entitled "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named, approved **July 17, 1945**.

PAUL POWELL,
*Secretary of State and
Ex Officio Clerk of the
Court of Claims*

OFFICERS OF THE COURT

JUDGES

MAURICE PERLIN, *Chief Justice*
Chicago, Illinois

ALFRED L. PEZMAN, *Judge*
Quincy, Illinois

ROBERT I. DOVE, *Judge*
Shelbyville, Illinois

WILLIAM J. SCOTT, *Attorney General*

WILLIAM H. CHAMBERLAIN
Secretary of State and Ex Officio Clerk of the Court
April 3, 1964—January 11, 1965

PAUL POWELL
Secretary of State and Ex Officio Clerk of the Court
January 11, 1965—

MELVIN N. ROUTMAN, *Deputy Clerk*
Springfield, Illinois

In Memoriam

Mrs. Belle P. White

Mrs. Belle P. White, who was secretary to three former Illinois Governors, one Lieutenant Governor and served as Deputy Clerk of the State Court of Claims for seventeen years, retiring in June of 1950, died July 30, 1965, in Springfield, Illinois.

She was a secretarial aide to Governors Charles S. Deneen, Edward F. Dunne and Frank O. Lowden. Mrs. White was first employed by the state in 1905 as private secretary to Governor Deneen and served him in that capacity until 1913, assistant to Governor Dunne from 1913 to 1917 and then served as personal secretary to Governor Lowden and as supervisor of the secretarial staff from 1917 to 1921. Following that, she was parliamentarian to the Illinois Senate and executive assistant to the late Lieutenant Governor Fred Sterling for twelve years. She will best be remembered, however, for her role as Deputy Clerk of the Court of Claims.

Mrs. White was instrumental in establishing the Court in permanent quarters, a vast improvement over temporary hearing rooms in which the Court had been working. During her tenure in this office she gained the respect of all whom she came in contact with. She will be long remembered by these many friends.

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT

Rule 1. The Court shall hold a regular session at the Capital of the State on the second Tuesday of January, May and November of each year, and such special sessions at such places as it deems necessary to expedite the business of the Court.

Rule 2. Pleadings and practice, as provided by the Civil Practice Act of Illinois and the Rules of the Supreme Court of Illinois, shall be followed except as herein otherwise provided.

Rule 3. The original and five (5) copies of all pleadings shall be filed with the Clerk at Springfield, Illinois. In order that the files of the Clerk's office may be kept under the system commonly known as "flat filing", all papers presented to the Clerk shall be flat and unfolded. Such papers need not have a cover.

Rule 4.

- A. Cases shall be commenced by filing a verified complaint with the Clerk of the Court at Springfield, Illinois. A party filing a case shall be designated as the claimant, and either the State of Illinois *or* the appropriate State Agency involved, as the case may be, shall be designated as the respondent. The Clerk will note on the complaint, and each copy, the date of filing, and deliver one of said copies to the Attorney General or to the Legal Counsel of the appropriate State Agency. Joinder of claimants in one case is permitted, as provided by the Civil Practice Act of Illinois.
- B. In all cases filed in this Court, all claimants not appearing pro se must be represented of record by a member of the Illinois Bar residing in Illinois. Any attorney in good standing, duly admitted to practice in the State where he resides, may, upon motion, be permitted to appear of record, and participate in a particular case. If the name of a resident Illinois attorney, his address, and telephone

number appear on a complaint, no written appearance for such attorney need be filed, but withdrawal and substitution of attorneys shall be in writing, and filed in the case.

- C. The 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	}	No.
	vs		
STATE OF ILLINOIS, (or the appropriate State Agency)	Respondent		

Rule 5.

- A. The claimant shall in his complaint set forth fully the following:
 1. Whether his claim has been *previously* presented to any State Department or officer thereof.
 - (a) If so presented, claimant shall state when and to whom.
 - (b) Any action taken on behalf of the State or the appropriate State Agency in connection with said claim.
 2. What persons are owners of the claim or interested therein, and when and upon what consideration such persons became so interested.
 3. That no assignment or transfer of the claim, or any part thereof or interest therein has been made except as stated in the complaint.
 4. That claimant is justly entitled to the amount therein claimed from the State of Illinois or the appropriate State Agency after allowing all just credits.
 5. The claimant believes the facts stated in the complaint to be true.

6. Whether this claim or any claim arising out of the same occurrence has been *previously* presented to any person, corporation or tribunal *other* than the State of Illinois.

(a) If so, state when, to whom, and what action was taken thereon, and what payments or other considerations, if any, have been received. (Claimant must file with *the* Clerk of the Court copies of all instruments evidencing such payment or consideration.)

B. Where a claim alleges damages as a result of personal injuries, claimant must attach to his complaint copies of the notices served by him as required by Chap. 37, Sec. 439.22-1, 1965 Ill. Rev. Stats., showing how and when such notice was served.

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

D. All claims for \$200.00 or less for services or materials furnished to the State of Illinois, payment of which has been denied solely because of a lapsed appropriation, shall be filed with the Clerk of the Court of Claims in the following manner:

1. Claims shall be initiated by filing with the Clerk of the Court of Claims in Springfield, Illinois an original and five executed copies of a sworn statement with a detailed statement of account attached as exhibit "A" on Court of Claims form *No.* 1, as furnished by the Clerk of the Court or prepared by claimant.
2. Respondent shall confirm or deny that such sum of money or any sum of money is due said claimant, and such confirmation or denial shall be made in writing to the Clerk of the Court within sixty (60) days from the date of the filing of said sworn statement.

Rule 6. If the claimant shall, *subsequent* to the filing of his complaint in the Court of Claims, commence a proceeding in another tribunal, or present a claim to any other person or corporation

for damages arising out of the same occurrence or transaction, then, in that event, the claimant shall immediately advise the Court of Claims in writing as to when, where and to whom such claim was presented or proceeding commenced. The complaint then pending in the Court of Claims will be continued generally until the final disposition of said claim or proceeding. *Failure of claimant to notify the Court of Claims, as provided herein, shall be grounds for dismissal of the complaint.*

Rule 7. A bill of particulars, stating in detail each item of damage, and the amount claimed on account thereof, *shall be attached to the complaint in all cases.* In claims based on personal injuries, claimant shall furnish the names and addresses of all persons providing medical services, hospitals where treated, name of claimant's employer and place of employment.

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

Rule 9. If the claimant dies pending the suit, the death must be suggested on the record, and the legal representative, on filing a duly certified copy of the record of 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 the fact first becomes known to him.

Rule 10. The respondent shall answer within thirty (30) days after the filing of the complaint, and the claimant may reply within fifteen (15) days after the filing of said answer, unless the time for pleading be extended; provided that, if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the complaint shall be considered as filed, except that respondent, upon good cause shown, may thereafter, by leave of Court, be permitted to file affirmative pleadings.

EVIDENCE

Rule 11. At the next succeeding session of the Court after a case is at issue, the Court, upon the call of the docket, shall assign the case to a commissioner, who, within a reasonable time, shall set

the time and place for hearing, and notify opposing counsel in writing. *After two (2) continuances have been granted in any case, no further continuances will be granted except upon good cause shown, supported by affidavit.*

Rule 12.

- A. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. When the evidence is taken, and the proofs in a case are closed, the evidence shall be transcribed, and the original and two (2) copies thereof shall be filed by the court reporter with the Clerk within thirty (30) days of the completion of the hearing.
- B. The format of the transcript of evidence shall conform to that of court reporters as nearly as practicable. Double spacing shall be used for each question and answer, and double or triple spacing shall be used between each question and answer. Letter or legal size paper shall be used, and margins shall be of suitable size.
- C. An index, identifying the names of the witnesses, shall be included in the transcript of evidence. The index shall further disclose the pages on which the testimony of each witness appears.
- D. An index identifying exhibits and reflecting the pages on which the exhibits are marked for identification shall be included in the transcript of evidence. The index shall further disclose the pages on which the exhibits are admitted into evidence or whereon admission thereof is denied.

Rule 13. All costs and expenses of taking evidence required by the claimant shall be borne by the claimant, and the costs and expenses of taking evidence required by the respondent shall be borne by the respondent.

Rule 14. If the evidence is not filed as herein required, the Court may, in its discretion, dismiss the complaint.

Rule 15. All records and files maintained in the regular course of business by any department, commission, board, agency or authority of the State of Illinois, and all departmental reports

made by any officer thereof relating to any matter or case 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 or the Legal Counsel of the appropriate State Agency to the claimant, or his attorney of record, and the original and four (4) copies filed with the Clerk.

Rule 16.

- A. In any case in which the physical condition of a claimant or claimants is in controversy, the Court may order him, or them, to submit to a physical examination by a physician. The order may be made by the Court on its own motion or on motion for good cause shown, and upon notice to the claimant to be examined, or his attorney, and to all other claimants, or their attorneys, if any, and shall specify the time, place, manner, conditions and scope of the examination, and the person or persons by whom it is to be made.
- B. If requested by the claimant examined, respondent shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery to the claimant of such detailed written report, respondent shall be entitled, upon request, to receive from the claimant examined a like report of any examination previously or thereafter made of the same physical condition. If the claimant examined refuses to deliver such report or reports, the Court, on motion and notice, may enter an order requiring delivery on such terms as are just, and, if a physician fails or refuses to make such a report, the testimony of such physician may be excluded, if offered at the hearing of the case.

ABSTRACTS AND BRIEFS

Rule 17. In all cases where the transcript of the evidence, including exhibits, exceeds seventy-five (75) pages in number, claimant shall furnish in sextuplicate a complete typewritten or printed abstract of the transcript of the evidence, including

exhibits, prepared in conformity with Rule **38** of the Rules of the Supreme Court of Illinois. The abstract must be sufficient to present fully all material facts contained in the transcript, and it will be taken to be complete, accurate and sufficient, unless respondent shall file a further abstract in conformity with said Rule **38**.

Rule 18. Each party **shall** file with the Clerk the original and five (5) 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 shall 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 case, together with the name and address of the attorney filing the same printed or plainly written thereon, The **filing of brief** and argument may be waived only upon good cause shown.

Rule 19. The abstract, brief and argument of the claimant must be filed with the Clerk on or before sixty (60) days after all evidence has been completed and filed with the Clerk, 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 sixty (**60**) days after the filing of the brief and argument of the claimant, unless the time for filing the brief of the claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Claimant may file a reply brief within thirty (**30**) days of the filing of the brief and argument of the respondent. Upon good cause shown, further time to file the abstract or briefs of either party may, upon notice to the other party, be granted by the Court, or by any Judge thereof.

EXTENSION OF TIME

Rule **20**. Either party, upon notice to the other party, may **make** application to the Court, or any Judge thereof, for an extension of time within which to file any pleadings, papers, documents, abstracts or briefs. A party filing such a motion shall submit therewith an original **and** five (5) copies of the proposed order in the furtherance of said motion.

MOTIONS

Rule 21.

- A. All motions shall be in writing. The original and five (5) copies of all motions, and suggestions in support thereof, shall be filed with the Clerk of the Court, together with proof of service upon counsel for the other party. When the motion is based upon matter that does not appear of record, it shall be supported by an affidavit. A copy of the motion, suggestions in support thereof, and affidavit, if any, shall be served upon counsel for the opposing party at the time the motion is filed with the Clerk.
- B. Objections to motions, and suggestions in support thereof, must also be in writing. An original and five (5) copies of all objections to motions shall be filed with the Clerk of the Court, together with proof of service upon counsel for the other party, within ten (10) days of the filing of the original motion. When motions are filed by either the claimant or the respondent, the moving party shall also submit an original and five (5) copies of the proposed order in the furtherance of said motion.
- C. There shall be no oral argument allowed on motions or objections to motions.

Rule 22. In case a motion to dismiss is denied, the respondent shall plead within thirty (30) days thereafter, and, if a motion to dismiss be sustained, the claimant shall have thirty (30) days thereafter within which to file an amended complaint. If the claimant fails to do so, the case will be dismissed.

ORAL ARGUMENTS

Rule 23. Either party desiring *to* make oral argument shall so indicate on the cover of his brief. Oral argument on a petition for rehearing **will** be permitted only when ordered by the Court on its own motion.

REHEARINGS

Rule 24. A party desiring a rehearing in any case shall, within **thirty** (30) days after the filing of the opinion, **file** with the Clerk

the original and five (5) copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court, with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

Rule 25. When a rehearing is granted, the original briefs, if any, 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 (20) days from the granting of the rehearing to answer the petition, and the petitioner shall have ten (10) 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.

Rule 26. When a decision is rendered, the Court within thirty (30) days thereafter, may grant a new trial for any reason, which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

RECORDS AND CALENDAR

Rule 27.

- A. The Clerk shall record all orders of the Court, including the final disposition of cases. 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.
- B. Within ten (10) days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the cases set for hearing, and of the cases to be disposed of at such session, and deliver a copy thereof to each of the Judges, the Attorney General, and to the Legal Counsel of the appropriate State Agency.

Rule 28. Whenever on call of *the* docket any case appears in

which no positive action has been taken, and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the day set by the Court why such case 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, such case 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.

FEEES AND COSTS

Rule 29. The following schedule of fees shall apply:

Filing of complaint in which award sought does not exceed \$1,000.00	\$ 10.00
Filing of complaint in which award sought exceeds \$1,000.00	25.00

Certified copies of documents filed in the Court of Claims may be obtained upon application to the Secretary of State and payment of the prescribed costs therefor.

ORDER OF COURT

The above and foregoing rules, as amended, were adopted as rules, as amended, of the Court of Claims of the State of Illinois on the 10th day of May, 1966 to be in full force and effect from and after the 1st day of July, A.D., 1966.

COURT OF CLAIMS LAW

AN ACT TO CREATE THE COURT OF CLAIMS, TO PRESCRIBE ITS POWERS AND DUTIES, AND TO REPEAL AN ACT HEREIN NAMED. (Chap. 37, Sec. 439, 1967 Ill. Rev. Stats.)

Section 1. The Court of Claims, hereinafter called the Court, is created. It shall consist of three judges, to be appointed by the Governor by and with the advice and consent of the Senate, one of whom shall be appointed chief justice. In 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. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

Section 2. Upon the expiration of the terms of office of the incumbent judges the Governor shall appoint their successors by and with the consent of the Senate for terms of 2, 4 and 6 years commencing on the ~~third~~ Monday in January of the year 1953. After the expiration of the terms of the judges first appointed pursuant to the provisions of this amendatory Act, each of their respective successors shall hold office for a term of 6 years and until their successors are appointed and qualified.

Section 3. Before entering upon the duties of his office, each judge shall take and subscribe the constitutional oath of office and shall file it with the Secretary of State.

Section 4. Each judge shall receive a salary of \$6,500.00 per annum payable in equal monthly installments.

Section 5. The Court shall have a seal with such a device as it may order.

Section 6. The Court shall hold a regular session at the Capital of the State beginning on the second Tuesday of January, May and November, and such special sessions at such places as it deems necessary to expedite the business of the Court.

Section 7. The Court shall record its acts and proceedings. The Secretary of State, ex-officio, shall be Clerk of the Court, but may appoint a deputy, who shall be an officer of the Court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the Court in the performance thereof.

The Secretary of State shall provide the Court with a suitable court room, chambers and such office space as is necessary and proper for the transaction of its business.

Section 8. The Court shall have jurisdiction to hear and determine the following matters:

- A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act.
- B. All claims against the State founded upon any contract entered into with the State of Illinois.
- C. All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts: For imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000; and provided further, the Court shall fix attorney's fees not to exceed 25% of the award granted.
- D. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against the Medical Center Commission, The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University, The Board of Regents of The Regency Universities System, or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case

sounding in tort shall not exceed the sum of \$25,000 to or for the benefit of any claimant. The defense that the State, or the Medical Center Commission, or The Board of Trustees of the University of Illinois, The Board of Trustees of Southern Illinois University, The Board of Regents of The Regency Universities System, or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

- E. All claims for recoupment made by the State of Illinois against any claimant.
- F. All claims for recovery of overpayment of premium taxes or fees or other taxes by insurance companies made to the State resulting from failure to claim credit allowable for any payment made to any political subdivision or instrumentality thereof. Any claim in this category, which arose after July 16, 1945, and prior to July 11, 1957, may be prosecuted as if it arose on July 11, 1957 without regard to whether or not such claim has previously been presented or determined.

Section 9. The Court may:

- A. Establish rules for its government and for the regulation of practice therein; appoint commissioners to assist the Court in such manner as it directs and discharge them at will; and exercise such powers as are necessary to carry into effect the powers herein granted.
- B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the Court, or before any notary public, or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the chief justice, or one of the judges, attested by the Clerk, with the seal of the Court 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 Clerk 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.

Section 10. The judges, commissioners and the Clerk of the Court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of them.

Section 11. The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became *so* interested; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true. The petition shall be verified, as to statements of facts, by the affidavit of the claimant, his agent, or attorney.

Section 12. The Court may direct any claimant to appear, upon reasonable notice, before it or one of its judges or commissioners or before a notary and be examined on oath or affirmation concerning any matter pertaining to his claim. The examination shall be reduced to writing and be filed with the Clerk of the Court and remain as a part of the evidence in the case. If any claimant, after being so directed and notified, fails to appear or refuses to testify or answer fully as to any material matter within his knowledge, the Court may order that the case be not heard or determined until he has complied fully with the direction of the court.

Section 13. Any **judge** or commissioner of the Court may sit at any place within the State to take evidence in any case in the court.

Section 14. Whenever any fraud against the State of Illinois is practiced or attempted by any claimant in the proof, statement, establishment, or allowance of any claim or of any part of any

claim, the claim or part thereof shall be forever barred from prosecution in the Court.

Section 15. When a decision is rendered against a claimant, the Court may grant a new trial for any reason which, by the rules of common law or chancery to suits between individuals, would furnish sufficient ground for granting a new trial.

Section 16. Concurrence of two judges is necessary to the decision of any case.

Section 17. Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the Court arising out of the rejected claim.

Section 18. The Court shall file with its Clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the Clerk of the Court.

Section 19. The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the interests of the State of Illinois in all cases filed in the Court, and may make claim for recoupment by the State.

Section 20. At every regular session of the General Assembly, the Clerk of the Court shall transmit to the General Assembly a complete statement of all decisions in favor of claimants rendered by the Court during the preceding two years, stating the amounts thereof, the persons in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of Court, the Clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Auditor of Public Accounts, and to such other officers as the Court directs.

Section 21. The Court is authorized to impose, by uniform rules, a fee of \$10.00 for the filing of a petition in any case in which the award sought does not exceed \$1,000.00, and \$25.00 in any case in which the award sought exceeds \$1,000.00; and to charge and collect for copies of opinions or other documents filed in the Court of Claims such fees as may be prescribed by the rules of the Court. All fees and charges so collected shall be forthwith paid into the State Treasury.

Section 22. Except as provided in sub-section F of Section 8 of this Act every claim, other than a claim arising out of a contract or a claim arising under subsection C of Section 8 of this Act, cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within 2 years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues 2 years from the time the disability ceases. Every claim cognizable by the Court, arising out of a contract and not otherwise sooner barred by law, shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within 5 years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues 5 years from the time the disability ceases. Every claim cognizable by the Court arising under subsection C of Section 8 of this Act shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within 2 years after the person asserting such claim is discharged from prison, or is granted a pardon by the Governor, whichever occurs later.

Section 22-1. Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against the State of Illinois for damages on account of any injury to his person shall file in the office of the Attorney General and also in the office of the Clerk of the Court of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

Section 22-2. If the notice provided for by Section 22-1 is not filed as provided in that section, any such action commenced against the State of Illinois shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury.

Section 23. It is the policy of the General Assembly to make no

appropriation to pay any claim against the State, cognizable by the Court, unless an award therefor has been made by the Court.

Section 24. "An Act to create the Court of Claims and to prescribe its powers and duties," approved June 25, 1917, as amended, is repealed. All claims pending in the Court of Claims created by the above Act shall be heard and determined by the Court created by this Act in accordance with this Act. All of the records and property of the Court of Claims created by the Act herein repealed shall be turned over as soon as possible to the Court created by this Act.

Section 25. Whenever a claim is filed with the Department of Mental Health or the Department of Public Safety for payment of medical fees or charges arising from the medical care or hospitalization of an escapee from a State controlled charitable, penal or reformatory institution, who was injured while being recaptured, the Department of Mental Health or the Department of Public Safety, as the case may be, shall conduct an investigation to determine the cause and nature of the injuries sustained, whether the care or hospitalization rendered was proper under the circumstances and whether the fees or charges claimed are reasonable, The Department shall forward its findings to the Court of Claims, which shall have the power to hear and determine such claims.

APPENDIX

AN ACT concerning damages caused by escaped inmates of charitable, penal, reformatory or other institutions over which the State has control. (Chap. 23, Sec. 4041, 1967 Ill. Rev. Stats.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Whenever a claim is filed with the Department of Mental Health, the Department of Children and Family Services, the Department of Public Safety, the Youth Commission, or the Department of Youth, as the case may be, for damages resulting from personal injuries or damages to property, or both, or for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has escaped from a chari-

table, penal, reformatory or other institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Mental Health, the Department of Children and Family Services, the Department of Public Safety, the Youth Commission, or the Department of Youth, as the case may be, shall conduct an investigation to determine the cause, nature and extent of the damages inflicted, and if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the Department or Commission may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims shall have the power to hear and determine such claims.

AN ACT terminating the Service Recognition Board, providing for the custody of its records, and providing for the transfer of funds in connection therewith. (Chap. 126½, Sec. 65, 1967 Ill. Rev. Stats.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 65. Any person who had a claim which would have been compensable by the Service Recognition Board except that during the period for filing claims such person was ineligible by reason of a dishonorable discharge from service, who, prior to July 1, 1953, has or shall have such discharge reviewed and has obtained or shall obtain an honorable discharge; and any person who had an amended or supplemental claim pending before the Service Recognition Board on May 20, 1953, but had not by that date submitted sufficient evidence upon which the Service Recognition Board could pay the amended or supplemental claim, shall be entitled to have such claim considered by the Court of Claims and to have an award on the same basis as if his claim had been fully considered by the Service Recognition Board.

AN ACT to establish a Military and Naval Code for the State of Illinois and to establish in the Executive Branch of the State Government a principal department, which shall be known as The Military and Naval Department, State of Illinois, and to repeal an Act therein named. (Chap. 129, Sec. 220, 1967 Ill. Rev. Stats.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 52. Officers, warrant officers or enlisted personnel of the Illinois National Guard or Illinois Naval Militia, who may be wounded or disabled in any way while on duty and lawfully performing the same so as to prevent their working at their profession, trade or other occupation from which they gain their living, shall be entitled to be treated by an officer of the medical or dental department detailed by the Adjutant General and to draw one-half of their active service pay, as specified in Sections 48 and 49 of this Article, for not to exceed thirty days of such disability, on the certificate of the attending medical or dental officer; if still disabled at the end of thirty days, they shall be entitled to draw pay at the same rate for **such** period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims.

Section 53. When officers, warrant officers or enlisted personnel of the Illinois National Guard or Illinois Naval Militia are injured, wounded or killed while performing duty in pursuance of orders from the Commander-in-Chief, said personnel or their heirs or dependents shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department.

AN ACT to *provide for the organization of the Illinois State Guard, and for its government, discipline, maintenance, operation and regulation.* (*Chap. 129, Sec. 277, 1967 Ill. Rev. Stats.*)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 277. Any officer or enlisted man of the Illinois State Guard who is wounded or sustains an accidental injury or contracts an illness arising out of and in the course of active duty and while lawfully performing the same shall:

- A. Be entitled to necessary hospitalization, nursing service, and to be treated by a medical officer or licensed physician selected by the Adjutant General, and
- B. If prevented from participating in active service or working at his profession, trade, or other occupation from which he earns his livelihood, as the result of disability caused by such injury or illness, during the continuance of such disability, be entitled to draw and receive full active duty pay, on *the* certificate of the attending medical officer or physician, for a period not to exceed thirty days, and if such disability continues in excess of thirty days shall be entitled to receive one-half his active duty pay for such period, not to exceed **six** months, as *a* board of three medical officers duly convened by the Adjutant General may determine to be just. Provided further, that where the period of such disability exceeds six months the Court of Claims of the State of Illinois shall have jurisdiction to award such further compensation as the merits of the case may demand. Where an officer or enlisted man of the Illinois State Guard is killed in the course of active duty and while lawfully performing the same, or dies as a result of an accidental injury or disease arising out of and in the course of active duty and while lawfully performing the same, or sustains an injury to his property arising out of and in the course of active duty and while lawfully performing the same, he, his heirs or dependents shall have a claim against the State for financial help or assistance and the Court of Claims of the State of Illinois shall act on and adjust the same as the merits of each case may demand.

*AN ACT relating to motor vehicles; defining terms used; providing for the administration; providing for the registration of motor vehicles; providing for the issuance of certificates of title; providing for anti-theft laws; providing for the registration of dealers, transporters, wreckers and rebuilders; providing for the registration and licensing of motor vehicle operators and chauffeurs; providing for the regulation of the privilege of operating motor vehicles upon highways; providing for the financial **and** safety responsibility on the part of those using*

the privilege of operating motor vehicles upon highways; providing for financial responsibility of owners of for-rent vehicles; fixing penalties for violations of this Act; repealing certain Acts therein named, except provisions of said Acts continued in force and effect. (Chap 95½, Sec. 7, Par. 503, 1967 Ill. Rev. Stats.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 7. During July, annually, the Secretary of State shall compile a list of all securities on deposit, pursuant to this Article, for more than three years and concerning which he has received no notice as to the pendency of any judicial proceeding that could effect the disposition thereof. Thereupon, he shall promptly send a notice by certified mail to the last known address of each such depositor advising him that his deposit will be subject to escheat to the State of Illinois if not claimed within thirty days after the mailing date of such notice. At the expiration of such time, the Secretary of State shall file with the State Treasurer an order directing the transfer of such deposit to the general revenue fund in the State Treasury. Upon receipt of such order, the State Treasurer shall make such transfer, after converting to cash any other type of security. Thereafter any person having a legal claim against such deposit may enforce it by appropriate proceedings in the Court of Claims subject to the limitations prescribed for such Court. At the expiration of such limitation period such deposit shall escheat to the State of Illinois.

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

(No. 5029—Claim denied.)

JOHN PALMER, Claimant, *vs.* NORTHERN ILLINOIS UNIVERSITY,
A CORPORATION, Respondent.

Opinion filed September 25, 1964.

WALLACE, SHELTON AND KLEINMAN, Attorneys for
Claimant.

DUNN, DUNN AND BRADY, Attorneys for Respondent.

PRACTICE AND PROCEDURE—*failure to give notice of intent to sue.*
Burden is on claimant to give notice provided in Secs. 22-1 and 22-2 of
the Court of Claims Act, and failure to do so is sufficient cause for the
action to be dismissed with prejudice.

PEZMAN, J.

Claimant, John Palmer, an orchestra leader, was engaged by the Northern Illinois University Alumni Association to present a program in the field house of Northern Illinois University, De Kalb, Illinois, on April 27, 1961. He arrived at the field house with his orchestra at approximately 3:30 P.M. on April 27, 1961, and rehearsed from 4:00 P.M. until approximately 6:00 P.M. Sometime between 6:00 P.M. and 7:00 P.M. claimant claims to have injured his foot and ankle in stepping or falling from the stage to a dirt track. He did not notice any depression in the dirt track before alighting from the stage, but did notice a depression after he stepped off the stage, and felt pain. The stage was set up in accordance with the specifications that were provided by claimant. Claimant alleges **he** was not able to see any depression in **the** dirt track when he stepped off the stage, because of the fact that **the**

lighting did not reach that area. Claimant continued his performance that evening, and then returned to Chicago.

Claimant was subsequently treated for a fracture of the fifth metatarsal, and an avulsion fracture of the lower end of the right fibula. The medical practitioner involved stated that there would not be any permanent residual disability as a result of the accident. Claimant now contends that he lost several engagements as a result of this accident, due to his inability to contact potential customers.

Respondent's witnesses indicate no knowledge of the alleged depression in the track before or after the accident. Evidence was introduced indicating that the custodial supervisor in charge of the field house had inspected the premises on April 27, 1961. This custodial supervisor did not notice any defect in the running track in the area described, and did not have notice or knowledge of any defect in the area prior to April 27, 1961.

Claimant's claim is denied. It is a well established rule that the State is not an insurer against accidents, and the mere fact that an accident happened does not, in and of itself, impose liability on the State or a subdivision of the State. Evidence indicates that the superintendent of buildings and maintenance and the custodial supervisor in charge of the field house were both in the field house in the performance of their duties on the day in question, and both had inspected the premises, and did not observe the alleged defect, which claimant asserts caused his injury. In order for claimant to recover, he must show that the State or a subdivision of the State had either actual or constructive notice of the defect of which the complaint alleges. The mere fact that a defective condition existed, if, in fact, it did exist, is not, in and of itself, sufficient to constitute an act of negligence on the part of respondent.

Claimant has not **only** failed to show any negligence

on the **part** of respondent, but has also failed to comply **with** Secs. 22-1 and **22-2** of the Court of Claims Act. These sections provide **as follows**:

“Sec. **22-1**. Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against the State of Illinois for damages on account of any injury to his person shall file in the office of the Attorney General and also in the office of the clerk of the Court of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.”

“Sec. **22-2**. If the notice provided for by Section **22-1** is not filed as provided in that section, any such action commenced against the State of Illinois shall be dismissed, and **the person** to whom any such cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury.”

The notice provided for in the above quoted statute is mandatory, and, as stated in Sec. **22-2**, failure to give such notice shall be sufficient cause for the action to be dismissed with prejudice. **We** find the cause for respondent.

(No. 5034—Claimant awarded \$2,544.00.)

WALTER L. BAYER, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed September 25, 1964.

DANIEL Mc MULLEN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **EDWARD A. WARMAN AND EDWARD G. FINNEGAN**, Assistant Attorneys General, for Respondent.

CNIL SERVICE Am—salary for *period of unlawful discharge*. Evidence disclosed that claimant, having made a conscientious effort to mitigate damages, was entitled to back salary from lapsed biennial appropriation.

PEZMAN, J.

Claimant seeks reimbursement for salary for a period of illegal suspension and illegal discharge from his employ-

ment **as** a classified employee under the Personnel Code of the State of Illinois. Claimant was employed by the Illinois Youth Commission, and is presently so employed.

A petition was filed on May 1, 1962, to which respondent did not file a specific pleading. The parties in the cause stipulated and agreed **as** follows:

"Claimant, Walter L. Bayer, was, on and prior to February 20, 1961, actively engaged in the performance of his duties as an employee of the Illinois Youth Commission under the rules of the Department of Personnel.

"Claimant was duly certified and appointed to his position after taking and passing the requisite Civil Service examination therefor.

"Claimant was promoted to Senior Guard Captain on September 1, 1959, which position was at that time, and at all times, designated and classified by the Civil Service Commission and by the rules of the Department of Personnel, and the salary range therefor was from \$500.00 to \$620.00 per month.

"The position was in the classified service of the Illinois Youth Commission of the State of Illinois, and **was** not exempt under the State Civil Service Act or the law governing the Department of Personnel.

"Claimant performed the duties of his position from the date of his appointment until the date of his discharge.

"On February 20, 1961, claimant was notified of a disciplinary suspension of thirty days, effective February 20, 1961, pending discharge at the request of the Chairman of the Illinois Youth Commission for the reason of 'violation of Illinois Youth Commission administrative regulations.'

"**On** March 20, 1961, claimant was notified of his discharge, effective February 20, 1961, at the request of the Chairman of the Illinois Youth Commission with the last day of pay as of February 21, 1961.

"Within the time required by law, claimant requested a hearing, and it was scheduled by the Civil Service Commission on notice to claimant for April 10, 1961, at which time the hearing was held.

"Claimant appeared before said Commission pro se, and, upon the conclusion of the hearing on January 12, 1962, the hearings referee decided 'It is, therefore, the decision of the hearings referee that petitioner, Walter L. Bayer, be and he is hereby retained in his position as Senior Guard Captain at the Illinois State Industrial School for Boys, Sheridan, Illinois, effective March 23, 1961.,

"Thereafter, on January 18, 1962, the Civil Service Commission entered its findings and decision as follows:

"The undersigned Civil Service Commissioners of the State of Illinois, having read and examined the proofs, oral, documentary and written, taken in the above entitled cause, together with the record, evidence, findings and decision of the above-named hearings referee, concur in,

and adopt the same as those of the Civil Service Commission, State of Illinois, and said findings and decisions so concurred in and adopted by the said undersigned Commissioners are hereby certified to the Director of the Department of Personnel, State of Illinois, for enforcement.'

"At the request of the Illinois Youth Commission claimant returned to his employment as a Senior Guard Captain at the Illinois Industrial School for Boys, Sheridan, Illinois, on February 13, 1962, and has since continued to work in said employment.

"The Illinois Youth Commission has paid claimant for his salary at the rate of \$590.00 per month for the period of July 1, 1961 to February 12, 1962, both dates inclusive, less claimant's earnings of \$2,748.10 from other employment during that period.

"The net amount paid to claimant by respondent was \$1,696.90.

"From the findings and decision of the Civil Service Commission it appears that claimant **was** removed from **his** Civil Service position, **and** was prevented from performing the duties of said position, and from receiving the salary appropriated therefor and attached thereto from February 20, 1961 to June 30, 1961, both dates inclusive.

"The findings and decision of the Civil Service Commission of the State of Illinois are in full force and effect, and have never been reversed, modified, annulled or set aside, and no appeal has been taken, or is pending.

"The salary appropriated was the sum of \$590.00 per month.

"For the period of February 20, 1961 to June 30, 1961, inclusive, the Illinois State Legislature passed appropriation bills for the position of Senior Guard Captain at the Illinois Industrial School for Boys, Sheridan, Illinois.

"Claimant **has** not been paid the back salary for the period of February 20, 1961 to June 30, 1961, inclusive."

From the record it appears that claimant made a conscientious effort to be employed during the period from February 20, 1961 to June 30, 1961. The evidence showed that he made applications at various places, but was unable to gain employment until July 2, 1961. The record and the stipulated statement of facts also show that, upon his return to employment by the Illinois Youth Commission, claimant was **paid** in full for services after June 30, 1961 when the biennium ended. The appropriation for services rendered prior to June 30, 1961 lapsed. Had there been no lapse of appropriation, the Illinois Youth Commis-

sion would have paid claimant, and this case would not have been brought before the Court of Claims.

The Court of Claims has expressed itself thoroughly on this point in the case of *Schneider* vs. *State of Illinois*, 22 C.C.R. 453, as well as in the cases of *Secaur* vs. *State of Illinois*, 21 C.C.R. 364, and *Poynter* vs. *State of Illinois*, 21 C.C.R. 393.

Claimant is, therefore, hereby awarded the sum of \$2,544.00 for his salary from February 20, 1961 to June 30, 1961, inclusive.

(No. 5061—Claimant awarded \$10,000.00)

CLIFTON W. BURGNER, Administrator of the Estate of MYRA J. BURGNER, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1964.

JAMES J. MASSA, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—notice of dangerous condition. Where record indicated respondent had notice that particular area of highway tended to an unusual accumulation of ice and water, and that respondent had, in fact, known of several accidents the previous night, respondent was held to have had actual notice of dangerous condition of highway.

NEGLIGENCE—duty to erect warning signs. Evidence showed that respondent had notice of dangerous condition of highway, and was negligent in failing to erect signs to warn the traveling public.

PERLIN, C. J.

Claimant, Clifton W. Burgner, Administrator of the Estate of Myra J. Burgner, deceased, seeks recovery of \$25,000.00 damages arising out of the death of his wife on Monday, January 29, 1962, on Illinois State Route No. 157.

Claimant alleges that the State of Illinois, through its Division of Highways of the Department of Public Works

and Buildings, was negligent in that it permitted Highway No. 157 to be and remain in an icy and dangerous condition, and failed to warn the traveling public of the dangerous condition. The accident occurred several miles north of Bunkham Road on Highway No. 157 at approximately 8:30 A.M.

Claimant, who was not a witness to the accident, testified that his wife left their home about 8:00 A.M. on the day of the accident to take her granddaughter to school, and then proceeded to her own job as a school teacher. She did not ordinarily use Route No. 157 to travel to her place of employment. Prior to her demise, Mrs. Burgener had never suffered an accident, and was cited by the Secretary of State for careful driving about a year before the accident.

Edwin Barmann testified that he lived about 150 feet from the scene of the accident, but was not a witness to it. He arrived at the scene of the accident, and saw the car upside down, and a woman lying alongside. The highway was heavily iced, the ice extending from the curve south of his home to north of it, and was solid across the road. It had been heavily iced three or four days before the time of the accident in question. Mr. Barmann called the State Police Friday evening to report a minor accident on that particular stretch. He called them again Sunday evening, the night before the accident in the instant case, about 8:00 to report several accidents, which occurred that day. He told the State Trooper there were three accidents at the point in question between 6:00 and 8:00 P.M., and that they ought to put a sign out there telling people to slow down. The State Trooper said it would be taken care of. From 8:00 to 12:00 P.M. two more accidents occurred. The witness did not see any highway trucks or police vehicles investigating the accidents after he called them on Sunday.

Mr. Barmann further testified that he has lived in his present home for about twenty years, and the icy condition, which was caused by water running from the bluffs onto the road and freezing, had appeared with regularity. The condition was especially heavy the year of the accident.

Mr. Barmann had driven the road five times the day before the accident, and stated that no cinders or salt had been spread that day.

Norman Becker testified that he was traveling behind the deceased when the accident occurred. He testified that she was going about 35 to 40 miles per hour going into the curve on Route No. **157**. The surface of the highway was iced starting just past the curve. He saw the ice about 12 or 15 feet from it, and could not see it earlier because of the curvature of the road. He **observed** no **warning** signs. He saw the Burgener car driving into the curve, and stated that the car was completely under control when she went around the curve, and was on the proper side of the road until she hit "that spot there, and she started fish-tailing back and forth". Until the curve, the highway was dry, and there was no snow, water, or ice on it. The ice covered about 400 feet or more on the east side of the highway, the side that Mrs. Burgener was traveling. The accident occurred at the foot of the bluffs, where the Burgener car overturned.

Velma Hartman was also traveling along Route No. **157** on the morning of the accident. She testified that, until one got past the curve, the ice could not be seen. "You are driving along as normal up to where you got **up** to that jut-off that obstructs your vision, and then, as soon as you got past that, you got ice." There were no warning signs posted or speed limit signs. She had driven that stretch of road for **13** years, and noticed that water had a tendency to accumulate. On the day of the accident, there were no

cinders, salt, or any other such thing on the ice. She **also** stated that the highway curves around the bottom of the bluff, and one does not see the next two or three hundred feet of highway until rounding the curve.

Robert Drummond, an engineer with the State of Illinois Division of Highways, testified that he **was** a maintenance field engineer, and the scene of the accident was in his territory on January **29**, 1962. He was at the scene of the accident the afternoon after it happened, and there was no ice on the pavement. There were gutters located nearby, which were carrying water, and, to the best of his knowledge, the water was confined to the gutter, and did not extend into the highway.

Billy J. Barnhill, the State Policeman who arrived at the scene of the accident before the ambulance arrived, testified that he found the Burgener car with the wheels in the air, and there was a thin film of ice covering the surface of the road, which was caused by water seepage out of the bluffs.

Mr. Paul Jones was highway maintenance supervisor for the area, which included the scene of the accident. He went to the scene of the accident on the day it occurred. There was a thin sheet of ice on the pavement for several hundred feet. He testified that salt and cinders had been applied the Sunday afternoon before the accident. At that time there was water and no ice, and the section man applied the abrasive to the moisture. Water comes out of the hillside at that point **all** year around. There were no **signs** warning northbound traffic between Bunkham Road (where the deceased had entered Route No. 157) and Caseyville, but there were signs in the area warning of the conditions on Route No. **157**. He was aware of the water formation, and the ice in the area in question whenever the temperature dropped prior to the Winter of January, **1962**.

Alfred Kassing, highway section man with the Division of Highways for the area in question, testified that on the morning of the accident he arrived at the scene of the accident, and was at that time spreading salt and cinders. He had spread salt and cinders the previous day on instructions from Mr. Jones, who told him to hit all the spots on Route No. 157, which might freeze. He spread salt and cinders about twice a day.

Another engineer for the State testified that he came upon the scene of the accident and saw ice, but he saw no cinders at the point of the accident, but rather the cinders he saw appeared to have stopped about **300** feet from the scene of the accident.

While the State is not liable for injuries from the natural accumulation of ice and snow (*Levy vs. State of Illinois*, 22 C.C.R. 694), it may be held liable for failure to warn the traveling public of the dangerous condition of a highway caused by an unusual accumulation of ice, where it has had notice of such condition. (*Bovey, Et Al, vs. State of Illinois*, 22 C.C.R. 95.)

There is substantial evidence in the record showing that the State had notice not only of the condition of the area on Highway No. 157, which had long tended to an unusual accumulation of ice and water, but it, in fact, had notice of several accidents the very evening before the one in question occurred. It would seem that the erection of signs or signals is the least action respondent should have exercised. **If** cinders were spread at that point, they were not spread in such a manner as to be reasonably effective under the circumstances. There were no signs posted upon Route No. 157 within the one-tenth mile between the icy condition and Bunkham Road where Mrs. Burgener turned onto Route No. 157.

Respondent contends that claimant has failed to establish that deceased was in the exercise of due care. Testimony of the eye-witness to the accident, Norman Becker, refutes respondent's contention, and, in fact, indicates that the deceased was in the exercise of due care for her safety. The witness himself did not see the ice until he was only 12 or 15 feet from the accumulation, the rest of the highway being dry.

It is the opinion of this Court that claimant be awarded damages in the sum of \$10,000.00.

(No. 5072—Claimant awarded \$13,459.95.)

FOSTER-WESTERN PHARMACY, INC., Claimant, os. STATE OF ILLINOIS, Respondent.

Opinion filed *September 25, 1964*.

IRWIN BLOOM, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation*. Where evidence showed that the reason claim was not paid was due to the fact that, prior to ~~the~~ time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

Claimant, Foster-Western Pharmacy, Inc., filed its original claim on November 16, 1962 seeking payment of the sum of \$26,919.90 for pharmaceutical supplies furnished to Illinois Public Aid recipients for a period of several years.

Subsequently, on April 23, 1964, a stipulation of facts was entered into by the attorney for claimant and the Attorney General for the State of Illinois whereby it was agreed as follows:

*Foster-Western Pharmacy, Inc., an Illinois Corporation and claimant

herein, is in the business of supplying pharmaceutical and sundry items to the public.

"Foster-Western Pharmacy, Inc., and the Public Aid Commission entered into **an** agreement wherein the State of Illinois was to reimburse the Foster-Western Pharmacy, Inc., for its sale to recipients of pharmaceuticals supplied by the said Foster-Western Pharmacy, Inc.

"The terms of the foregoing agreement and the acceptance thereof by the State of Illinois are fully set forth in the complaint hereto as exhibits A and B.

"The Foster-Western Pharmacy, Inc., after fully performing its obligations under the said agreement rendered and mailed a bill to the State of Illinois for the sum of **\$13,459.95**.

"The Seventy-Second biennium appropriations out of which the bill was payable had lapsed at the time the bill was mailed, and the funds to pay said bill were no longer available to the Public Aid Commission.

"Foster-Western Pharmacy, Inc., by its counsel, again represents that no assignment or transfer of the claim in this cause, **or** any part thereof or interest therein, has been made by Foster-Western Pharmacy, Inc., and that the Foster-Western Pharmacy, Inc., is justly entitled to the **sum** of **\$13,459.95** from the State of Illinois after allowing all just credits."

An amended petition filed on May **12**, 1964 reduced the ad damnum to **\$13,459.95**, the amount of damages agreed upon in the stipulation.

This **Court** has held in previous decisions that, where the evidence shows that the only reason a claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made. *Continental Oil Company vs. State of Illinois*, **23 C.C.R. 70**; *M. J. Holleran, Inc., vs. State of Illinois*, **23 C.C.R. 17**.

Pursuant to the evidence submitted, and the stipulation of facts filed herein, **an** award is hereby made to claimant, Foster-Western Pharmacy, Inc., in the sum of **\$13,459.95**.

(No. 5073—Claimant awarded \$9,808.95.)

WESTRIDGE PHARMACY, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion *filed September 25, 1964.*

IRWIN BLOOM, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

Claimant, Westridge Pharmacy, Inc., filed its original claim on November 16, 1962 seeking payment of the sum of \$19,617.90 for pharmaceutical supplies furnished to Illinois Public Aid recipients for a period of several years.

Subsequently, on April 24, 1964, a stipulation of facts was entered into by the attorney for claimant and the Attorney General for the State of Illinois whereby it was agreed as follows:

“Westridge Pharmacy, Inc., an Illinois Corporation and claimant herein, is in the business of supplying pharmaceutical and sundry items to the public.

“Westridge Pharmacy, Inc., and the Public Aid Commission entered into an agreement wherein the State of Illinois was to reimburse the Westridge Pharmacy, Inc., for its sale to recipients of pharmaceuticals supplied by the said Westridge Pharmacy, Inc.

“The terms of the foregoing agreement and the acceptance thereof by the State of Illinois are fully set forth in the complaint hereto as exhibits A and B.

“Westridge Pharmacy, Inc., after fully performing its obligations under the said agreement rendered and mailed a bill to the State of Illinois for the sum of \$9,808.95.

“The Seventy-Second biennium appropriations out of which the bill was payable had lapsed at the time the bill was mailed, and the funds to pay said bill were no longer available to the Public Aid Commission.

“Westridge Pharmacy, Inc., by its counsel, again represents that no **assignment** or transfer of the claim in this cause, or any part thereof or

interest therein, has been made by Westridge Pharmacy, Inc., and that the Westridge Pharmacy, Inc., is justly entitled to the sum of \$9,808.95 from the State of Illinois after allowing all just credits."

An amended petition filed on May 12, 1964 reduced the ad damnum to **\$9,808.95**, the amount of damages agreed upon in the stipulation.

This Court has held in previous decisions that, where the evidence shows that the only reason a claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made. *Continental Oil Company vs. State of Illinois*, 23 C.C.R. 70; *M. J. Holleran, Inc., vs. State of Illinois*, 23 C.C.R. 17.

Pursuant to the evidence submitted, and the stipulation of facts filed herein, an award is hereby made to claimant, Westridge Pharmacy, Inc., in *the* sum of \$9,808.95.

(No. 5132—Claimant awarded \$3,740.00.)

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

Opinion filed September 25, 1964.

WILLIAM FRANKLIN FUITEN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **C. ARTHUR NEBEL**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

The complaint filed herein alleges that there is now due and owing claimant from respondent the sum of **\$3,740.00**. Said amount represents charges for certain changes, alterations, additions and extra **work** in connection with a contract entered into with the State of Illinois, De-

partment of Public Works and Buildings, for the construction of a certain building in Springfield, Illinois, known as the New State Museum Building. The contract was entered into on December **28, 1960**, and was subsequently amended by authorizations, issued by respondent, and agreed to by claimant.

It is further alleged that the provisions of the contract and subsequent authorizations were completely performed by claimant on or before November 18, **1963**; that respondent was submitted a statement for the balance due and owing claimant on or about November **18, 1963**; and, that the appropriation lapsed prior to the payment of said claim.

Respondent's Departmental Report and Supplemental Departmental Report, dated January **8, 1964** and May **15, 1964**, respectively, and signed by Francis S. Lorenz, Director of the Department of Public Works and Buildings, acknowledge that the balance due and owing claimant for performing said services is the sum of **\$3,740.00**.

Respondent has stipulated in writing with claimant that the Departmental Report and Supplemental Departmental Report of the Department of Public Works and Buildings shall constitute the record in the case.

From the record submitted in this case, it appears that the amount of **\$3,740.00** is now due and owing claimant by respondent, and an award in that amount is hereby made.

(No. 5142—Claimant awarded \$843.40.)

INDIANA HARBOR BELT RAILROAD COMPANY, A CORPORATION,
Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 25, 1964.

RICHARD O. OLSON, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General. GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On or about the 14th day of August, 1962, claimant, Indiana Harbor Belt Railroad Company, a Corporation, entered into an agreement with respondent, acting by and through the Department of Public Works and Buildings, Division of Waterways, whereby claimant granted respondent permission to enter upon its property to make certain channel improvements.

The instant claim in the amount of **\$843.40** arises from said contract, and represents the amount due and owing claimant for engineering and inspection expenses.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“Indiana Harbor Belt Railroad Company, a Corporation and claimant herein, is a railroad corporation engaged in the business of common carrier in the State of Illinois.

“Indiana Harbor Belt Railroad Company and the State of Illinois, Department of Public Works and Buildings, Division of Waterways, entered into an agreement on August **14, 1962** permitting the State to enter upon claimant’s property to make certain channel improvements, and the State specifically agreed to reimburse claimant for its engineering and inspection expense.

“The terms of the foregoing agreement **and** the acceptance thereof by the State are fully set forth herein as exhibit A in the complaint.

“Claimant, after fully performing its obligations under the said **agreement** rendered and mailed a bill to the State for the sum of **\$843.40**, a true copy is attached to the complaint herein, and marked exhibit B.

“That the appropriation out of which the bill was payable had lapsed at the time the bill was mailed, and the funds to pay said bill were no longer available to the Division of Waterways, and Indiana Harbor Belt Railroad Company was so advised by letter, a true copy of which is attached to the complaint herein as exhibit C.”

A report of the Department of Public Works and Buildings, signed by Francis S. Lorenz, Director of the Department of Public Works and Buildings, and bearing the recommendation of John C. Guillou, Chief Waterway Engineer, acknowledges the agreement to reimburse claimant for engineering and inspection expenses, and sets forth the amount of \$843.40 as being due and owing claimant. It further states that, unless lateness in submitting statement may preclude payment of such claim, claimant is entitled to receive payment for such services.

From the record submitted in this case, it appears that the amount of \$843.40 is now due and owing claimant by respondent. The claim in that amount is hereby allowed, and claimant, Indiana Harbor Belt Railroad Company, a Corporation, awarded the sum of \$843.40.

(No. 5148—Claimant awarded \$1,920.00.)

CENTRAL LANDSCAPING, INC., A CORPORATION, Claimant, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1964.

CENTRAL LANDSCAPING, INC., A CORPORATION, Claimant,
pro se.

WILLIAM G. CLARK, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

The complaint in this case was predicated upon an oral contract entered into with the Department of Public Works and Buildings, Division of Highways, prior to May 13, 1963, whereby claimant, Central Landscaping, Inc., a

Corporation, agreed to trim and remove certain trees along the right of way of certain highways under the supervision and maintenance of the State of Illinois.

The Report of the Division of Highways, dated June **15, 1964**, and signed by A. R. Tomlinson, Supervisor of Claims, states that the work was performed satisfactorily by claimant, inspected, approved and accepted by the Department of Public Works and Buildings, Division of Highways. It acknowledges that the charges of **\$1,920.00** were the usual, reasonable and customary charges for operations of this nature, and, further, that the only reason that the bill was not paid was that it was not received by the Division of Highways until the appropriation from which payment could have been made had lapsed.

Respondent has stipulated in writing with claimant that the Departmental Report, petition and exhibits attached thereto shall constitute the record in this case.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; and (4) adequate funds were available at the time the contracts were entered into, it would enter an award for the amount due. *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. **5109**, opinion filed June **26, 1964**; *The Pittsburg and Midway Coal Mining Company, A Corporation, vs. State of Illinois*, Case No. **5147**, opinion filed July **24, 1964**. It appears that all qualifications for an award have been met in the instant case.

Claimant, Central Landscaping, Inc., a Corporation, is, therefore, hereby awarded the sum of **\$1,920.00**.

(No. 5156—Claimant awarded \$2,826.90.)

ILLINOIS FIRE-PROOF COVERING CO., AN ILLINOIS CORPORATION,
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1964.

LEWIS, OVERBECK AND FURMAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

On or about the 30th day of March, 1962, claimant, Illinois Fire-Proof Covering Company, an Illinois Corporation, entered into a written contract with respondent, the State of Illinois acting by and through its agent, the Department of Public Works and Buildings. In it claimant agreed to do certain pipe coverage work in an addition to the Junior Livestock Building, Illinois State Fair Grounds, Springfield, Illinois.

The instant claim in the amount of \$2,826.90 arises from said contract, and represents the unpaid balance thereon.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“Illinois Fire-Proof Covering Company, an Illinois Corporation and claimant herein, was engaged in the general insulation and pipe-covering business in the City of Chicago, County of Cook, and State of Illinois, during the performance of the contract, which is attached to the complaint filed herein and marked exhibit A.

“Illinois Fire-Proof Covering Company and the State of Illinois, acting by and through its agents, the Department of Public Works and Buildings, entered into an agreement whereby the claimant agreed to do certain pipe coverage work for an addition to the Junior Livestock Building, Illinois State Fair Grounds, Springfield, Illinois, and the State was to reimburse Illinois Fire-Proof Covering Company for the cost of such work.

“The terms of the foregoing agreement and the acceptance thereof by the State are fully set forth in ~~the~~ complaint herein as exhibit A.

“Illinois Fire-Proof Covering Company on or about July 17, 1963, after fully performing the obligations under the said agreement, rendered and mailed a bill to the State for the sum of **\$2,826.90**, and that said sum became due and payable on or about August 16, 1963.

“The Supervising Architect, Lorentz A. Johanson, Department of Public Works and Buildings, State of Illinois, advised the claimant by letter that the funds making up the unpaid balance on the contract lapsed September 30, 1963.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; and, (4) adequate funds were available at the time the contracts were entered into, it would enter an award for the amount due. *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964; *The Pittsburg and Midway Coal Mining Company, A Corporation, vs. State of Illinois*, Case No. 5147, opinion filed July 24, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Illinois Fire-Proof Covering Co., an Illinois Corporation, is, therefore, hereby awarded the sum of **\$2,826.90**.

(No. 5165—Claimant awarded \$1,268.05.)

ROCKFORD MEMORIAL HOSPITAL ASSOCIATION, A CORPORATION,
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1964.

PEDDERSON, MENZIMER AND CONDE, Attorneys for
Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S.
GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence showed that the **only** reason **claim** was not paid was due to the fact that, prior to the *time*

a statement was presented, the appropriation lapsed, an award **will be** made.

PEZMAN, J.

On July 2, 1963, it was determined by the Illinois Public Aid Commission, by and through its office in Winnebago County, Illinois, that one John Willier was eligible to participate in its Program of Assistance to the Medically Indigent Aged. Claimant in the instant case was so notified of the acceptance of the responsibility for payment of its charges by the Department of Public Aid, and proceeded accordingly.

A complaint in this matter was filed in the Court of Claims on June 16, 1964 in which request for payment of the sum of \$1,399.53 was made, which sum represented charges for room, food, nursing, drugs, etc., for one John Willier for the period of April 29, 1963 to June 1, 1963. Upon application to the Court, an order was entered granting claimant permission to file an amended complaint. Said document was filed on August 20, 1964, and in same the ad damnum clause was amended, and the amount claimed is now \$1,268.05.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in essence support the allegations contained in the amended complaint of claimant, and further indicates that the sum of \$1,268.05 is still due and owing claimant. An amendment to the amended complaint and to the stipulation, as well as a Departmental Report filed on September 14, 1964, indicate clearly that the appropriation from which this claim could have been paid had lapsed.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4)

adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the bien-nium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964; *The Pittsburg and Midway Coal Mining Company, A Corporation, vs. State of Illinois*, Case No. 5147, opinion filed July 24, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Rockford Memorial Hospital Association, a Corporation, is, therefore, hereby awarded the sum of \$1,268.05.

(No. 5169—Claimants awarded \$427.53.)

JAMES PITTACORA AND FRANCIS ZIEGENHORN, Claimants, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed *September 25, 1964*.

DANIEL P. WARD, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; **GERALD S. GROBMAN**, Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—payment of extradition expenses. The expenses incurred in the extradition of a criminal, whose punishment of the crime shall be confinement in the penitentiary, shall be paid out of the State Treasury in pursuance of Chap. 60, Sec. 41, Ill. Rev. *Stats.*

DOVE, J.

The **claim** of James Pittacora and Francis Ziegenhorn was filed in the Court of Claims on July 3, 1964. Shortly thereafter a stipulation setting forth the facts was duly entered into by and between the attorney for claimants and the Office of the Attorney General for the State of Illinois. It provides as follows:

“That each of the two individual claimants was authorized and acting in his capacity as an employee of the State’s Attorney of Cook County on July 23, 24 and 25, 1962, when he performed his assignment of the extradition of Frederick Halstrom from Jacksonville, Florida to Chicago, Illinois for a subsequent trial in the Criminal Court of Cook County upon an indictment for burglary.

“That each of the two claimants traveled by air from Chicago to Jacksonville on July 23, spent the evening in a Jacksonville motel, traveled on July 24 to Florida State Prison in Raiford (where Halstrom was serving an armed robbery sentence, and where the claimants were informed that Halstrom would not be released into their custody until July 25), spent that evening in a Jacksonville motel, traveled on July 25 to the Florida State Prison, (where the claimants acquired custody of Halstrom) and then to the Jacksonville airport, whence each claimant returned by air to Chicago with Halstrom.

“That taxi fares were required in lieu of automobile rental expense, because of the serious nature of Halstrom’s prior offenses, and because of his attempted prison escape in the then recent past.

“That the expenses directly incident to the aforesaid official travel were:

(a) James Pittacora:

7-23: Air travel-Chicago to Jacksonville.	\$60.65
Limousine travel-Jacksonville (airport to motel)	2.50
Food	5.00
Lodging.	9.27
7-24: Taxicab travel	11.00
Food	5.00
Lodging.	9.27
7-25: Taxicab travel	13.50
Food	2.50
Air travel-Jacksonville to Chicago.	60.65
	<hr/>
TOTAL..\$179.34

(b) Francis Ziegenhorn:

7-23: Expressway toll to O’Hare Field (Chicago)	\$.90
Air travel-Chicago to Jacksonville.....	60.65
Limousine travel-Jacksonville (airport to motel)	2.50
Food	5.00
Lodging	9.27
7-24: Taxicab travel	11.00
Food	5.00
Lodging	9.27
7-25: Taxicab travel	13.50
Food	2.50
Food (for Halstrom)	2.50

Air travel-Jacksonville to Chicago.. .. .	60.65
Air travel-Jacksonville to Chicago (for Halstrom).	62.45
Tips-(entire trip)	3.00
	<hr/>
TOTAL.	\$248.19

“That all appropriate travel vouchers required by statute (Ill. Rev. Stats., 1963, Chap. 127, Sec. 148) were submitted to the Auditor of Public Accounts after the close of the last fiscal year of the Seventy-Second General Assembly, and that, because of the resultant absence of a corresponding appropriation of State revenue, the Auditor of Public Accounts did not at any time issue a warrant to reimburse the claimants for the aforesaid expense or any part thereof.

“That each of the claimants was and is entitled to payment from the State treasury of his expenses incurred in direct incident to his official travel for the extradition of Frederick Halstrom, pursuant to statute.

“That neither James Pittacora nor Francis Ziegenhorn has assigned or transferred his aforesaid claim or any part thereof, and that no principal or interest has been received thereon, and that each claimant is justly entitled to the amount claimed from the State of Illinois: James Pittacora, the amount of One Hundred and Seventy-nine dollars and Thirty-four cents (\$179.34); and Francis Ziegenhorn, the amount of Two Hundred and Forty-eight dollars and Nineteen cents (**\$248.19**).”

Chap. 60, Sec. 41 of the 1963 Ill. Rev. Stats., provides as follows with reference to extradition expenses: “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.”

It appears that all qualifications for an award have been met in the instant case. Claimant, James Pittacora, is hereby awarded the sum of **\$179.34**; and, claimant, Francis Ziegenhorn, is hereby awarded the sum of **\$248.19**.

(No. 5177—Claimant awarded \$1,260.00.)

OREST BAYUK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1964.

NEWTON DALE HACKER, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

MOTOR VEHICLES—*escheat of safety responsibility deposit*. Evidence disclosed that claimant was entitled to a refund of monies escheated to State pursuant to Chap. 95½, Sec. 7-503, Ill. Rev. Stats.

DOVE, J.

On August 27, 1964, claimant, Orest Bayuk, filed a complaint seeking refund of the Responsibility Security Fund deposited with the Secretary of State of the State of Illinois, as required by Section 42-12 of the Motor Vehicle Law of the State of Illinois.

A stipulation was entered into by and between the attorney for claimant and the Attorney General for the State of Illinois. From such stipulation it appears:

1. That on or about August 23, 1959, claimant, Orest Bayuk, was involved in an automobile accident at Lake Zurich, Illinois.

2. That on or about November 25, 1959, claimant deposited with the Secretary of State of Illinois One Thousand Two Hundred Sixty Dollars (\$1,260.00) as Financial Responsibility Security, as required by Section 42-12 of the Motor Vehicle Laws of the State of Illinois.

3. That all claims regarding said accident have been disposed of.

4. That more than three years have elapsed since the security deposit was deposited with the Secretary of State; that application for refund was not made within the stated time period; and, claimant's security deposit was transferred to the General Revenue Fund in the State Treasury, pursuant to Chapter 95½, Par. 7-503, Ill. Rev. Stats.

5. That, on September 27, 1963, a demand was made upon the Secretary of State for a refund of said security deposit.

6. That claimant has *not* received a refund of the security deposit from the Secretary of State of Illinois; that

no assignment or transfer of the claim has been made by claimant; and, that said claimant is justly entitled to the sum of One Thousand Two Hundred Sixty Dollars (\$1,260.00) from the State of Illinois.

Sec. 7-503, Chap. 95½, Ill. Rev. Stats., provides that any person having a legal claim against such deposit may enforce it by appropriate proceedings in the Court of Claims. The Court is of the opinion that claimant has complied with the statute, and is justly entitled to a refund.

An award is accordingly made by this Court to claimant, Orest Bayuk, in the amount of \$1,260.00.

(No. 4921—Claimants awarded \$6,500.00.)

W. G. CRITES AND BERTHA CRITES, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1964.

ALLEN AND ALLEN, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; LAWRENCE W. REISCH, JR., Assistant Attorney General, for Respondent.

HIGHWAYS—obstruction to natural flow of water. 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.

SAME—negligence. Where evidence showed that respondent's failure to remove its structure from the river bed was the direct and proximate cause of the damages to claimants' property, an award will be made.

SAME—damages. The measure of damages is the difference between the fair cash market value of property immediately before and immediately after the improvement.

PERLIN, C. J.

Claimants, W. G. Crites and Bertha Crites, seek recovery of \$43,050.00 for alleged damage to the value of their real estate resulting from actions by the State of Illinois.

Claimants allege that since prior to 1954 they owned, in joint tenancy, Lots Two and Four in County Clerk's

Subdivision of the Southwest Fractional Quarter (SWFR **v4**) of Section **8**, Township **19** North, Range **11** West of the 2nd **P. M.** in Vermilion County.

They further allege that in **1954** respondent sought to acquire title to a portion of Lot **2** for the purpose of improving U.S. Route No. **150**, also known as Illinois State Bond Issue Route No. **1**, along the westerly boundary of Lot **2**; that, in negotiations for such title, the State entered into an agreement to pay to claimants a sum of money for the portion taken, and for damages to that portion not taken. In addition thereto, and as part of the consideration thereof, respondent allegedly agreed to replace one large existing driveway giving Lot **4** access to the westerly side of Route No. **150** with two new driveways or accesses from said highway to Lot **4**; that pursuant to the agreement the State did construct the improvements to the highway, including the accesses or driveways to Lot **4**; that thereafter, on or about July **8, 1958**, the State of Illinois caused the driveways to be torn out, and a solid curbing built the entire length of Lot **4** along the highway without the knowledge, consent, or approval of claimants, thereby depriving claimants of all direct access from said Lot **4** to the highway, and thus lessening the value of Lot **4**.

Claimants further contend that Lot 2, described above, is bounded on the north and west by the Big Vermilion River, which flows in a northeasterly direction along the west boundary of said tract; that, immediately west thereof said river is crossed by a bridge erected on Illinois State Bond Issue Route No. **1**; that said Big Vermilion River is a natural water course, and at all times claimants have been entitled to the unobstructed flow of said waters along the boundary of the above described property; that the State of Illinois entered into contract with the McCalman Construction Company, a Corporation, to construct a new

bridge across said Big Vermilion River immediately west of the property above described, which contract contained a provision for removal of the existing structure, and provided that there should be incorporated into said contract by reference the standard specifications for road and bridge construction promulgated by the State of Illinois Department of Public Works and Buildings, Division of Highways; that, in violation of the requirements of said contract and standard specifications, the State of Illinois permitted the McCalman Construction Company to deposit said existing structure in the bed of the Big Vermilion River instead of removing the same, thereby altering the force and direction of the current of said Big Vermilion River, and, as a direct and proximate result thereof, claimants' land has been subjected, and is being subjected to excessive erosion along the boundary thereof, and during periods of high waters has been, and is being subjected to flooding to the damage of claimants.

That the right of access to an existing public street or highway is a valuable property right, which cannot be taken away or materially impaired without just compensation, has been established in Ill. Rev. Stats., Chap. 121, Sec. 2-210; *Department of Public Works and Buildings vs. Mabee*, 22 Ill. (2d) 202; *Department of Public Works and Buildings vs. Wolf*, 414 Ill. 386, 111 N. E. (2d) 322; and *Ill. Malleable Iron Co. vs. Com'rs of Lincoln Park*, 263 Ill. 446, 105 N. E. 336.

It has further been determined that 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. (*Cook vs. City of DuQuoin*, 256 Ill. App. 452, and *Fenwick vs. Bluebird Coal Co.*, 12 Ill. App. (2d) 464.)

It is not a simple task to evaluate what damage, if any, was caused to claimants' properties by respondent's actions.

In original hearings a wide disparity resulted from the conflicting appraisals of various "experts." To more equitably resolve this issue, it was necessary to hold supplemental hearings, and an independent investigation as well was undertaken by Commissioner John P. Simpson.

The measure of damages, if any, is the difference between the fair cash market value of the property immediately after the improvement. *Tipps vs. State of Illinois*, 21 C.C.R. 581 at 584. (Improvements in this case were made approximately in July, 1958.)

We find that the removal of access in this instance did in fact limit the full and unobstructed use of claimants' property. It is still, however, extremely valuable property. In our opinion the reasonable differential in market value immediately before and after the actions of respondent is \$5,000.00.

We are also of the opinion that six acres of Lot 2 were in fact damaged by respondent's activities in the adjacent river. We find that claimant suffered a loss of \$1,500.00 in the value of said property.

We, therefore, award to claimants the sum of \$6,500.00.

(No. 5076—Claim denied.)

CLARENCE M. LEE, as Administrator of the Estate of MAGGIE M. LEE, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1964.

R. W. HARRIS, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence-maintenance of shoulder. Court held that State **must** use reasonable care in maintaining the shoulder of a highway, but a difference of three or four inches in levels of the road and shoulder did **not** constitute a dangerous condition per se.

~~SAME~~—*contributory negligence*. Where evidence disclosed that claimant's own actions proximately caused the accident, claim was **denied**.

PERLIN, C. J.

Claimant seeks recovery of \$25,000.00 for the death of his wife, Maggie **M.** Lee, on May 23, 1962, while she was driving on Illinois State Bond Issue Road No. **34** in Saline County, Illinois.

The evidence shows that claimant's intestate was driving a 1955 Plymouth automobile in a northerly direction along the highway when the front wheel of the motor vehicle dropped off the paved portion of the highway onto the lower east shoulder. She drove back onto the pavement, and the car went out of control, crossed the pavement into the southbound traffic lane, came back into the northbound traffic lane, and then onto the east shoulder of the roadway into a ditch on the east side. The car **spun** around, overturned on its left side, then uprighted, and headed in a southerly direction where it came *to* a rest.

Claimant contends that respondent failed to maintain the roadway in a reasonably safe condition; that the shoulder was not even with the surface of the roadway on the east side of the highway; and that, as a proximate cause of such negligence, the accident resulting in the death of claimant's intestate occurred.

Ida Eubanks, the sister of Maggie Lee, testified that she and Mrs. Lee were traveling from Rosiclare, Illinois to Harrisburg. Mrs. Lee was driving, and Mrs. Eubanks was riding in the front seat. The weather was clear, the sun was shining, and the pavement was dry. According to Mrs. Eubanks, Maggie Lee was driving her car about **45** or **50** miles per hour, and that, when she drove too close to the edge of the pavement, the car dropped off onto the shoulder. The witness had not looked at the speedometer, but estimated the speed at which the car was being driven.

She testified that her sister had both hands on the steering wheel; that, when the car dropped off the edge of the pavement, she turned back sharply; and, when the car started back, it returned to the pavement, whirled to the left, went back to the right, and then clear across the pavement on the other side. According to Mrs. Eubanks, Mrs. Lee's brakes were on when she turned back to the right. Mrs. Eubanks estimated that the shoulder of the road was about five or six inches lower than the surface of the road. She stated that there were no cars approaching them from the other direction, and there were no cars behind them.

Guthrie Alexander, an Illinois State Trooper, testified that he investigated the scene of the accident. The shoulder of the road seemed to be two to three and one-half inches lower than the road. The tracks first ran off the road on the right, veered across and off the highway on the left, back across the highway, and off into the field where the car was resting. He arrived at the accident scene about ten minutes after it occurred.

Cassidan McDaniel arrived at the scene of the accident about an hour after it occurred, and described the level of the highway as about three or four inches higher than the shoulder.

Joan Mason, who drove to the scene of the accident after it occurred, stated that the difference in the level of the roadway and the shoulder was two to three inches.

Ethlene Vaughn, who arrived at the scene of the accident at about the time it occurred, testified that she did not notice the difference in the road level at the time. However, she had seen it since that time, and observed that the difference in level was about three or four inches.

Louie Furlong testified that he was employed in the maintenance of the highway, which included the areas of

Routes Nos. 34, 146 and 145. He was engaged in a mowing operation on the right-of-way of Route No. 34 south of Harrisburg when the accident occurred. He was standing on a hill flagging autos over it, and observed the car driven by Maggie Hill come around the turn, leave the pavement, and hit the shoulder. She was traveling towards him, and he observed her going off the right-hand side. After she went off the right-hand side, she “cut her car right back across the road, hit the other shoulder, cut to the right, and went off to where she ended up.” The car was about an eighth of a mile away when he saw it go off the road. About ten days before the accident, he had graded along the shoulder. In so doing, the gravel had been pushed up to the pavement, mashed, and then rolled down. The shoulder was a little lower than the pavement—about three inches. The road was graded about once every month, because it was on a turn, and the large trucks would throw the gravel away from the road. Mrs. Lee went off the pavement right after coming around the curve. She apparently failed to straighten out. The shoulder is graded with small gravel, backed, and leveled with the tractor wheels. Mr. Furlong estimated the car was traveling about 65 miles per hour.

Otis Palmer testified that he was a maintenance man with the State of Illinois Division of Highways. He was mowing grass at the time of the accident. He was going north at the time, and a sign indicating “mowing ahead” was about $\frac{3}{4}$ of a mile behind him. He further testified that he had graded the shoulder where the accident occurred about two or three weeks prior to the accident, and had used a tractor and grader, which pulled the dirt or gravel up to the pavement, which was blacktop over concrete.

In order to recover, the following elements must be proven: (1) that claimant’s intestate was free from contributory negligence; (2) that respondent was negligent; and, (3) that such negligence was the proximate cause of

the damage alleged in the complaint. It is claimant's contention that the accident was caused by the condition of the road, in that the shoulder was several inches lower than the road, and the edge of the pavement was ragged from the blacktop.

From the testimony of the two eye witnesses in this case, it appears that Maggie Lee was contributorily negligent, and that her own actions proximately caused the accident resulting in her death. At the time she hit the shoulder, she was apparently still in control of her car. Then she **turned** sharply to the left. She then put on her brakes, as she came back to the right. It would seem that she did not exercise reasonable care in this situation, which would require that she attempt to enter the road gradually, and not sharply as was done.

Claimant contends that it was the jagged edge of the road, which caused Maggie Lee to leave the pavement. From the photographs submitted by claimant, and from the testimony of the witnesses, it would appear that there is no difference between the edge of the road at that point and the edge of any other blacktop road. No reason was given for Maggie Lee's vehicle dropping off the pavement. The weather was clear, the road was dry, and the sun was shining. There were no other vehicles on the road in the immediate vicinity.

Sec. 54 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stats., Chap. 95½, Sec. 151) provides that "upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway." Exceptions to this rule do not apply in the instant case. Sec. 12 of that Act (Ill. Rev. Stats., Chap. 95½, Sec. 109) defines "roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular traffic, *exclusive of the berm or shoulder.*" (Emphasis supplied.)

In the case of *Sommer vs. State of Illinois*, 21 C.C.R. 259, this Court stated:

“We do not feel respondent has a duty to maintain the shoulders of its highways in a manner that would insure the safety of vehicles turning off onto the shoulder, for whatever their purpose might be, and then attempting to return to the roadway, while traveling at the same speed.”

While the State must use reasonable care in maintaining the shoulder of a highway, there is no basis to hold that a difference of three or four inches in the levels of the road and shoulder constitutes a dangerous condition *per se*.

In the opinion of this Court, claimant has failed to sustain his burden of proof that Maggie Lee was free from contributory negligence.

The claim is hereby denied.

(No. 5080—Claimant awarded \$970.18.)

**LINCOLN CHAPTER, LOGAN COUNTY FEDERATION OF SPORTSMEN'S CLUBS, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.**

Opinion filed December 10, 1964.

**ROBERT J. WOODS AND ROGER W. THOMPSON, Attorneys
for Claimant.**

**WILLIAM G. CLARK, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.**

PRISONERS AND INMATES—damage by escaped inmates—evidence. Before recovery will be granted, claimant must prove by a preponderance of the evidence that respondent was negligent in failing to exercise reasonable care to prevent the escape of a patient, and that such negligence was the proximate cause of claimant's damage.

SAME—evidence—burden of proof. Where claimant makes a prima facie case and respondent offers no evidence in rebuttal, the Court will conclude that claimant has sustained the burden of proof and make an award.

PERLIN, C. J.

Claimant, Lincoln Chapter, Logan County Federation

of Sportsmen's Clubs, an Illinois Not-For-Profit Corporation, seeks recovery of \$970.18 for damages caused to personal and real property, owned by claimant, on June 12, 1962 by Robert Bluemel, an inmate of the Lincoln State School, Lincoln, Logan County, Illinois.

The complaint alleges that the State of Illinois, by and through its agents and servants, failed to exercise reasonable care in preventing the escape of the inmate, Robert Bluemel, and that, as a proximate result of this negligence, he escaped and caused damage to claimant's property.

The evidence shows that, on June 12, 1962, Robert Bluemel, aged 41, was a patient of the Lincoln State School, which was operated by the State of Illinois as an institution for mentally retarded persons. He had been a patient there since his admission in 1953. At about 3:00 P.M. on June 12, 1962, Bluemel, who was quartered in the town portion of the Lincoln State School, escaped from the institution, and, while absent, caused damage to the property, owned by claimant, by setting fire to its clubhouse, and smashing various items of personal property within the building. The patient was apprehended about 6:30 P.M. the same day by security officers from the Lincoln State School, and was returned to the institution.

Mr. Robert Endres, Chief of the Safety Protection Service at the Lincoln State School, testified that there were about 3,000 to 3,200 patients at the town unit of the school. Another unit of the school is located at a farm, approximately three miles north of the town unit. He stated that there were normally about two men from his department stationed at the town unit. The men in his department are charged with the safety and protection of the patients and property, and the public in general, and attempt to see that the patients are kept within their various units.

According to Endres, Lincoln State School is not a

penal institution, and, although there is a fence around it, at least two of the four gates are open at all times. There were no guards or attendants at the gates or approaches.

Endres testified that, since Robert Bluemel was admitted to the institution, he had five previous unexcused absences or escapes, the last one occurring on June 4, 1962, when he escaped, and was returned on the same day. The other escapes occurred in 1953, 1955 and 1960.

In the town unit there is one maximum security building, called Smith Cottage, and a second designated as North Wing. The third floor of North Wing is a locked ward, and the remaining two floors are open. Bluemel escaped from the second floor of North Wing. On the second floor of North Wing there was at the time of the incident usually one attendant to supervise 70 or 80 patients. In the opinion of the witness, additional men or means were needed to prevent patients from wandering off the grounds, and doing damage to persons or property.

According to the report received by Endres, Robert Bluemel ~~was~~ working in the storeroom of the second floor of North Wing, and received permission from an employee to go to his quarters on the third floor of North Wing, but he proceeded, instead, to go out of the building and through the open gate. Had he been in his quarters on the third floor, he would have been locked in. Since Lincoln State School is an open institution, patients are permitted on the grounds, but not off the grounds without special permission, and then only when accompanied by an employee. The decision as to whether or not a patient be kept in a locked ward is made by the Superintendent, who is a medical doctor.

William Chambers, Chief Psychologist at the Lincoln State School, testified that to his knowledge a psychiatrist had not been employed at the Lincoln State School for two

or three years preceding June 12, 1962, although possibly one might have come in on consultation. While Robert Bluemel was at the Lincoln State School, he was tested one time in June, 1953. Mr. Chambers saw Bluemel on May 14, 1958 to evaluate his mental condition, and concluded he was diagnostically inadequate, with paranoid symptoms, and was developing a psychosis.

Mr. Chambers summarized Bluemel's history as follows: Robert Bluemel came to Lincoln State School from the Illinois Security Hospital on a transfer on June 1, 1953. He was a cooperative individual at the Security Hospital. He had originally been committed to the Dixon State School on March 25, 1930 by the Circuit Court of Cook County. His commitment was occasioned by frequent truancy from home, and failure to adjust in several foster home placements. At Dixon his over-all adjustment was very poor during his entire stay. He fought other patients, escaped frequently, repeatedly destroyed property, constantly engaged in malicious mischief, without known provocation, and was a chronic aggressive homosexual. He suffered gonorrhea in 1935, which developed into meningitis. He suffered gonorrhea again in 1938 and 1941 and infected many other patients. He also contracted syphilis about that time. Because of this behavior, he was transferred to the Illinois Security Hospital on January 1, 1950. The specific incident, which caused this transfer, was that he escaped from Dixon to Wisconsin, and, while on escape, burglarized a filling station, stole a car, and accosted a young girl in a restaurant. He also admitted that he had burglarized a fishing cabin, and had stolen articles of clothing, a gun, and a butcher knife. In June, 1955, he was given a trial on wage placement in a nursing home, and was returned in August of that year, because of an unauthorized absence from his job.

On June 4, 1962, he escaped, and was apprehended, and punished in Smith Cottage. On his release, he was angry, because he was to be placed on a locked floor of North Wing, instead of being returned to the second floor, and to his job in the storeroom. He escaped again on June 12, 1962, and entered the Sportsmen's Club near the institution. There he destroyed articles of furniture, tore an American flag, and set it afire. He stole food and a large hunting knife, and threatened a woman and her daughter with this knife in an attempt to get them to drive him to Springfield. He bragged about his attempt to assault the security guards, who came to apprehend him, and admitted that he threatened them with the knife, which he stole from the premises. He made repeated homicidal threats against "American Schwein", spoken in pseudo-German, and hinted about his **private communications with Nazi leaders.**

After the escape in question, Chambers conducted a full interview with Bluemel, and suggested that he be transferred to the Illinois Security Hospital for his protection and the protection of others.

In Chambers' opinion, Lincoln State School lacks sufficient staff in several areas of functioning. He stated: "It turned out that Robert needed much more supervision than we gave him. Robert was in Smith Cottage, and participated in our rehabilitation, and he was released to work in connection with rehabilitation proceedings there. This meant that he was allowed to return to the second floor of North Wing and to his job, where he had undue freedom, and then he was, for one month, in solitary confinement in the night time. Then the decision was made to have him leave Smith Cottage, and be on the locked floor, which, on the face of it, I didn't think he was capable to adjust to this freedom in the daytime, and then being locked up in the evening, What had happened was the decision of how

Robert was to be handled was made at different places and according to different programs, and it is not like we would like it to be—in other words, the consistency of it.”

Chambers further testified that five psychologists are employed at Lincoln State School for 5,200 to 5,500 patients. When Chambers interviewed Bluemel in 1958, he did record a finding, which would indicate a disturbed personality, which might be damaging to people and property. In his opinion there was not sufficient personnel at the Lincoln State School, either before or during June, 1962, to study and evaluate the mental conditions of the patients at the institution.

Before recovery may be granted, claimant must prove by a preponderance of the evidence that the State, by and through its servants, was negligent in failing to exercise reasonable care to prevent the escape of the patient, and that the negligence of the State was the proximate cause of the damage inflicted upon claimant’s property.

Respondent presented no testimony in the proceedings, but joined in the offer of an exhibit.

In *Redebaugh vs. State of Illinois*, 22 C.C.R. 306, this Court said: “The Department of Public Welfare owes a duty to the public to see that inmates of a State School do not escape, and cause injury to others.” The Court further stated at page 308: “Since respondent did not offer any evidence in rebuttal that would show that reasonable efforts were made to prevent the escape of the inmates, or any other facts or circumstances surrounding their escape, the Court must conclude that there were no facts and circumstances.”

The Court has also held in similar factual situations that, if claimant makes a prima facie case, and respondent offers no evidence as to the circumstances surrounding the

escape, it will conclude that claimant has sustained the burden of proof. *Carl Paulus vs. State of Illinois, No. 4945; U.S.F. & G. vs. State of Illinois, 23 C.C.R. 188.*

Both the official in charge of security at the Lincoln State School and the Chief Psychologist testified that the patients were not adequately supervised, and the psychologist stated that there was not sufficient personnel to evaluate the mental conditions of the approximately 5,000 patients in residence at the institution.

In view of the patient's history: five escapes, one just eight days prior to the incident in question, his homosexual activities, his paranoid symptoms, and the findings of a disturbed personality, which might be damaging to people and property, it was reasonable to anticipate that allowing him freedom of the Lincoln State School, which is an open institution, might or could result in damage to persons or property.

It is the opinion of the Court that respondent was negligent in failing to exercise reasonable care to prevent the escape of Robert Bluemel, and that this negligence was the proximate cause of the damages inflicted upon the property of claimant by the inmate, Robert Bluemel.

The Departmental Report, submitted by Dr. Joseph Albaum, Superintendent of Lincoln State School, states that the estimate of damages caused by Robert Bluemel to claimant's property is approximately \$1,000.00, and that the figure of \$970.18, listed by the bill of particulars, is correct. The Report states: "The claimant is justly entitled to the amount therein."

The claimant, Lincoln Chapter, Logan County Federation of Sportsmen's Clubs, an Illinois Not-For-Profit Corporation, is, therefore, awarded the sum of \$970.18.

(No. 5166—Claimant awarded \$467.12.)

ST. FRANCIS HOSPITAL, AN ILLINOIS CORPORATION, Claimant, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1964.

WOODRUFF A. BURT, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S.
GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the **only** reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On April 24, 1963, it was determined by the Illinois Public Aid Commission, by and through its office in Stephenson County, Illinois, that one Herman Blaser was eligible to participate in its Program of Assistance to the Medically Indigent Aged. Claimant in the instant case was so notified of the acceptance of the responsibility for payment of its charges by the Department of Public Aid, and proceeded accordingly.

A complaint in this matter was filed in the Court of Claims on June 19, 1964 in which request for payment of the sum of \$601.45 was made, which sum represented charges for care and services, as well as for drugs and medical supplies, furnished one Herman Blaser for the periods of March 12, 1963 to March 29, 1963 and May 28, 1963 to June 30, 1963. Upon application to the Court, an order was entered granting claimant permission to strike the ad damnum clause of its complaint, and to insert in lieu thereof a request for payment of the sum of \$467.12.

A written stipulation was entered into between claimant and respondent, **by** their respective attorneys, which, in essence, supports the position **of** claimant in this matter, **and** further indicates that the sum of \$467.12 is still due

and owing claimant. A further amendment to the complaint, as well as the Departmental Report filed on September 21, 1964, establish clearly the fact that the appropriation from which this claim could have been paid had lapsed on September 30, 1963.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, St. Francis Hospital, an Illinois Corporation, is, therefore, hereby awarded the sum of \$467.12.

(No. 5167—Claimant awarded \$528.04.)

**ST. FRANCIS HOSPITAL, AN ILLINOIS CORPORATION, Claimant, vs.
STATE OF ILLINOIS, Respondent.**

opinion filed December 10, 1964.

WOODRUFF A. BURT, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On August **12, 1963**, it was determined by the Illinois Public Aid Commission, by and through its office in Stephenson County, Illinois, that one Jacob Kraft was eligible to participate in its Program of Assistance to the Medically Indigent Aged. Claimant in the instant case was so notified of the acceptance of the responsibility of its charges by the Department of Public Aid, and proceeded accordingly.

A complaint in this matter was filed in the Court of Claims on June **19, 1964** in which request for payment of the sum of **\$532.35** was made, which sum represented charges for care and services, as well as for drugs and medical supplies, furnished one Jacob Kraft for the period of May **28, 1963** to June **28, 1963**. Upon application to the Court, an order was entered granting claimant permission to strike the ad damnum clause of its complaint, and to insert in lieu thereof a request for payment of the sum of **\$528.04**.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in essence, supports the position of claimant in this matter, and further indicates that the sum of **\$528.04** is still due and owing claimant. A further amendment to the complaint, as well as the Departmental Report filed on September **24, 1964**, establish clearly the fact that the appropriation from which this claim could have been paid had lapsed.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid

had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, St. Francis Hospital, an Illinois Corporation, is, therefore, hereby awarded the sum of \$528.04.

(No. 5179—Claimant awarded \$640.80.)

CARGILL, INCORPORATED, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed December 10, 1964.

SORLING, CATRON AND HARDIN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN,**
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefore, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

The complaint in this case was predicated upon a written contract entered into on October 30, 1962 with the Department of Public Works and Buildings, Division of Highways, whereby claimant, Cargill, Incorporated, agreed to sell to respondent 96,000 pounds of snow and ice salt at a total price of \$640.80.

The Report of the Division of Highways, dated September 17, 1964, and signed by A. R. Tomlinson, Supervisor of Claims, states that the rock salt was duly delivered, as ordered. It acknowledges that the amount due therefore

was the usual and customary charge for rock salt in Whittington, Illinois, the community to which it was delivered; and, further, that the only reason that the bill was not paid was due to the fact that the invoice therefore was not received by the Division of Highways until the appropriation from which payment could have been made had lapsed.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in part, is as follows:

“The State of Illinois, Division of Highways, **was** unable to make payment pursuant to said agreement, because the appropriation for it had lapsed on September **30, 1963**, and by that reason alone claimant has been denied payment.

“Claimant is justly entitled to the amount claimed, namely, \$640.80, after allowing all just credits.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964; *The Pittsburg and Midway Coal Mining Company, A Corporation, vs. State of Illinois*, Case No. 5147, opinion filed July 24, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Cargill, Incorporated, is, therefore, hereby awarded the sum of \$640.80.

(No. 5098—Claimants awarded \$2,000.00.)

GINO ASCANI AND MARY ASCANI, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1965.

KNIGHT, INGRASSIA AND ROSZKOWSKI, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; JOHN C. CONNERY, Special Assistant Attorney General, for Respondent.

HIGHWAYS—damages due to public improvement. Where evidence disclosed that claimants suffered a property loss by reason of the construction of a public improvement, the measure of damages is the difference between the fair cash market value of the property immediately before and after the improvement.

DOVE, J.

On March 25, 1963, claimants filed their complaint, consisting of Two Counts, in this Court seeking damages for loss of value to claimants' property arising from the construction of a bridge over the Rock River, and loss of business in claimants' grocery store by reason of such construction.

The facts of the case are as follows:

In 1946, claimants purchased, and are still owners of the following described real estate:

Lot Two in Block Twenty-two of Dunbar Addition to the City of Rockford, situated in the City of Rockford, County of Winnebago and State of Illinois.

This property, known as 790 and 792 North First Street, Rockford, has a frontage of 66 feet facing easterly on the west side of North First Street, and runs westerly a distance of approximately 155.75 feet to an alley in the rear of the premises. It is improved with two separate dwellings, a grocery store building, and a building in the backyard. The property is situated in an area where there are many Class A residences occupied by one family, and a few multiple dwellings.

In 1961, the State of Illinois commenced the construction of a bridge across the Rock River and an easterly approach to the bridge, and completed the same in 1962. Prior to the construction of the public improvement in question, Caroline Street, an east-west street in the City of Rockford, intersected North First Street one lot north of claimants' property. The State of Illinois acquired Title to the lot immediately north of claimants' property (purchasing other pieces of property in the area as well), and built the easterly approach to the bridge.

The approach is an embankment approximately fifteen feet higher than the original surface of Caroline and North First Streets. At the west end of the Ascanis' property, where the new bridge abuts, the slope reaches a height of eighteen feet above the original surface of the ground. The embankment is so constructed that it occupies the whole width of Caroline Street and the lot immediately north of claimants' property, Caroline Street is completely obstructed, and its use cut off from claimants' property. North First Street now swings to the southeast, and ties in with North Second Street, one block east of North First Street.

The jurisdiction of the Court of Claims to hear and determine claims for consequential damages to property not taken arising out of the construction of a public improvement is affirmed in *Tenboer vs. State of Illinois*, 21 C.C.R. 353. The proper measure of damages, if any, is the difference between the fair cash market value of the property immediately before and after the improvement. *Tipps vs. State of Illinois*, 21 C.C.R. 581.

Two experienced realtors, Lee Nelson Daniels and Frank G. St. Angel, testified that the market value of claimants' property before the construction of the improvement was \$20,000.00, and that the market value of the property after the construction of the improvement was \$15,000.00,

the difference being a loss of \$5,000.00 in market value. On cross-examination, each admitted that \$3,000.00 of the loss might be attributable to a general decline in market values in the neighborhood independent of the construction of the bridge and the approach thereto, but that \$2,000.00 of the loss was unmistakably attributable to the adverse effect of the construction on claimants' property. It was stipulated by claimants and respondent that if one Clarendon Mower, Jr., a Rockford realtor and appraiser, whom the State proposed to call as a witness, but who was unavailable at the time of the hearing, was to testify, he would testify that 'in his experience the damage attributable to the public improvement, based on before and after valuation of the Ascani property, would not exceed two thousand dollars.'

Photographs of the property and immediate area taken before and after the construction show dramatically and conclusively the adverse effect of the improvement on claimants' property.

Considering the unanimity of testimony that \$2,000.00 was the loss of market value to claimants' property arising from the construction of the bridge over the Rock River and its eastern approach (this testimony being supported vividly by the photographs in evidence), claimants are entitled to an award of \$2,000.00.

We find no merit to the claim for damages because of "permanent loss of business due directly to the obstruction of both Caroline and North First Streets, abutting and in front of claimants' property." Mr. Ascani closed his grocery store in July of 1961 before the construction started, and there is no evidence in the record of loss of business.

An award is, therefore, made to claimants in the sum of \$2,000.00.

(No. 5181—Claimant awarded \$1,050.00.)

ARTHUR F. WEISKOPF, d/b/a J. F. WEISKOPF AND SON, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1965.

GIFFIN, WINNING, LINDNER AND NEWKIRK, Attorneys for
Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

The complaint filed herein alleges that there is now due and owing claimant from respondent the sum of **\$1,050.00**. Said amount represents charges for installing certain heating equipment at the State Museum Building, which is located at the northeast corner of Spring and Edwards Streets in the City of Springfield, Illinois. The work in question was covered by a contract entered into on June **27, 1963**, and designated by respondent as authorization No. SA 2500.

Respondent's Departmental Report, dated October **15, 1964**, and signed by Francis S. Lorenz, Director of the Department of Public Works and Buildings, acknowledges that the installation of the heating equipment was completed by claimant in accordance with plans and specifications. It further states that claimant did not present a bill for the payment of said work until November **9, 1963**, and that the funds from which it could and would have been paid had lapsed as of September **30, 1963**.

Respondent has stipulated in writing with claimant

that the Report of the Department of Public Works and Buildings shall constitute the record in the case.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Arthur F. Weiskopf, doing business as J. F. Weiskopf and Son, is, therefore, hereby awarded the sum of \$1,050.00.

(No. 5184—Claimant awarded \$2,371.26.)

THEODORE DIRKSEN, GEORGE DIRKSEN, ANN DIRKSEN, PARTNERS,
d/b/a A. DIRKSEN AND SONS, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed January 12, 1965.

GIFFIN, WINNING, LINDNER AND NEWKIRK, Attorneys
for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

The complaint filed herein alleges that there is now due and owing claimant from respondent the sum of \$2,371.26. Said amount represents charges for floor coverings and draperies, as well as the installation thereof, in a residence located on the State Fair Grounds, Springfield, Illinois.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“It is hereby stipulated and agreed by and between claimant, Theodore Dirksen, George Dirksen, Ann Dirksen, Partners, d/b/a A. Dirksen and Sons, by its attorneys, Giffin, Winning, Lindner and Newkirk, and respondent, State of Illinois, Department of Agriculture, by William G. Clark, its Attorney General, that the report of the Department of Agriculture, signed by H. E. Paxton, General Auditor, dated December 11, 1964, which has been filed in this cause pursuant to Rule 15, shall constitute the record in the case.

“It is further stipulated and agreed that this claim arises from four contracts duly entered into by claimant and an authorized employee of the said department, each contract calling for sale of the merchandise referred to in the said departmental report, and the installation of said merchandise, all of said contracts aggregating in total the sum of **\$2,371.26**; the said sum was not paid by the department solely because of a lapse of available appropriations.”

The report of the Department of Agriculture, referred to in the stipulation, signed by H. E. Paxton, General Auditor, acknowledges that the goods were received and services rendered, and that the charges therefor were the usual and reasonable charges in the community where furnished. It further indicates that the invoices for such goods and services were received by the Department of Agriculture after the appropriation for the biennium had lapsed, and, further, that said invoices would have been vouchered and paid in the regular course of business, if they had been received at the appropriate time.

This Court has repeatedly held that, where a contract

has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Theodore Dirksen, George Dirksen, Ann Dirksen, Partners, d/b/a A. Dirksen and Sons, is, therefore, hereby awarded the sum of \$2,371.26.

(No. 5185—Claimant awarded \$171.90.)

R. L. CORTY AND COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed January 12, 1965.

R. L. CORTY AND COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; **GERALDS. GROBMAN**, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

During the months of February and April, 1963 the State of Illinois, through its Department of Public Works and Buildings, Division of Highways, contracted with R. L.

Corty and Company, a Corporation, claimant in the instant matter, for certain materials and rental equipment. The complaint filed herein alleges that such services and materials were furnished, and that there is now due and owing claimant from respondent the sum of \$173.02.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“R. L. Corty and Company and the State of Illinois, Department of Public Works and Buildings, Division of Highways, entered into an agreement at the special instance and request of said Division of Highways, which instructed R. L. Corty and Company to perform sales, service and rental of equipment, as set forth in the original complaint, marked exhibits Nos. 1 through 4, inclusive.

“The terms of the foregoing agreement and the acceptance thereof by the State are fully set forth in the complaint herein as exhibits Nos. 1 through 8, inclusive.

“R. L. Corty and Company, after fully performing its obligations under the said agreement, rendered and mailed a bill to the State for the sum of **\$173.26**, a true copy of claimant’s office copy of which is attached to the complaint filed herein, and marked exhibits Nos. 1 through 4, inclusive.

“The Seventy-second biennium appropriation out of which the bill was payable had lapsed at the time the bill was mailed, and the funds to pay said bill were no longer available to the Division of Highways, and R. L. Corty and Company was so advised by letter, a true copy of which is attached to the complaint herein as exhibit No. 6.”

An amendment to the stipulation of facts was later filed in this case, in which it was agreed that the proper amount due claimant was the sum of \$171.90. The difference of \$1.12 represents sales tax, which the State of Illinois is not obliged to pay.

A report of the Department of Public Works and Buildings, Division of Highways, signed by A. R. Tomlinson, Supervisor of Claims, acknowledges that each of the items in question was purchased by persons having proper authority, and states that no part of the bills have been paid by the Division of Highways, or any other State agency, for

the reason that the bills were not presented, scheduled, and processed until after the appropriation for the payment had lapsed. The Departmental Report further points out that, **as of September 30, 1963**, there was an unobligated balance of sufficient amount in the appropriation from which claimant's invoice could and would have been paid.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, R. L. Corty and Company, a Corporation, is, therefore, hereby awarded the sum of \$171.90.

(No. 5197—Claimant awarded \$2,624.61.)

MEMORIAL HOSPITAL OF DU PAGE COUNTY, A CORPORATION,
Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed January 12, 1965.

ERLENBORN, BAUER AND HOTTE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **GERALD S. GROBMAN,** Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On May 6, 1964, claimant, Memorial Hospital of Du Page County, a Corporation, presented its statement to the Department of Public Aid for hospitalization services rendered one Bridget A. Herley. Although the Department had determined that the subject patient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, it denied the claim for services on the grounds that the appropriation for the biennium had lapsed at the time the statement was received by its office.

Thereafter, on November 10, 1964, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$2,624.61, representing charges for the hospitalization services furnished said Bridget A. Herley for the period of March 21, 1963 to June 15, 1963, inc.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in essence, supports the position of claimant in this matter. It indicates that claimant did furnish the services to one Bridget A. Herley, and that the reasonable and equitable charge for such services was the sum of \$2,624.61. The stipulation reflects the further fact that the appropriation from which payment could have been paid had lapsed prior to the time the statements were submitted. These facts are not refuted by the Department of Public Aid in the Departmental Report filed in this case on December 30, 1964.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had

lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that **all** qualifications for an award have been met in the instant case.

Claimant, Memorial Hospital of Du Page County, a Corporation, is, therefore, hereby awarded the sum of **\$2,624.61**.

(No. 4894—Claimant awarded \$18,000.00.)

GEORGE W. MAIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 29, 1965.

PREE AND PREE AND JOE CRAIN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **LAWRENCE W. REISCH, JR.**, Assistant Attorney General, for Respondent.

HIGHWAYS—negligent construction of temporary dam. Where the weight of the evidence established that the construction of the dams was the primary cause of the flooding, **an** award will be made for the consequential damages sustained thereby.

SAME—damages. Damages must be actual and not speculative or uncertain, but a distinction has **to** be drawn between uncertainty **as** to cause and uncertainty as to amount, and once the causation has been established difficulty in ascertaining the amount of damages is not fatal to claimant.

DOVE, J.

This claim was brought by George W. Main, a farmer of Johnson County, Illinois, for flooding damages to his farm land alleged to have been caused by certain constructions approved and made by the Division of Highways, Department of Public Works and Buildings of the State of Illinois.

Claimant owns a 1,500 acre farm on the north side of the Cache River in Johnson County. The farm is divided

by Illinois State Bond Issue Route No. 147. During the early part of 1956, claimant entered into an agreement with the Department of Public Works and Buildings to lease a strip of ground twenty feet wide along the west side of Route No. 147. The Cache River bisected the leased property at midpoint.

By virtue of this agreement, the Division of Highways entered upon the land to construct a temporary detour bridge, while the original bridge on Route No. 147 was being replaced. From the testimony, it appears that the initial construction began on January 3, 1957. The testimony indicates that, after the clearing process and the construction of the detour bridge, two earthen dams were constructed across the Cache River on either side of the construction area. The purpose of the dams was to provide the workmen with a dry working area by pumping out the water between the two dams. It appears that the earthen dams were built in the Spring of 1957. At a later date the earthen dams were replaced by wooden coffer dams, which remained until November, 1959.

When the claimant noticed the construction of the dams, he complained that they would obstruct the drainage system of the area. But, his objections to the resident engineer, State Highway Department employees in Carbondale, and in Springfield to the Department of Public Works and Buildings, were to no avail.

During October, 1957, claimant's farm land was partially flooded. In the Spring of 1958, the area was again flooded, and, after the crops were replanted, flooding occurred again in October, 1958, which destroyed the crops for the third time.

Claimant contends that the damming up of the Cache River caused depreciation of the value of the farm land, as well as crop damages.

Testimony was offered, which showed that, although the area has drainage problems, and through the years there has been occasional spotted flood damage, the farm had not experienced flooding of this nature during a crop season since 1928.

However, evidence was also introduced, which established that this particular drainage area experienced abnormally high rainfall during the crop seasons of 1957 and 1958. Such high rainfall had not been encountered since the 1928 crop season. It is difficult, however, to compare the drainage system of 1928 with that of 1957 and 1958, since, during the interim, the area had undergone many changes. These include new drainage ditches, and culverts laid by the State, the railroad, and private individuals, as well as levies and cut-offs between the rivers and streams. The consideration of the case must also include the fact that the coffer dams were not removed until November, 1959, and that no flooding occurred during the crop season of 1959.

The difficulty, of course, lies in establishing the causation of the flooding. Claimant alleges that it was caused by the dams constructed across the river. Respondent has answered that the cause was not the dams, but rather the heavy rainfall. Both parties have introduced into evidence a myriad of exhibits and data to establish their respective positions. We believe that the weight of the evidence establishes that the construction of the dams was the primary cause of the flooding.

The determination of the amount recoverable by the claimant is more difficult. Although it is a well established maxim of law that damages, to be recoverable, must be actual, and not speculative or uncertain, a distinction has been drawn between uncertainty as to cause and uncertainty as to amount. *Philadelphia and Reading Coal and Iron Co.*

vs. *Calumet Shipyard and Dry Dock Co.*, 339 Ill. App. 142, 88 N.E. 2d 891 (1949).

In the present case, claimant has exercised great diligence to prove his loss. However, by the very nature of the facts, absolute certainty is impossible. In such cases, it has been held that difficulty in ascertaining the amount of damages is not fatal to claimant, once the causation has been established. *Johnston vs. City of Galva*, 316 Ill. 598, 147 N.E. 453 (1925).

The evidence shows that approximately 140 of the cultivated acreage was flooded in 1957 and 1958. It was also shown that in past years there has been crop damage to a portion of this 140 acres during periods of high rainfall. This lower area consists of approximately 20 acres. The weight of the evidence shows that the cause of the remaining damage can be attributed to the construction of the dams. We are of the opinion that the State of Illinois is liable for 120 acres of crop loss in both years, 1957 and 1958. This is a total crop loss of 240 acres for the two years.

Claimant testified that corn and soy beans were alternately planted on the farm. His testimony shows that the average yield would amount to \$80.00 per acre, less the cost of planting and harvesting in the sum of \$4,800.00, for a total amount of \$14,400.00. To this must be added the cost of replanting during 1958 in the amount of \$3,600.00.

Claimant also alleges that the fair market value of the farm was depreciated by the flooding. However, it was shown that no permanent damage resulted to the farm land, and we are of the opinion that claimant's allegations are without merit.

An award is, therefore, entered in favor of claimant, George W. Main, in the sum of \$18,000.00.

(No. 5000—Claimant awarded \$800.00.)

JOSEPH E. WALLS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 29, 1965.

LANSDEN AND LANSDEN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LAWRENCE W. REISCH, JR., Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—personal injuries—negligence. Where respondent was negligent in violating the Rules of the Health and Safety Act, claimant, if free from contributory negligence, will recover for injuries sustained **by** reason thereof.

PEZMAN, J.

Claimant seeks to recover the sum of \$15,000.00 as damages for the traumatic amputation of the end of his left ring finger, and for injuries to other fingers on his left hand. The accident occurred while claimant, then an inmate at the Illinois State Farm, Vandalia, Illinois, was pushing a piece of wood through a jointer or **buzz** planer, as one of the operations in shaping it. The jointer-planer was a part of the equipment in the carpentry shop at the institution. Claimant contends that his injuries resulted from the negligence of respondent, and that he was not guilty of contributory negligence, nor did he assume the risk of injury.

Respondent contends that claimant, Joseph E. Walls, has not proved any acts or omissions of respondent, which were the proximate cause of the accident, and further contends that claimant has not proven **his** own freedom from contributory negligence.

The facts indicate that claimant was operating a jointer-planer in the carpentry shop of the institution. In pushing a piece of wood through the planer, his left hand slipped into the blades of the machine severing the entire distal phalanx of the left ring finger even with the base of the nail, and the tips of the left index, middle and little finger

of the left hand were lacerated. Claimant was treated at the institution hospital on April 28, 1961, and was released to return to his duties at his own request on May 15, 1961. Claimant was alone in the carpentry shop at the time of the accident. There is considerable testimony indicating that there was never a guard over the blades of the jointer-planer.

Claimant introduced into evidence, subject to the objection of respondent, certain Health and Safety Rules of the Industrial Commission of Illinois. This Court will take judicial cognizance of these Rules as being in effect on the date of the accident, April 28, 1961. Part B, Chapter 3, Section 3, Rule 11, reads as follows: "Jointer or buzz planer: Class A—(a) A cylindrical cutting head shall be provided; (b) A guard which adjusts automatically over the cutting head shall be provided. All exposed parts of cutting head shall be guarded."

Testimony developed throughout the hearing that claimant had worked in the carpentry shop since his arrival at the institution, and that there were numerous safety signs present in the room and close to the machine upon which claimant was working. Witnesses for respondent conceded that the jointer had not been equipped with a safety guard, but could have been so equipped. Respondent bases its entire case upon the alleged failure of claimant to establish that he was free and clear of contributory negligence. There was nothing in the testimony, disclosed by the transcript, indicating the presence of contributory negligence on the part of claimant, nor can we presume, through the absence of such evidence, that claimant has failed to establish his freedom from the same.

It is apparent that respondent has been guilty of violation of the Rules of the Health and Safety Act, and in this manner can be held to be negligent. The two major cases

in the Court of Claims in recent years dealing with this specific problem were *Moore vs. State of Illinois*, 21 C.C.R. 282, and *Morris vs. State of Illinois*, 23 C.C.R. 91. This Court in the Moore case held as follows:

“Although we have held that claimant cannot sue for a violation of the Health and Safety Act, the fact that respondent itself, acting through the Industrial Commission, has determined that food grinders not mandatorily equipped with hoppers are dangerous to those using them is an express recognition by respondent that food grinders should be equipped with hoppers to be rendered safe.

“We will not create an anomaly by holding that a food grinder without a hopper used by private persons is dangerous, while a similar unequipped grinder used by respondent is not dangerous. Respondent should in this case be held to the same standards, as it by law compels others to abide by.”

The Morris case held that if claimant was assigned to work under unsafe conditions, was not guilty of contributory negligence, and was injured, then respondent would be guilty of negligence. The late Joseph J. Tolson, Chief Justice, in his opinion refers to the reasoning in the Moore case, and rules as follows:

“The Health and Safety Act makes specific mention of jointers or buzz planers, and requires that all exposed parts of the cutting head shall be guarded. It is difficult for this Court to justify two standards of conduct by the State, one for workers outside prison walls, and another for inmates.”

Claimant is awarded the **sum** of \$800.00.

(No. 5022—Claim denied.)

WILLIAM F. PORTER, Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion fled January 29, 1965.

FRANK E. TROBAUGH AND STEPHEN E. BRONDOS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **C. ARTHUR NEBEL**, Assistant Attorney General, for Respondent.

NEGLIGENCE—*res ipsa loquitur*. Where claimant failed to prove the

necessary elements under the doctrine of *res ipsa loquitur* to establish medical malpractice on the part of respondent, the claim will be denied.

PEZMAN, J.

Claimant, William F. Porter, seeks to recover the sum of \$325.00 for the death of a Hereford cow, allegedly resulting from a test for "Bang's Disease" by a State veterinarian. Respondent contends that claimant has failed to establish the cause of death of the cow, and, further, that malpractice cannot be proven without expert testimony. The amended complaint of claimant invokes the doctrine of *res ipsa loquitur* as applicable to the facts and circumstances in this case, and seeks damages for the death of the cow in the above amount.

Claimant was cooperating with the plan for the eradication of bovine brucellosis, otherwise known as "Bang's Disease". Claimant's cow weighed around 1,200 pounds, and was five years old. On January 22, 1962, Dr. William Prusaczyk, a veterinarian employed by the State of Illinois, administered tests for brucellosis and tuberculosis to claimant's herd of cattle. In administering these tests he used a Silver King cattle chute, which was owned by the State of Illinois. The chute was known as a bleeding chute, and was approximately seven feet long, two and one-half feet wide, and six feet high. The cows or other animals to be tested were led into this chute, which had a horizontal bar that came down over the animal's neck holding it in place, and with a yoke at the bottom to keep the animal as rigid as possible during the test.

On the date in question, one of claimant's cows was led into the chute, and its head fastened in the head gate to enable the veterinarian to withdraw sample blood. At this time the veterinarian, Dr. William Prusaczyk, noticed the air intake of the cow was restricted, and both he and claimant testified that the tongue of the cow was protruding

from its mouth. The veterinarian testified that he immediately released the cow to relieve the pressure, but the cow collapsed in the chute, and, when she went down, it looked to him like there was a considerable amount of pressure. He further testified that the cow started to recover with normal breathing, displayed bright eyes, and that he let her stay at the bottom of the chute for about five minutes. When they tried to get the cow up, she collapsed and died within a minute or two. Ten minutes elapsed from the time the cow entered the chute until the time it died. The veterinarian testified that, from the time the cow was driven into the chute, it was entirely under his control, and Mr. Porter, the claimant, had nothing to do with it. The veterinarian admitted the breathing of the cow was temporarily restricted, and he further testified that he noticed the cow had difficulty breathing when he withdrew the sample of blood, but could not remember whether the cow collapsed before he released it. Dr. Prusaczyk testified that in his opinion the cow did not suffocate. He stated that, in pneumonia or in a starvation of the lungs of an animal, it is customary for the tongue to protrude. He testified that the cow's tongue was not out when she died, but she was gasping for air, and her breathing was labored just before she died.

Claimant contends that, the facts and circumstances show the death of the cow would not have happened in the ordinary course of events, had the veterinarian used ordinary care. Claimant states that the veterinarian had exclusive control of the cow, the chute, and the bar with which he positioned the cow's head in the head gate, and that he supervised the entire operation on behalf of respondent, and that it was this operation, which resulted in the cow's death. Claimant testified that it was a perfectly healthy cow prior to the tests for "Bang's Disease". He contends

that the doctrine of *res ipsa loquitur* applies in this case, and that respondent is liable for the malpractice of its veterinarian. In behalf of these contentions, claimant cites *Mertel vs. State of Illinois*, 20 C.C.R. 285 at 287, and *Carter vs. State of Illinois*, 20 C.C.R. 213. The *Mertel* case attempts to define or explain *res ipsa loquitur*, but the facts are not at all consistent or even similar to those in the case at hand, so as to permit a fair comparison of the application of the doctrine. In the *Carter* case, claimant seeks to recover for the malpractice of a veterinarian employed by respondent to test claimant's herd of cattle for Bovine Infectious Abortion, commonly known as "Bovine Brucellosis" or "Bang's Disease". In that case, claimant produced an expert witness, Dr. G. J. Krueger, who was also a veterinarian for respondent, and who testified at the hearing, without objection, that the death of the cow was due to a malignant edema, which resulted from the insertion of the blood needle without the taking of the proper sanitary precautions by Dr. Ruck, respondent's veterinarian, and the Court held on behalf of claimant.

In *O'Neil vs. State of Illinois*, 21 C.C.R. 532, the Court of Claims held that the doctrine of *res ipsa loquitur* applies in medical malpractice cases only where a layman is able to see, as a matter of common knowledge and observation, or from the evidence can draw an inference, that the consequences of professional treatment were not such, as would have ordinarily followed, had due care been exercised. The Court in the *O'Neil* case stated:

"*Res ipsa loquitur* is a form of circumstantial evidence creating an inference of negligence, which may be utilized by claimant in establishing a prima facie case. As stated by the Supreme Court of Illinois in *Chicago Union Traction Co. vs. Giese*, 229 Ill. 260, 'the circumstances surrounding a case, where the maxim, *res ipsa loquitur*, applies, amount to evidence from which the fact of negligence may be found.'

"In order for such doctrine to be available to a claimant, it is well established generally, and in Illinois specifically, that the injury must have

been caused by a thing in the exclusive control or management of the defendant, and, further, that the accident must be such as in the ordinary course of events will not happen, if those who have such control and management use proper care."

The Supreme Court of the State of Illinois in *Chicago and Eastern Illinois Railroad Company vs. Reilly*, 212 Ill. 506 stated:

"The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed, where nothing is done out of the usual course of business, unless that course of business itself is improper."

Generally speaking, it is the law in Illinois, and generally throughout the country, that in a malpractice action the doctrine of *res ipsa loquitur* is not applicable, but the plaintiff, in order to recover, must offer affirmative evidence, and, as a general rule, expert testimony to show that the bad result or injury was caused by an alleged unskillful or negligent act. *Olander vs. Johnson*, 258 Ill. App. 89.

In the cause at hand, the proper test to determine whether the doctrine applies would be as follows: Do the facts and circumstances show that the alleged injury to claimant's cow would not have happened in the ordinary course of events had the Defendant used ordinary care in conducting the test for "Bovine Brucellosis?" And, more specifically, was the treatment of such a nature that the only reasonable inference to be drawn from the occurrence of injury is that the treatment was improperly and negligently conducted? There is no testimony as to the specific cause of death of the animal, nor is there expert testimony as to the apparent malpractice on the part of the State veterinarian. Claimant admitted that he took control of the dead animal, and disposed of the carcass without causing a post-mortem to be held to determine the cause of death.

Claimant has failed to prove the necessary elements under the doctrine of *res ipsa loquitur* to establish medical

malpractice on the part of Dr. Prusaczyk, the State veterinarian. The precedent was set by this Court, and cited hereinabove.

Claim for an award is denied.

(No. 5068—Claimant awarded \$25,000.00.)

HAZEL ROBINSON, Executrix of the Estate of LAWRENCE ROBINSON, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 29, 1965.

DONALD R. MITCHELL, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*duty to control inmates.* State is required to exercise reasonable care in restraining and controlling dangerous insane persons committed to its custody, so that they will not have the opportunity to inflict a foreseeable injury **upon** others.

SAME—*negligence.* Where evidence disclosed that the State was negligent in taking no precautions to prevent a reasonably anticipated escape of a dangerous inmate, an award will be made for damages caused **by** such inmate.

PERLIN, C.J.

Claimant asks damages of \$25,000.00 for the death of her husband, Lawrence Robinson, on July **14**, 1962, when he was allegedly shot and killed by Cecil Burns, a patient at the Anna State Hospital, a mental institution, owned and operated by respondent at Anna, Illinois.

To recover, claimant must prove by a preponderance of the evidence (1) that Lawrence Robinson used due care for his own safety; (2) that Cecil Burns killed Lawrence Robinson; and, (3) that respondent was negligent in failing to prevent the escape of Cecil Burns from the Anna State Hospital to which he was committed.

That Cecil Burns, an inmate of Anna State Hospital, **escaped** through the window **of** his dormitory on the night

of July 13, 1962 about 10:00 P.M., and was absent until captured by police about 7:00 A.M. on Sunday, July 15, 1962, is undisputed.

Claimant Hazel Robinson, wife of the deceased, testified that Lawrence Robinson left his home on Saturday, July 14, 1962, at approximately 7:30 A.M. to work on his farm. He never returned. She stated that he kept a 12 gauge double-barreled shotgun at the farm, and was the kind of man, who would strive to guard his life and safety.

John Paul Davis, State's Attorney of Union County, testified that he, with other law enforcement officers, investigated the death of Robinson.

Cecil Burns was arrested and interrogated in the office of the State's Attorney on Sunday, July 14th. Burns was then taken to the scene of the homicide, where the Sheriff of Union County took off Burns' shoes, and fitted them into footprints at the Robinson farm. Burns thereupon volunteered to make a statement, which included the following information: He climbed out of a window at the Anna State Institution after dark on Friday, July 13, about 9:30 P.M. He stayed in the woods, and then left about 5:30 the next morning. He found an empty house, where he stole a rifle and a number of dimes. He walked along Illinois Highway No. 146 toward Vienna, and stopped at a home where he asked for coffee. He then walked along the highway, and approached Lawrence Robinson's house.

Robinson was in the garden. Burns jumped over the fence, and he and Robinson sat and talked about the idea of Robinson getting a dog. Robinson then went back to plowing, and Burns left, and walked toward the highway. Burns then saw Robinson's truck, and decided to take it to go to Paducah. So, "I went around the house, and picked up his shotgun. He started around the truck, and I shot him." This was about 11:00 or 12:00 o'clock. Burns then went to

Paducah in the truck, and stayed in it all night. He returned to Illinois the next day in the same truck. He purchased a can of paint to use over the letters "L. Robinson" on the truck.

Bums' statement was witnessed by six persons.

Claude M. Stearns testified that he was the Sheriff of Union County at the time in question, and, in such capacity, investigated the death of Lawrence Robinson. He was notified of the occurrence about 8:30 P.M. on July 14th, and arrived on the scene of the slaying about 9:00 o'clock. Footprints were found in the area, and guarded until they could be examined by daylight.

About 9:30 P.M. it was ascertained that Cecil Bums had escaped from the Anna State Hospital; that a man answering his description had asked for a cup of coffee from Elijah Davis, who lived three-quarters of a mile from the Robinson farm; that he was carrying a 22 rifle; and, that he had then proceeded toward the Robinson farm.

The sheriff determined that the shooting occurred about 11:30 or 12:00 o'clock on Saturday, July 14, 1962. There was also a report of a break-in at the house of Winstead Tucker, which was located just west of the Elijah Davis' farm. He reported that a large number of dimes and a 22 caliber rifle were missing. After Cecil Bums was apprehended, the sheriff learned that Bums had purchased paint at a store in Paducah, Kentucky, and had paid for it with dimes. When the pickup truck was recovered, it was discovered that the name L. Robinson had been painted out with black paint. The sheriff found the can of paint and brush behind the seat. Burns was taken to the scene of the shooting. The sheriff asked Burns to give him one of his shoes, which he then fit into the footprint in the freshly plowed garden of the Robinson farm. The sheriff stated that it was an oxford type high heel, like that found on a cowboy shoe, and fit

the tracks perfectly. Afterwards Burns said he would like to “tell us about the whole thing.” The sheriff then returned Bums to the State’s Attorney’s office where he gave his statement of confession to the murder. The statement was verified by the sheriffs investigation.

Earl Wade, sergeant of the Cairo Police Department, and Fred Stilley, an Illinois State Police Trooper, testified that they participated in the chase and apprehension of Cecil Bums. Wade stated that the chase began when he received a call from the Cairo Police that a stolen truck belonging to Mr. Robinson had been sighted. He and Trooper Stilley chased the truck at speeds up to 105 miles per hour. The driver tried to force Wade off the highway, and in so doing turned the truck over. The driver resisted arrest by pointing a shotgun at Wade, but was eventually forced to drop his gun by Trooper Stilley, who was covering him from a high rock ledge. The driver of the truck was Cecil Burns. The truck, which Bums was driving, belonged to Lawrence Robinson. The shotgun Burns used was a 12 gauge, loaded, double barreled L. C. Smith.

The Court concludes from the foregoing evidence that Cecil Bums shot and killed Lawrence Robinson after escaping from the Anna State Hospital.

The next question to be determined is whether respondent was negligent in permitting Cecil Bums to escape and inflict injury.

The following data concerning Cecil Burns was revealed:

1. October 2, **1941**, in the County Court of Massac County, Illinois, Burns pleaded guilty to assault and battery upon **his** wife.

2. June 8, **1946**, he became a voluntary patient at the Anna State Hospital.

3. July 23, 1946, he was discharged.

4. November 19, 1952, the Medical Commission of Massac County filed a report recommending that Cecil Burns be sent to the Security Hospital at Chester, Illinois. Its findings were: "No. 1, Cerebral Syphilis; No. 2, Multiple Sclerosis; No. 3, Persecution Complex; No. 4, Homicidal Tendencies, cut mother's throat."

5. November 20, 1952, Burns was committed by the County Court of Massac County to the Illinois Security Hospital at Menard, Illinois.

6. January 14, 1953, he was indicted by the Grand Jury of Massac County for the crime of assault with intent to murder his mother. The policeman, who worked on the case, testified that Burns had cut his mother's throat, and had then left her in a critical condition.

7. September 27, 1954, Burns was transferred from the Illinois Security Hospital to the Anna State Hospital.

8. March 23, 1955, he was discharged from the Anna State Hospital.

9. October 24, 1955, Burns was committed by the County Court of Massac County, Illinois to the Anna State Hospital.

10. November 12, 1955, Burns escaped from the Anna State Hospital, and was returned on January 27, 1956. During this time he pleaded guilty to burglary of a business place in Springfield, Ohio, while on escape.

11. September 6, 1956, he was discharged from the Anna State Hospital.

12. In November, 1956, the Superintendent of Anna State Hospital received a letter from the State's Attorney advising that Cecil Burns had committed sodomy. The Superintendent testified that someone in the hospital had

put a notation on the bottom of the letter saying: "Maybe we should send him to security?"

13. November 21, 1956, Burns was committed by the Massac County Court to the Anna State Hospital.

14. September 23, 1957, ~~Cecil~~ Burns and two other patients plotted to break out of the maximum security ward.

15. September 8, 1958, annual patient survey indicates that Burns is a constant escapee, judgment is poor, and he should be kept hospitalized because of his past history of aggressiveness.

16. June 11, 1958, Burns escaped, and was returned on July 15, 1958.

17. May 11, 1959, he escaped, and was captured by the Illinois State Police. Burns escaped from the police, but was eventually recaptured.

18. February 14, 1962, Burns offered money to female patient for cooperation in sexual activity. He was placed in maximum security until March 2, 1962, and was then transferred to the Veteran's Building.

19. In April, 1962, Burns escaped from the Veteran's Building, and stole a knife and drill from a barn. He assaulted and injured an employee, who found and returned him. The report states that the patient became combative, restless and disturbed, and he was thereafter placed in maximum security. He was returned from the maximum security ward on July 5, 1962 with a statement that "he should be in locked ward, but does not need maximum security, and should not be given a grounds' pass."

20. July 13, 1962, Burns pushed out an insect screen in the Veteran's Building, and escaped to commit homicide.

The Deputy Sheriff of Union County testified that he

had returned Cecil Burns from the City of Anna to the hospital about three or four times in the previous two years.

Wayne Isaacs, Assistant Superintendent at the hospital, testified that, when Cecil Burns escaped, he escaped deliberately, and was not the type of patient just to wander around the grounds.

Dr. Robert C. Steck, the Superintendent at Anna State Hospital, described the different ward classifications as follows: (1) Maximum security ward, which is kept locked, has detention security screens set in a metal frame, and has more employees than on a lesser security ward. (2) Security wards, which are locked with ordinary insect screens. (3) Open wards. The Veteran's Building is a locked ward with ordinary insect screens. The Veteran's Building, from which Burns made his escape on July 13, 1962, consists of a center room with two dormitories on either end, which house 50 patients each, and have two attendants. If the attendant left the ward, according to Dr. Steck, a patient could push out a screen, and go out the window. There is no fence around the hospital grounds to prevent a patient from walking away from the hospital.

The evidence further revealed that the escape of Burns was discovered at 10:05 P.M., but the Illinois State Police were not notified until 11:30 P.M. The Assistant Superintendent described the procedure concerning an escape as follows: The psychiatric aide, who first notices a patient missing, notifies his supervisor; the supervisor notifies the nurse in charge of the specific area; then the nurse notifies either the Superintendent or one of the two Assistant Superintendents. The Assistant Superintendent said that he was notified by the nurse shortly after 10:00 P.M., and told her to notify the authorities.

The attendants on duty in the Veteran's Building testified that they were cleaning up the dining room in the

center section of the building when Burns escaped. There were no attendants in the dormitory. Most of the dormitory windows were raised, and not locked. One of the witnesses testified that the screens could easily be removed, and that the windows were close to the ground. He said: "I don't know why they kept the doors locked, and not the windows." Burns' escape was discovered about 10:00 P.M. during a bed check.

This Court has long held that it is the duty of respondent to exercise reasonable care in restraining and controlling dangerous insane persons committed to its custody, so that they will not have the opportunity to inflict a foreseeable injury upon others, *Malloy vs. State of Illinois*, 18 C.C.R. 137; *Callbeck vs. State of Illinois*, 22 C.C.R. 722; *Redebaugh vs. State of Illinois*, 22 C.C.R. 306; *Clifton vs. State of Illinois*, No. 5076.

The profile of Cecil Burns, which is detailed in his history, clearly indicates that Cecil Burns was a ruthless, dangerous man, whose constant escapes would preclude keeping him in a place, where he might easily push out an ordinary insect screen, and walk away undetected from unfenced grounds. There was a recent warning of his violent propensities in the fact that not less than eleven weeks before the homicide of Lawrence Robinson, Burns not only escaped, but also stole a knife and drill, and injured an institution employee after attacking him. His entire history would certainly suggest that "reasonable care" be substantially more than was manifested in the instant case. If he was to be kept in a locked ward, as prescribed, the windows should at least have been locked, or should have been equipped with security screens, as were used in other sections of the institution. Minimum standards of reasonable care were violated in this case. It is the conclusion of the Court that respondent was negligent in taking no pre-

cautions to prevent a reasonably anticipated escape of a dangerous inmate.

Claimant presented further evidence to show that she was wholly dependent upon her husband for support; that he had, at 51, a life expectancy of 22 years; and, that his income as an employee of the Vogler Motor Company averaged from \$5,000.00 to over \$6,000.00 per year for the years of 1957 through 1961.

It is the opinion of this Court that claimant be awarded the sum of \$25,000.00.

(No. 5092—Claimant awarded \$545.00.)

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

Opinion filed January 29, 1965.

JAMES HOPKINS, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; JOHN C. CONNERY, Special Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*negligence—damage caused by escaping inmates.* Where evidence sufficiently showed that respondent was negligent by not having reasonably foreseen the consequences, and that claimant was not guilty of contributory negligence, an award will be made.

PEZMAN, J.

Claimant, James Hopkins, seeks to recover for loss of use of property damaged by escaped inmates of the Illinois State Training School for Boys. Respondent does not dispute the facts, but contends that claimant failed to establish and prove that the damage to his property arose out of the

ant's duty was that of night custodian of the Security Building, commonly known as Roosevelt Cottage. He worked a shift from 10:00 P.M. to 6:00 A.M., and worked this same shift six and one-half nights per week, and had held this particular assignment for approximately two years. Roosevelt Cottage is a one-story building, which contains sixteen cells, where boys are confined for disciplinary purposes. The custodian on duty sits at a desk in a hallway at the front of the building. A wash room, a linen room, offices, a utility room, and a kitchen open off either side of this hallway. The hallway continues from the front of the building to the rear of the building, but a locked cage door bars access to the portion of corridor into which the cells open. In the portion of the building beyond the locked cage door there is a shower and eight cells on one side of the corridor, and a utility room and eight cells on the other side of the corridor. Each cell door is of solid metal, and contains a slot, approximately eight inches by ten inches, that goes up and down, and works with the same key that opens the cell door. One key unlocks the cage door, and a master key unlocks all of the cells.

On the night of July 8, 1962, claimant reported for work at his customary time, and relieved a Mr. Lowry, who had been on duty during the previous shift. After Mr. Lowry left there were no other State employees in the building, and claimant was alone with the inmates. At approximately 11:00 P.M., one of the inmates called out for some toilet paper. Each cell has its own toilet bowl, but the inmates are not permitted to keep paper in the cells, because the paper can be used to flood the toilets and create a disturbance. Claimant unlocked the cage door, proceeded down the corridor to the cell of the inmate, who had called, and, as he was handing the paper to the inmate through the slot of his door, one John Egan came from his unlocked cell

across the corridor, and attacked claimant with a piece of metal eighteen inches long and one-quarter inch thick, which he had taken from his bed. Egan, weighing 150 pounds, knocked claimant, weighing about 90 pounds, to the floor, took his keys away from him, and unlocked the cell of his fellow escapee across the hall. The two escaping inmates beat claimant, shoved him into an office in the front portion of the building, and left the premises taking claimant's 1956 Buick Super Sedan, using the keys that they had forcibly stolen from him. The two escapees drove in the direction of the gate, and the gateman, seeing them coming, opened the gate for them, and let them out upon the highway. After he had let them through the gate, the gateman realized that they were not employees. In the interim, claimant recovered sufficiently to telephone for help. About a mile and a half west from the entrance of the school, the escaping inmates struck a curbing, turned the car over, and demolished it.

Claimant must make sufficient showing of negligence on the part of respondent that the State of Illinois should have reasonably foreseen the consequences. The facts disclose that the guards on duty, prior to claimant's arrival, failed to lock Egan's cell after returning him to that cell from his shower; and, that they also failed to check the door of each cell before going off duty. It was not the practice of the incoming employee to make a check of the cells, nor was there an institution rule requiring him to do so. It does not appear from the testimony that claimant was guilty of contributory negligence in failing to check the cell doors. It is the opinion of this Court that claimant did not violate the rules of the institution.

This Court, therefore, holds that claimant should not be held to a degree of care for his own safety, which was not required **by** the rules of the institution at the time that

he was employed, and also at the time that the escape occurred. *Callbeck vs. State of Illinois*, 22 C.C.R. 722.

Claimant's ad damnum has been fixed by testimony in the transcript at approximately \$545.00, that amount being a reasonable cost or market value of the vehicle.

Claimant is awarded the sum of \$545.00.

(No. 5196—Claimant awarded \$1,082.20.)

MEMORIAL HOSPITAL OF DU PAGE COUNTY, A CORPORATION,
Claimant, os. STATE OF ILLINOIS, Respondent.

Opinion filed January 29, 1965.

ERLENBORN, BAUER AND HOTTE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On January 14, 1963, claimant, Memorial Hospital of Du Page County, a Corporation, presented its statement to the Department of Public Aid for hospitalization services rendered one Elizabeth B. Grose. Although the Department had determined that the subject patient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, it denied the claim for services on January **13, 1964** on the basis that the claim was for services rendered prior to July 1, 1963, and that the appropriation for that biennium had lapsed.

Thereafter, on November 10, 1964, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$1,120.35, representing charges for the hospitalization services furnished said Eliz-

abeth B. Grose for the periods of December 7, 1962 to December 31, 1962, and January 1, 1963 to January 8, 1963.

A Departmental Report was filed in this matter on December 30, 1964, paragraph four of which reads as follows:

“The Department has not been given credit for \$38.15 against the sum that is alleged by claimant. Under the Rules and Regulations of the Department the recipient was to pay ten per cent of her income towards the bill, which income was \$54.50 a month for seven months, or a total of \$381.50. Therefore, the amount to be paid by the recipient and not by the Department towards the indebtedness was \$38.15. The Department admits liability to \$1,082.20, and further admits this is the amount properly due claimant.”

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“That claimant furnished services to one Elizabeth B. Grose, 227 South Miner Street, Bensenville, Illinois from December 7, 1962 to December 31, 1962, and from January 1, 1963 to January 8, 1963, during which time Elizabeth B. Grose was an in-patient of claimant.

“That the reasonable and equitable charges for the services so provided by claimant to the aforementioned Elizabeth B. Grose during the times aforementioned were \$1,082.20.

“That the said Elizabeth B. Grose was determined by the Du Page County Department of Public Aid to be eligible to receive assistance under the program for Assistance to the Medically Indigent Aged, and, consequently, that claimant was entitled to be reimbursed in the amount aforementioned.

“That the biennial appropriation out of which these charges were payable had lapsed at the time the statements were submitted, and the funds to pay said charges were no longer available to the Du Page County Department of Public Aid.”

On January 6, 1965, claimant was given leave to file its amended complaint. It amends the ad damnum clause of the original complaint, and indicates an amount of \$1,082.20 due and owing claimant. This conforms to both the sum determined by the Department to be due claimant, as well as that set forth in the stipulation of facts.

This Court has repeatedly held that, where a contract

has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *Memorial Hospital of Du Page County, A Corporation, vs. State of Illinois*, Case No. 5197, opinion filed January 12, 1965. It appears that all qualifications for an award have been met in the instant case.

Claimant, Memorial Hospital of Du Page County, a **Corporation**, is, therefore, hereby awarded the sum of **\$1,082.20**.

(No. 4974—Claimant awarded \$3,286.00.)

RICHARD J. KNARR, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed February 25, 1965.

FISHMAN AND FISHMAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **EDWARD A. WARMAN AND GERALD S. GROBMAN**, Assistant Attorneys General, for Respondent.

ILLINOIS NATIONAL GUARD—limitation on amount of award. In personal injury cases brought pursuant to the Military and Naval Code, Sec. 220.53 and similar provisions, an award will be limited to an amount no greater than the maximum prescribed for similar claims under the Illinois Workmen's Compensation Act in effect in the State of Illinois at the time the injuries were incurred.

SAME—damages for permanent disability. The Court will accept the Illinois Workmen's Compensation Act as a guide in determining damages for permanent disability.

PEZMAN, J.

Claimant, Richard J. Knarr, brings this action for injuries received while on active duty with the Illinois National Guard. The claim alleges an injury caused by the negligence of an employee of respondent, and bases recovery upon a common law theory asserting that claimant be compensated in accordance with all of the elements of damage, which are applicable in such common law actions.

Respondent denies the right of claimant to an option of either instituting this cause of action as in tort, or under the Military and Naval Code. Respondent urges that all previous decisions of the Court of Claims relating to injured National Guardsmen were based solely on the aforementioned Military and Naval Code of the State of Illinois.

On May 22, 1960, claimant, Richard J. Knarr, was a member of the Illinois National Guard, and was on active duty at a weekend meeting, which was held at 119th Street and Ridgeland Avenue in Cook County, Illinois. At about 2:30 P.M., James E. Getz, also a member of the National Guard, while in the line of duty, was operating a power lawn mower on the south side of a mess hall at the aforesaid National Guard site. According to Private Getz's statement, which is set forth in the Departmental Report, as he came to the sidewalk, he was unable to control the mower due to a twisted belt. Other witnesses stated that he attempted to turn the mower on the sidewalk. As he reached the sidewalk, he noticed that claimant was walking along said sidewalk. He shouted a warning to him to prevent the mower from hitting him, but claimant fell, as he attempted to avoid the mower, and the power mower struck him on the right foot. Claimant's right foot was caught in the blade of the power lawn mower, which cut through his army combat boot, and severely wounded his right foot. He was immediately taken to the orderly room where a tourniquet was placed upon his right leg. He was thence removed to St.

Francis Hospital in Blue Island, where an emergency operation was performed by Drs. Norman S. Schwartz and Albert L. Sheetz. Claimant remained at St. Francis Hospital from May 22, 1960 to June 9, 1960, and was then transferred to the Great Lakes Naval Hospital, where he remained from June 9, 1960 until August 15, 1960. Following his release from said Great Lakes Naval Hospital, claimant was under continual medical treatment until he was again hospitalized at the Great Lakes Naval Hospital from February 6, 1962 until April 9, 1962.

Claimant suffered a deep wound of the dorsum, or top of the right foot. He had a severance of the numerous extensor tendons and muscles, and there were fractures of the metatarsal bones. The first metatarsal bone had comminuted type fractures of the anterior portion of the entire length of its shaft, which was accompanied by considerable loss of bone substance. There was also a transverse fracture in the midshaft of the first metatarsal, and an oblique fracture of the second metatarsal. The medical testimony of Dr. Schwartz set the number of fractures or fragments to be from twenty-five to thirty. There were serious involvements of nerves, tendons, muscles, soft tissues and blood vessels of the right foot. The extensor tendons, digital artery and nerve of the first toe were severed. There was a contracture of the joint of the first metatarsophalangeal joint, and a dislocation of the metatarsal cuneiform joint. claimant's doctor testified that the injury to the right foot was permanent in nature, but was unable to specify the percentage of permanent disability. On August 21, 1962, the U.S. Army Physical Evaluation Board issued a report, which found claimant physically fit for duty.

At the time of his injury, claimant had a civilian job with the Illinois National Guard as a Supply Specialist, and was earning \$4,940.00 per year. In addition to this, he was

also an active military member of the Guard, which increased his earnings sufficiently to make a gross total of \$5,200.00 per year. From the time of his injury until April of 1962, claimant was kept on an active duty disability status by the Illinois National Guard, and during that time he received compensation in the sum of \$269.00 per month. After his release from the Guard, claimant started a completely new job with the Continental Casualty Company, and at the time of the hearing was earning \$450.00 per month. Claimant asserts that he lost the difference between his gross salary of \$5,200.00 a year, prior to the occurrence of the accident, and the \$269.00 a month, or \$3,552.00 a year, which he received while on a disability status, or the sum of \$3,296.00.

The Supplemental Departmental Report, which was submitted by the Military and Naval Department of the State of Illinois, was admitted into evidence as respondent's exhibit No. 2. It stated that claimant served continuously in the National Guard until September 7, 1962, when he was discharged by reason of his removal from the State of Illinois. It further indicates as follows:

"4. Under Public Law 108, 81st Congress, Specialist Knarr was entitled to and received medical treatment, hospital care, pay, allowances and travel reimbursement. The following payments were made from federal funds during the period of incapacitation:

Pay, allowances and travel reimbursement	\$6,573.76
Civilian medical and hospital bills	875.05
Civilian federal technician sick pay	570.00

Total:	\$8,018.81
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"5. In addition to the payments made above, all expenses incurred during the periods of hospitalization at the U.S. Naval Hospital, Great Lakes, Illinois, (a federal facility) were paid from the Army Medical Services Activities Fund at Department of the Army level."

Upon conclusion of oral argument by counsel for the parties before the Court of Claims, it was agreed that a further medical evaluation of the injuries of claimant would

be obtained, and filed with this Court. On August 7, 1964, a letter of Dr. Harry E. Barnett, 116 South Michigan Avenue, Chicago, Illinois, was filed with the Clerk of the Court, and admitted in evidence by agreement of the parties. Dr. Barnett's diagnoses were as follows:

"1. Initial multiple lacerations of the right foot involving primarily the first metatarsophalangeal region.

"2. Healed fracture with varus deformity of the right first metatarsal bone.

"3. Severance of extensor tendons of right great toe with residual flexion deformity at the metatarsophalangeal joint.

"4. Marked derangement of bony alignment with secondary arthritic changes at the right first metatarsophalangeal joint."

In this medical report, Dr. Barnett estimates a partial disability of 40% of the function of the right foot, and further states that it is his impression that the patient will require an arthrodesis of the first metatarsophalangeal joint of the right great toe.

The case at hand is clearly one in which claimant should be reimbursed for his injury. He is not entitled to the full measure of damages that he would receive in an ordinary common law action, nor has he any right to bring his action in this instance under Section 8D of the Court of Claims Act. All previous decisions of the Court relating to injuries suffered by Illinois National Guardsmen were based solely on the aforementioned Military and Naval Code of the State of Illinois. This Court has held that claimant may invoke the jurisdiction of the Court when the disability exceeds a period of *six* months, and he shows a need for financial help and assistance in addition to that provided under the Military and Naval Code. (*Insalato vs. State of Illinois*, 12 C.C.R. 27)

The Court of Claims in *Durnham vs. State of Illinois*, 23 C.C.R. 28, established a basis for determining the amount of financial help and assistance, which an injured National

Guardsmen would be entitled to, by using the Workmen's Compensation Act as a guide. In that case, the Court considered claimant's percentage of permanent disability, his loss of wages during the period of incapacitation, and the amount received by claimant from the Federal Government as compensation for the same injuries.

This Court changed its standards of recovery in *Ward vs. State of Illinois*, 24 C.C.R. 229, when it stated:

"We recognize that there have been a few instances where this Court did not follow its general practice of using the Workmen's Compensation Act as a gauge to the amount of recovery allowed in personal injury and death cases under the Military and Naval Code, as in the *Dudley* case, cited above, and *Roberts vs. State of Illinois*, 21 C.C.R. 406. We find, however, that recovery based on established standards is essential to the dispensing of equal justice.

"We shall henceforth allow claimants in personal injury or death cases brought pursuant to the Military and Naval Code, Sec. 220.53, and similar provisions, to recover an amount no greater than the maximum prescribed for similar claims under the Workmen's Compensation Act in effect in the State of Illinois at the time the injuries were incurred. We are cognizant that in most cases the Federal Government has made substantial payments to the injured person and his survivor. In determining the extent of aid to be contributed by the State, we will disregard any payments from the Federal Government or other sources.

"The ruling of the Court herein does not conflict with the decision of the Supreme Court in *Hays vs. Illinois Transportation Co.*, 363 Ill. 397, which held that the Workmen's Compensation Act does not apply to those in military service, since the Compensation Act is only being used as a guide in determining the extent of our awards, and the cases acknowledgedly arise under the Military and Naval Code."

The Supplemental Departmental Report, set forth hereinabove, indicates that claimant received certain specific payments providing for medical treatment, hospital care, pay, allowances and travel reimbursement. We are, therefore, faced with considering only two elements in determining the ad damnum to which claimant is entitled.

1. Lost wages during the period of incapacitation in the form of the difference between the amount actually received by the injured person during that period when he

was out of work as a result of the injury, and the amount received or granted under the Workmen's Compensation Act as temporary total disability. In this cause of action the injured party actually received more compensation on active duty disability status from the Illinois National Guard than he would have received as temporary total disability under the Workmen's Compensation Act.

2. Claimant's percentage of permanent disability. In considering this element, the Court of Claims has previously accepted the Workmen's Compensation Act as a guide in determining damages. Using the medical report of Dr. Harry E. Barnett, dated July 22, 1964, we find that claimant for all practical purposes has no function at all of the great toe of the right foot. Medically, the amputation or loss of the great toe is considered as 20% total impairment of the foot. The reason for this is that the main function of the great toe is to provide balance. Accordingly, a complete ankylosis of the great toe, without amputation, is usually medically rated at only about 15% of the foot, since much of the function of balance still remains after ankylosis. In addition, claimant has a mild limitation of motion of the second toe, which has relatively little functional ability, as well as some scarring on the top of the foot. This might be rated medically at about 5% of the foot, or a total impairment of 20% of the foot.

In converting "impairment" from a medical standpoint to the industrial "permanent disability", other factors are usually considered. In this case, claimant is quite young, and was obviously in excellent physical condition before the accident. In addition, it appears that an arthrodesis, or fusion of the inner joint of the great toe, is probable. The evidence in the form of a medical report by Dr. Harry E. Barnett estimates a partial disability of 40% of the function of the right foot, and also indicates that the patient will re-

quire an arthrodesis of the first metatarsophalangeal joint of the great right toe. This evidence is not controverted. Claimant, Richard J. Knarr, at the time of the accident was married, and had one child. Under the rates established by the Illinois Industrial Commission, compensation for 40% of the loss of the right foot would be \$3,286.00.

Claimant is, therefore, awarded the sum of \$3,286.00.

(No. 5011—Claimant awarded \$3,336.25.)

MELVIN E. BRYANT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion fled February 25, 1965.

WOLSLEGEL AND ARMSTRONG, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD G. FINNEGAN, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—salary for period of unlawful discharge. Where claimant was unlawfully discharged, and evidence disclosed no failure to mitigate damages, he was entitled to **back** salary for period of his illegal removal.

DOVE, J.

Claimant, Melvin E. Bryant, seeks recovery for loss of wages for the period of February 20, 1961 to June 30, 1961 during his suspension and discharge from duties as Assistant Warden at the Industrial School for Boys, Sheridan, Illinois.

From the record it appears that claimant was certified and appointed to his present position as Assistant Warden on August 22, 1951. On February 20, 1961, written charges seeking a thirty day disciplinary suspension pending discharge were served on claimant, and, on March 1, 1961, notice of grievance concerning the disciplinary suspension pending discharge was filed with the Chairman of the Illinois Youth Commission. Written charges seeking the discharge of claimant, effective as of March 20, 1961, were

served on claimant on March 19, 1961. Thereafter, claimant appealed by written notice to the Illinois Civil Service Commission, and requested a hearing. On April 25, 1961, a hearing was held before John Morrow, Hearings Referee, and, on October 9, 1961, his decision retaining claimant in his position as Assistant Warden at the Illinois Industrial School for Boys, Sheridan, Illinois, was handed down. The decision further found that claimant was entitled to full compensation. Subsequently, the Civil Service Commission of Illinois unanimously concurred in said decision.

Thereafter, claimant requested the Director of the Department of Personnel of the State of Illinois to review the thirty day disciplinary suspension in accordance with Rule 25 of the Department of Personnel. The Director, by letter, stated that the Department would be bound by the ruling of the Civil Service Commission as to the thirty day disciplinary suspension, insofar as the accrual of pay and other benefits were concerned. The Director of the Department of Personnel further recommended to the Chairman of the Illinois Youth Commission on November 7, 1961 that claimant be paid his regular salary at the rate of \$785.00 per month from February 20, 1961 to March 20, 1961, the period of the disciplinary suspension.

Dr. Arthur E. Wright, Superintendent of the Illinois Industrial School for Boys at Sheridan, Illinois, testified that claimant's position was filled by a Mr. Shockley after March 15, 1961. Mr. Shockley was Acting Assistant Warden from February 21, 1961 to March 15, 1961, and received \$685.00 per month after his appointment on March 16, 1961. Dr. Wright further testified that both claimant and Mr. Shockley were paid a salary for the period from July 1, 1961 to October 21, 1961, and that claimant would have been paid his salary from February 20, 1961 to June 30, 1961, if the appropriation had not lapsed.

Claimant testified that he applied for employment elsewhere on a number of occasions, but was unable to obtain a position; that he was not employed, and earned no money during the time he was suspended and discharged; and, that he received no salary for the period of February 20, 1961 to June 30, 1961, but had been paid \$2,624.64, his salary from July 1, 1961 to October 31, 1961.

This Court has long held that, where a Civil Service employee is illegally prevented from performing his duties, and is subsequently reinstated to his position by a Court of competent jurisdiction, he is entitled to the salary attached to said office for the period of his illegal removal, but that he must do **all** in his power to mitigate damages. *Snyder vs. State of Illinois*, 22 C.C.R. 453; *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Smith vs. State of Illinois*, 20 C.C.R. 202; *Cordes vs. State of Illinois*, 24 C.C.R. 491.

There is no evidence of failure to mitigate damages for the period involved in the instant case.

Claimant is hereby awarded the sum of \$3,336.25.

(No. 5013—Claimant awarded **\$2,860.00.**)

RAYMOND L. FARBER, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion fled February 25, 1965.

WOLSLEGEL AND ARMSTRONG, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD G. FINNEGAN, Assistant Attorney General, for Respondent.

CIVIL SERVICE Am—salary for period of unlawful discharge. Where claimant was illegally removed from his Civil Service employment, and there was no evidence of his failure to mitigate damages, he was entitled to back salary for period of unlawful discharge.

DOVE, J.

Claimant, Raymond L. Farber, seeks recovery for loss

of wages for the period of February **20**, 1961 to June **30**, 1961, incurred when he was suspended and discharged from his duties as School Principal I at the Illinois Industrial School for Boys, Sheridan, Illinois.

The stipulation entered into by and between the parties is as follows:

“That claimant herein, on September **2**, 1953, was certified and appointed to the position of School Principal I at the Illinois Industrial School for Boys, Sheridan, Illinois; that claimant continued to perform the duties of said position until February **20**, 1961, at which time a copy of written charges seeking a **thirty** day disciplinary suspension pending discharge was personally served upon claimant.

“That on March **1**, 1961 claimant filed a notice of grievance with Oliver J. Keller, Jr., the then Chairman of the Illinois Youth Commission, with respect to the aforesaid thirty day disciplinary suspension pending discharge.

“That on March **6**, 1961 claimant filed a notice of appeal with the Illinois Civil Service Commission of the aforesaid thirty day disciplinary suspension pending discharge.

“That on March **20**, 1961 a copy of written charges seeking discharge, filed by the then Chairman of the Illinois Youth Commission, Oliver J. Keller, was served upon claimant, Raymond L. Farber, said discharge to be effective on March **20**, 1961.

“That thereafter, and within fifteen days following receipt of said written charges seeking discharge, claimant, by and through his attorneys, Wolslegel and Armstrong, made written requests of notice of appeal to the Illinois Civil Service Commission for a hearing in defense to the said written charges filed against said claimant.

“That, pursuant to said notice of appeal of said charges seeking discharge, a hearing was held in the Conference Room, 21st Floor, 160 North La Salle Street, Chicago, Illinois, on May **23**, 1961, commencing at 9:30 A.M. before the Honorable John Morrow, Hearings Referee for the Illinois Civil Service Commission.

“That on September **13**, 1961 the Hearings Referee, the Honorable John Morrow, handed down his decision stating that claimant, Raymond L. Farber, be, and he is hereby retained in his position as School Principal I at the Illinois Industrial School for Boys, Sheridan, Illinois, with full compensation.

“That on September **20**, 1961 the Illinois Civil Service Commission unanimously concurred in, and adopted the findings and decision of said Hearings Referee, and certified said decision to the Director of the Department of Personnel, State of Illinois, for enforcement.

“That on May **23**, 1961 claimant, through his attorneys, requested by

letter that the Director of the Department of Personnel, State of Illinois, review the grievance as to the aforesaid thirty day disciplinary suspension in accordance with Department of Personnel Rule **25**.

“That on June **13**, 1961 the Director of the Department of Personnel, by letter, stated that the Department would be bound by the ruling of the Civil Service Commission as to the said **thirty** day disciplinary suspension, insofar as accrual of pay and other benefits were concerned as to said period.

“That on October 27, 1961 the Director of the Department of Personnel of the State of Illinois, by letter, recommended to the now Chairman of the Illinois Youth Commission, John A. Troike, that claimant, Raymond L. Farber, be paid his regular monthly salary from February 20, 1961, to March 20, 1961, the period of said disciplinary suspension.

“That claimant, by virtue of and because of his aforesaid retention in his position as School Principal I at the Illinois Industrial School for Boys at Sheridan, Illinois, became and was entitled to back pay from the date of said reinstatement to February 20, 1961.

“That claimant’s monthly pay amounted to a gross sum of \$660.00 per month prior to July 1, 1961; and a gross sum of \$700.00 per month after July 1, 1961.”

Doctor Arthur E. Wright, Superintendent of the Illinois Industrial School for Boys at Sheridan, Illinois, testified that claimant would have been paid his salary from February 20, 1961 to June 30, 1961, if the appropriation had not lapsed, and that for the time subsequent to June **30**, 1961 claimant had been paid his salary in full.

Claimant testified that he applied for employment elsewhere on a number of occasions, but was unable to obtain a position; that he was not employed, and earned no money during the time he was suspended and discharged, and that he received no salary during the period of February 20, 1961 to June 30, 1961. This claim is for claimant’s gross salary for the period from February 20, 1961 to June 30, 1961.

This Court has long held that, where a civil service employee is illegally prevented from performing his duties, and is subsequently reinstated to his position by a court of competent jurisdiction, he is entitled to the salary attached to said office for the period of his illegal removal, but that he must do all in his power to mitigate damages. *Snyder vs.*

State of Illinois, 22 C.C.R. 453; *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Smith vs. State of Illinois*, 20 C.C.R. 202; *Cordes vs. State of Illinois*, 24 C.C.R. 491.

There is no evidence of failure to mitigate damages for the period involved in the instant case.

Claimant is hereby awarded the sum of \$2,860.00.

(No. 5036—Claimant awarded \$967.50.)

LESTER WOODRUM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 25, 1965.

EUGENE L. DAVISON, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

DAMAGES—*action of trespass.* In an action of trespass, the law infers some damage without proof of actual injury, and claimant is always entitled to at least nominal damages.

DOVE, J.

Claimant, Lester Woodrum, seeks recovery herein for damages sustained in the years of 1960 and 1961, as a result of loss of pasture and forage, and resultant expenditures for hay and feed, as well as for losses incurred in the sale of his cattle and sheep. From the transcript of evidence, it appears that in March of 1960 claimant leased for farming and residential purposes by written lease a farm in McLean County, which consisted of 100 acres, which lease by its terms expired on March 1, 1961. It further provided for a rental charge of \$1,200.00 in cash, which sum was paid by claimant to the lessor, one Asa Arthington. Claimant was in possession of the premises during the term of the lease, except as his possessive rights were interfered with by respondent.

Sometime in June of 1960 the lessor, Asa Arthington, sold the premises involved herein to the Department of Con-

servation of the State of Illinois, but nothing in the deed of conveyance indicated the rights of claimant.

It appears from the record that the lessee intended to winter livestock, consisting of 11 head of cattle and 23 head of sheep, on the corn forage, grass waterways and pasture land on the farm.

On December 12, 1960, without regard to claimant's rights under his unexpired written lease, and disregarding claimant's protests, the contractor for the Department of Conservation entered on the premises with a bulldozer, and pushed down the fences enclosing the corn forage, grass waterways and pasture. Claimant was forced to put the livestock in a lot to keep them from roaming around at will. He was not otherwise disturbed in the possession of the farm, and continued to occupy and use the house and barn. His principal means of livelihood was employment as a heavy equipment operator, and he lived with his wife and two children on the farm.

As stated in American Jurisprudence: "From every direct invasion of the person or property of another the law infers some damage without proof of actual injury; hence in an action of trespass, the plaintiff is always entitled to at least nominal damages. . . ." 52 *Am. Jur.* 872, Sec. 47—Trespass.

While the evidence in this case leaves much to be desired, there is not a total failure of proof so far as damages are concerned. An award is, therefore, made for feed and hay purchased in the amount of **\$530.00**, and for the loss on the sale of the livestock in the amount of **\$437.50**.

The claim of Lester Woodrum is, therefore, allowed in the sum of \$967.50.

(No. 5094—Claimant awarded \$750.00.)

LARRY McCAULEY, A Minor, by his Father and next friend,
CHARLES McCAULEY, Claimant, vs. STATE OF ILLINOIS, Re-
spondent.

Opinion filed *February 25*, 1965.

WISEMAN AND HALLETT, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

EVIDENCE—*notice of dangerous condition.* Where no evidence was adduced by respondent to refute testimony that steps were kept unclean and in a dangerous condition for a number of years, Court held that respondent should have known such condition existed, and should have used reasonable care to remove the debris, which caused the hazardous condition.

PERLIN, C.J.

Claimant, Larry McCauley, a minor, in this action filed by his father, Charles McCauley, seeks recovery of \$5,000.00 for injuries suffered on June 11, 1962, when claimant, then ten years old, slipped and fell on the steps of the McCambridge Viaduct, which was built and is maintained by the Division of Highways of the State of Illinois.

Claimant contends that respondent failed to maintain the steps of the viaduct in a suitable and safe condition by permitting debris to accumulate and remain on the steps, which, as a result of respondent's negligence, caused claimant to slip on the stairs, fall into the path of an automobile and sustain injuries.

Claimant, Larry McCauley, testified that on the day of the accident he had walked about fifteen blocks from his home to go swimming at the Recreation Center in Madison, Illinois with his sister, Charlene, and some other children. He had climbed upstairs on the viaduct, and then crossed the viaduct, which passes over railroad tracks, and has a street and pathway to walk on. He was in the pool when it

started raining, and the children picked up their clothes, and started walking back home. To reach home they had to cross over the viaduct and descend the stairs. Claimant was wearing his swimming trunks, and carrying his other clothes and shoes in his right hand. He stated he was holding the railing with his left hand, as he walked down the stairs. It was raining heavily. The steps were wet, muddy, and slippery. When he reached the fifth or sixth step from the bottom he slipped, but does not know exactly what he slipped on.

A photograph submitted as claimant's exhibit No. 4 showed the steps with debris on them. Claimant testified that the steps had gravel, sand, small rocks, and paper on them, and that the photograph showed the condition of the steps when he fell. He was walking more slowly than usual. He had used the steps about three or four hundred times before, but never in the rain. He lived about a block and a half away from the viaduct. As he descended, one child was in front of him, with about four others behind him, but not close enough to touch him. Claimant said he was going more slowly than his usual speed because he was scared of going down the stairs.

After he slipped, he remembered nothing until he awoke in a restaurant where he was put in an ambulance and taken to the hospital.

Claimant spent three days in the hospital, and his injuries were described as a fractured skull, head split open, stitches in chin and elbow, and sprained left ankle. He testified that, whenever he gets warm, his eye swells, and, whenever he reads, he sees a line down his eye. He had not seen a doctor with regard to the eye condition.

Charlene McCauley, age 13 at the time of the hearing, testified that she was Larry McCauley's sister, and had accompanied her brother to the pool on the day he was in-

jured. She stated that there was no shorter way to get to the swimming pool, and it was necessary to use the stairs to cross the railroad tracks.

At the time of the accident, according to Charlene, there were mud, cinders, paper, little rocks and dirt on all the steps. It was raining heavily when they started down the steps. She saw her brother just before he fell. He was walking with his left hand on the rail. When he fell he rolled to the middle of the road. He was holding on to the rail when he fell, but then let go of it and his clothes. The bottom two steps were muddier than the other steps. On the day of the accident it was not easy *to* walk on the steps, and one of the other children slipped and almost fell.

Charles McCauley, claimant's father, testified that, **in** the three years he had lived in the neighborhood, he had never seen the steps clean. According to McCauley, three days after the accident the steps were dirty with trash, mud, cinders, rocks, fresh asphalt, broken glass, and fresh rocks. The only maintenance, which McCauley had noticed in the three years he had lived there, was the cutting of the grass about twice a month. McCauley had gone up and down the stairs in question many times, and described the difficulty in descending them as follows: "**It** is just straight down, and seems like it pulls you down, as you are coming down; and, with cinders on there and all that paper and trash, you can't watch where you step, and you **slip.**"

McCauley further testified that Larry saw the doctor three times after he left the hospital, but had not seen a doctor with regard to his complaints that his face puffs up when he gets hot, and that he sees a line running through his eye, McCauley stated he does not have enough money to take Larry to a doctor.

Norman L. Soehlin testified that he was driving a station wagon at about 2:00 P.M. on June 11, 1962, and was

stopping for a sign about thirty or forty feet past the viaduct steps. It was raining hard. His brakes were on, and he was moving about five or ten miles per hour when he saw a flash on the ground to his left, which looked like a boy, and it was a boy. He tapped him with his bumper, but did not run over him. **At** that time he was about a foot past the bottom of the stairs. The boy looked like he was diving from the stairs, and sliding across the road on his stomach and had landed in a prone position. He was bleeding about the eyes.

Marion E. Norris, District Maintenance Engineer for the Illinois Division of Highways, East St. Louis, testified that McCambridge Viaduct was built and is maintained **by** the Illinois Division of Highways. It includes about forty-five steps with a seven and one-half inch riser and a twelve inch tread. The steps are approximately four feet in width, with a slope of two feet horizontally to one foot vertically. **A** concrete platform at the bottom of the stairs is five feet long and five feet wide. The witness did not know the condition of the steps at the time of the accident, although it is a departmental policy to clean the steps every spring when the bridge deck is cleaned. He did not know when the steps in question were cleaned. Respondent produced no further witnesses.

In order to recover, claimant must prove by a preponderance of evidence (1) that the minor claimant exercised that degree of caution and freedom from contributory negligence as children of like age, intelligence and reason would have exercised; (2) that respondent was negligent in its maintenance of the stairway leading to the sidewalk over the viaduct; and, (3) that the negligence of respondent was the proximate cause of the injuries sustained.

Both claimant and his sister testified that he was **pro**-ceeding slowly down the steps, and was holding on to the

railing with his left hand. No evidence has been introduced, which would suggest that claimant was using less than due care commensurate with his age, as he descended the stairway. There was apparently no nearby alternate route, which the children could have taken across the railroad tracks. It was not unreasonable for a ten year old boy to remove his shoes in the hard rain, when he was accustomed to going without them much of the summer.

Respondent has offered no evidence to counteract the testimony of Charles McCauley that to his knowledge the steps had never been cleaned in the past three years, nor does respondent deny that the steps were covered with debris prior to the accident. This condition remained uncorrected despite frequent visits by respondent's agents when **they were cutting grass in the area. Therefore, respondent** should have known that the dangerous condition existed, and should have taken reasonable care to remove the debris, which would prove hazardous to persons descending the long flight of stairs.

Although respondent contends that claimant has failed to prove the proximate cause of his fall, it can be reasonably inferred that, if someone is exercising care and holding on to the railing of a stairway covered with wet debris, the condition of the stairway caused the fall. *Holsman vs. Darling State Street Corp.*, 6 Ill. App. 2d 517, 128 N.E. 2d 581 (1955).

Claimant, Charles McCauley, has testified that the minor claimant has not seen a doctor with regard to the swelling in the area of his eye, and the line he sees through his eye, because he cannot afford medical care. In the absence of any medical evidence, the Court is unable to assess damages with regard to this aspect of the injury claim.

Claimant did establish that Larry suffered an injury to his head, and at the time of the hearing the record noted

that he had a two inch scar over his eye, a scar on his chin, and one on his elbow. The hospital and doctor bills were covered by amounts of \$101.35, which were paid from an accident and health policy carried by Charles McCauley, and \$153.35 for executing a covenant not to sue Norman L. Soehnlín.

Claimant is hereby awarded the sum of \$750.00.

(No. 5058—Claimant awarded \$750.00.)

ERIKA GITNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 20, 1965.

ROSENGARD AND HECHT, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; SAMUEL I. NEIBERG AND GERALD S. GROBMAN, Assistant Attorneys General, for Respondent.

HIGHWAYS—negligence. The doctrine of *res ipsa loquitur* is applicable to a public authority in Illinois.

NEGLIGENCE—*res ipsa loquitur*. Where evidence disclosed that road was under control and management of State, and that occurrence causing accident was such as in the ordinary course of events would not have happened if due care had been exercised by respondent, *res ipsa loquitur* was properly applied.

PEZMAN, J.

From the evidence introduced by claimant at the hearings herein, it appears that Dempster Street in Niles, Illinois is a four-lane highway for two-way traffic. It is known as State Aid Route No. 123, and, as such, is under the jurisdiction and control of the State of Illinois. On April 12, 1962, at approximately 3:30 P.M., the weather in Niles, Illinois was drizzling. In the section of the highway from about 30 to 90 yards west of the Milwaukee Road overpass on Dempster Street the stated speed limit was 45 miles per hour. At that time and place claimant, Erika Gitner, was driving a 1959 Oldsmobile vehicle in an easterly direction

on State Aid Route No. **123**. She was in the east bound inner lane (that lane closest to the center line), and was traveling at a speed of about **35** miles per hour. She noticed nothing unusual about the roadway in front of her vehicle. There were no holes, excavations, craters, warning signals or devices apparent in either of the two east bound lanes. There were other vehicles proceeding east in front of her, occupying the two lanes available for east bound traffic. These vehicles passed over that portion of the roadway where the accident herein complained of occurred without any unusual events.

As the claimant's automobile passed over that portion of the roadway approximately **30** yards west of the Milwaukee Road overpass, the roadway suddenly and without warning collapsed. This collapse caused Mrs. Gitner's vehicle to veer temporarily out of control in a northerly direction into the path of the oncoming west bound traffic. Mrs. Gitner quickly pulled her car back to the right (south), and it unavoidably collided with the south wall of the Milwaukee Road overpass. Upon inspection of that portion of the roadway where the collapse occurred, a crater approximately **12** feet long and **5** feet wide was found. The evidence does not show how deep the crater was.

After this occurrence claimant experienced a feeling of fright and shakiness. She was taken home by two Illinois State troopers, who were traveling behind her vehicle at the time of the accident. Upon arriving home Mrs. Gitner recovered somewhat from her feeling of nervousness and fright, and then began to experience severe pain in various parts of her body, including her neck, shoulder, back, head and arms.

The next day she was taken to the offices of Drs. Franz Steinitz and Henry Heller, **3653** West Lawrence, Chicago, Illinois, by her husband for an examination. The examination

revealed pain and tenderness of the cervical spine, right trapezius muscle and dorsal spine, particularly in the area of the 8th, 9th, 10th and 11th vertebrae. X-rays of Mrs. Gitner revealed a loss of normal lordosis in the cervical spine. The treatment rendered to Mrs. Gitner consisted of analgesics, diathermy, massage and B-12 injections. It was necessary for the doctors to render treatment, as described, to claimant on twelve different occasions during the period from April 13, 1962 to May 26, 1962. Thereafter she received a bill for \$158.00, which included charges for the examination, x-rays and treatments. At the time of the hearings Mrs. Gitner was still experiencing, to some degree, the symptoms for which she was treated by Drs. Steinitz and Heller.

In addition to the medical expense, claimant had to pay \$150.00 for a full-time maid to stay at her residence for two weeks after the accident, and do the housework claimant was unable to do herself.

Claimant contends that her evidence is sufficient to raise a rebuttable presumption or inference of negligence on the part of respondent under the doctrine of *res ipsa loquitur*, and that she is entitled to an award of \$10,000.00, inasmuch as respondent introduced no evidence to overcome or rebut the presumption. Respondent on the other hand takes the position that the doctrine of *res ipsa loquitur* has no application to a public authority; that claimant must show that the State had either actual or constructive knowledge of a dangerous condition; and, that claimant has failed to maintain her burden of proof of such actual or constructive knowledge. There is no claim by anyone, or any evidence, that claimant was guilty of contributory negligence. The issue presented, therefore, is whether the doctrine of *res ipsa loquitur* is applicable.

The Court is of the opinion that the doctrine of *res ipsa*

loquitur is applicable to a public authority in Illinois, and should be applied in this case. *Charles M. Kenney, Administrator of the Estate of Steve Bolf, Deceased, vs. State of Illinois*, 22 C.C.R. 247; *Finch vs. State of Illinois*, 22 C.C.R. 376; *Roberts vs. City of Sterling*, 22 Ill. App. (2d) 337, 161 N.E. (2d) 138; *Bolger vs. City of Chicago*, 198 Ill. App. 123; *Bollenbach vs. Bloomenthal*, 341 Ill. 539, 173 N.E. 670. Claimant has clearly shown, we think, that the road in question was under the control and management of the State, and that the occurrence was such as in the ordinary course of events would not have happened if due care had been exercised by respondent. Claimant has, in our opinion, established a prima facie case of negligence on the part of respondent, thus shifting the burden of proof to respondent. *Roberts vs. City of Sterling*, supra; *Bollenbach vs. Bloomenthal*, supra; *McCleodus Nel-Co. Corp.*, 350 Ill. App. 216, 112 N.E. (2d) 501. Respondent, having failed to produce any evidence, has failed to rebut the presumption raised by claimant's evidence.

With respect to the amount of damages to which claimant is entitled, there is no dispute as to the necessity for or reasonableness of the expenditures for medical care and hired help in her home. The evidence of her pain and suffering is strong, but there is little evidence of permanent injuries. It is our opinion, then, that an award to claimant in the amount of **\$750.00** to cover her medical expenses, damages, and pain and suffering is reasonable under all the facts and circumstances.

An award is hereby made to claimant in the amount of **\$750.00**.

(No. 5071—Claimant awarded \$8,074.25.)

MARTHA VAN POUCKE, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed April 20, 1965.

SINNETT, RINK AND CORYN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*maintenance of stairway.* Where evidence disclosed that claimant was in the exercise of due care for her own safety, that respondent had notice of the dangerous condition of the step and had failed to repair it, and that such negligence was the proximate cause of claimant's injuries, an award **will** be made.

DOVE, J.

A complaint in this matter was filed in the Court of Claims on November 7, 1962, alleging that respondent, State of Illinois, owns, operates, maintains and controls an institution, known as the East Moline State Hospital, which is located at 100 Hill Crest Road, East Moline, Illinois. Further it is alleged that, on or about March 23, 1962, claimant, Martha Van Poucke, was a guest on the premises of said hospital; that at the time claimant was in the exercise of due care and caution for her own safety; that it was the duty of respondent to construct, maintain and repair said premises, so that persons rightfully thereon would not be injured; and, that respondent was then and there guilty of one or more of the following negligent acts or omissions:

(a) Failed to construct the sidewalk and steps on said premises in a safe and proper manner;

(b) Failed *to* maintain the sidewalk and steps on said premises in a safe and proper manner;

(c) Failed to repair the sidewalk and steps on said premises in a safe and proper manner;

That, as a direct and proximate result of one or more of the aforesaid negligent acts or omissions of respondent, the public sidewalk and steps directly in front of the main

building on said premises were defective, cracked, loose and unsafe, thereby causing claimant to fall, and be thrown and hurled to said sidewalk and steps with great force and violence; that claimant was injured severely both internally and externally, and has been and **will be** prevented from attending to her usual and ordinary affairs and household duties; that she has expended, and will be compelled to expend, large sums of money; that no assignment or transfer of the claim of said Martha Van Poucke, or any part thereof or interest therein, has been made; that claimant has heretofore caused to be served upon the Secretary of State of the State of Illinois and the Attorney General of the State of Illinois notice of said claim in accordance with the provisions of the **1961 Ill. Rev. Stats**; and, that claimant, Martha Van Poucke, prays for judgment in the sum of **\$12,224.25**, in accordance with a bill of particulars attached to said claim.

From the testimony of claimant, it appears that, on March **23, 1962**, she was at the East Moline State Hospital for the purpose of getting acquainted with the Superintendent, and to arrange with him for a dinner involving Mental Health. She had arrived at the hospital at approximately 2:00 P.M., and, after concluding her business, left the building at about 3:30 P.M. On her way out of the building she met Donald L. Gilliatt, Chief of Security for the hospital, and walked with him down the hall, out the front door, and down the steps. Claimant apparently stepped down to the middle step, which moved, and she fell down the steps and onto the sidewalk. She then was removed from the East Moline State Hospital to the Moline Lutheran Hospital, and was there treated by Dr. Henry Arp.

Mr. Gilliatt was called as a witness for claimant, and testified that on the day of the accident he was coming in the main door to the Administration Building, and that, as

he reached the top of the second flight of stairs, he saw Mrs. Van Poucke. He returned to the first flight of stairs, and opened the door for her. As they carried on a conversation, both were standing on the second step on the outside of the building, until Mrs. Van Poucke stated to him that it was time for her to go. He stepped back, which caused the second step to move, and claimant lost her balance, fell down the steps, and onto the sidewalk. At the time of the accident he had been employed at the East Moline State Hospital for approximately four years, and during that period of time he had used the step in question many times. He had reported to his superiors, in writing, that the step was loose and in need of repairs. He further stated that since the date of the accident he had retired, and was no longer employed by the State of Illinois.

Dr. Konstantin D. Dimitri, Superintendent of the East Moline State Hospital, was called as a witness by the State. He testified that Mrs. Van Poucke came to his office on the day in question, and discussed her business with him. He did not see the accident, but was informed of her fall, and found her on the sidewalk at the bottom of the steps in front of the building.

In order to recover, claimant must prove by a preponderance of the evidence: (1) That she was in the exercise of due care and caution for her own safety; (2) that respondent was negligent in its maintenance of the steps; and, (3) that the negligence of respondent was the proximate cause of her injuries.

The evidence conclusively indicates that the step had been loose for a long period of time before the accident in question. The Superintendent of the hospital had been notified, in writing, of the defect, but nothing had been done to repair the broken step.

Dr. Henry Arp diagnosed the injuries to Mrs. Van

Poucke as an impacted comminuted fracture of the cervical neck of the right humerus and a badly bruised and sprained back on the left side. She was in the Moline Lutheran Hospital from March 23 until May 19, 1962. A cast, which had been placed on her right arm, was removed after she had been in the hospital approximately three or four weeks. At the time of the hearing Dr. Arp was still giving her sedatives and sleeping pills. Dr. Arp testified that, in his opinion, Mrs. Van Poucke had suffered a permanent disability to her shoulder and arm as a result of the accident, and that her condition would improve only slightly in the future. He stated that claimant could not reach to her back to tie an apron or fasten her brassiere, and was unable to get her hand over her head.

The medical expenses incurred are as follows:

Dr. J. N. Bourque - x-rays	\$ 25.00
Dr. Henry Arp..	507.50
Moline Lutheran Hospital.	1,541.75
	Total..
	\$2,074.25

The Court finds that at the time of the accident claimant, Martha Van Poucke, was in the exercise of due care for her own safety, and, that respondent had notice of the dangerous condition of the step, and neglected to take the necessary precautions to prevent injuries to visitors entering or leaving the building.

The remaining question for the Court to decide is the amount of claimant's damages. The medical expenses above set out total **\$2,074.25**.

The Court believes claimant is entitled to an additional sum of **\$6,000.00** for pain, suffering, and impairment to her shoulder and arm.

An award is, therefore, made to claimant in the sum of **\$8,074.25**.

(No. 5104—Claimant awarded \$2,695.00.)

ARTHUR F. WEISKOPF, d/b/a J. F. WEISKOPF AND SON, Claimant,
 vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 20, 1965.

GIFFIN, WINNING, LINDNER AND NEWKIRK, Attorneys for
 Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
 Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

On or about September **23**, 1958, claimant, Arthur F. Weiskopf, doing business as J. F. Weiskopf and Son, submitted its offer to furnish the Division of State Fairs of the Department of Agriculture one **3 L V 7 S** gas burner, complete with draft box and automatic pilot controls, for the total sum of \$1,425.00. In addition, on October 27, 1958, claimant also presented an offer to install one gas burner, complete with draft box, automatic pilot controls, and all other necessary controls in a standby boiler in the basement of the Emerson Building, which, too, was located on the Illinois State Fair Grounds, as well as to remove the stoker, clean the standby boiler, and wire the controls thereof, all for the total sum of \$1,270.00. Both offers were accepted by the Department of Agriculture, and claimant proceeded to perform all of the conditions contained therein. Statements were thereafter presented to the Division of State Fairs of the Department of Agriculture, but were denied. The amended complaint filed herein alleges that such services and materials were furnished, and that there is now due and owing claimant from respondent the total sum of \$2,695.00.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“It is hereby stipulated and agreed by and between claimant, Arthur F. Weiskopf d/b/a J. F. Weiskopf and Son, by its attorneys, Giffin, Winning, Lindner and Newkirk, and respondent, State of Illinois, Department of Agriculture, by William G. Clark, its Attorney General, that the report of the Department of Agriculture, signed by H. E. Paxton, General Auditor, dated January 5, 1965, which has been filed in this cause pursuant to Rule 15, shall constitute the record in the case.

“It is further stipulated and agreed that this claim arises from two contracts duly entered into by claimant and an authorized employee of the said Department of Agriculture, each contract calling for the sale of merchandise or the furnishing of installation services referred to in the said Departmental Report; both of said contracts aggregate in total the sum of \$2,695.00. The said sum was not paid by the Department solely because of the lapse of the available appropriations.”

A report of the Department of **Agriculture, signed by H. E. Paxton, General Auditor**, acknowledges that each of the estimates and offers were duly accepted by the Department of Agriculture. It further notes that the equipment was furnished and proper installations made, and that the invoices therefor were first received after the appropriation from which payment could have been made had lapsed. The report concludes with the following paragraph:

“The said materials and services hereinabove specified were ordered by persons having proper authority, the said materials were received in good condition, and the said services were rendered in good workmanlike fashion. The said charges are true and correct, and no part of them have been paid. Claimant’s invoices in the total amount of \$2,695.00 would have been vouchered and paid in the regular course of business, *if* they had been submitted to the proper office at the appropriate time. An appropriation had been made by the State Legislature covering this material, and, as of the date of the lapse of the appropriation, there was an unobligated balance of sufficient amount in the appropriation from which claimant’s invoices could and would have been paid.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with

such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. **5165**, opinion filed September 25, **1964**; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. **5109**, opinion filed June 26, **1964**. It appears that all qualifications for an award have been met in the instant case.

Claimant, Arthur F. Weiskopf d/b/a J. F. Weiskopf and Son, is, therefore, hereby awarded the sum of \$2,695.00.

(No. 5187—Claimant awarded \$1,921.66.)

GOEDDE LUMBER COMPANY, AN ILLINOIS CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 20, 1965.

WAGNER, CONNER, FERGUSON, BERTRAND AND BAKER,
 Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
 Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

JURISDICTION—limitations. Every claim arising out of a contract, shall be forever barred from prosecution therein unless filed within five years after it first accrues.

PEZMAN, J.

On or about May 29, **1957**, claimant entered into a lease with the Illinois Public Aid Commission pertaining to part of the premises owned by claimant in East St. Louis, Illinois.

The lease provided in part that claimant would “furnish light and water until such time as a refrigeration unit or other installation requiring an unusual use of water and electricity was installed, at which time the rental was to be adjusted for electricity and water used above normal requirements.” The Illinois Public Aid Commission thereafter installed in and on the leased premises refrigerators, coolers, freezers, **air** conditioners, blowers, and other equipment requiring an unusual use of electricity above the normal requirements for electric light. Respondent maintained said equipment in and on the leased premises during all of the term of said lease, which commenced on July 1, 1957 and terminated on June 30, 1959. The lease was subsequently renewed for the period commencing July 1, 1959 and terminating on June 30, 1961, and again for the period beginning on July 1, 1961 and ending on June 30, 1963.

In its complaint, claimant alleges that it incurred additional electrical expenses during the running of the lease as follows:

July 1, 1957 - June 30, 1958.....	\$ 230.85
July 1, 1958 - June 30, 1959.....	340.71
July 1, 1959 - June 30, 1960.....	251.86
July 1, 1960 - June 30, 1961.....	481.88
July 1, 1961 - June 30, 1962.....	444.26
July 1, 1962 - June 30, 1963.....	743.66
	<hr/>
	\$2,493.22

Claimant further alleges that there is now due and owing it from respondent the total sum of \$2,493.22, as indicated above, and brings this action to recover said amount.

A written stipulation was entered into between claimant and respondent by their respective attorneys, which in part **is** as follows:

“The report of the Illinois Department of Public Aid to the **Illinois** Attorney General, dated January 5, 1965, (**a** copy of which is attached hereto, marked exhibit **A** and, by this reference, incorporated herein and

made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“Claimant has waived, and does hereby waive any and all claim, as alleged in its petition, to interest on the claim from and after October 28, 1963, or any other date, and the parties agreed that leave may be granted claimant to amend its petition by interlineation to delete any and all reference to or demand for any such interest.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$2,493.22.**”

The report of the Department of Public Aid, referred to in the stipulation, and signed by Gershom Hunvitz, Assistant to the Director, acknowledges the allegations contained in claimant’s petition, and states that no part of said claim has been paid. The concluding paragraph of this Departmental Report states: “The Department admits that the amount of the claim of **\$2,493.22** is a proper and a just claim. The Department denies any liability for interest, as the petitioner did not file any statement of claim until October 28, 1963, and admitted it was due to his oversight.”

Section 22 of the Court of Claims Act in part provides as follows: “Every claim cognizable by the Court, arising out of a contract and not otherwise sooner barred by law, shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within five (5) years after it first accrues.” An examination of claimant’s petition indicates that the first two amounts for \$230.85 and **\$340.71** would have accrued on June 30, 1958 and June 30, 1959, respectively, and would, therefore, be barred by the limitations contained in Section 22 of the Court of Claims Act.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed,

it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case except with relation to the amounts that have been barred by Section 22 of the Court of Claims Act.

Claimant, Goedde Lumber Company, an Illinois Corporation, is hereby awarded the sum of \$1,921.66.

(No. 5211—Claimant awarded \$435.00.)

SIEGERT-MATHEWSON MEDICAL GROUP, A Partnership, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion fled April 20, 1965.

WILLIAM H. AMLING, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
 Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation*. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

On May 6, 1964, claimant, Siegert-Mathewson Medical Group, A Partnership, presented its statement to the Department of Public Aid for medical services rendered one Rachel Green. Claimant alleges that its statement for services was not submitted at an earlier date, because of failure of the Department of Public Aid to notify claimant that the said patient was subject to the provisions of its program for Assistance to the Medically Indigent Aged, and, further, that no part of its claim has been paid. Thereafter, on January 21, 1965, a complaint in this matter was filed in the

Court of Claims. It contains a request for payment of the charges for medical services furnished said Rachel Green for the period of April **26, 1963** to, on or about May **26, 1963**, inc.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in essence, supports the position of claimant in this matter. It indicates that claimant did furnish the services to one Rachel Green, and that, according to the fee schedule of payments established by the Department of Public Aid of the State of Illinois, the value of such services was in a total amount of \$435.00. The stipulation reflects the further fact that the appropriation from which payment could have been paid had lapsed prior to the time the statement was submitted. These facts are not refuted by the Department of Public Aid in the Departmental Report filed in this matter on February **19, 1965**.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. **5165**, opinion filed September 25, **1964**; *Memorial Hospital of Du Page County, A Corporation, vs. State of Illinois*, Case No. **5197**, opinion filed January **12, 1965**. It appears that all qualifications for an award have been met in the instant case.

Claimant, Siegert-Mathewson Medical Group, a Partnership, is, therefore, hereby awarded the sum of **\$435.00**.

(No. 5213—Claimant awarded \$1,720.57.)

KENNETH M. PITCHER, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed April 20, 1965.

ROBERT H. BRUNSMAN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—*lapsed appropriation.* Where evidence showed that the only reason claim was not paid was due to the fact that, prior to **the** time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

During the months of February, March, April, May, and June, 1963 claimant, Kenneth M. Pitcher, incurred certain expenses for travel in the course of his duties as an employee of the Illinois Public Aid Commission. Because of the lapse of the appropriation from which said expenses could have been paid, claimant has now filed his claim in this Court for reimbursement.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which in part is as follows:

“The report of the Illinois Department of Public Aid to the Illinois Attorney General, dated April 6, 1965, (a copy of which is attached hereto, marked exhibit A, and, by **this** reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the **sum** of \$1,720.57.”

The report of the Department of Public Aid, signed by Gershom Hurwitz, Assistant to the Director, which is referred to in the said stipulation, acknowledges that the expenses were incurred by claimant in the performance of his duties for the Illinois Public Aid Commission, and states that they were not paid by the Department of Public Aid

for the reason that the travel vouchers were not presented, scheduled, and processed until after the appropriation from which payment could have been made had lapsed.

This Court has held in previous decisions that where the evidence shows that the only reason the claim was not paid was due to the fact that, prior to the time that a statement was presented, the appropriation lapsed, an award will be made. *Ray S. Thompson, Claimant, vs. State of Illinois, Respondent*, 24 C.C.R. 487.

Claimant, Kenneth M. Pitcher, is, therefore, hereby awarded the sum of \$1,720.57.

(No. 5214—Claimant awarded \$17,412.50.)

THE COUNTY OF RANDOLPH, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed April 20, 1965.

HOWARD CLOTFELTER, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

COUNTIES—*reimbursement for writs of habeas corpus in form pauperis*. Upon stipulation of facts and expenses, an award was entered pursuant to Chap. 65, Secs. 37-39, and Chap. 81, Sec. 81, 1961 Ill. Rev. Stats.

PEZMAN, J.

Claimant, The County of Randolph, seeks reimbursement of \$17,412.50, representing expenses incurred by claimant and its officials for services performed in connection with court proceedings involving petitions for Writs of Habeas Corpus by the inmates of the Illinois State Penitentiary and the Illinois Security Hospital. These are penal and charitable institutions of the State of Illinois. Both are located within the County of Randolph.

The parties have stipulated as follows:

“That divisions of the Illinois State Penitentiary and Illinois Security Hospital, the same being penal and charitable institutions of the State of Illinois, are situated in Randolph County, Illinois;

“That petitions of Writs of Habeas Corpus in forma pauperis by inmates of the Illinois State Penitentiary and Illinois Security Hospital, not residents of or committed from Randolph County, are frequently filed in the Circuit Court of Randolph County;

“That by virtue of certain statutory provisions (Chap. 65, pars. 37, 38 and 39, 1963 Ill. Rev. Stats.) the State of Illinois is required to assume and to pay the necessary expenses, including all costs and fees of county officers, arising from such petitions for Writs of Habeas Corpus;

“That, as provided in Chap. 81, Sec. 81, 1963 Ill. Rev. Stats., a fee of \$1.00 is charged on each civil case when pleading is filed to defray costs of law library;

“That attached to the complaint as claimant’s exhibit A is a list of the petitions for Writs of Habeas Corpus in forma pauperis filed in the Circuit Court of Randolph County between the dates of November 8, 1962 and January 6, 1965, *inc.*, which list is a true and correct itemization of said petitions filed between the said dates, and, further, that in all cases on the said exhibit A, wherein amounts are itemized as Sheriff’s fees, State’s Attorney’s fees and law library fees, Writs of Habeas Corpus were issued and hearings held before the Circuit Court of Randolph County;

“That claimant, County of Randolph, claims in this action, all amounts to which it is entitled in the cases listed in exhibit A for filing fees, Sheriff’s fees, State’s Attorney’s fees and law library fees, and, further, that a similar claim based upon similar items of expenses, but arising out of other cases, was presented by the County of Randolph and determined by this Court in an opinion filed June 24, 1955, in volume No. 22 of the Court of Claims Reports, page 205; and again in opinion filed July 24, 1958, in volume No. 22, of the Court of Claims Reports, page 733; and again in opinion filed May 23, 1959, in volume No. 23, Court of Claims Reports, page 136;

“That none of the petitioners set forth in exhibit A attached to the complaint herein were residents of or committed from Randolph County, Illinois;

“That no claim has been presented to any State Department other than the filing of the complaint herein, and that there has been no assignment of any of the items herein claimed;

“That the Board of County Commissioners of Randolph County adopted a resolution on February 15, 1962 imposing an additional fee of \$1.00 upon all cases filed in the Circuit Court of Randolph County, Illinois, for library purposes, as authorized by the 1961 Ill. Rev. Stats., Chap. 81, par. 81.”

The Commissioner’s Report states that both he and an Assistant Attorney General of the State of Illinois appeared

in the Circuit Court of Randolph County on March 25, 1965, and, together with the State's Attorney of Randolph County, examined the entries in the court docket. The Commissioner found that the amounts prayed for in the complaint are true and accurate, and that claimant is entitled to be paid the total sum of \$17,412.50.

We, therefore, award The County of Randolph the sum of \$17,412.50.

(No. 4735—Claimants awarded \$3,250.00.)

ROBERT S. KAY AND JANET KAY, Claimants, vs STATE OF ILLINOIS,
Respondent.

Opinion filed May 11, 1965.

FRIEDLUND, LEVIN AND FRIEDLUND, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; EDWARD A. WARMAN, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*negligent* operation of vehicle. Evidence showed that driver of National Guard vehicle did not have proper management and control of his vehicle, which directly caused the accident.

NEGLIGENCE—*contributory* negligence. Claimant exercised due care as an ordinary prudent person would have done in similar circumstances and did not contribute in any way to the accident.

DOVE, J.

The complaint in this case was filed on August 1, 1956, and arises out of a collision, which occurred at 7:00 A.M. on July 5, 1955 at the intersection of Cicero and Grand Avenues in the City of Chicago, Illinois. Cicero Avenue runs in a north-south direction, and Grand Avenue runs east and west. The traffic is controlled at this intersection by the usual red, yellow and green electric traffic signals.

Robert Kay testified that he was a certified public accountant at the time of the accident. On the date of the

accident the weather was clear, and the sun was shining brightly. Claimant was driving his 1953 Chevrolet Sedan in a southerly direction on Cicero Avenue in the innermost lane of travel. He was accompanied by his wife, who was sitting in the front seat on the passenger side.

As the traffic signal turned red for his lane of traffic, claimant stopped his car at the intersection, and noticed cars were stopped across the intersection on Cicero Avenue waiting to proceed north. While he was making his stop he noticed a National Guard truck going through the intersection, and, as he glanced to his left down Grand Avenue, he observed two other National Guard trucks coming west, which were traveling at a speed of approximately 35 to 40 miles an hour. About the time the traffic lights governing west-bound traffic changed to yellow, the second truck went through the intersection, and the third truck was 50 to 75 feet behind the second truck. After the north-south lights had changed to green, an Oldsmobile, which was being driven by William Rawle, proceeded north from the south side of the intersection, and, as the Rawle car arrived at the center of the intersection, it was struck by the truck driven by Sergeant Lucente. As a result, the Rawle vehicle was shoved into the front of claimant's car.

Claimant, Robert S. Kay, testified that his left arm and leg were bruised, his mouth was lacerated on the inside and outside, and his nose was broken. He and his wife were taken to St. Anne's Hospital, where twenty-five stitches were applied to cuts about his mouth. He still has a visible scar $\frac{1}{2}$ inch below his lower lip, which is 1 to $1\frac{1}{4}$ inches long. He further testified that since the accident he has had frequent colds and a sinus condition. The discomfort of his left arm and leg lasted for two weeks, and he experienced frequent headaches, which were rather severe for the first week or two. He also testified that he could not eat solid foods for

one week, but returned to normal eating habits within four weeks; and, that he was unable to return to work for four days, but continued to receive his salary while he was absent.

Janet Kay testified that on the day in question she was a secretary for a law firm. Her testimony corroborates the testimony of her husband. She further testified that she was four months pregnant at the time of the accident, but she gave birth to a normal, healthy baby in the usual time, and since the date of the accident has given birth to two other children. Her testimony discloses that her knees were cut and bruised as a result of the accident, but apparently no stitches were required. She left the hospital with her husband, and returned home. She was away from her work for four days following the accident, but her employer paid her during that time.

Dr. Leslie A. Schier testified that he is a physician and surgeon, resides in Evanston, Illinois, and specializes in diseases of the ear, nose and throat. He stated he first saw claimant professionally in 1959, and an examination at that time revealed a fractured nasal septum (membranous wall dividing two cavities), which was a few years old; that the septum was deviated by the fracture, and obstructed the nose; and, that he recommended surgery for this condition at a cost of \$335.00.

Dr. Schier stated he only saw Mr. Kay on two occasions. The second time was on April 9, 1963, fifteen days before the hearing. On this last occasion he noted a possible sinus infection on the left side of Mr. Kay's nose, which was probably caused by the deviated septum, Dr. Schier suggested surgery of the deviated septum, conservative treatment of the sinus, and, if this failed to clear up the sinus infection, then surgery of the sinus at an additional cost of \$550.00.

Sergeant Lucente testified that he was 32 years old at

the time of the hearing. He had joined the National Guard in 1947, and, on July 5, 1955, was driving the third truck in a convoy west on Grand Avenue in the inner lane. The headlights of the truck were on when he left the Armory at 2653 West Madison Street, Chicago, Illinois. He was traveling about 25 to 30 miles per hour at a distance of approximately 120 feet behind the truck immediately in front of him. He further testified that the first National Guard vehicle went through the intersection on the green light, the second one went through on the caution light, and he was going through during the process of the light changing from caution to red. He was "blowing the horn" on the truck, as he approached the intersection.

Sergeant Lucente further testified that, as he approached the intersection, an Oldsmobile was coming from the south, and entered into the intersection. He applied his brakes, turned his steering wheel to the left, but was unable to avoid a collision with the Oldsmobile, which was more than half-way through the intersection.

The facts in the instant case show that claimant was in his proper lane of traffic, and was exercising due care as an ordinarily prudent person would have done under similar circumstances.

Taking all of the facts and circumstances into consideration, the necessary conclusion in this case is that claimants did not contribute to the accident in any way, but that Sergeant Lucente, driver of the National Guard truck did not at the time of the accident have proper management and control of his vehicle, and, by not having proper management and control of his vehicle, caused the damage to claimant's car, as well as the personal injuries to claimants, Janet Kay and Robert S. Kay. (*Hutchinson vs. State of Illinois*, 24 C.C.R. 99.)

We are of the opinion that claimant, Janet Kay, should

recover as damages, including pain and suffering, the sum of \$500.00; and claimant, Robert S. Kay, should recover as his damages, including pain and suffering, and for any permanent damages, as well as for property damages, the sum of \$3,750.00, making a total award of **\$4,250.00**.

Claimants have recovered from William Rawle on a covenant not to sue the sum of \$1,000.00, which should be deducted from the above amount, leaving a balance of **\$3,250.00**.

It is, therefore, the order of this Court that the sum of **\$3,250.00** be awarded to claimants, Robert S. Kay and Janet Kay.

(No. 4813—Claimants awarded **\$12,145.14**.)

THOMAS BARRY, ERNEST McCLINTOCK, CLYDE McMILLAN, PEIER ALBERT, FRANK SCARCELLI, WILLIAM SCARCELLI, GEORGE KEAGLE, JAMES COSGROVE AND LEONARD LINK, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion re liability filed November 16, 1960.

Opinion re damages filed May 11, 1965.

AUGUST B. BLACK, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; BERNARD GENIS AND SAMUEL J. DOY, Assistant Attorneys General, for Respondent.

NEGLIGENCE—*proximate cause*. The evidence disclosed that the negligence of the State in the maintenance of the canal bank proximately contributed to the cause of the extensive flooding of claimants' property, and so claimants **will** be compensated for their losses.

SAME—*defense*—“*Act of God*.” In order to invoke the defense of an “Act of God”, respondent must be completely free from any negligence proximately contributing to the injuries, and it must appear that such “Act of God” was the sole proximate cause thereof.

WHAM, J.

Claimants in this case each contend they suffered dam-

ages to their property by the flooding caused by the escape of water from the Illinois and Michigan Canal on July 13, 1957 in Troy Township, Will County, Illinois. The complaint charges that respondent negligently failed to maintain the canal bank in a good state of repair so that a break occurred proximately causing the flooding of the lands and damages to claimants' crops and property.

The evidence disclosed that approximately 6.73 inches of rain fell in less than fifteen hours on July 13, 1957, and that a break occurred in the south bank of said canal flooding the land owned and occupied by claimants adjacent to the canal and the surrounding vicinity. The break was approximately fifty feet in width and twelve feet in depth.

The break in the canal was not repaired for some eight or nine days due to the fact that the surrounding area was in such a condition that heavy equipment could not be brought to the site of the break, and it was necessary to repair the roads proceeding to the site, which required two or three days. The flow of water through the break was stopped on the first day of work on the wall.

Claimants contend that this was the second occasion in recent years when the particular portion of the bank gave way, and that respondent, in repairing the first break, used improper materials and methods, which resulted in the bank giving way again on the July 13, 1957 occasion after the heavy rainfall. Claimant, Clyde McMillan, testified that he was certain the break in 1954 occurred on his farm at the same place as it did in 1957, and that the 1954 break was about the same as the 1957 break. Floyd McMillan, son of Clyde McMillan, also testified that the 1954 break at the McMillan farm was at the same place as in 1957. He also testified he observed this break at between 10 and 11 o'clock in the morning of July 13, 1957.

James Cosgrove, claimant, testified that he saw the

break at the McMillan farm in 1954. Claimant, Ernest McClintock, also saw the break at the McMillan farm in 1954. William Scarcelli, son of the claimant, Frank Scarcelli, testified he saw the break at the McMillan farm in 1954, and observed the manner in which it was repaired. He also saw the repair operations on the 1957 break, and stated in 1954 they did not tamp down the filling, but in 1957 they ran a bulldozer back and forth tamping it down, and also made the bank wider at the bottom than it had been before the 1957 break.

Another claimant, Leonard Link, testified that there was a break on the McMillan farm in 1954, and he had observed at the time the repairs being made by respondent's employees. Mr. Link's occupation is that of a trucking and building contractor, which occupation he has followed for approximately 30 to 35 years. He stated that the repairs to the break in 1954 were not done properly. He stated that they put trees in the break, and that, as the trees deteriorated, the level of the bank at that point gradually sunk down three feet, and the fill soil was not properly compacted. He stated that the 1957 break was repaired with better material, and the soil was properly compacted.

It appears from the testimony that the State had kept no record of the previous breaks. The only testimony offered to oppose that of claimants on this point was that of Roy F. Annis, maintenance man for the Division of Waterways. He testified that he had been a maintenance man on the canal since 1952, and that in 1954 there was a break adjacent to the Scarcelli farm, which was not the same site as the break at the McMillan farm. He testified they used stone, clay, and dirt to repair the break in 1954, and that this was the only previous break in the canal wall. He stated it occurred approximately a mile to a mile and a half from the McMillan farm. On cross-examination, however, he stated that he did

not know whether there was or was not a break at the Mc-Millan farm in **1954**.

From the testimony and the record on this point, we find that claimants have borne the burden of proving that the **1957** break occurred at the same place as did that in **1954**. We also find from the evidence that the repairs of **1954** were not properly made, and consequently we hold that the State was negligent in the maintenance of the canal bank.

Although there is evidence to the effect that the canal overflowed its banks at a number of locations, as was testified to by Leroy Latz, General Superintendent of the canal, there is nothing in the record to show how much of the flooding of claimants' respective farms was caused by the overflow rather than the break in the canal bank.

From the evidence in this record, we find that the negligence of the State in the maintenance of the canal bank proximately contributed to the cause of the extensive flooding of claimants' property, and the State should respond in damages.

The State raised an "Act of God" defense based on the contention that the rainfall was so extensive that the State could not reasonably be held to guard against it. This defense is not well taken. As stated in **28** Illinois Law and Practice page **106**, the law on this question is, "One may not be held liable for injuries to another where an 'Act of God,' or, as it is sometimes referred to, an act of nature, is the proximate cause of the injuries, and one is not guilty of any negligence proximately contributing to such injuries, but in order that this rule may apply it should appear that the 'Act of God' or of nature is the sole proximate cause of the injuries." This rule is applied and stated in *Miller vs. Mobile & Ohio Railroad Company*, **265** Ill. App. **414** at **418**, wherein the court stated with regard to a question of this

defense, "Before he can invoke the rule, he must be free from negligence, which was a proximate cause of the damage."

Moreover, the evidence established that the rainfall of July **13** was not unprecedented, and, in fact, had been exceeded on one occasion as demonstrated by exhibit **A**, a certified copy of a weather report of the State Climatologist, United States Department of Commerce, Weather Bureau, which indicated that on June **11, 1926** at the same vicinity there was a rainfall of **6.86** inches.

Then, too, the doctrine is well established that, although a rainfall may be more than ordinary, there is a duty to provide against the consequences of such rainfall. In *Drda vs. Illinois Terminal Railroad Company*, **210 Ill. App. 640** at **648**, the court stated: "The doctrine is well established that, although a rainfall may be more than ordinary, that is extraordinary, yet if it be such as has occasionally occurred, even though at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or obstructing the flow of water to provide against the consequence of such a rainfall. . . . Even though the rainfall of August, **1916** had been unprecedented, yet if the act of the appellant in constructing its bridges and embankments contributed together with such Unprecedented flow of water to the flooding of appellee's lands, appellant would be liable at law for injury caused thereby."

In 94 C.J.S., Sec. **365** at page **432**, it is stated: "The owner of an irrigation ditch or canal, being bound to exercise reasonable care and prudence in the construction and management thereof, is ordinarily liable in damages for injuries resulting from the breaking, leakage, or overflow of such canal or ditch when caused by the want of the required care." And at page **436** it is stated: "A flood must have been so extraordinary and unprecedented manifesta-

tion of nature as could not have been reasonably anticipated or foreseen to come within the term 'Act of God'."

Claimants also contend that the locks at Channahon, Illinois were defective, and that the gate tender was unable to open the locks, and that, because of such defective condition, respondent was unable to lower the level of the canal, and thus relieve the flooded condition of claimants' land. These gates, when opened, direct the flow of canal water into the DuPage River, and it is undisputed that gate No. 3 could not be opened, and gate No. 2 could only be partially opened. These locks were located some five or six miles downstream from the break. It appears from the records of the Department of Public Works and Buildings that an inspection of the locks had been made on June 7, 1957, which revealed that the gates needed replacing and other repair work was necessary. It also appears from the testimony that the repairs were not made until August 19, 1957.

The testimony of respondent established that the gates at Channahon, Illinois controlled the water for only about four miles upstream. It is respondent's position that it would make no difference whether the gates were open or closed after a certain point upstream was reached.

Mr. Ralph O. Fisher, Assistant Principal Engineer of the Division of Waterways, testified to these facts as an expert. No testimony was offered by claimants to the contrary. We, therefore, hold on this issue that claimants have not borne the burden of proof with respect to the defective locks proximately causing any damage.

The evidence establishes to our satisfaction that the lands of all claimants were extensively flooded, and that they are entitled to recover damages, inasmuch as respondent's negligence in maintaining the canal bank proximately contributed to cause the flooding condition.

On the question of damages, however, the record is for the most part unsatisfactory, and this Court will not speculate in attempting to arrive at the amount of damages.

In view of the fact that no objection was made at the time of the hearing regarding the proof of damages, we are re-submitting this case to the Commissioner for further proof on the question of damages, and will withhold passing on any of the claims until the proof on the damage question is completed.

It is, therefore, ordered that the record in this case be re-submitted to the Commissioner, and that claimants and respondent offer further evidence on the question of damages.

AUGUST B. BLACK, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; BERNARD GENIS, Assistant Attorney General, for Respondent.

PER CURIAM:

The facts in this claim have been set forth previously in the opinion rendered by Judge Wham, which was filed in this Court on November 16, 1960. In the opinion the Court stated: "From the evidence in this record, we find that the negligence of the State in the maintenance of the canal bank proximately contributed to the cause of the extensive flooding of claimants' property, and the State should respond in damages." Pursuant to the order entered in that opinion, a further hearing was held on February 16, 1961 as to the damages sustained by claimants. From this evidence the Court finds as follows:

1. Claimant, Clyde McMillan, lost **20** acres of corn with a probable yield of 80 bushels per acre and at a selling price of **\$1.04** per bushel, less a reduction of \$7.00 per acre for cost of harvesting.

2. Claimant, James Cosgrove, lost **18** acres of corn with a probable yield of 60 bushels per acre and at a selling price of **\$1.04** per bushel, less a reduction of \$7.00 per acre for cost of harvesting and \$100.00 for salvage.

3. Claimant, William Scarcelli, lost **15** acres of corn with a probable yield of 75 bushels per acre and at a selling price of **\$1.04** per bushel, less a reduction of \$7.00 per acre for cost of harvesting. In addition, claimant also lost 25 acres of soy beans with a probable yield of 30 bushels per acre and at a selling price of **\$2.15** per bushel, less a reduction of \$7.00 per acre for cost of harvesting.

4. Claimant, George Keagle, lost 5 acres of corn with a probable yield of 80 bushels per acre and at a selling price of **\$1.04** per bushel, less a reduction of \$7.00 per acre for cost of harvesting.

5. Claimant, Leonard Link, suffered damages to his basement, sump pump, motor, and furnace as the result of the flooding. There were also damages to canned food in the basement, as well as miscellaneous damages to the exterior and interior of claimant's property.

6. Claimant, Thomas Barry, lost **35** acres of **soy** beans with a probable yield of 30 bushels per acre and at a selling price of \$2.15 per bushel, less a reduction of \$7.00 per acre for cost of harvesting.

7. Claimant, Peter Albert, suffered property damage loss as a result of the flooding to the extent that a driveway was washed away, the replacement cost for which totalled **\$96.00**. In addition, claimant's well was flooded and condemned, which necessitated the drilling of a new well, and the purchase of a new pump.

8. Claimant, Frank Scarcelli, had 18 acres in asparagus, **12** acres of which were totally destroyed. A probable gross income of **\$260.00** per acre, less a reduction of \$80.00 per

acre for the cost of harvesting and marketing, would make a loss of \$180.00 per acre.

9. Claimant, Ernest McClintock, lost 5 acres of corn with a probable yield of 80 bushels per acre and at a selling price of \$1.04 per bushel, less a reduction of \$7.00 per acre for cost of harvesting. In addition, claimant also lost 30 tons of clover hay at a selling price of \$20.00 per ton, less a reduction of \$5.00 per ton for the cost of baling and storing. A claim for the loss of a seed crop was also made. We estimate this loss at 30 bushels of clover seed with a probable selling price of \$24.00 per bushel, less the cost of mowing, combining and cleaning in the amount of \$6.00 per bushel.

In addition to the foregoing, claimant, Robert McClintock, also alleged damages for the loss of top soil. It is the opinion of this Court, however, that the evidence in this matter is not such that would warrant an award for this alleged loss.

Awards are, therefore, made to claimants in the following amounts:

Clyde McMillan	\$1,524.00
James Cosgrove	897.00
William Scarcelli	2,502.50
George Keagle	381.00
Leonard Link	800.00
Thomas Barry	2,012.50
Peter Albert	497.14
Frank Scarcelli	2,160.00
Ernest McClintock	1,371.00

(No. 4892—Claimants awarded \$15,597.69.)

LISSIE RAINS, Administrator of the Estate of MARILYN RAINS, Deceased; ROBERT WAGGONER, A Minor, by LYNDEL K. WAGGONER, His Father and Next Friend; GUY MATSON, A Minor, by ASTRID MATSON, his Mother and Next Friend; MARY ELLEN GORE, A Minor, by LINCOLN GORE, her Father and Next Friend; and, LYNDEL K. WAGGONER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

LEONARD J. DUNN AND JAMES A. DOOLEY, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence. State was negligent in placing concrete block upon the highway without illumination, which proximately contributed to the accident.

SAME—contributory negligence. Facts disclosed that claimant, driver, was contributorily negligent by **failing** to keep a proper lookout for traffic signs along the highway.

NEGLIGENCE—imputing negligence to guests. Negligence of drivers, who had complete control over vehicle, could not be imputed to guest passengers.

SAME—bailments. Negligence of son, who had permissive use of his father's automobile, is not imputable to **the** father.

PEZMAN, J.

On November 20, 1959, claimants filed their verified complaint in this Court. It consists of five counts, being a separate count for each individual claimant.

There appears to be no serious dispute of facts concerning the accident in question. The facts appearing from the evidence offered herein are as follows: On June 13, 1959, at about 12:30 A.M., claimant, Robert Waggoner, was driving a 1953 Dodge, 4-door automobile, which was owned by his father, (claimant, Lyndel K. Waggoner) in a southerly direction on Illinois State Route No. 45 in an area known as LaGrange Road. At 71st Street and LaGrange Road, claim-

ant, Robert Waggoner, stopped at a stop light estimated to be about seven blocks north of a bridge known as Canal Bridge, over which said Route No. 45 passes in Willow Springs, Cook County, Illinois. Illinois State Route No. 45 was at the time of the collision a four lane highway, with two lanes for southbound traffic and two lanes for northbound traffic. However, at the time of the collision in question, there was a repair zone extending about one-half mile in length involving the two inner traffic lanes approaching the said Canal Bridge. On the night in question, the two middle lanes of the bridge were in the repair zone, and were sealed off at both the north and south ends by barricades, thus permitting the two outer lanes to be open for traffic, creating one lane traffic in a north and south direction as to the outside lanes.

After stopping at the traffic signal aforesaid, claimant, Robert Waggoner, proceeded south in the inside lane of traffic, and continued in this lane to the place of the accident. Claimant, Robert Waggoner, testified that an automobile moved up along his right side, and drove along his right side to the place of the accident; that he was unable to turn into the outer or right-hand lane as the other automobile was too close to him at all times; and, that he did not have room to move into the outer lane.

As claimant approached the repair zone in question from the traffic signal at 71st Street and LaGrange Road, there were signs placed along the side of the highway as follows, and in the following order: A sign 36 inches square bearing the legend "Road Repairs Ahead, Please Drive Carefully;" a sign 3 feet by 3 feet bearing the legend "One Bridge Lane;" a sign 24 inches high and 18 inches wide bearing the legend "Keep to the Right;" a sign 3 feet by 3 feet bearing the legend "One-Way Traffic;" and a sign 42 inches wide and 20 inches high bearing the legend "Barri-

cade Ahead.” These signs commenced approximately 1,000 feet from the bridge construction area, and were located approximately 200 feet apart going toward the bridge in a southerly direction. They were erected about 18 to 24 inches from the edge of the pavement.

To channel the traffic into the single lane across the bridge, which would be the outer lane, rubber cones were used as markers. These were held down by concrete blocks to prevent them from being displaced. The blocks, which were ordinary concrete building blocks, were used in their natural color, which color was approximately the same color as that of the highway. There was no illumination on the blocks or the cones, and no overhead lights illuminating the area. It was stipulated that the State of Illinois was in full supervision and control of the construction. David Guard, a construction foreman for the Division of Highways, State of Illinois, testified that he supervised the installation and traffic protection system set up around where construction work was in progress on State Highways, and that rubber cones were used as markers to channel traffic into the single bridge lane, because they were soft, and would not damage the cone or the car, if hit.

As claimant, Robert Waggoner, approached the bridge in question, he was driving his vehicle at a speed between 40 and 50 m.p.h. Riding in the front seat with him was claimant, Mary Ellen Gore, and riding in the back seat was claimant, Guy Matson, and the decedent, Marilyn Rains. At a point approximately 200 feet from the barricade, which was placed north of the bridge in question, and which sealed off the inner lane, claimant, Robert Waggoner, still driving in the inner traffic lane, struck a concrete block with the left front wheel of his vehicle. The impact blew out the left front tire, and caused the automobile to go out of control and strike the bridge railing. As the automobile struck the

bridge railing, the doors came open, and claimant Gore and said Marilyn Rains were thrown onto the pavement. Claimant Matson had his foot hooked under the back seat, and his body hung out of the door, as the vehicle proceeded onward. Claimant, Robert Waggoner, remained in the automobile until it came to a halt.

As a result of the accident, the evidence reveals injuries and damages as follows:

Marilyn Rains was critically injured, and died on June 20, 1959, eight days after the accident. Respondent stipulated that the accident was the cause of her death. Marilyn Rains left surviving her father and her mother, the latter, Lissie Rains, being appointed as Administrator of her estate. The evidence reveals that Marilyn Rains was 17 years of age, a bright, alert girl who had been an excellent student, and was already registered in college for the following Fall term. She had worked for periods of six months in drive-in theaters and restaurants. She had performed services around her home for both parents, and was to have commenced work at a mail order house the Monday after the accident in question. With monies she earned, she contributed to the support of the family. Her father worked as a barber, and her mother worked in a dress factory. Lissie Rains, as the representative of the estate, claims damages in the sum of \$25,000.00.

Mary Ellen Gore, aged 17 at the time of the accident, suffered a brain concussion, and the evidence reveals, through the testimony of her physician who had known her since she was six years old, that she also suffered a traumatic neurosis, which condition the physician described to be permanent. Claimant Gore testified that she is afraid to drive at night, cries a great deal, has difficulty remembering things, and is more irritable than before the accident. Her doctor bill, as a result of the accident, was \$50.00. She claims

damages through her father, as next friend, in the sum of \$25,000.00.

Guy Matson was treated at the hospital after the accident, and then released. No physician testified as to his injuries. Claimant Matson testified that a doctor told him that a nerve in his back had probably been injured, but that eventually it would go away. He further testified to pain for two or three days after the accident, and stated that his back bothered him when lifting. He further testified that his hair had been falling out since the accident. His medical bills, including X-Rays and drugs, totaled \$47.69. He claims damages through his mother, as next friend, in the sum of \$25,000.00.

Lyndel K. Waggoner, father of Robert Waggoner, was the owner of the automobile involved in the accident. The evidence shows that a bailment relationship existed between the owner and driver of the automobile at the time of the accident. Lyndel K. Waggoner testified that his car was a total loss, and that the fair cash market value of the car was approximately \$300.00. Claimant, Lyndel K. Waggoner, also makes claim for an ambulance bill for \$28.00, and doctor and X-Ray bills in a total amount of \$65.00 for his son, Robert Waggoner.

Robert Waggoner received a mild compression fracture of the fifth vertebra. There was evidence that the condition caused pain and limitation of movement of the spine, and also the amount and type of work that claimant could do. He was treated at a hospital after the accident, and then released. His total medicals, including X-Rays, amounted to \$55.00. He claims damages through his father, as next friend, in the sum of \$25,000.00.

It was stipulated between the parties that none of the claimants in this cause received any money or compensation

from other sources, nor is there any claim pending before any other Court on behalf of any of the claimants.

Claimants contend that respondent was guilty of negligence, which proximately caused the injuries and damages, and that they were not guilty of contributory negligence.

Respondent contends that it was not negligent, that it discharged its duties toward claimants by erecting five large, illuminated, reflectorized signs warning of the particular danger, and that claimant's failure to see the signs was the sole and proximate cause of the accident.

The Court finds that the primary issues are as follows:

Was respondent guilty of negligence in maintaining the repair zone in question?

Was the negligence of respondent, if any, the proximate cause, or a proximate contributing cause of the injuries and damages suffered by claimants?

Were claimants, or any one of them, guilty of contributory negligence at the time and place in question?

Was the negligence of any claimant, or claimants, a proximate contributing cause of the injuries and damages sustained **by** claimants?

From the evidence in this case, it **is** clear that the State violated its duty by placing concrete blocks approximately eight inches high and six inches thick upon the highway in question, using said blocks in their natural color and without any illumination. A State employee testified that the blocks were used to hold down the rubber cones, which in turn were used to channel the traffic into a single lane. The cones were used because they were soft, and would not damage an automobile when struck. The State apparently knew that the concrete blocks were likely to be struck by motorists, as a State employee testified that it was necessary to replace

at least fifty or sixty concrete blocks, which were broken up by traffic during the three month period of construction. The State, at the time of the accident, had no one assigned to make periodic checks to see if the concrete blocks were in place, and had apparently left the repair zone unattended until the Monday following the accident in question. A State witness, Mr. Guard, admitted that some peril existed in placing concrete blocks upon the highway, but attempted to excuse this act by saying that it was the best thing available to hold down the rubber cones. This does not in any way discharge the duty owed by the State to motorists on the highway. The automobile in question struck one of the concrete blocks, which was placed upon the highway by respondent, before it went out of control. The proof indicates negligence on the part of respondent, which was the proximate contributing cause of the accident in question.

The evidence further shows that claimant, Robert Waggoner, was guilty of contributory negligence proximately contributing to the cause of the injuries and damages in question, and he is barred from recovery against the State. (*Bloom vs. State of Illinois*, 22 C.C.R. 582.)

Claimant, Robert Waggoner, drove approximately 1,000 feet, and passed five warning signs without seeing them. Yet, he testified that he was watching the road during this period. It would appear from the evidence that these signs were within his range of vision. The law charges a person with the duty of seeing that which is clearly visible and within his range of vision. (*Dickinson vs. Rockford Van Orman Hotel Co.*, 326 Ill. 686.) Robert Waggoner obviously failed to keep a proper lookout for traffic signs placed along the highway. This negligence on his part contributed to cause the accident in question.

The evidence shows that the claimant passengers and the claimant owner of the damaged automobile were free

from contributory negligence. There can be no contributory negligence in the contemplation of the law where there is an exercise of ordinary and reasonable care. (*Lasko vs. Meier*, 394 Ill. 71.) It is not seriously contended in this cause by respondent that there is any lack of due care on the part of claimants other than Robert Waggoner, nor is there any evidence of their lack of due care in the record.

The driver, Robert Waggoner, had complete control over the operation of the vehicle in question, and his negligence cannot, of course, be imputed to the guest passengers. (*Lasko vs. Meier*, 394 Ill. 71.) Permissive use by a son of his father's car creates a bailor-bailee relationship between Lyndel K. Waggoner **and** his son, Robert. The negligence of Robert is not imputable to his father. (*Gilman vs. Lee*, 23 Ill. App. 2d 61.) Lyndel K. Waggoner may, therefore, recover for damages to his automobile. As to damages expended for medicals claimed to be expended for his son, Robert Waggoner, it appears that in Count II, Par. 10 of the complaint filed herein, that Lyndel K. Waggoner has set over and transferred any right to recover for said medicals to his son, Robert Waggoner, and this claim is considered under Robert Waggoner's claim for injuries:

From a consideration of all the facts in the case, we find:

1. That respondent was guilty of negligence, which was a proximate contributing cause of the injuries and damages in question.

2. That the claimant driver, Robert Waggoner, was guilty of contributory negligence, which proximately contributed to the cause of the accident in question.

3. That the other claimants in this cause were free of any contributory negligence, which was a proximate cause of the injuries and damages in question.

The duty of the State to motorists using public highways under its control is to exercise ordinary care to keep them reasonably safe for such use, or to warn of unsafe conditions existing. (*Rickelman vs. State of Illinois*, 19 C.C.R.54.)

The evidence of damages is not disputed, and we find that damages have been proven by all claimants.

The claim of Robert Waggoner, by Lyndel K. Waggoner, his father and next friend, is, however, denied because of his failure to prove that he was in the exercise of due care for his own safety at the time of the accident.

The claim of Lyndel K. Waggoner for damages to his car is allowed, and an award, therefore, is made to claimant, Lyndel K. Waggoner, in the sum of \$300.00.

We find that **Guy** Matson, formerly a minor, but now of age, suffered damages in the amount of **\$547.69**, and an award, therefore, is made to claimant, Guy Matson, in the sum of \$547.69.

We find that Mary Ellen Gore Skvier, formerly a minor, but now of age and married, suffered damages in the amount of \$750.00, and an award, therefore, is made to Mary Ellen Gore Skvier, in the sum of \$750.00.

Lastly, we find that the claim of Lissie Rains, as Administrator of the Estate of Marilyn Rains, deceased, be allowed to the extent of \$14,000.00, and an award, therefore, is made to claimant, Lissie Rains, as Administrator of the Estate of Marilyn Rains, deceased, in the amount of \$14,000.00.

(No. 4914—Claimant awarded \$360,000.00.)

E. H. MARHOEFER, JR., Co., AN ILLINOIS CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 28, 1965.

HEALY, NEWBY, BARRETT AND HEALY, Attorneys for
Claimant.

WILLIAM G. CLARK, Attorney General; LESTER SHAPIRO
AND ERWIN H. GREENBERG, Special Assistant Attorneys Gen-
eral, for Respondent.

CONTRACTS—*extra compensation allowed under.* Where evidence dis-
closed that respondent was solely responsible for delays and change of
plans, which prevented claimant from completing his contract, an award
will be made for increased costs incurred by claimant.

PERLIN, C.J.

This action was instituted by claimant, E. H. Mar-
hoefer, Jr., Co., an Illinois corporation, for damages in the
sum of **\$493,544.88** resulting from alleged unreasonable de-
lays in completion of a construction contract, which was
awarded to claimant by the State of Illinois. At hearing,
claimant increased its ad damnum to \$591,695.60.

At the conclusion of a lengthy hearing, during which
the parties submitted a great number of exhibits, books and
documents, the following stipulation was entered into by
and between the attorneys for claimant and the Attorney
General of Illinois representing respondent :

STIPULATION OF FACT

“It is hereby stipulated by and between the parties hereto, by their
respective attorneys, after trial of the within cause before the Special Com-
missioner appointed to hear same, and upon presentation of all the evi-
dence both oral and documentary, as follows:

“1. That the **Court** has jurisdiction of the parties to and the subject
matter of this cause.

“2. That the complaint was brought under Chap. 37, Par. 439.8 of
the Ill. Rev. Stats.

“3. That claimant is in the general contracting business, and has **been**

so engaged for many years last past, and has offices at 2424 North 25th Avenue, Franklin Park, Illinois.

"4. That claimant is the sole owner of the claim herein alleged against the State of Illinois, and that no other person or corporation has any interest in said claim.

"5. That, on or about August 21, 1956, claimant as a general contractor submitted to the Department of Public Works and Buildings of the State of Illinois its proposal for the general work for the Illinois Psychiatric Institute State Hospital to be erected at 1601-1659 West Taylor Street, Chicago, Illinois.

"6. Prior to the submission of said proposal, the respondent required bidders to include in same certain allowances for hardware, which allowance was included in claimant's proposal submitted August 21, 1956 to respondent.

"7. That claimant's proposal was accepted, and a contract was entered into between claimant and respondent, dated September 18, 1956, pursuant to which contract claimant agreed to do the work described therein and in the plans and specifications and other contract documents for a total contract amount of \$4,259,524.00 comprised as follows:

SCOPE OF WORK:

'Proposal No. 1 for the General Work for the Illinois Psychiatric Institute State Hospital (Eleven Story Building), 1601-1659 West Taylor Street, Chicago, Illinois, as shown on the drawings, and as specified, the sum of. \$4,297,924.00

'Proposal No. 9 for the General Work (Eleven Story Building)—in event that the electrically controlled locks for the Patients' Rooms and Stairway Doors are not installed, thus changing the special shaped door frames for these doors to standard door frames, and changing the locks to standard locks, as shown on the drawings, and as specified, except that the electrically operated locks shall be provided for Door B to Stair W, Door B to Stair N, Door B to Stair S, and Door H2 from Corridor 500 W to Public Corridor 500, in all stories from the 5th to the 11th, inclusive, is accepted and authorized, deduct the sum of. **43,700.00**

\$4,254,224.00

'Proposal No. 11 for the General Work—in event that the installation of 'Detention Screens' in lieu of 'Protective Screens' at all windows where the protective screens are indicated, as shown on the drawings, and as specified, is accepted and authorized, add the sum of.. **5,300.00**

\$4,259,524.00'

"8. That said contract originally provided a hardware allowance of

\$168,000.00, which said amount was modified by Addendum No. 2 in the amount of \$38,000.00 from said hardware allowance by the elimination of certain locks and other hardware, all as is more particularly set out in Proposal No. 9, which contained a deductive hardware allowance of \$38,000.00. That the final allowance for hardware provided for under the contract documents amounted to \$168,000.00 less the \$38,000.00 covering the change in locks and other hardware requirements bringing the net hardware allowance under the contract documents to \$130,000.00. That said net hardware allowance of \$130,000.00 was the true and correct amount of same, and is the amount used by respondent in computing the hardware allowance credits and debits with respect to claimant's payments. That, claimant's claim that it is entitled to \$38,000.00 because of an error of the respondent in computing the correct amount of said allowances after giving consideration to the deductive Proposal No. 9 is not supported by the evidence, and, therefore, the Court finds in favor of respondent and against claimant with respect to said claim for \$38,000.00 hardware allowance alleged credit.

"9. That claimant commenced construction of the building pursuant to the plans and specifications and other contract documents, and experienced certain small delays in pouring the first floor concrete slab, which said delays were caused by contractors of respondent, but that said delays were not unreasonable, and, therefore, claimant is not entitled to reimbursement from respondent for additional costs incurred by reason of these small delays.

"10. That respondent unreasonably delayed claimant in choosing a hardware supplier, and in approving the finished hardware schedules required by the metal door frame and metal door manufacturer in order to properly and promptly manufacture said door frames and doors. That because of this delay the metal door frames and doors could not be manufactured in time to meet the progress schedule of claimant, and that this in turn interfered with the sequence of claimant's work on the interior masonry walls of the project, and in so doing decreased efficiency of performance of said work by claimant. That these delays were without fault on the part of claimant or its subcontractor, suppliers, employees or agents but solely the fault of respondent, and said delays were unreasonable in extent. That, as a result of said delays, claimant was obliged to incur additional costs for both direct and indirect labor, equipment rental expense, and overhead expenses in the total amount of \$197,961.75, and is entitled to reimbursement from respondent for said amount.

"11. That during the course of the construction respondent changed the design of windows in the curtain wall of the building from center pivoted windows to double hung windows. That this change was not provided for in the plans and specifications or other contract documents on which claimant originally bid, and was not made a part of it until on or about April 26, 1957 after all the engineering and design of the curtain wall and its center pivoted windows, as originally required by the plans and specifications and other contract documents, had been completed. That because of this change, which was required by respondent, all the engineering and

detailed computations and drawings had to be re-calculated and re-drafted, and claimant lost its place in the manufacturing schedule of its supplier. The delays entailed by all of the foregoing, which were due to no fault of claimant, but due solely to the fault of respondent, caused claimant additional costs in direct and indirect labor, equipment rental expense, and overhead, all of which would not have had to have been incurred by claimant had not the change in window design from center pivoted to double hung windows been made by respondent. That these delays were unreasonable in extent, and caused change of sequence of work, and reduced efficiency in the performance thereof by claimant. That by reason of the foregoing claimant was further damaged in the amount of **\$125,332.57** for additional costs, which claimant had to incur because of said change of window design, which would not have had to have been incurred had there been no such change, and claimant is, therefore, entitled to be reimbursed for said additional costs in said amount by respondent.

"12. That claimant was further delayed by respondent because of several smaller changes in the plans and specifications from those provided for in the plans and specifications. That one of these delays involved the construction of an ambulance entrance canopy. That a further delay occurred when respondent decided to construct a basement passageway, and then later abandoned this proposed construction. An additional delay occurred when changes were made in the x-ray room design, which held up completion of other work in the area. A further delay occurred when respondent changed the original plans and specifications by requiring claimant to construct bases for nurses' cabinets in the nurses' stations throughout the eleven story hospital building, and a further delay was caused by respondent when it required claimant to install and construct lightweight concrete locker bases for **356** lockers made of metal. That all of the foregoing 5 delays were unreasonable, and because of same work was held up, which could have been finished earlier had not said delays occurred. That as a result claimant was obliged to incur additional expense for direct and indirect labor, equipment rental and overhead, and, since this was towards the end of the performance of the entire job, respondent was responsible for increased costs due to escalation of direct labor by reason of an increase in union rates required to be paid for same. That the work that was held up could have been performed before these rates went into effect had not such delays occurred. That none of these delays were the fault of claimant, its subcontractor, suppliers, employees or agents, but were solely caused by respondent, and said delays were unreasonable. That the additional costs incurred by claimant due to these 5 delays, which would not have had to have been incurred by it were it not for said delays, amounts to **\$31,210.57**, and claimant is entitled to reimbursement for said amount from respondent.

"13. That, by reason of all of the above and foregoing delays, additional insurance premiums had to be paid for the total period of said delays. That the additional insurance premiums for this period of time, which had to be paid by claimant, but which would not have had to have been paid

were it not for such delays, amounts to \$5,495.11. That claimant is entitled to be reimbursed by respondent for said amount.

“14. That a flood occurred in a construction project known as the Pediatric Building, which was being constructed by Pathman Construction Company, a direct contractor of respondent. That an exceptionally heavy rainfall occurred on the night of April 27, 1959 and in the early morning of April 28, 1959. That, as a result of said rainfall, a flood occurred in the Pediatric Building, flowed into the Illinois State Psychiatric Hospital, and caused certain damage therein. That respondent is not responsible to claimant for said flooding or for the damage occasioned thereby, and claimant is, therefore, not entitled to any reimbursement from the State of Illinois for said flood damage.

“15. That claimant has included in its claim additional financing costs incurred by it because of respondent’s withholding of the claimant’s retention money, and further for additional financing costs due to the failure of respondent to pay the claims involved in this proceeding. That claimant is not entitled to any payment from respondent for either of these items of alleged damage.

“16. That claimant performed all construction work required under the terms and conditions of the plans and specifications and other contract documents, and that said work was accepted and approved by respondent. That claimant was not reimbursed for any of the above and foregoing claims asserted by it against respondent.

“17. That, in summary, claimant is entitled to be reimbursed from respondent for the following amounts, and only those amounts:

‘Expenses incurred by claimant because respondent failed to properly coordinate the approval of certain finished hardware schedules and the choosing of a supplier for such hardware, which expenses claimant would not have had to incur except for delays caused by such failure	\$197,961.75
‘Expenses incurred by claimant because respondent changed the design of windows from center pivoted windows to double hung windows, which claimant would not have had to incur except for delays caused by such change.....	125,332.57
‘Expenses incurred by claimant because of numerous changes and additions in the work to be done toward the end of the construction period, which would not have had to have been incurred except for the delay caused by such changes and additions..	31,210.57
Additional insurance premium expense due claimant caused by respondent’s delays.	5,495.11
TOTAL.	\$360,000.00’

“It is further stipulated by and between the parties by their respective attorneys that the filing of the briefs and abstracts; and all notices with respect thereto, be and the same are hereby waived, and that a Judgment

Order be entered in the amount of THREE HUNDRED SIXTY THOUSAND, AND NO/100 (\$360,000.00) DOLLARS in favor of claimant and against respondent.”

Also submitted into the record by the Attorney General as a Report of the Department of Public Works and Buildings is a communication from the Director of said Department, dated May **21**, 1965, which is as follows:

“Honorable William G. Clark
Attorney General
State of Illinois
160 North La Salle Street
Chicago, Illinois

Re: Claim of E. H. Marhoefer, Jr., Co. vs. State of Illinois,
Illinois Court of Claims #4914

Dear Mr. Clark:

After thoroughly reviewing the above claim on an extensive examination of the facts and circumstances surrounding same and considering the evidence presented **at the trial** of the case involving **said** claim, it is hereby acknowledged that the Department of Public Works and Buildings owes the sum of \$360,000.00. This amount is arrived at after eliminating all amounts claimed, except it is based on delays which we feel are actionable.

Very truly yours,

/s/ FRANCIS S. LORENZ
Director”

In view of the stipulation of the parties hereinbefore in toto set forth, supported **by** the Report of the Department of Public Works and Buildings hereinabove cited, it is the opinion of this Court that claimant be awarded damages in the sum of \$360,000.00.

(No. 4923—Claimant awarded \$25,000.00.)

BURTON HOSEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion fled May 11, 1965.

McCONNELL, KENNEDY, McCONNELL AND MORRIS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LAWRENCE W. REISCH, JR., Assistant Attorney General, for Respondent.

STRUCTURAL WORK ACT—*burden of proof*. Where claimant sustained his burden of proving that respondent was in charge, and in control of the work being performed, and that respondent was guilty of a wilful violation of the Structural Work Act, an award will be granted.

SAME—*contributing negligence—assumption of risk*. The defenses of contributory negligence and assumption of risk are not available under the Structural Work Act.

SAME—*damages*. Respondent is not entitled to any credit or set-off of amounts received by claimant under the Workmen's Compensation Act.

PEZMAN, J.

This is an action by claimant, Burton Hosey, against respondent, the State of Illinois, under the Structural Work Act for personal injuries sustained by claimant when he fell from a scaffold under the Cedar Street Bridge owned by the State of Illinois on August 28, 1959. Claimant's cause is based upon certain statutes, being Secs. 60, 63 and 69 of Chap. 48, 1959 Ill. Rev. Stats., which are set forth as follows:

"Sec. 60. Scaffolds, cranes, ladders, etc.—erection and construction. That **all** scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, **firm** or corporation in this state for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or any other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

"Scaffold, or staging, swung or suspended from **an** overhead support more than twenty (20) feet from the ground or floor shall have, where practicable, a safety rail properly bolted, secured and braced, **rising a** (at) least thirty-four inches above the floor or main portion **of** such scaffolding or staging, and extending along the entire length of the outside and ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure . . .

"Sec. 63. Inspection—Notice—Alteration and reconstruction—Free access—Devices regulated. Whenever it shall come to the notice **of the** Director of Labor or the local authority in any city, town or village in

this State charged with the duty of enforcing the building laws, that the scaffolding or the slings, hangers, blocks, pulleys, stays, braces, ladders, irons or ropes of any swinging or stationary scaffolding, platform, or other similar device used in the construction, alteration, repairing, removing, cleaning, or painting of buildings, bridges, or viaducts within this State are unsafe or liable to prove dangerous to the life or limb of any person, the Director of Labor or such local authority or authorities shall immediately cause an inspection to be made of such scaffolding, platform or device, or the slings, hangers, blocks, pulleys, stays, braces, ladders, irons or other parts connected therewith. If, after examination, such scaffolding, platform or device or any of such parts is found to be dangerous to the life or limb of any person, the Director of Labor or such local authority shall at once notify the person responsible for its erection or maintenance of such fact, and warn him against the use, maintenance or operation thereof, and prohibit the use thereof, and require the same to be altered and reconstructed so as to avoid such danger. Such notice may be served personally upon the person responsible for its erection or maintenance, or by conspicuously affixing it to the scaffolding, platform, or other such device, or the part thereof declared to be unsafe. After such notice has been so served or affixed, the person responsible therefor shall cease using and immediately remove such scaffolding, platform, or other device, or part thereof, and alter or strengthen it in such manner as to render it safe.

“The Director of Labor or such local authority, whose duty it is under the terms of this act to examine or test any scaffolding, platform, or other similar device, or part thereof, required to be erected and maintained by this section, shall have free access at all reasonable hours to any building, structure or premises containing such scaffolding, platform, or other similar device, or parts thereof, or where they may be in use. All swinging and stationary scaffolding, platforms, and other devices shall be so constructed as to bear four times the maximum weight required to be dependent therein, or placed thereon, when in use, and such swinging scaffolding, platform or other device shall not be so overloaded or overcrowded as to render the same unsafe or dangerous . . .

“Section 69. Penalties—recovery of damages—attorney’s fees. Any owner, contractor, subcontractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any buildings, bridge, viaduct or other structure within the provisions of this Act, shall comply with all the terms thereof, . . . for any injury to person or property, occasioned by any wilful violation of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives.”

Claimant contends that respondent knowingly or willfully failed to comply with such statutes in one or more of the following respects:

- (a) Failed to maintain the said scaffolding or staging in a reasonable and safe condition, when it knew or by the exercise of reasonable care ought to have known that the scaffolding or staging was unsafe and improper and dangerous to the life and limb of workmen employed on said scaffolding or staging as was this claimant.
- (b) Neglected and failed to inspect the said scaffolding or staging when in the exercise of ordinary care this respondent knew or ought to have known that an inspection of said scaffolding or staging would reveal it to be in an unsafe condition for the purposes for which it was being used by this claimant.
- (c) Neglected and failed to provide adequate safeguards in accordance with said statute.
- (d) Neglected and failed to require the said Neumann and Co. to build and maintain the scaffold or staging in a safe and reasonable manner so as to prevent injury to persons such as this claimant.
- (e) Knowingly permitted the erection and construction on its premises of a scaffold or staging that was not erected and constructed in a safe, suitable and proper manner, and was not so erected, constructed and placed as to give proper and adequate protection to the life and limb of this claimant employed or engaged thereon in that it was constructed so that it swung from an overhead support more than twenty feet from the ground and no hand rails were provided therefor, contrary to the statute.

Respondent contends that, in order for the State of Illinois to be liable under the Structural Work Act, it must have been in charge of the work being performed at the time of the occurrence in question, and states that this is the question of fact to be decided by the Court or a jury. Respondent further contends in a second point that it should be allowed to offset against any award, which might be made by the Court of Claims, any money which the claimant may have received under the Workmen's Compensation Act.

On August 28, 1959, claimant, then 34 years of age and weighing 230 pounds, was employed by the Neumann Com-

pany, a painting and sandblasting contractor. The company was employed to paint the Cedar Street Bridge in Peoria, Illinois. At the time of the accident, they were working on the Peoria side of said bridge. It is not disputed that the bridge was owned by the State of Illinois. The claimant had worked as a painter and sandblaster for about six years. At 8:00 A.M. on the day of the accident, the claimant was instructed by his Superintendent to go up on the scaffolding constructed by his employer to do some painting. The scaffold in question consisted of **3** needle beams, made of wood, **4** inches square and 20 or **24** feet in length, suspended from the bridge by cables. One needle beam was suspended from each side of the bridge and one from the center. Two picks (or platforms) ran from the needle beams to each side of the bridge, and rested on the outer needle beams. These picks were **36** inches wide **and** 24 feet long, constructed like a ladder, but with board coverings being attached to the rungs. The picks were laid across the needle beams, and from the evidence it does not appear that they were tightly lashed or tied to them. The entire scaffold was about **40** feet above the ground. Claimant had just stepped onto one of the picks, when one of the outside needle beams broke, causing him to fall about 40 feet onto hard compacted ground. The evidence indicates that each needle beam was hung by a steel cable, but with no reinforcing cable under the body of the beam. It was further developed that none of the wooden needle beams in use on this particular job were reinforced with **a** wire cable around the top and bottom and the ends of the beams to prevent their breaking. Claimant testified that he had worked on other jobs similarly rigged, but on those jobs, if wooden needle beams were used, they were reinforced by steel cable, or that needle beams made of steel pipe were used. It is further shown that the pick on which claimant was standing at the time of the accident was not equipped with guard rails, and there were

no nets beneath the scaffold. Claimant also stated that on other jobs on which he had worked, safety belts had been provided, which could be attached to the structure on which they were working.

Paul Kjelshus, a resident engineer of the Division of Highways of the State of Illinois, was called as an adverse witness by claimant. He testified that, at the time of the accident on August 28, 1959, he was an Engineering Technician II of the State Division of Highways of the Department of Public Works and Buildings; that since June 17, 1957, he had been an inspector for the State of Illinois, and, that his duties were to see that the jobs were done in accordance with the contract provisions. He testified that the State of Illinois owned the Cedar Street Bridge on the date of the accident, and that he was an inspector at that time, and on that date that his other duties with reference to the Cedar Street Bridge were to see that the job and the working conditions proceeded in a safe and proper manner. He testified that it was his duty to inspect safety measures at the Cedar Street Bridge and on other bridge jobs being done for the State, and that one of his duties was to see that proper safety measures were taken for the welfare of the men on the job. Kjelshus testified that on August 28, 1959, he arrived at the Cedar Street Bridge at about 7:50 A.M., and that before that date he had inspected the operation almost every day since it had started. He further stated that his superiors were also at the job, and that his duties required him to get under and upon the bridge, and to report to his superiors from time to time about what was going on at the job. Kjelshus' testimony included a statement by him that he was aware of the so-called Scaffolding Act, and knew that it was in force. He stated that he was responsible for the total conduct of the work of painting and sandblasting the Cedar Street Bridge on August 28, 1959. On that date,

he was on the bridge, heard something break, and saw Mr. Hosey fall. He testified that he determined that the needle beam, which was made of wood, broke.

Subsequently, the same Paul Kjelshus was called as a witness for respondent. Upon such direct examination, he stated that he was the engineer on this job, and, as such, was responsible for its execution. He first saw the needle beam, which broke, at 8:00 A.M. on the morning of the accident. It was constructed of Douglas fir, 4 inches by 4 inches and 20 feet in length, and was apparently in a good and dry condition. He stated that he knew what the needle beam was to be used for, but did not know when the board arrived on the job. He asked the Superintendent on the job if he was sure the beam was in satisfactory condition, and told Mr. Doremus, Superintendent for the Neumann Company, that he did not like the looks of the board, and asked him not to use it. He stated that about three or four feet from the end there was a small indentation like a knot. He further testified that the board did not break at the point of the knot, but broke in a long slant or diagonal break, not in the small defect that he had noticed. Kjelshus testified that he had registered a complaint to the Superintendent about the particular board, but that the Superintendent used it anyway. He stated that he had seen picks with guard rails on single installations, but didn't believe that guard rails on the pick would have prevented the fall, if the needle beam broke. He testified that claimant could have ridden the pick down, hanging on to the rail, but whether he could have prevented himself from being injured was another story. His testimony further disclosed that a loose strand of rope was wrapped around the pick and the needle beam, but not tightly lashed, and that the needle beam was attached to cables running through the ends, but not underneath the wood. He further stated that

the custom and usage of the business is to use a needle beam of suitable material, if it has been determined by testing to be satisfactory — steel cable, a pipe needle beam, oak needle beam, or a fir beam with a cable support. Upon cross-examination by claimant's counsel, Kjelshus testified that he had the authority to stop work on a job, call the whole group off for grounds that he considered proper, and that he had the authority to tell Mr. Hosey what to do. He also stated that he had the authority to tell the Superintendent what to do, and when to do it, but did not give orders to the workmen.

Upon redirect by the Attorney General, Kjelshus was asked, "Did you have the authority to direct details of the operation on this project? In other words, could you tell Mr. Hosey whether to go upon a paint ladder or not?" The witness answered, "I believe I have the authority to tell a man what to do, I believe." He further stated that he didn't actually give orders to the workmen, but could tell the Superintendent to tell the men what to do, and when to do it.

Clifford Doremus was called as a witness by respondent, and testified that he was Superintendent for the Neumann Company, and in charge of the operations on the job at the Cedar Street Bridge in Peoria; that he instructed Burton Hosey, claimant, to go to the area from which he fell. He stated that he saw the needle beam, which broke, before it was put up, that he had ordered it, and was there when it was tested, although he did not test it personally. Doremus further stated that he knew fifteen or twenty contractors who use them all the time, and that **he** had used them for twenty to twenty-five years, and this was the first one that he had seen break in twenty-five years. Upon further questioning, it was developed that he was using supporting wires for his wood needle beams. Doremus

admitted that Paul Kjelshus, the State Inspector, had mentioned to him that there was a knot in the end of the needle beam. The witness stated that guard rails would not have prevented the accident, but the pick was still hanging and the needle beam was still hanging immediately thereafter by the ropes, which had supported them originally. Upon cross-examination, Dorernus admitted that after the accident he put cables around all of his wood needle beams because that made them stronger, and, although they might crack, they would not break off, and that, even if they cracked or broke, it would give you enough warning to grab hold of something. He stated that he did not see the accident occur, and that the State Inspector did not tell him not to use the beam that broke.

Walter Jacobs was called as a witness for respondent, and testified that he was a bridge painter foreman for the Neumann Company, and, as such, was so engaged on August 28, 1959 at the Cedar Street Bridge project. He said that he saw Hosey on the job that morning, and was with him when he went over to the scaffold from one pier to the other. He said the needle beam, which broke, had been used a week, and was tested at the lumber yard by jumping on it on all four sides. Upon cross-examination by claimant's counsel, Jacobs admitted that the particular beam had a small knot in it, and that he did not know whether the particular beam was tested or not. He also stated that the State Inspector, Paul Kjelshus, was on the Cedar Street Bridge job every day, and inspected all of the scaffolding that was rigged up.

This Court is charged with the responsibility of determining whether claimant has sustained his burden of proving that respondent was in charge of, and was in control of the work being performed on the Cedar Street Bridge job, and whether or not respondent was guilty of

a wilful violation of the Structural Work Act. Sec. 60 of Chap. 48, as set forth hereinabove, requires that all scaffolds for use in painting a bridge shall be erected and constructed in a safe, suitable, and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon. It further states, "Scaffold, or staging, swung or suspended from an overhead support more than twenty (20) feet from the ground or floor, shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof, and properly attached thereto, and such scaffolding, or staging, shall be so fastened as to prevent the same from swaying from the building or structure." Sec. 69 of the same act provides that any owner shall comply with all the terms thereof, for any injury to persons or property, occasioned by any wilful violation of the act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured. From the evidence submitted, as contained in the transcript and the exhibits, there can be no doubt that the scaffold from which claimant fell was not in compliance with the provisions of the Structural Work Act. Testimony clearly develops that the scaffold was over twenty feet above the ground, had no guard rail, and that there was some question as to the safety of the structure (needle beam) used.

Ownership of the Cedar Street Bridge was established by the admission of respondent and the testimony of witnesses, and, as such an owner, respondent is bound by the provisions of the Structural Work Act. (Chap. 48, Ill. Rev. Stats., Sec. 69). See *Kennedy vs. Shell Oil Co.*, 13 Ill. 2d 431. The testimony of witness Paul Kjelshus, State Inspector, and

Clifford Doremus, Superintendent of the Neumann Company established that respondent was in charge of the project and the work being performed at the time of the accident, which is the basis for the cause of action. Respondent made no attempt to refute or even impeach the testimony of its own employee, and did not introduce into evidence its contract with the Neumann Company to establish its independence from supervision of the project. By the evidence contained in the transcript, it is clear that respondent had full and complete knowledge of the scaffold being used, its nature, and its potential for safety. This same evidence indicates that the State Inspector, Paul Kjelshus, had objected to the use of the needle beam, which broke, and further had the authority (from his own testimony) and control of the project to stop the use of the scaffold. This is enough knowledge to create "wilful" disregard of the provisions of the Structural Work Act. *Kennedy vs. Shell Oil Co.*, 13 Ill. 2d 431. *Schultz vs. Henry Ericsson Co.*, 264 Ill. 156. It was the duty of the State Inspector to see that proper safety measures were taken for the welfare of the men working on the job. He was responsible for the conduct of the work, including the method in which it was done, and he had the authority to stop the job by his own testimony. He had knowledge that the needle beam, which ultimately broke, was being used, and he even inquired of the contractor's Superintendent to determine if the same was in satisfactory condition. He testified that he didn't want the Superintendent to use the beam, but it was used anyway; and further testified that he had the authority to stop the use of the same.

The argument of respondent touches upon the question of contributory negligence or assumption of the risk. These defenses are not available under the Structural Work Act. *Thomas vs. Carroll*, 14 Ill. App. 2d 205; *Fetterman vs. Pro-*

duction Steel Company of Illinois, 4 Ill. App. 2d 403, and *Kennedy vs. Shell Oil Co.*, 13 Ill. 2d 431. The Fetterman case states that the Structural Work Act imposes a statutory liability in case of wilful failure to comply with the act upon the owner, contractor and sub-contractors. The object of the act is to prevent injuries to persons employed in dangerous and extra hazardous occupations, so that negligence on their part in the manner of doing their work might not prove fatal.

Respondent urges the Court to adopt a policy, which would allow the State of Illinois a credit or set-off of amounts received by claimant under the Workmen's Compensation Act. In effect, respondent is asking this Court to grant to the State of Illinois special privileges under the law, which would not be available to the private owner who might be a defendant in a cause under the Structural Work Act in the Circuit Court of any County in this State. In nearly every instance where a cause of action is brought under the Structural Work Act against an owner, Plaintiff has also been entitled to and has probably obtained an award under the Workmen's Compensation Act of the State of Illinois. This point was precisely settled in the case of *Bryntesen vs. Carroll Construction Co.*, 36 Ill. App. 2d 167, decided on June 19, 1962. In the Bryntesen case, defendants asserted that the Workmen's Compensation payments to the plaintiff should have been admitted into evidence. This was also a case that arose under the Structural Work Act. In its opinion at page 182, The Court stated: "We do not find any case in this State permitting the receipt of a Workmen's Compensation award paid by the employer to diminish the damages recoverable against a third party tort feisor for his wrong-doing." The Appellate Court in the Bryntesen case cited with approval the case of *O'Brien vs. Chicago City Railway Co.*, 305 Ill. 244, in which the Supreme Court said:

“No injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable without deduction for compensation which the injured person may receive from another source, which has no connection with the negligence, whether that source is a claim for compensation against his employer, a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend,” Affirmed in 27 Ill. 2d 566 at 568.

The injuries to the Claimant were of such a serious nature that they can best be described by extracting from the record the language of Dr. James J. Flaherty, the orthopedic surgeon who treated claimant on August 28, 1959, and on many occasions thereafter until he left St. Francis Hospital in Peoria. Dr. Flaherty testified that the x-ray exhibits showed a fracture and dislocation of the left ankle with fusion of the joint at the ankle level, surgically done; that there was some distortion about the lower end of the tibia. He stated that claimant's exhibit No. 19 shows the right ankle with distortion of the lower end of the tibia, and some backward displacement of the tibia with relation to the foot; that there may not be complete union at the side of the fusion, and that the x-ray also shows a healed fracture through the calcaneus. Claimant's exhibit No. 20 shows the left wrist and a portion of the hand, with a healed fracture of the distal end of the radius with some shortening of the radius, some dorsal displacement of the wrist joint, and some irregularity of the joint line. Dr. Flaherty stated that the fractures shown in exhibits Nos. 18 and 19 would interfere with the normal function of these members, and would also interfere with the normal function of the left wrist. He stated that claimant's exhibit No. 21 is a side view of the claimant's left femur, and that it shows a fracture of the upper middle third with three screws securing the frag-

ments and the intramedullary pin in place. The doctor testified that this injury would interfere with the normal function of the leg. He stated that claimant's exhibit No. **22** was a front to back view of claimant's left femur showing the three screws, the intramedullary pin and the united fracture. He stated that exhibit No. **23** is an **AP** view of claimant's pelvis and hip joints, and that **it** shows a healed fracture of the transverse process of the fifth lumbar vertebra, and a completely healed fracture of the pubis and pelvis with normal contour.

Dr. Flaherty testified as to the general treatment of all of claimant's injuries on August 28, 1959, and thereafter until the said patient was transferred to another hospital. He stated that he examined the patient again on September **28**, 1960, and examined him clinically and by x-ray, and at that time he had some shortening of the right radius with obvious deformity of the wrist; that he had **30**" flexion of the wrist compared to a normal of 70" to 90"; that he had 10° extension of the wrist compared to a normal of 70° to 90°; and, that there was deformity of the contour of the wrist, and that the pathology he found would interfere with *the* normal function of the hand, wrist, and arm, including his ability to live and do manual labor. The doctor stated that all of these conditions were permanent.

Dr. Flaherty further testified that an examination of the left leg showed a one and one-half inch shortening, and further, that, when the leg was held in external rotation, the foot could not be brought back past the neutral position. There was distortion of the left ankle, and there was distortion with healed scars, which were also over the buttocks and outer aspects of the left thigh. He stated that these findings would interfere with the normal use of the left leg and foot, and interfere with his ability to walk or climb, do manual labor, and were all permanent. He further testified

that there was a healed scar over the anterior aspect of the right ankle, and there was perhaps some motion at the ankle, but no rotation of the right foot. He stated that claimant needed a cane to assist him in walking, and that this condition was also permanent. Stipulation by counsel indicates that the medical and hospital expenses of claimant amounted to \$9,177.12.

Claimant testified that prior to the accident he was in good health, and had never sustained any fractures; that his job with Neumann Company paid him \$3.50 per hour, and that he could work a 40 hour week. Claimant testified that he had an eighth grade education, and no trade except that of a common laborer; that he did not work from the date of the accident on August 28, 1959, until January 1, 1961, when he opened up a service station in Tullahoma, Tennessee. He further testified that he was not able to do much at the station, because he could not be on his feet, but was able to pump some gas and make change. He stated further that he earned about \$40.00 per week, net, from the operation of the station, as compared with \$140.00 per week, which he earned prior to the accident.

The Court finds that claimant has sustained the burden of proving that respondent was guilty of a wilful violation of the Structural Work Act, and grants him an award of \$25,000.00.

(No. 4939—Claimant awarded \$25,000.00.)

ROBERT N. McCORMICK, Claimant, OS. STATE OF ILLINOIS,
Respondent.

Opinion filed May 11, 1965.

MELVIN O. MOEHLE, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LAWRENCE W.
REISCH, JR., Assistant Attorney General, for Respondent.

STRUCTURAL WORK Am—negligence. Evidence **disclosed** that respondent did assume control and take charge of the particular project, and **was** guilty **of** a **knowing** violation of the Structural Work Act.

SAME—damages. The Court will not set-off from its award any amounts received by claimant under the Workmen's Compensation Act.

PEZMAN, J.

This is an action by claimant, Robert N. McCormick, against the State of Illinois, respondent, under the Structural Work Act for personal injuries sustained by claimant when he fell from a scaffold while working on a highway overpass in East Peoria, Illinois. On August 10, 1959, Robert N. McCormick, then approximately thirty-three years of age, was employed as a laborer by The McDougal Hartmann Co. of Peoria, Illinois. Claimant and another workman were working on a scaffold underneath a highway overpass, which was known as Industrial Spur No. 10 in East Peoria, Illinois. Both men were working on the scaffold some twenty-five to thirty feet above the ground. The scaffold was suspended from the overpass by means of dollies riding on steel rails, which were suspended by cables attached to the bannisters on the overpass. The dolly wheels rode on the small I-beams at each end of the scaffold, and the scaffold moved in two directions, both the width and the length of the bridge. The rails upon which the dolly wheels rode were twenty to thirty feet long and in sections, which were apparently moved as the work progressed. Claimant and his fellow workman had transferred one end of the scaffold to a new rail, and, as Mr. McCormick was walking across the scaffold to the opposite end to assist in moving it to the next rail, one end of the scaffold came off of the I-beam, and dropped down. This movement threw claimant off of the scaffold to the ground some twenty-five or thirty feet below, and he sustained serious and permanent injuries.

Claimant contends that the State of Illinois, as respondent, was the owner of the premises, and was guilty **of a**

wilful violation of the Structural Work Act, and that, therefore, claimant is entitled to an award in the sum of \$25,-000.00. Claimant seeks to establish such responsibility under the Structural Work Act. He alleges and seeks to prove that respondent had charge of the work at the time of the accident, and was guilty of a wilful violation of the act or wilful failure to comply with any of its provisions.

Respondent contends that the State must be found to have been "in charge of" the work at the time of the accident, and argues that evidence introduced by the State tends to show that the State was not in charge of or responsible for safety control, but admittedly had control of the quality of the work and the materials used. Respondent further contends that, although the contract for the construction gave the State specific control, such control is limited to quality and not safety. Respondent claims that, in the event an award is made to claimant, it should be allowed to off-set the amount of Workmen's Compensation coverage from the award granted.

Claimant's own testimony and exhibits Nos. **3** and **4** clearly indicate that the scaffold in use at the time of the accident traveled on dolly wheels suspended from I-beams, and that it was necessary that these wheels be transferred to adjacent I-beams when they reached the end of a section of such beam. The accident in question occurred when claimant and the other man on the scaffold were moving the scaffold ahead at the end of such a section of I-beam. From such testimony it appears that the dolly wheels on one corner of the scaffold lost contact with the I-beam, which caused claimant to lose his balance and fall to the ground from a heighth of about twenty-five to thirty feet.

The evidence clearly establishes that the scaffold in question had a ten inch high piece of tubing or railing on each side to keep material from dropping off of the scaffold,

with no protection on the ends. It further discloses that the scaffold had no safety hooks or safety cables attached to its structure, and that the scaffolding was about 8 feet wide and about 20 feet long and made of steel tubing. The scaffolding did not fall, but was hanging with one corner down immediately after the accident. The testimony establishes that the scaffold in use from which claimant fell was hung in a different manner than were other scaffolds used on the same job. The I-beam to which the scaffold was attached by dolly rails was hung from the top rail of the bridge structure by steel cables, which swayed with the wind or upon movement by the parties using the scaffold.

Claimant called, as an adverse witness under Section 60 of the Civil Practice Act, A. F. Burnham, District Construction Engineer for District 4 of the Division of Highways at Peoria. Mr. Burnham testified that all plans and specifications of the structure were prepared by the Division of Highways; that engineers and technicians under his supervision did the staking work for the bridge, and that the contract was let on March 25, 1958, and awarded on April 3, 1958 to the McDougal Hartmann Company of Peoria. Burnham stated that he was on the job weekly throughout the entire construction period, and that he had representatives or employees under his jurisdiction on the job at the same time. He testified that Henry C. Bankie, Jr. was under his supervision on this particular job, and was the Project Engineer, and had a number of men working under him. He stated that his job was to inspect the work of the engineers under him, and that Bankie was required to report the progress to him weekly, and had an office approximately $1\frac{1}{4}$ miles from the construction site.

Burnham stated that the word "engineer," as used in the specifications for road and bridge construction of the State of Illinois, refers to the Chief Highway Engineer and his

delegated authority. He stated that he was a part of the delegated authority of said Chief Highway Engineer, as was Mr. Bankie on the date of August 10, 1959. He also testified that Article 5.1, of the Standard Specifications For Road And Bridge Construction, entitled "Authority of Engineer," adopted January 2, 1952, applied to the contract for construction of the overpass on which the accident happened. Burnham further testified that Article 5.11 entitled "Inspection" applied to the contract in question in this cause, as well as Article 8.8, entitled "Suspension of Work," and Article 8.7, entitled "Character of Workmen and Equipment." Burnham stated that he had noticed the scaffolding on the bridge construction in question some weeks after they had finished the pouring of the deck. He said he saw the men working on the scaffolding and that the appearance of the scaffolding was the same as that shown in claimant's exhibits Nos. 1, 2, and 3 with the exception that the scaffolding in use at the time of the accident was not secured by the hook fastened to the lower plank of the I-beam on each end, as is shown in the exhibits. Burnham stated that he did not observe any handrails on the scaffolding itself, and further testified that the suspension of the railing on which the scaffolding ran was suspended to a cable attached to the handrail attached to the structure above, which would allow the scaffold to sway.

Henry C. Bankie, Jr. was called as an adverse witness under Section 60 of the Civil Practice Act, and testified that he was an engineer with the Division of Highways, State of Illinois; that on August 10, 1959, he was Project Engineer under the immediate supervision of A. F. Burnham, Construction Engineer, on Contract No. 13529 for the building of an overpass on Route No. 10 Spur at East Peoria, Illinois. He testified that he was the Project Engineer on the overpass bridge in question during its entire period of con-

struction, and visited the construction site approximately daily. He stated that he had free access to see and inspect any part of the premises, and frequently spent from fifteen minutes up to two hours each day at the site of the overpass bridge upon which the accident occurred. He testified that he was not at the site on August 10, 1959, but did know that an accident occurred on that date. His testimony included statements verifying claimant's exhibits as to the type of scaffolding that was being used on August 10, 1959 when the accident occurred. He stated that the scaffolding did not have any side or end rails, and was suspended from the structure above it in such a manner that it would sway. He testified that the scaffolding was supported by dollies, which ran on I-beams attached to the cables hung from the top side of the bridge, and that there was nothing to prevent the scaffold from falling if the dollies came off of the rails.

Respondent called as a witness, Jack C. Tomlinson, Superintendent for McDougal Hartmann Company on the project in question in this cause of action. He testified that he was a graduate engineer, had been in the construction business for ten years, and had never seen safety nets used under the type of scaffold in use when the accident occurred. He stated that he was not on the job at the time of the accident, but arrived at the scene afterwards, and saw the scaffolding from which claimant fell. He testified that one corner of the scaffold was down about six feet from the rail, but the other three comers were connected to the rails from which the scaffolding was suspended. He stated that apparently the trolley came through the joints, between the two rails. He also indicated that there were no handrails on the scaffold. Tomlinson admitted upon cross-examination that the scaffolding did not have safety rails properly bolted, secured, and braced rising at least thirty-four inches

above the floor, extending along the entire length of the outside of the ends of the scaffolding. He stated that, in fact, the scaffolding did not have any safety rails at all, and was not fastened to the structure, so as to prevent it from swaying. Mr. Tomlinson testified that he saw Mr. Bankie and Mr. Burnham at the project site, prior to August 10, 1959, and that he conferred with both of them regarding the construction of the highway overpass bridge, and that they both gave him instructions as to the nature of the project, and particularly as to quality control. He stated that in his supervisory position he followed the instructions given by Mr. Burnham and Mr. Bankie.

Respondent called as a witness, Robert A. Duncanson, a graduate civil engineer, who had been in the construction business for fifteen years, and who testified that he had worked on sixty bridges during the past five years, and was **very** familiar with scaffolding being used in the business. He stated that from hearing the testimony in the case, observing the exhibits and that the scaffolding, as shown in the exhibits, was the usual and customary type of scaffolding used in this type of work. He also stated that it was not the custom and usage generally to use safety belts or safety hooks on this type of scaffolding.

Respondent called for direct testimony, A. F. Burnham, and among other things Mr. Burnham stated that his Project Engineer, Mr. Bankie, had no responsibilities regarding safety for the type of work being done. He also testified that it was not customary to use handrails upon scaffolds in this type of operation. Upon cross-examination by claimant's counsel, Mr. Burnham testified as follows: "There is no—according to my interpretation of the Standard Specifications, there are no provisions for the engineer to instruct the safety of the work." Upon further questioning, he indicated that it was his interpretation of the Standard Specifi-

cations that there was no responsibility on the part of his men or himself to make safety inspections.

Counsel for parties hereto stipulated and agreed as to the following facts:

1. That at the time of the occurrence herein, on August 10, 1959, the State of Illinois was the owner of a certain structure, known as a highway bridge, located over Route U.S. No. 150, Toledo, Peoria and Western Railroad tracks, and had an easement over the railroad tracks and Farm Creek.

2. That, on August 10, 1959, respondent, State of Illinois, was constructing a new highway bridge on the said premises, and had as one of its contractors on said job The McDougal Hartmann Co.

3. That at said time and place the scaffold on which claimant was working had been constructed by employees of the McDougal Hartmann Company other than himself.

4. That notice of intention to commence suit in the Court of Claims was given to Grenville Beardsley, Attorney General of the State of Illinois, on or about February 1, 1960, and, further, that notice of intention to commence suit in the Court of Claims was given to Charles F. Carpenter, Secretary of State and **Ex** Officio Clerk of the Court of Claims, on or about February 1, 1960.

5. That no assignment or transfer of the claim, or any part thereof, or interest therein, has been made to any person or persons.

In the case at hand, respondent is charged with wilful violation of Section 60, Chap. 46, Ill. Rev. Stats., which provides as follows:

"Scaffolds, cranes, ladders, etc. — Erection and construction.

". . . That all scaffolds, hoists, cranes, stays, ladders, supports, or **other** mechanical contrivances, erected or constructed by any person, firm or

corporation in this State for use in the erection, repairing, alteration, removal, or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

“Scaffold, or staging, swung or suspended from an overhead support more than twenty (20) feet from the ground or floor shall have, where practicable, a safety rail properly bolted, secured and braced, rising a (at) least thirty-four (34) inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside **and** ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure.”

Claimant seeks to recover under Section 69 of the same Act, and is attempting to prove that respondent was guilty of wilful violation of the Act, or wilful failure to comply with any **of** its provisions. Ownership of the premises has been established by the stipulation entered into between claimant and respondent. In order to make an award, this Court must find that respondent not only wilfully violated or wilfully failed to comply with the provisions of the Act, but also was in control or had charge of the work being performed. *Gannon vs. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 22 Ill. (2d) 305. Prior to the language of the Supreme Court in the Gannon case, the words “having charge of” were of no legal consequence in determining the liability of the owner of any building or other structure under the Act. In the Gannon case, the Court held that the statute did not intend liability where there was no control, stating:

“The Act specifies, ‘Any owner, contractor, subcontractor, foreman, or other person **having charge of** (emphasis supplied) the erection, construction, repairing, alteration, removal, or painting of any building, bridge, viaduct or other structure within the provisions of the Act, shall comply with all the terms thereof. . . . It is inescapable from these words that the Legislature intended to hold liable those named persons who are in charge of the work, and the words ‘or other person’ were included to cover **the**

situation where someone other than the named persons was in charge of the work, in order to prevent such person from escaping liability.”

The Supreme Court also noted that Section 9 of the Act imposes civil liability only for “willful violations,” which means knowing violations, and that these can only be perpetrated by persons directly connected with the operations, and not by virtue of mere ownership of the premises.

Respondent’s exhibits Nos. 5, 6, and 6a were admitted in evidence. Exhibit No. 5 is identified as contract No. 13529. It contains The Notice to Bidders, Specifications, Proposal, Contract, and Contract Bond. Exhibits Nos. 6 and 6a are identified as being The Standard Specifications For Road And Bridge Construction and Supplemental Specifications. The State of Illinois awarded contract No. 13529 for the construction of the highway overpass in question to McDougal Hartmann Company of Peoria, Illinois on April 3, 1958. Article 5.1 of the Standard Specifications For Road And Bridge Construction, which is entitled “Authority of Engineer,” reads as follows:

“All work shall be done under the supervision of the Engineer, and to his satisfaction. He shall decide all questions which arise as to the **quality** and acceptability of material furnished, work performed, manner of performance, rate of progress of the work, interpretation of the plans and specifications, acceptable fulfillment of the contract, compensation and **disputes**, and mutual rights between contractors under the specifications. He shall determine the amount and quality of work performed and materials furnished, and his decision and estimate shall be final. His estimate shall be a condition precedent to the right of the contractor to receive money due him under the contract. In case of failure on the part of the contractor to execute work ordered by the Engineer, the Engineer may, at the expiration of a period of forty-eight (48) hours after giving notice in **writing** to the contractor, proceed to execute such work as may be deemed necessary, and the cost thereof shall be deducted from compensation due or which may become due the contractor under the contract.”

Article 5.11, entitled, “Inspection,” reads as follows:

“All materials and each part of detail of the work shall be **subject** at all times to inspection by the Engineer or his authorized representatives, and the contractor **will** be held strictly to the true intent of the **specifications** in regard to quality of materials, workmanship, and the diligent

execution of the contract. Such inspection may include mill, plant, or shop inspection, and any material furnished under the specifications is subject to such inspection. The engineer or his representatives shall be allowed access to all parts of the work, and shall be furnished with such information and assistance by the contractor as is required to make a complete and detailed inspection."

Article 8.7, entitled, "Character of Workmen and Equipment," reads as follows:

"The contractor shall employ only competent and efficient laborers, mechanics, or artisans, and whenever, in the opinion of the engineers, any employee is careless, incompetent, obstructs the progress of the work, acts contrary to instructions or conducts himself improperly, the contractor **shall**, upon request of the engineer, discharge or otherwise remove him from the work and shall not employ him again, except with the written consent of the engineer."

Article 8.8, entitled, "Suspension of Work" reads as follows:

"The engineer shall have authority to suspend the work wholly or in part, ~~for~~ such period of time as he may deem necessary, due to conditions unfavorable for the satisfactory prosecution of the work, or to conditions which in his opinion warrant such action; or for such time as is necessary by reason of failure on the part of the contractor to carry out orders given; or to perform any or all provisions of the contract. No additional compensation will be paid the contractor because of any costs caused by such suspension, except when the suspension is ordered for reasons not resulting from any act or omission on the part of the contractor, and not related to weather conditions. If it becomes necessary to stop work for an indefinite period of time, the contractor shall store all materials in such manner that they will not obstruct or impede the traveling public unnecessarily or become damaged in any way, take every precaution to prevent damage or deterioration of the work performed, provide suitable drainage of the roadway, and erect temporary structures where necessary. The contractor shall not suspend work without written authority from the Engineer."

These Articles from the Standard Specifications are incorporated in the contract by reference, and are an essential part thereof. They indicate without doubt the imposition of authority upon the Engineer (Chief Highway Engineer and those Engineers delegated thereunder) to control and take charge of the project on behalf of respondent. The Construction Engineer, Mr. Burnham, and the Project Engineer, Mr. Bankie, were admittedly in charge of the project involved herein, discussed the same with the Superintendent

on behalf of the contractor, and gave orders to the Superintendent, which he followed. The testimony of Messrs. Burnham and Bankie that they were not responsible for the safety of the workmen and were only concerned with quality control is overtly contrary to the language of the contract and the Standard Specifications, and against the best interest of the public and the State of Illinois. Absence of proper safety precaution and inspection would add to the cost of the project, as well as obstruct the progress of the same. This Court does not deny that the major interest of the Department of Public Works and Buildings in supervising construction is to control the quality under the contract, but it will not accept the premise that the Department assumes no responsibility for safety in its supervision of the same projects. It is the opinion of this Court that the State of Illinois, through its Division of Highways and Chief Highway Engineer, and any delegated authority thereunder, did assume control of and take charge of the particular project involved in this case. Both the Construction Engineer, A. F. Burnham, and the Project Engineer, Henry C. Bankie, Jr., testified to knowing in advance of August 10, 1959, when the accident happened, that the scaffold in question had neither safety rails, nor was so attached that it would not sway, as provided for in Section 60 of Chap. 48, Ill. Rev. Stats.

Irregardless of the customary usage in the construction trade in the Peoria area, the Structural Work Act proposed a duty that such scaffold "suspended from an overhead support more than twenty (20) feet from the ground or floor shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four (34) inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened *as* to prevent the same

from swaying from the building or structure.” We find that respondent was not only guilty of a “knowing violation” of the Structural Work Act, but also had charge of the structural activities in and about the project.

Respondent seeks to set off any Workmen’s Compensation award against any award made herein to claimant, and argues that the Court of Claims has heretofore taken into consideration amounts, which have been paid to a claimant under a covenant not to sue, and has also allowed a set-off of amounts paid by a joint wrongdoer as against an award made to claimant. The case at hand does not involve joint tort feasers.

In the Workmen’s Compensation claim, claimant, Robert N. McCormick, was the petitioner, and McDougal Hartmann Co. was the respondent. The relief afforded was statutory, and did not arise as a right out of the commission of a tort. In the case at hand, claimant seeks to recover from respondent, the State of Illinois, in the Court of Claims under another statute, the Structural **Work** Act. We find no analogy in these two situations. The Appellate Court in the case of *Anna L. Bryntensen vs. Carroll Construction Company*, 36 Ill. App. 2d 167, and affirmed in 27 Ill. 2d 566 at 568, held that evidence of the receipt of Workmen’s Compensation payments was properly excluded from the jury. In the Bryntensen case, a widow who had received Workmen’s Compensation payments from her deceased husband’s employer, a subcontractor, for loss of support, sued the general contractor also for loss of support, alleging wilful violation of the Structural Work Act. The Court cited the O’Brien case (*O’Brien vs. Chicago City Railway Co.*, 305 Ill. 244), where the Supreme Court said: “No injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable without deduction for compensation which

the injured person may receive from another source, which has no connection with the negligence, whether that source is a claim for compensation against his employer, a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization, or a gift from a friend.”

From the testimony of claimant and medical witnesses, it is apparent that the injuries to claimant were extensive. The accident occurred on August 10, 1959, and he was hospitalized from that date until September 14, 1959 at St. Francis Hospital, Peoria, Illinois, from whence he was transferred successively to the Forest Park Rehabilitation Center and Massachusetts Memorial Hospital in Boston, Massachusetts. On October 11, 1960, he was discharged from the Massachusetts Memorial Hospital and took up residence at 617 East Virginia Avenue in Peoria, Illinois. Claimant was again hospitalized on December 4, 1960 for a bladder operation, and again on June 7, 1961. He was subsequently discharged on December 13, 1961. From the evidence, it is apparent that, as a result of the accident on August 10, 1959, claimant was paralyzed from the chest down. His right elbow and wrist were shattered, and he lost the rotation in the right wrist. There are a few degrees of movement in the elbow. He has no movement in his legs, and cannot stand or walk. He uses crutches or a wheelchair. He does not have any bladder control, and urine elimination is by permanent catheter. Claimant also has no control of his bowel movements. At the time of the hearing he was not employed, and had not been employed since the date of the accident. He requires daily assistance, which his mother was performing, although he had had a male attendant in the past. Through the use of hand controls, claimant is able to get in and out of his car. It is apparent that he has lost his ability to work and care for himself or his family.

Claimant is awarded the sum of \$25,000.00.

(No. 4996—Claimant awarded \$11,759.26.)

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

Opinion filed May 11, 1965.

WHAM AND WHAM and CARUTHERS AND MONTREY, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence—duty to inform of insufficient clearance. Where evidence disclosed that respondent could have and should have informed claimant of the insufficient clearance, and its failure to do so was the proximate cause of the accident, an award will be made.

SAME—defense—exculpatory clause. An exculpatory clause, purporting to relieve respondent from liability for negligence, is unenforceable where the matter is one of public concern and respondent is in a dominant position.

PEZMAN, J.

On January 10, 1961, claimant, Parkhill Truck Company, filed a written application with the Illinois Division of Highways, Bureau of Traffic, for permission to transport a load (vessel) weighing 22,000 pounds with an overall width of 11 feet and a height of 14 feet, 6 inches on a 5-axle tractor semi-trailer from the Missouri-Illinois line south of St. Louis to Champaign, Illinois over the following highways: By-Pass U.S. 50, Illinois 157, U.S. 66, 16, 127, 48, 47, and 10. On the same day the Division of Highways sent the following telegram to Union, Missouri:

“Parkhill Truck Co.

Will Call

Union, Missouri

Permit 710 authorizes movement vehicle weighing 22,000 pounds, mounted on 5-axle tractor semi-trailer, overall width 11 feet, overall height 14 feet 6 inches, from Missouri line U.S. Bypass 50, 157, U.S. 66, 16, 127, 48, 47, 10 to Champaign. Expires sunset January 25. Flagman shall be furnished by grantee to insure safety to all other traffic and any projecting loads shall be clearly marked with flags. Movement shall be made during daytime any day except Saturday, Sunday or holiday. Grantee is responsible

for any accident or damages resulting from this movement. Permit granted insofar as Department has authority. In accepting permit, grantee certifies that movement will be made in accordance with limitations stated herein. Speed limit **30** miles per hour. Movement shall be made only when pavements are free from ice and snow.”

The permit was granted pursuant to the pertinent portions of Pars. 222a and **230**, Chap. 95½, Ill. Rev. Stats. (1959):

Pur. 222a: “The height of a vehicle from the underside of the tire to the top of the vehicle, inclusive of load, shall not exceed thirteen feet, six inches . . .”

Pur 230: “(a) The Department with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing or by telegram and good cause being shown therefor, issue a special permit in writing or by telegram authorizing the applicant to operate or move a vehicle or combination of vehicles of a size and weight of vehicle or load exceeding the maximum specified in this Act or otherwise not in conformity with the provisions of this Act upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible. Where a permit is sought for overweight the application shall show that the load to be moved by such vehicle or combination of vehicles cannot reasonably be dismantled or disassembled.

(b) The application for any such permit shall specifically describe the vehicle or vehicles and load to be operated or moved and whether such permit is requested for a single trip or for limited continuous operation. The application shall state, also, the points of origin and destination of overweight vehicles or loads and of oversize vehicles or loads when specifically requested by the Department or local authority.

(c) The Department or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued at its discretion to prescribe the route or routes to be traveled, to limit the number of **trips**, to establish seasonal or other time limitations within which the vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, when necessary to assure against undue damages to the road foundations, surfaces or structures, and may require such undertaking or other security as may be deemed necessary to compensate for any injury to any roadway or road structure.

(d) Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer or authorized agent of any authority granting such permit, and no person shall violate any of the terms or conditions of such special permit.”

Parkhill’s driver, William Beggs, picked **up** his load,

which consisted of a prefabricated sewage pumping station, at Leavenworth, Kansas at about **7:30** on the morning of January **10, 1961**, and, preceded by his wife, Elaine, who was driving a **1961** Ford Fairlane displaying a warning flag, drove to Washington, Missouri where he spent the night. He picked up the telegram at Union, Missouri on the way.

The load, which was owned by the *firm* of Zimmer & Francescon of Moline, Illinois, was **14** feet, **4** inches above the ground at its highest point at the time Beggs started his trip, and was being carried by Parkhill as bailee of Zimmer and Francescon, and as lessee of Beggs, the owner of the tractor, and one Robert Nesmith who owned the trailer.

Early the next morning Beggs, again preceded by his wife in the Ford, resumed his trip and at about **11:40** A.M., **while** traveling north on U.S. **66** about **3** miles east of Edwardsville, Illinois, came to the intersection of U.S. **66** and Illinois **143**. Route **143**, running east and west, passes over U.S. **66** with a clearance of **14** feet, **2** $\frac{1}{2}$ inches. There were no clearance signs (because of the Highway Division's policy of not marking bridge clearances that are more than **14** feet), and Beggs, maintaining his speed of about **30** miles an hour, headed under the overpass. The top of the pumping station struck the I-beam on the underside of the overpass, slid off the back of the trailer on to the road beneath the bridge, and was irreparably damaged. According to the testimony there had been no change in tire pressure, nor had anything else been done, which would have caused a change in the height of the load between the starting point of the trip and the point of impact with the bridge, so we can assume that at the time of impact the highest point of the load was still **14** feet, **4** inches above the ground.

Respondent does not dispute Parkhill's claim that the cargo was damaged in the amount of **\$12,059.26**, and that its remaining salvage value was \$300.00. Thus Parkhill,

which brings this action under a subrogation agreement with Carriers Insurance Exchange, the insurance carrier for Zimmer and Francescon, is entitled to an award of either **\$11,759.26** or nothing.

Claimant contends, in essence, that (a) Respondent breached its duty to claimant in allowing claimant, without warning, to proceed over a route, which respondent knew, or, in the exercise of ordinary care, should have known, was unsafe under the circumstances; (b) that claimant was in the exercise of ordinary care for the safety of its vehicle and the load; and, (c) that respondent's negligence proximately caused the collision and resultant damage.

Respondent, on the other hand, contends (a) that the accident was proximately caused by the driver's negligent failure to advise himself that the clearance of the overpass at **66-143** was insufficient for his load; and, (b) that by accepting the permit Parkhill accepted responsibility for damages incurred in moving the overheight vehicle.

The issue then is whether the duty to be certain that the load would clear the overpass was on claimant or respondent.

It is true, as contended by respondent, that the bridge merely created a condition, and was not the proximate cause of the collision, and that the State is not an insurer against accidents on its highways. We believe, however, that claimant has proven by a preponderance of the evidence that respondent could have, and should have taken steps to prevent this accident. It either knew, or, in the exercise of ordinary care, should have known that by traveling the prescribed route with the load, which he had on, Beggs would have trouble at the intersection in question. Respondent's failure to either re-route Beggs, or refuse the permit was, in our opinion, the proximate cause of the accident.

We are aware of the fact that Parkhill asked for this particular route, and that, as shown by the evidence, a booklet was available showing the insufficient clearance at this intersection. It is clear from the evidence, however, that the booklet contained certain errors, and was not very reliable, and that Beggs had never seen the booklet, and never had any reason to know of its existence. Moreover, Parkhill had in the past received **30** overweight permits under which its drivers had traversed Illinois highways without mishap. Under these circumstances, it is our opinion that Beggs and his superiors in the Parkhill Company had a right to expect that respondent would not allow this load to be carried over a clearly dangerous route. We do not believe that Beggs could reasonably be expected to stop and examine each overpass as he came to it. **Nor** was he under any duty, **as suggested by** respondent, to **take the ramp up over 143** instead of trying to go underneath the overpass, **as** he did. To do so would have been a departure, however slight, from the prescribed route.

The clear mandate of the statute is that the Department shall examine each application as it comes in, and use its discretion as to whether to issue the permit as requested, issue a different one, or refuse altogether. This may create practical difficulties in view of the large number of applications received daily by the Department, but the automatic issuance of permits would render the statute wholly meaningless.

Without attempting a precise definition of the provision in the permit, which states that the grantee assumes all responsibility for any accidents or damages resulting from the movement, it **is** our conclusion that such a provision cannot be used by the State, as counsel for respondent contends, to relieve itself of liability for negligence. We do not believe that an exculpatory clause is enforceable where, as

here, the matter is one of public concern, and the party seeking exculpation is in a dominant position. *Willis Jackson vs. First National Bank of Lake Forest*, 415 Ill. 453; *Cerny-Pickas and Co. vs. C. R. Jahn Co.*, 7 Ill. 2d 393; *O'Callaghan vs. Waller and Beckwith*, 15 Ill. 2d 436; *Gulf Transit Co. vs. United States*, 43 Ct. Cl. (F) 83; *Kenna vs. Calumet, Ham- and Southeastern R. Co.*, 206 Ill. App. 17; *Campbell vs. Chicago, R. I. and P. Ry Co.*, 243 Ill. 620.

It is our judgment that an award be made to claimant in the amount of **\$11,759.26**.

(No. 5018—Claimant awarded **\$2,040.00**.)

ALVIN MCGEE, A Minor, By MINNIE MCGEE, his next friend,
Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

MCCOY AND MING, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD A.
WARMAN, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*personal injuries*. When an Illinois National Guardsman is injured while in the performance of his duties, pursuant to orders of the Governor, or of the U.S. Department of Defense with the consent of the Governor, an award will be made.

SAME—*damages*. The Court in determining damages will use the Illinois Workmen's Compensation Act as a guide, but not as a fixed rule.

DOVE, 3.

Claimant, Alvin McGee, A Minor, by Minnie McGee, his mother and next of kin, filed his complaint in this Court on January 3, 1962. Claimant seeks financial help or assistance, as provided by the Military and Naval Code of Illinois, Chap. 129, Sec. 202.53, 1961 Ill. Rev. Stats., for personal injuries, which he suffered while a member of the Illinois National Guard, and in performance of duty pursuant to competent orders.

From the record it would appear that Alvin McGee, now an adult, at the age of 18 enlisted in the Illinois National Guard, and was assigned to Battery A, 1st Automatic Weapons Battalion, 184th Artillery, at Chicago, Illinois. At the time he executed his enlistment documents on March 27, 1960, he signed an "Enlistment Agreement," which required that he enter upon "six months of active duty for training." On May 14, 1960, and pursuant to written orders, he entered into such training duty at Fort Leonard Wood, Missouri. While at Camp Leonard Wood, all of his superior officers were **U.S.** Army personnel on full time active duty. Claimant would have been released from such training duty on November 13, 1960 but for an accidental injury, which occurred on October 29, 1960, while on the post at Fort Leonard Wood, Missouri.

He was hospitalized for said injury, a fractured leg, at the Fort Leonard Wood Army Hospital, and there he remained until on or about May 1, 1961. His accident and injury were stipulated to have been "in line of duty."

Upon his release from the hospital on May 1, 1961, claimant was wearing an ischial weight-bearing brace on the leg, which had been fractured in the accident. Following his return to Chicago, he reported to his Illinois National Guard unit, and attended all armory drill assemblies and the annual field training at Camp Perry, Ohio. While at Camp Perry, Ohio, his Illinois National Guard Battalion Commander noticed the leg brace, while claimant was standing in ranks on July 7, 1961. Immediately he ordered that claimant be given a medical examination and care while at field training. X-rays showed a complete fracture of the tibia and fibula in the middle third of the lower left leg; the segments of the fibula were completely separated; and, the segments of the tibia were in poor alignment with soft tissues interposed.

From Camp Perry, Ohio, claimant was transferred to the U.S. Naval Hospital at Great Lakes, Illinois, for further hospitalization, treatment and disposition. He was returned to "full duty" on January 10, 1962 after a medical board proceeding, which was held at the said hospital.

From the time claimant went on active duty on May 14, 1960, and until he was discharged from the hospital at Fort Leonard Wood, he received military pay as a private first class, or \$83.00 per month. After his discharge from the hospital, and until he was returned to "full duty" on January 10, 1962, the Departmental Report shows that he received but \$392.14 as military pay. Claimant still has a non-union of the fibula, and still suffers swelling of the leg, associated with pain and discomfort, which is caused by the gravitational flow of cellular fluid from the soft tissue over the tibia surface. Dr. Allen Wright, a Major in the U.S. Medical Corps, and an orthopedic surgeon, estimated that claimant had sustained a 20 per cent permanent loss of the use of his leg.

There appears to be no dispute as to the facts; nor is there any dispute that claimant might recover under the said statute, if the written authority, or written orders, under which claimant entered upon such training duty had issued from the office of Leo M. Boyle as Adjutant General of the State of Illinois, by order of the Governor of the State of Illinois; or that if all of claimant's superior officers had been Illinois National Guardsmen at the time of the injury.

The State of Illinois has, since 1909, provided, through awards of this Court, financial help or assistance to guardsmen, who have been injured while performing their duties in the Illinois National Guard under competent orders. *Dudley vs. State of Illinois*, 21 C.C.R. 255; *Dunham vs. State of Illinois*, 23 C.C.R. 28; and, *Sypniewski vs. State of Illinois*, 21 C.C.R. 586. In the latter case, claimant was allowed an

award, even though respondent argued that claimant was “on a frolic of his own” where the facts showed that claimant left his kitchen police duties between meals, went for a hike in the woods, and touched a grenade, which he saw partly imbedded in the dirt, and which exploded and caused him serious injuries.

Respondent in this case argues that, because claimant’s orders, which directed him to report for training duty at Fort Leonard Wood, were signed by Leo M. Boyle as Major General of the United States Army rather than as Adjutant General of the State of Illinois, claimant was not performing his duties at the time of his injuries in pursuance of orders issued by the Commander-in-Chief, the Governor of the State of Illinois.

There was admitted into evidence in this case, by agreement, a true copy of the written order placing claimant on active duty for a six months training period at Fort Leonard Wood. Said exhibit is upon the letterhead of the Department of the Army, National Guard Bureau, Washington, D.C., and reads in part as follows:

“. . . Each of the following enlisted *with . . . the consent of the governor* (emphasis supplied) of the State of Illinois is ordered to (active **duty** for training) for *a* period of *six* months.”

Said order ends as follows:

“. . . By order of Wilbur N. Brucker, Secretary of the **Army**: /s/ Leo M. Boyle, Major General, U.S.A. (Adjutant General of Illinois).”

Respondent argues further that, because claimant’s activities were supervised by military personnel other than officers of the Illinois National Guard, claimant was not performing duties under orders from the Commander-in-Chief, the Governor of the State of Illinois, but was performing duties pursuant to orders from the U.S. Department of the Army.

In *Dudley vs. State of Illinois*, 21 C.C.R. 255 at 256, we

said: "officers and enlisted men of the Illinois National Guard are members of both the National Guard of the United States and the federally recognized National Guard of the several states." We hold that, when an Illinois National Guardsman is injured while in the performance of duties pursuant to orders of the Governor, or of the **U.S.** Department of Defense with the consent of the Governor, such are competent orders, which allow an injured National Guardsman to make claim for financial aid and assistance.

In considering the amount of financial help and assistance claimant is entitled to under the statute, we have held that awards are made as the merits of each case may demand. This Court has often used the Workmen's Compensation Act as a guide. In doing so, however, it has not considered the Workmen's Compensation Act to be either a ceiling over or a floor under the awards. *Dunham vs. State of Illinois*, 23 C.C.R. 32.

In the instant case, claimant's earning capacity was, and is, unquestionably affected. For the 20 per cent permanent loss of the use of his leg, we are of the opinion that an award of \$2,040.00 would be proper.

An award is hereby made to claimant, Alvin McGee, A Minor, by Minnie McGee, his next friend, in the sum of \$2,040.00.

(No. 5054—Claimant awarded **\$2,000.00.**)

PEARL L. WARE, Claimant, os. **STATE OF ILLINOIS**, Respondent.

Opinion filed May 11, 1965.

GUNN, DAVIDSON AND BRANTMAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **EDWARD A. WARMAN AND SAMUEL I. NEIBERG**, Assistant Attorneys General, for Respondent.

NEGLIGENCE—res ipsa loquitur. Where respondent's chair collapsed injuring claimant, and respondent failed to rebut the presumption of negligence raised by claimant's testimony, the doctrine of *res ipsa loquitur* is applicable, and an award will be made.

PEZMAN, J.

Claimant seeks to recover the sum of \$25,000.00 from the State of Illinois for injuries received while visiting the office of the Department of Labor, Division of Unemployment Compensation, at 106 South Ashland Avenue, Chicago, Illinois. Pearl Ware seeks to recover such damages from respondent under the doctrine of *Res Ipsa Loquitur*.

Respondent alleges that claimant waited approximately one month before seeking medical attention at Cook County Hospital, and further contends that the injuries were not of the nature alleged by claimant in her cause.

On December 21, 1961, claimant, Pearl Ware, visited the office of the Division of Unemployment Compensation of the Department of Labor of the State of Illinois at 106 South Ashland Avenue, Chicago, Illinois, for the purpose of applying for unemployment compensation. Claimant was directed to sit down and wait her turn, and upon being so directed she went to the east side of the building, sat down on a wooden folding chair there provided, and, after sitting on it for a minute, the chair collapsed under her. Claimant was thrown to the floor with her left arm under her to catch her fall, and, in so doing, she jammed her left elbow and shoulder. Pearl Ware reported the injury to the personnel at the Division office, who told her to go home, and wait until someone came to see her.

Claimant testified that she began feeling severe pain in her left arm and shoulder immediately after the fall, and even stated at the hearing in October of 1963 that she still suffered some pain. Claimant's testimony indicates that she waited for a visit or a call from the Division of Unemploy-

ment Compensation of the Department of Labor, and upon receiving none finally went to the Cook County Hospital on January 22, 1962, where she was x-rayed. Her arm was placed in a sling, and she was instructed to return in about a month. The x-ray, which was taken at the Cook County Hospital within approximately one month after the accident, was admitted into evidence. It was examined by Dr. Leonard Smith who stated that the x-ray showed a comminuted fracture of the acromion with a slight displacement of the fragments. Claimant returned to Cook County Hospital for treatment in February and March of 1962, and on March 8, 1962 was discharged. On April 30, 1962, Pearl Ware went to see Dr. Leonard Smith, an orthopedic surgeon, who x-rayed her, and told her that she would need another treatment, For this treatment he sent her to the Chicago Physical Therapy Center. Claimant was given forty-one separate treatments under the direction and supervision of Dr. Virginia L. Winkler, a licensed physician and therapist, during the period from May 11, 1962 to and including October 18, 1962. Dr. Leonard Smith saw and treated claimant on numerous occasions between April 30, 1962 and August 19, 1963.

Dr. Smith testified at the hearing that "there appeared to be a separation of the acromioclavicular joint on claimant's left side with a considerable degree of proliferic changes, which may have been a fracture of the acromion process." He also testified that in his opinion surgery would be necessary to relieve the pain, that as a result claimant would be further disabled for a period of four to six weeks, and that the total charges in connection with such surgery would be approximately \$750.00.

From the transcript it appears that claimant was not gainfully employed after her injury for approximately six months. Prior to that time she had been doing domestic

work in and around Chicago, for which she was paid \$20.00 a week, plus her meals and carfare.

Pearl Ware never received a bill from the Cook County Hospital. Her bill with Dr. Leonard Smith is \$390.00, and remains unpaid. Also unpaid is a statement from Dr. Virginia Winkler for \$624.00. From claimant's own testimony, unrefuted, she has had a loss of wages amounting to \$480.00.

Respondent made no allegation of contributory negligence on the part of claimant, and the issue was not presented. Respondent merely contends that the doctrine of *Res Ipsa Loquitur* is not applicable to a public authority. No witnesses were presented, but respondent did introduce into evidence photostatic copies of certain departmental records having to do with claimant's visits to the office, both before and after her accident. Respondent states in its brief that by stipulation of the parties claimant was examined by one Dr. John F. Gleason in 1963. There is no evidence of any such stipulation in the record by testimony or agreement, and respondent's exhibit No. 2 does not show on the record as having been admitted or agreed to, nor is there any record of the same having been requested by the Court or on motion of either party. A letter constituting a medical report of the said Dr. John F. Gleason is included in the transcript as respondent's exhibit No. 2 without any further comment. Rule 16A of the Court of Claims Rules provides,

"In any case in which the physical condition of a claimant or claimants is in controversy, the Court may order him, or them, to submit to a physical examination by a physician. The order may be made by the Court on its own motion or on motion for good cause shown, and upon notice to the claimant to be examined, or his attorney, and to all other claimants, or their attorneys, if any, and shall specify the time, place, manner, conditions and scope of the examination, and the person or persons by whom it is to be made."

There is nothing in the Court file or the transcript of testimony to indicate that this rule was relied upon or used.

Regardless, the examination by Dr. John F. Gleason, made on December 23, 1963, could not be given the same weight, as that made by an attending physician within thirty days after the injury.

This Court is of the opinion that the doctrine of Res Ipsa Loquitur is applicable to a public authority in Illinois. (See *Roberts vs. City of Sterling*, 22 Ill. App. 2d 337; *Kenney vs. State of Illinois*, 22 C.C.R. 247; and *Finch vs. State of Illinois*, 22 C.C.R. 376.) The testimony clearly shows that the chair in question was under the control and management of the Unemployment Compensation Division of the Department of Labor of the State of Illinois, and that the occurrence was such as in the ordinary course of events would not have happened if due care had been exercised by respondent. Claimant has established a prima facie case of negligence on the part of respondent, thereby shifting the burden of proof to respondent. Respondent produced no evidence on the question of negligence, and has failed to rebut the presumption raised by claimant's testimony. There is testimony in the record by claimant that after the fall she noticed there was an old place in the chair where the chair had cracked, and that there was a crack on the back part of the chair where the seat goes into the leg. Under the doctrine of Res Ipsa Loquitur it becomes the obligation of respondent to show by affirmative proof that respondent was not guilty of negligence in the incident in question, namely, the collapsing of the chair on which claimant sat. Respondent has failed to do so, and the Court finds that respondent was guilty of negligence in the maintenance of the chair, and that said negligence caused the injury to claimant. Claimant's "but of pocket" expenses are clearly established at \$1,494.00, and, in addition, she seeks to recover for miscellaneous expenses, pain and suffering, future medical expenses, and compensation for permanent injury. This Court

does not find it necessary to deal with each of these individually.

Claimant is awarded the sum of \$2,000.00.

(No. 5096—Claimants awarded \$15,000.00.)

KATHERINE ELIZABETH GASPER, Surviving Widow of **ROBERT GASPER**, Deceased, Individually, and as Mother and next friend of **KIP E. GASPER** and **BRAD A. GASPER**, Surviving Children of **ROBERT GASPER**, Deceased, Claimants, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion fled May 11, 1965.

JOHN E. CASSIDY, JR., Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—death claim. Where evidence showed that claimant was a member of the Illinois National Guard, and at the time of his death was performing duty in pursuance of orders from the Commander-in-Chief, an award will be made.

PEZMAN, J.

Katherine Elizabeth Gasper, as surviving spouse, and mother and next of kin of two minor children, brings her action in the Court of Claims pursuant to the provisions of Chap. 129, Sec. 220.53, Ill. Rev. Stats. Claimants seek to recover under that provision of statute, as the result of the death of their husband and father, Major Robert Gasper, who was killed while in the performance of his duty as a pilot for the Illinois Air National Guard.

On January 18, 1963, Robert Gasper, a Major in the Illinois Air National Guard, was killed while flying an F-84F jet fighter plane approximately twelve miles northwest of the City of Springfield, Illinois. At the time of his death Major Gasper was a Tactical Fighter Pilot and Operations Officer of the 169th Tactical Fighter Squadron, a unit of the

Illinois Air National Guard, and he was engaged in a training flight from the Greater Peoria Airport over the local Springfield area pursuant to a flight order, which was signed by George H. Mason, Major, Illinois Air National Guard, Commander of the 169th Tactical Fighter Squadron. Major Gasper's plane crashed for unknown reasons at approximately 8:00 P.M. on January 18, 1963. His duty status at the time of the accident was "Inactive duty for training. Authority: Section 502, Title 32, United States Code." Claimants are Katherine Elizabeth Gasper, widow of Robert Gasper, individually, and as mother and next friend of Kip E. Gasper, a son, born on October 5, 1953, and Brad A. Gasper, a son, born on July 30, 1955.

It is claimants contention that they are entitled to recover the maximum amount allowed for death pursuant to the provisions of Chap. 129, Sec. 220.53, as stated hereinabove, and seek to recover the sum of \$15,000.00 as the maximum amount, which would be allowed for death under the Illinois Workmen's Compensation Act. Claimants cite, in support of their position, two cases previously decided by this Court, *Ward vs. State of Illinois*, 24 C.C.R. 229, and *Lott vs. State of Illinois*, 24 C.C.R. 336,

The only contention before the Court in this case is raised by the Departmental Report of the Adjutant General, which is dated April 15, 1963, and addressed to William G. Clark, Attorney General, From the Departmental Report we cite the following:

"1. At the time of his death, Major Gasper was performing duty in a federal 'Inactive Duty Training' status under Section 502, Title 32, U.S. Code.

"Section 101(23), Title 38, U.S. Code, defines 'Inactive Duty Training' as:

"a. Duty (other than full-time duty) prescribed for Reserves by the Secretary concerned.

"b. Special additional duties authorized for Reserves by an authority designated by the Secretary concerned, and performed by them on a vol-

untary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

“In the case of a member of the National Guard or Air National Guard, the term ‘Inactive Duty Training’ means duty under Sections 316, 502, 503, 504, or 505 of Title 32, U.S. Code.”

The same Departmental Report further states:

“5. Major Robert Gasper AO695051, was a pilot with the 169th Tac. Ftr. Sq., *Ill ANG* (emphasis supplied), from 16 July 61 until his death 18 Jan. 63. He was initially appointed 1st Lt. He was promoted to Captain 1 Nov. 55, and to Major 12 August 60. His duty assignment at the time of his death was Tactical Fighter Pilot and Operations Officer of aforementioned unit.”

At the hearing, the Departmental Report was objected to by claimants’ counsel insofar as the same related to the conclusions drawn by that Report in which the Adjutant General states as follows:

“Therefore, the duties being performed at time of death in this instance were pursuant to federal authority, as stated in paragraph 1b above, and were not pursuant to orders from the Commander-in-Chief. For this reason, Chap. 129, Sec. 220.53, Ill. Rev. Stats. 1961, cited and quoted as basis for this complaint is incorrect. The orders authorizing the flying training mission in this instance were issued by the unit commander pursuant to the above mentioned federal authority, and were not issued from the Commander-in-Chief (Governor).”

The same Departmental Report clearly indicates that Major Robert Gasper was on Inactive Duty Training, and was a member of the 169th Tactical Fighter Squadron, Illinois Air National Guard. The decedent had previously been activated into federal service on October 1, 1961. He was discharged from such active duty on August 20, 1962. His unit was not federally activated at the time of his death.

This Court cannot accept the contention of the Adjutant General in the Departmental Report of April 15, 1963. Art. V, Sec. 14 of the Constitution of Illinois of 1870 provides as follows:

“The governor shall be commander-in-chief of the military and naval forces of the state (except when they shall be called into the service of the United States), and may call out the same to execute the laws, suppress insurrection, and repel invasion.”

Art. XII of the Illinois Constitution relates to Militia, and states at Sec. 3 as follows:

“All militia officers shall be commissioned by the governor, and may hold their commissions for such time as the general assembly may provide.”

Chap. 129, Ill. Rev. Stats., is entitled “State Militia,” and the major portion of this code was revised by the legislature in 1957. Art. I, State Militia in General, was created to establish in the executive branch of the State Government a principal department, which shall be known as the Military and Naval Department, State of Illinois. It provides that the Illinois State Militia shall be divided into two classes: the organized and the unorganized militia. Art. II of the same statute relates to the organized militia, and states at Sec. 5 thereof as follows:

“The military force of the State is hereby designated the Illinois National Guard, consisting of the Army National Guard and the Air National Guard.”

Art. III, Sec. 220.11, provides as follows:

“The governor of the State is commander-in-chief of the military and naval forces of the State.”

Chap. 129, Art. VIII, Sec. 220.37, reads as follows:

“The Commander-in-Chief shall make all appointments in the commissioned rank in the Illinois National Guard and Illinois Naval Militia. Commissions evidencing all appointments shall be signed by the Governor and attested and issued by The Adjutant General.”

Sec. 220.38 also reads:

“Commissions to officers shall read to a certain grade in a given branch of corps. Assignment to duty in any unit shall be by order of the Commander-in-Chief. The validity of all commissions shall be subject to formal acceptance and the execution of oath of office prescribed by law.”

In *Lott vs. State of Illinois*, 24 C.C.R. 336, almost identical facts are found except for the time, place, and the person involved. In that case, this Court stated:

“The Departmental Report of the Adjutant General confirms that, at the time of the accident, Lieutenant Lott was performing Inactive Duty Training, and was killed in the line of duty.”

In that case, the Court held for claimant.

In a companion case to the Lott case, *William H. Egan vs. State of Illinois*, 24 C.C.R. 114, the Departmental Report is set forth in full as follows:

22 June 1959

“Honorable Grenville Beardsley
Attorney General of Illinois
Springfield, Illinois

Dear Sir:

The following comments are made in reply to your request of 6 June 1959 concerning the claim against the State of Illinois made by Mr. William H. Egan (Claim No. 4871).

2d. Lt. Hugh B. Lott, Jr., AO3079986, was appointed and federally recognized in the Illinois Air National Guard on 29 June 1957, with duty assignment as Pilot Tactical Fighter, 169th Tactical Fighter Squadron (Sp. Del.).

Lt. Lott was, as directed by flight order No. 72 (Attachment No. 1), piloting an **F-84F** Aircraft, Serial No. 526544, which crashed on the property belonging to Mr. Egan at approximately 1320 hours on 14 March 1959.

Lt. Lott at the time of the accident was performing inactive duty training, as authorized under Title 32, United States Code, Section 502. The accident occurred during the landing phase of the flight when Lt. Lott allowed the aircraft to ‘stall out’ while turning on the final approach for landing. The accident and subsequent damage to Mr. Egan’s property is attributable to ‘pilot error’ on the part of Lt. **Lott** in not maintaining sufficient air speed and proper altitude of the aircraft to effect a **safe** landing at Greater Peoria Airport, Peoria, Illinois.

Attachment No. 2 is a report of the aircraft accident investigating officer setting forth **all** of the facets involved in the accident.

In regard to the above, attention is invited to the opinion of your office, dated 31 July 1947, concerning claims for damage to private property by government aircraft assigned to the Illinois National Guard.

Very truly yours,
LEO M. BOYLE
Maj. Gen., AGC, Ill. ARNG
The Adjutant General”

This Court held in the Egan case that Lt. Hugh B. Lott, Jr., was a member of the Illinois Air National Guard, and on the date of his death was flying a routine training mission.

It is the opinion of this Court that on the 18th day of

January, 1963, at the time of his death, Major Robert Gasper was a member of the Illinois Air National Guard, flying a routine training mission, as directed in flight order No. 11 (claimant exhibit No. 2), which was signed by Major George H. Mason, also of the Illinois Air National Guard. The duty being performed by Major Robert Gasper at the time of his fatal accident was assigned to him by a commissioned officer of the Illinois Air National Guard, and by authority granted to him by the Commander-in-Chief (Governor).

We find that Major Robert Gasper on January 18, 1963 was killed while performing duty in pursuance of orders from the Commander-in-Chief, and we, therefore, award to claimants the sum of \$15,000.00.

(No. 5191—Claimants awarded \$3,780.50.)

JOSEPH SWEE, T. M. JABLONSKI, HAROLD MARISCEK, HENRY CARR, RAYMOND TOOHEY, MARY JANE WINN, HARRY HECHT, RAYMOND DELANEY, ROY DROLEN, JOHN ALLMAN, RAYMOND CISCO, MILTON EDSTRAND, JOSEPH PETERS, LAWRENCE MAGGIO, WILLIAM O'BRIEN, WILLIAM TRIGG, NORA SCANNEL, and O. W. WILSON AS SUPERINTENDENT OF POLICE, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

JOSEPH SWEE, T. M. JABLONSKI, HAROLD MARSICEK, HENRY CARR, RAYMOND TOOHEY, MARY JANE WINN, HARRY HECHT, RAYMOND DELANEY, ROY DROLEN, JOHN ALLMAN, RAYMOND CISCO, MILTON EDSTRAND, JOSEPH PETERS, LAWRENCE MAGGIO, WILLIAM O'BRIEN, WILLIAM TRIGG, NORA SCANNEL, AND O. W. WILSON AS SUPERINTENDENT OF POLICE, Claimants, *pro se.*

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—*payment of extradition expenses.* The expenses incurred in the extradition of a criminal, whose punishment of the crime shall be confinement in the penitentiary, shall be paid out of the **State Treasury** in pursuance of Chap. 60, Sec. 41, Ill. Rev. Stats.

DOVE, J.

On November 2, 1964, a petition for reimbursement for travel expenses, which were incurred by certain detectives and police officers of the City of Chicago in the performance of their official duties as messengers of the Governor of the State of Illinois in extradition proceedings, was filed in the Court of Claims. It is alleged therein that the sum of \$5,186.15 is now due and owing claimants.

A written stipulation was subsequently entered into by and between O. W. Wilson as Superintendent of Police of the City of Chicago and the Attorney General for the State of Illinois. It provides in part as follows:

“That claimants are the duly appointed police officers of the Judicial District of Cook County of the State of Illinois with Police Headquarters located at 1121 South State Street, Chicago, Illinois.

“That from the period of January 1, 1962 through June 30, 1963, as set forth in the Bill of Particulars of the Amended Complaint, said claimants incurred out of pocket expenses for travel and meals in the performance of their official duties as messengers of the Governor of the State of Illinois.

“That, as set forth in the Bill of Particulars of the Amended Complaint, claimants were in the performance of official duties outside the State of Illinois pursuant to Chap. 60, Par. 41 of the 1963 Ill. Rev. Stats.

“That the appropriation available during the 72nd biennium has lapsed.

“That in each and every instance hereinabove set forth where the expenses were incurred there remained a sufficient unexpended balance in the appropriation from which payments could have been made.

“That said claim has not been previously presented to any State Department or officer thereof, and that said claimants are the sole owners of the claim or interest therein, and that no assignment or transfer has been made of these claims, or any part thereof, except as stated in the complaint.

“That claimants are justly entitled to the amounts therein claimed from the State of Illinois, or the appropriate State Authority, after allowing all just credits.

“That claimants believe the facts stated in their complaint are true, and that there is now **due** the sum of **\$3,780.50**.

“That no other claims arising out of the same occurrences have been previously presented to any person, corporation or tribunal other than the State of Illinois.”

In conjunction with the said stipulation, a joint motion of claimants and respondent was filed for leave to amend the ad damnum clause of claimants’ amended complaint. This motion was allowed in an order filed by the Chief Justice on March 19, 1965. It grants leave to claimants to amend the ad damnum clause by reducing their prayer for relief to **\$3,780.50**.

A report of the Department of Finance, signed by James A. Ronan, Director, was also filed in this matter. The last paragraph thereof states:

“Our records disclose that the messengers made the **trips** out of State in pursuance of proper authorizations, and their reimbursement accounts are due and payable in a total amount of **\$3,780.50**. Vouchers were not drawn in payment of the expenses incurred for the reason that the same were presented after the biennial appropriation period had lapsed.”

With reference to extradition expenses, Sec. 41 of Chap. 60, 1963 Ill. Rev. Stats., 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.” It appears that in the instant case all qualifications for an award have been met.

Claimants are, therefore, hereby awarded the total sum of **\$3,780.50** payable as follows:

Joseph Swee and T. M. Jablonski.. .. .	\$902.30
Nora Scannel	220.00
Harold Marsicek and Henry Carr.. . . .	263.30
Raymond Toohey and Mary Jane Winn.. . . .	850.70
Harry Hecht and Raymond Delaney.	638.65
Raymond Cisco and Milton Edstrand.. . . .	431.65
O. W. Wilson, Superintendent of Police of the City of Chicago.	473.90

(No. 5203—Claimant awarded \$303.66.)

THERMO-FAX SALES, INC., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

CHARLES KENNEY, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

Claimant sold to the Illinois Public Aid Commission during the months of March, June, and December, 1962, Thermo-Fax copy paper in the amount of \$303.66. Because of the lapse of the appropriation from which said expenses could have been paid, claimant has now filed its claim in this Court for reimbursement.

The report of the Department of Public Aid, signed by Gershom Hunvitz, Assistant to the Director, acknowledges that the supplies were purchased, and that “claimant is justly entitled to \$303.66,” and, further, that “the bills were presented after the close of the biennium, which was too late for payment.”

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in part, is as follows:

“Neither party objects to the entry of an order in favor of claimant, and against respondent, in the sum of \$303.66.”

This Court has held in numerous decisions that where the evidence shows that the only reason the claim was not paid was due to the fact that, prior to the time that a statement was presented, the appropriation lapsed, an award

will be made. *Thompson vs. State of Illinois*, 24 C.C.R. 487.

Claimant, Thenno-Fax Sales, Inc., A Corporation, is, therefore, hereby awarded the sum of \$303.66.

(No. 5205—Claimant awarded \$7,418.31.)

FRED THORNBERRY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

SCOTT AND SEBO, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—salary for period of unlawful discharge. Where claimant was illegally removed from his Civil Service employment, and there was *no* evidence of his failure to mitigate damages, he was entitled to back salary for period of unlawful discharge.

PERLIN, C.J.

Claimant, Fred Thornberry, seeks recovery for loss of wages incurred when he was suspended and discharged from his position as an employee of the Department of Financial Institutions, Cemetery Care Division, State of Illinois, from February 1, 1962 to June 30, 1963, inclusive.

The complaint, which with the stipulation filed in this case constitutes the record, alleges the following: That claimant is presently unemployed; that on February 27, 1961, claimant was certified as a Financial Institution Examiner II in the Department of Financial Institutions and continued to perform the duties of the office until January 31, 1962; that on January 24, 1962, a written application for the discharge of claimant was filed with the Department of Personnel by the Department of Financial Institutions, and, on January 29, 1962, the charges were approved by the Department of Personnel effective as of January 31, 1962; that, within 15 days after the receipt of the charges seeking dis-

charge, claimant requested the State Civil Service Commission to grant him a hearing on said charges,

Pursuant to such request, a hearing was set for March **9, 1962**, and was then continued by agreement of the parties to June **14, 1962**, with claimant reserving any back pay rights, which might accrue to him. Testimony was heard before the Hon. Melvin H. Routman, hearing officer for the Civil Service Commission of the State of Illinois and evidence was introduced by both parties to said proceeding. On August **31, 1962**, the hearing officer handed down his decision that claimant, Fred Thornberry, be discharged and removed from his position as Examiner II for the Department of Financial Institutions and from the services of the Department.

On September **25, 1962**, the Civil Service Commission unanimously concurred in, approved and adopted the findings and decision of the hearing officer and certified said decree to the Director of Personnel, State of Illinois, for enforcement.

A complaint for administrative review of the decision of the Civil Service Commission discharging the claimant was filed in the Circuit Court of Brown County on October **22, 1962** by claimant, Fred Thornberry. On November **15, 1963**, the Circuit Judge handed down his decision, which reversed the decision of the Civil Service Commission, and entered judgment for claimant. Claimant was ordered reinstated to his former position as Examiner II for the Department of Financial Institutions. The decision of the Circuit Court was affirmed by the Appellate Court for the Fourth District on June **11, 1964**.

Claimant further alleges that because of his reinstatement he is entitled to back pay and benefits from February **1, 1962** to and including June **30, 1963**, and that he has not received pay or benefits for this time because the funds of

the Department of Financial Institutions appropriated for such period lapsed due to the expiration of the fiscal bien-nium, and that there is now due and owing to claimant by respondent the sum of **\$8,760.00**. (Personnel Code, Chap. 127, Sec. 63(b), Ill. Rev. Stats.)

The stipulation submitted by the parties states that during the period of time in question, claimant earned the sum of **\$1,341.69**, which amount he would not have earned had he been employed by the Department of Financial Institutions, and that the amount so received constitutes a set-off against said claim. The stipulation further states that claimant is entitled to receive the sum of **\$7,418.31** from respondent and that the amount has not been **paid** by the Department of Financial Institutions solely because of a lapse of available appropriations, said appropriations having lapsed as of July 1, 1963.

This Court has long held that where a Civil Service employee is illegally prevented from performing his duties and is subsequently reinstated to his position by a Court of competent jurisdiction, he is entitled to the salary attached to said office for the period of his illegal removal, but that he must do all in his power to mitigate damages. *Schneider vs. State of Illinois*, 22 C.C.R. 453; *Poynter vs. State of Illinois*, 21 C.C.R.393; *Smith vs. State of Illinois*, 20 C.C.R. 202; *Cordes vs. State of Illinois*, 24 C.C.R. 491; *Bryant vs. State of Illinois*, case no. 5011; *Farber vs. State of Illinois*, case No. 5013.

No evidence of claimant's failure to mitigate damages has been adduced in this instance. Consequently there being no question of law or fact, claimant is hereby awarded the sum of **\$7,418.31**.

(No. 5207—Claimant awarded \$7,868.43.)

AXEL GILBERT ANDERSON, Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed May 11, 1965.

R. W. DEFFENBAUGH, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
Assistant Attorney General, for Respondent.

CIVIL SERVICE Am—salary for period of unlawful discharge. Where claimant was unlawfully discharged, he may seek back pay for the period of illegal removal, less credit to the State for supplemental earnings during said period of time.

SAME—determination of damages by court of claims. Court of Claims is not barred from independently determining claimant's damages, both with respect to mitigation of damages and set-offs of outside earnings during period of unlawful dismissal.

SAME—payment of court costs expended in another court. There is no authority in the Court of Claims Act for the payment of court costs expended in another court by a claimant.

DOVE, J.

Claimant is seeking an award for **\$11,370.00** for back salary as a Conservation Inspector I in the Department of Conservation of Illinois, Law Enforcement Division, from February **14, 1961**, on which date he was unlawfully discharged, to June **30, 1963**, plus court costs incurred by claimant in the amount of **\$110.30**.

On February **1, 1961**, William T. Lodge, Director of the Department of Conservation of Illinois, submitted to Maude Myers, Director of the Department of Personnel of Illinois, a written request for the separation of claimant from his employment as a Conservation Inspector I in the Department of Conservation of Illinois, Law Enforcement Division. Thereafter, claimant was laid off from his position on February **14, 1961**.

Subsequently, claimant filed a complaint for mandamus in the Circuit Court of Sangamon County, Illinois, and, on

March 9, 1964, a decree was entered directing William T. Lodge and Maude Myers to reinstate claimant to his position and title of Conservation Inspector I as of February 14, 1961.

From July 1, 1963 to the date of claimant's reinstatement, the court directed the Auditor of the State of Illinois to issue salary warrants and the Treasurer of the State of Illinois to pay such warrants in the amount of claimant's full salary and wages for such period.

From February 14, 1961 to June 30, 1963, for which period funds had lapsed, the Circuit Court order provided as follows:

“(e) That **this Court** orders and declares the plaintiff, Axel Gilbert Anderson, is entitled to and has a right to the **full** salary and wages of **his** said position as Conservation Inspector I in the Department **of** Conservation of Illinois from February **14, 1961**, to June **30, 1963.**”

On August 13, 1964, the Appellate Court for the Fourth District dismissed respondent's appeal from the Circuit Court of Sangamon County and issued its mandate to the Circuit Clerk of Sangamon County.

The State of Illinois has paid claimant in the amount of \$5,630.32, his full salary and wages for the period from July 1, 1963 to August 18, 1964, the date of his reinstatement.

Because of the lapse of appropriations, claimant has filed his complaint in this Court to recover his salary and wages for the period of February 14, 1961, through June 30, 1963.

In prosecuting his mandamus action in the Circuit Court, and in defending the State's appeal in the Appellate Court, claimant incurred court costs in the amount of \$110.30.

The mandate of the Appellate Court reads in part as follows:

“And it is further considered by the Court that the said appellee recover of and from the said appellants costs by him in this behalf expended the same to be collected in due course of law.”

There are two issues in this case:

(1) Respondent admits that claimant’s gross wages for the period of February 14, 1961, through June 30, 1963, are in the amount of \$11,370.00, but denies that claimant is entitled to an award for the full amount;

(2) Respondent denies that claimant is entitled to an award for his Circuit and Appellate Court costs.

It was stipulated by the parties that claimant’s outside earnings for the years in question were as follows:

1961\$ 370.00
1962	2,263.55
1963 (January 1, 1963, to June 30, 1963, inc.)	868.02

Total.	\$3,501.57

This Court is of the opinion that neither the language of Sec. 63-b-111, Chap. 127, 1963 Ill. Rev. Stats., nor the order of the Circuit Court of Sangamon County bars this Court from independently determining claimant’s damages —both with respect to mitigation of damages (see *Schneider vs. State of Illinois*, 22 C.C.R. 453), and set-offs of outside earnings during the period of unlawful dismissal (see *Poynter vs. State of Illinois*, 21 C.C.R. 393).

There is no authority in the Court of Claims Act for the payment of court costs expended in another court by a claimant. This part of the claim is denied.

Claimant, Axel Gilbert Anderson, may seek back pay for the period from February 14, 1961, to June 30, 1963, in the amount of \$11,370.00, less credit to the State for supplemental earnings during said period of time in the amount

of **\$3,501.57**, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of **\$7,868.43**.

Claimant is, therefore, awarded the sum of **\$7,868.43**.

(No. 5223—Claimant awarded \$3,300.00.)

RUEL R. HINDMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

MICHAEL F. RYAN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—salary for period of illegal lay-off. Where record discloses that claimant is entitled to back salary during period of illegal lay-off, and there is no evidence of failure to mitigate damages, an award will be made.

PERLIN, C.J.

On March 22, 1965, claimant, Ruel R. Hindman, filed his complaint in this Court seeking recovery for loss of wages for the period of January 16, 1963 to June 30, 1963, during which time he alleges he was laid off and prevented from performing his duties as a Marketing Specialist for the Department of Agriculture.

A stipulation in lieu of evidence was entered into by and between claimant and respondent, by their respective attorneys, and is as follows:

“That claimant, Ruel R. Hindman, after taking and successfully passing the examination held by the Civil Service Commission of the State of Illinois, was on, to-wit, June 8, 1956, certified and appointed to the position of Marketing Specialist in the Division of Markets of the Department of Agriculture of the State of Illinois.

“That claimant performed his duties in said position, and received the salary appropriated therefor and attached thereto until, to-wit, January 15, 1963, at which time he was laid off from his position by the then Director of the Department of Agriculture of the State of Illinois, the reason assigned for said lay-off being: ‘Lack of requests by Fruit Industry and

Fruit Brokers for fruit and vegetable Marketing Specialist work, which is authorized under Public Law No. 733.'

"Thereafter, on, to-wit, July **23, 1963**, claimant filed a complaint for mandamus against the agents of respondent, the Auditor of Public Accounts of the State of Illinois and the Treasurer of the State of Illinois; said complaint being filed in the Circuit Court of Cook County in cause entitled '*People of the State of Illinois, ex rel. Ruel R. Hindman, Plaintiff, vs. Robert K. Schneider, Director of the Department of Agriculture of the State of Illinois, Et Al, Defendants,*' No. 63 C 12550; that in said complaint claimant asserted that his lay-off was illegal and requested his reinstatement, together with back salary.

"Thereafter, the defendants in said proceeding filed their answer to the said mandamus complaint, and on, to-wit, February **10, 1965**, the Hon. Charles S. Dougherty, Judge of the Circuit Court of Cook County, entered a judgment order for the writ of mandamus; a true and correct copy of said judgment order being hereto attached, marked exhibit A, and by reference thereto incorporated herein; that in and by said judgment order the Circuit Court found that he had been illegally laid off from his position, and found that claimant was entitled to the payment of his salary for the period from January **16, 1963** to August **16, 1963** at the rate of \$7,200.00 per annum.

"That by virtue of the lapsing of the biennial appropriation, **expiring June 30, 1963**, respondent is unable to pay the back salary due for the period from January **16, 1963** to and including June **30, 1963**.

"That the judgment order, hereinabove referred to, was entered in full settlement of all controversies involved in said litigation, growing out of the lay-off of claimant, as aforesaid, and said judgment order is in full force and effect; has not been appealed from, and is in all respects final.

"That claimant, Ruel R. Hindman, by his counsel again represents that this claim has not previously been presented to any State Department or to any officer thereof; that claimant is the owner of said claim, and no assignment or transfer thereof has been made; that claimant is justly entitled to the amount herein claimed from the Department of Agriculture of the State of Illinois, after allowing all just credits; that claimant believes the facts stated in his complaint to be true; that this claim or any claims arising out of the occurrences set forth in the complaint have not previously been presented to any person, corporation or tribunal, other than the Department of Agriculture of the State of Illinois.

"That the amount due claimant from respondent for back salary covering the period from January **16, 1963** to August **16, 1963** is **\$4,200.00**, and the amount claimed herein for the period from January **16, 1963** to June **30, 1963**, being the period which has lapsed under the **1961-1963** biennial appropriation, is **\$3,300.00.**"

A Departmental Report, signed by R. M. Schneider, Director of the Department of Agriculture, has also been filed in this matter. It admits that claimant was employed

as a certified Marketing Specialist in the Department of Agriculture, Division of Markets, until January 16, 1963, at which time he was laid off. Further, it states that a judgment order for the writ of mandamus was entered by Hon. Charles S. Dougherty, but that due to the expiration of the biennium, the Department of Agriculture is unable to pay the salary of claimant for the period of January 16, 1963 to June 30, 1963.

There is no evidence to indicate that claimant failed to make a reasonable effort to mitigate his damages.

From the record in this case it would appear, and we are of the opinion that claimant is entitled to an award for his salary for the period of January **16, 1963** to June **30, 1963**.

An award is, therefore, hereby made to claimant, Ruel R. Hindman, in the sum of \$3,300.00.

(No. 5224—Claimant awarded \$1,081.72.)

POOR SISTERS OF ST. FRANCIS SERAPH OF THE PERPETUAL ADORATION-INC., An Indiana Not-For-Profit Corporation, d/b/a St. FRANCIS HOSPITAL, EVANSTON, ILLINOIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

CORCORAN AND CORCORAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

On December **30, 1963**, claimant, Poor Sisters of St. Francis Seraph of the Perpetual Adoration, Inc., An Indiana Not-For-Profit Corporation, d/b/a St. Francis Hospital,

Evanston, Illinois, presented its claim to the Cook County Department of Public Aid for hospitalization services rendered one Isabelle Corrigan. Although the Department had determined that the subject patient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, it denied the claim for services on the grounds that the appropriation for the biennium had lapsed at the time the statement was received by its office.

Thereafter, on April 8, 1965, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$1,081.72, representing charges for the hospitalization services furnished said Isabelle Corrigan for the period of May 5, 1963 to June 11, 1963.

A written stipulation was entered into between claimant and respondent, by their respective attorneys, which, in essence, supports the position of claimant in this matter. It indicates that claimant did furnish the services to the said Isabelle Corrigan, and that the reasonable and equitable charge for such services was the sum of \$1,081.72. The stipulation reflects the further fact that the appropriation from which payment could have been made had lapsed prior to the time the statements were submitted. These facts are not refuted by the Department of Public Aid in the Departmental Report filed in this case on April 28, 1965.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Memorial Hospital of Du Page County, A Corporation, vs. State of Illinois*, Case No. 5197, opinion filed January 12, 1965; *Siebert-*

Mathewson Medical Group, A Partnership, vs. *State of Illinois*, Case No. **5211**, opinion filed April 20, 1965. It appears that all qualifications for an award have been met in the instant case.

Claimant, Poor Sisters of St. Francis Seraph of the Perpetual Adoration, Inc., An Indiana Not-For-Profit Corporation, d/b/a St. Francis Hospital, Evanston, Illinois, is, therefore, hereby awarded the sum of \$1,081.72.

(No. 5228—Claimant awarded \$7,028.33.)

MILDRED DAVIS, Administrator of the Estate of ROBERT M. DAVIS, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1965.

SCOTT AND SEBO, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—*salary for illegal discharge*. Evidence disclosed that claimant was entitled to back salary less set-off for actual earnings during period of unlawful discharge, because claim was not paid solely due to lapse of available appropriations.

PEZMAN, J.

Claimant, Mildred Davis as Administrator of the Estate of Robert M. Davis, deceased, seeks reimbursement for salary for the decedent for the period of his illegal suspension and illegal discharge from his employment as a Financial Institution Examiner I in the Department of Financial Institutions of the State of Illinois for the period of February 1, 1962 to and including June 30, 1963.

A complaint was duly filed by the said Administrator in the Court of Claims, and respondent has filed no responsive pleadings thereto. A stipulation by and between claimant, as Administrator, and the Attorney General was entered into, which provides as follows:

“It is hereby stipulated and agreed by and between claimant, Mildred Davis, Administrator of the Estate of Robert M. Davis, deceased, her attorneys, Scott and Sebo, and respondent, State of Illinois, by William G. Clark, its Attorney General, that the complaint filed herein and the report of the Department of Financial Institutions signed by Joseph E. Knight, Director, which has been filed in this cause pursuant to Rule 14, shall constitute the record in this case.

“It is further stipulated and agreed that this claim arises out of the claim for wages by the claimant’s deceased, Robert M. Davis, as an employee of the Department of Financial Institutions, Cemetery Care Division, State of Illinois, covering the period of February 1, 1962, to and including the 30th day of June, 1963, totaling \$8,135.00, as set out in said complaint. That during said period of time the claimant’s deceased earned the sum of \$1,106.67, which amount he would not have earned had he been employed by the Department of Financial Institutions in the aforesaid capacity, and that the amount so received constitutes a set-off against said claim. That attached to this stipulation and made a part hereof are copies of the income tax returns of claimant’s deceased, Robert M. Davis, for the years of 1962 and 1963. That during the year of 1962 he earned a total of \$712.50, all of which was earned during the months of December, 1961 and January, 1962 while employed by the Department of Financial Institutions, as is established by the memorandum from the said Department, marked exhibit A and attached hereto, and made a part hereof. That the amount of \$712.50 is not a part of this claim. That during the year of 1963, from January 1, 1963, to June 30, 1963, claimant earned the sum of \$1,106.67, as is shown by exhibit 2c, attached hereto and made a part hereof. That claimant’s deceased’s income tax return, a copy of which is attached hereto, marked exhibit 2 and made a part hereof, shows his earnings and the earnings for the entire year of 1963, and the earnings of his wife, Mildred Davis, as shown by exhibits 2a and 2b; that claimant’s deceased had made every reasonable effort to mitigate damages.

“That the sum of \$1,106.67 is the amount stipulated herein as a set-off against the claim of the Estate of Robert M. Davis, deceased, claimant herein. That claimant is entitled to receive the sum of \$7,028.33 from respondent, State of Illinois. That said sum has not yet been paid by the Department of Financial Institutions solely because of a lapse of available appropriations, said appropriations having lapsed as of July 1, 1963.”

From the facts set forth in the stipulation it appears that the decedent made every reasonable effort to mitigate the damages caused by his illegal discharge. The appropriation for such services rendered prior to June 30, 1963 lapsed.

The Court of Claims has expressed itself thoroughly on this point in the case of *Schneider vs. State of Illinois*, 22 C.C.R.453, as well as in the cases of *Secaur vs. State of Illi-*

nois, 21 C.C.R. 364, and *Poynter vs. State of Illinois*, 21 C.C.R. 393.

Claimant is, therefore, hereby awarded the sum of \$7,028.33.

(No. 5052.—Claimants awarded \$4,074.00.)

LEONARD BENVENUTI AND MARY BENVENUTI, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1965.

PERONA AND PERONA and TOBIAS G. BARRY, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; JOHN C. CONNERY, Special Assistant Attorney General, for Respondent.

HIGHWAYS—damages from public improvement. Where evidence disclosed that claimants suffered damages for loss of market value of their real estate, by reason of public improvement made on the neighboring highway, an award will be made in the amount of such loss.

SAME—statute of limitations. The statute of limitations is not a defense in a continuing claim, where the entire project is considered as one improvement.

DOVE, J.

The facts of the case are as follows:

Leonard Benvenuti and Mary Benvenuti are the owners of a parcel of real estate, which measures approximately 80 by 138 feet, and is located at the northeast corner of Center and Plain Streets, Peru, Illinois. The real estate is improved with a two-story imitation brick building, the upper story of which is a three-bedroom flat, and is the claimants' residence. Claimants purchased the premises in 1934, and have since that time made the flat their residence. Except from 1950 for the period to 1958, they have operated the lower floor as a restaurant and tavern.

In December of 1955, the first of several contracts was

awarded for a highway bridge and cloverleaf improvement located immediately to the east and north of claimants' property. Construction on the bridge was stopped on June 16, 1956, and it was opened to traffic by June of 1962. The completed construction rises 30 to 35 feet above the ground level of claimants' property, and is built upon a dirt fill. Claimants' direct access to the highway was lost when Plain Street was closed as part of the construction of the cloverleaf.

It appears from the pleadings and evidence that claimants suggest they incurred damages of almost every conceivable type as a consequence of this highway improvement, including loss of business profits, reduction in the value of their real estate, change of water course, trespass by State employees, **2, 4-D** spray damage to their garden, and damages to the roof of the building caused by the debris thrown from the bridge by persons unknown.

Most of the facts appear to be supported by photographs, which were introduced in evidence. It further appears from the evidence that there were a number of storms or heavy rainfalls during the course of construction, particularly in 1962, which caused surface water carrying dirt and debris to flow in and about claimants' premises from the earthen embankments. It also appears that the Department of Public **Works** and Buildings did in August of 1962 construct a concrete ditch at the foot of the cloverleaf, immediately to the north of claimants' property, to divert surface water around and along the west right-of-way of the bridge.

Proofs regarding the loss of market value are in conflict, but the evidence does establish loss of market value beyond any doubt, which we find to be \$4,000.00.

Respondent's suggestion that the Statute of Limitations is at least a partial defense to this action is unfounded. This

was a continuing claim, which began in 1956, and the entire project must be considered as one improvement. (*Kershaw vs. State of Illinois*, 21 C.C.R. 389.)

From the evidence, the Court finds that claimants have suffered damages in the amount of **\$4,074.00**, consisting of **\$4,000.00** for loss of market value of the real estate, and **\$74.00** for plants destroyed in August of 1960 by 2, 4-D spray.

An award is, therefore, made to claimants, Leonard Benvenuti and Mary Benvenuti, in the sum of **\$4,074.00**.

(No. 4957—Claim denied.)

JOHN EDWARD SCHUCK AND THE MARYLAND CASUALTY COMPANY,
Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 25, 1965.

NICK D. VASILEFF and V. ROBERT MATOESIAN, Attorneys
for Claimants.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

HIGHWAYS—duty to public using highways. State is not an insurer against all accidents occurring on its highways, but only has duty to keep its highways reasonably safe for ordinary travel by persons **using** due care and caution for their own safety.

SAME—contributory negligence. Where claimant fails to keep his vehicle under control, he is not free from contributory negligence and will be denied recovery.

PERLIN, C.J.

Claimants seek recovery of **\$677.96** for monies expended to repair a 1959 Chevrolet automobile, which was owned by claimant John Edward Schuck, and insured by claimant The Maryland Casualty Company.

This claim arises out of an accident, which occurred when **Leo** Edward Schuck, the son of claimant, was oper-

ating the vehicle on July 13, 1960 at about 4:50 P.M. along a frontage road, which ran parallel to Interstate Route No. 70, near the City of Collinsville, and collided with a tree.

Route No. 70 and the frontage road were being constructed under the supervision and by authorization of the State of Illinois, Division of Highways. Claimants contend that the State of Illinois failed to maintain the frontage road in a reasonably safe condition, and failed to warn the driver of a sudden drop-off, decline, and sharp curve in the road, which were not apparent until reached by the motorist.

In order to recover, claimant must prove by a preponderance of the evidence (1) that Leo Schuck was free from contributory negligence; (2) that respondent was negligent; and (3) that such negligence was the proximate cause of the accident.

The evidence shows that the accident happened in the daylight. The weather was clear, and the road was dry.

The Departmental Report, which was submitted by the Division of Highways, describes the Frontage Road as follows:

“The design, intent and purpose of a frontage road is to afford ingress and egress to owners whose properties lie adjacent thereto. A frontage road differs from an access highway in that the former does not connect with the adjoining primary highway route; in this instance with Federal Aid Interstate Route No. 7, Section 60-8, Madison County, Illinois.

The frontage road has its beginning at Keebler Road, and extends southwesterly a distance of approximately 4,925 feet, where it terminates at the entrance to the L. E. Morris property. The centerline of the frontage road lies 100 feet northwesterly from Route No. 7, and has the following construction characteristics: It is 20 feet wide with a 5 foot earth shoulder on each side, and has a bituminous treated surface on a base course of crushed stones 6 inches in thickness.”

Leo Edward Schuck testified that immediately before the accident he was on North Keebler road on his way back to his office. “At the point where North Keebler goes under Interstate Route No. 70 there is an access road, which I

wanted to use to save me some time in getting back to the office.”

He testified that he was traveling west on the access road to reach Interstate Route No. 70. He had followed this route before. He found that the connecting lanes, which he had previously used were blocked by posts, and, thinking that there would be some outlet to the highway, he kept on, and

“before I realized I was looking—I was at the top of a hill. You might say I was going level all the time. I didn’t actually go up a hill, but I was at the top of a drop-off, you might call it, and all I could see wag down, and the road dipped pretty quick, and curved to the right at about a forty degree angle, and, of course, the first thing I did I applied the brakes. It did no good because the chat was loose, and there was a tree straight ahead, which, of course, I tried to avoid, and I guess if it hadn’t been for the slippery grass right there, then I probably wouldn’t have slid into the tree head on. However, I did sideswipe it, and I might mention the weather was good, and the light was sufficient, and the sun wasn’t bothering me or anything, and it was a good road, and I mean, it was not bumpy or anything or not slippery, nothing of that nature; also the road was in no way or in no manner posted as to speed limits or restricting of the thoroughfare in any manner at all. I mean there was nothing, no signs of any nature placed alongside the road.”

Mr. Schuck stated that he had driven on the road in question once the week before the accident, but had never driven down the road to the point “where it drops down.”

The road onto which he turned was not marked as an access road, nor were there any signs of identification. Schuck stated that he turned off Keebler onto the frontage road in order to avoid the rough road, which lies between the underpass of Interstate Route No. 70 and City Route No. 40. He expected to get onto Interstate Route No. 70, although there were no signs indicating that he would do so by going in that direction.

Keebler Road was a two lane road of oil and chat, and is a country road. The point at which Schuck turned off onto the frontage road was not marked as a State route. The road

in question was of tar and chat, and the chat was still loose. He drove about a mile and a half before the accident occurred. The "road," which he had used to get from the frontage road to Route No. 70, was a dirt path, which had been used by a construction company. He then drove across the shoulder of Route No. 70 to get onto the highway. Schuck estimated his speed at 35 miles per hour at the time of the accident, but he was not watching the speedometer. He did not use his brakes until he noticed that the road curved. He missed the curve, then collided with the tree, and thereby damaged the automobile.

There were no other witnesses to the accident.

Sergeant Allen E. Smith of the Illinois State Highway Police investigated the accident. He stated that no signs designated the frontage road, and that the road was in no way connected with Interstate Route No. 70. He left his car on Route No. 70, and walked a short distance to reach the accident scene. Sergeant Smith patrolled the area as part of his duties, but had never traveled on the frontage road, nor did he recall at any time seeing cars travel onto Route No. 70 from the frontage road.

Carl Schlosser, a construction engineer with the Illinois Division of Highways, testified that Interstate Route No. 70 was a limited access road, and that the frontage road is a service road intended for the use of the property owners on that side of the Interstate. The frontage road is 20 feet wide, and is not marked with a center line. It ends at the L. E. Morris property. He further testified that contractors did use a connection between the frontage road and Interstate Route No. 70 prior to the time Interstate Route No. 70 was open for traffic, but, when the highway was opened, the contractors were restricted to the same traffic pattern as the motoring public.

It is the opinion of the Court that claimant has not

proven freedom from contributory negligence. It is the duty of a driver to keep his vehicle under control, and failure to do so amounts to negligence.

He has shown no hazardous or dangerous condition of which the State had either actual or constructive notice. There have apparently been no accidents or complaints in regard to this portion of the highway, nor is it apparent that failure to post signs on a roadway used by so few motorists was a breach of respondent's duty to keep its highways reasonably safe for ordinary travel by persons using due care and caution for their own safety. The State is not an insurer against all accidents which occur on its highways. (*Beenes vs. State of Illinois*, 21 C.C.R. 83). (*Hook vs. State of Illinois*, 22 C.C.R. 629, *Gray vs. State of Illinois*, 21 C.C.R. 521, *Link vs. State of Illinois*, 24 C.C.R. 69, *Vesci vs. State of Illinois*, 24 C.C.R. 23).

Leo Schuck was not unaware of the gravel surface of the road, since he had traveled about one and a half miles on the same before reaching the curve. His own testimony indicated that he was not looking at the road, but was looking for a way to cross from the frontage road to Interstate Route No. 70 instead of anticipating a possible change in the curvature of the road.

For the foregoing reasons, claimants are hereby denied recovery.

(No. 4976—Claim denied.)

DONALD EMM AND JOHN VANDA, Claimants, *vs.* **STATE OF ILLINOIS**, Respondent,

Opinion filed June 25, 1965.

THOMAS R. FLOOD, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; EDWARD G. FIN-

NEGAN and EDWARD A. WARMAN, Assistant Attorneys General, for Respondent.

HIGHWAYS—negligence. State is not insurer of highways, but is required only to keep them in reasonably safe condition for purpose to which they are devoted.

SAME—negligence. Placing adequate warning signs fulfills State's obligation to users of highway.

EVIDENCE—burden of proof. Claimant has burden of proof to show freedom from contributory negligence, or claim will be denied.

NEGLIGENCE—contributory negligence. Record disclosed that claimants knowingly ignored the warning signs, exposing themselves to danger, thus failing to establish freedom from contributory negligence.

DOVE, J.

Claimants, Donald Emm and John Vanda, filed their complaint in this Court on April 27, 1961. They seek to recover for damages to Emm's car as well as compensation for personal injuries, alleged to have been sustained on April 30, 1960, while driving on State Route No. 17, approximately 17 miles west of Kankakee, Illinois. The amount of damages claimed by Claimant Emm is \$3,500.00, and that by Claimant Vanda is \$2,500.00.

From the evidence it appears that on April 30, 1960 at 11:00 P.M., claimants collided with a bridge, which was being constructed on Route No. 17, approximately 17 miles west of Kankakee, Illinois. Donald Emm was the owner and driver of the 1955 Pontiac Sedan, and John Vanda was a passenger riding in the right front seat at the time of the accident.

Route No. 17 west of Kankakee was under construction at the time. Detour signs were posted. Numerous signs were posted for the direction and control of westbound traffic from Washington Street in Kankakee to 17 miles west of Kankakee were in place on the date of the accident. All of the signs faced east, were reflectorized, and had their messages in black on yellow backgrounds. Signs at the west

edge of Kankakee at Washington Street indicated that the road was closed to all except local traffic, and the Superintendent of Highways. Emm testified that he had his lights on bright; that he saw signs "17 Closed West Detour"; another, as he approached Lehigh Road, reading "To Illinois 17 Detour 4 Miles"; another, as he approached Warner Bridge Road 10 miles west of Kankakee, which read "17 Closed West Detour Use 45-52 to 115." These signs were all 36" × 36" in size. Emm also testified that he saw another sign at the Warner Bridge Road saying "Barricade Ahead," and beyond that sign another sign saying "Bridge Out," and just beyond that sign another sign saying "Road Closed." All these signs were 36" × 36" reflectorized. At the next road, Goodrich Road, further travel westward on Route No. 17 was blocked by a permanent barricade across the middle of the road, which was equipped with flashing warning lights and a sign "Barricade Ahead." He did not turn off at any of the posted detour signs at Washington Street, Wall Street, Lehigh Road, Warner Bridge Road or Goodrich Road detours.

Of the three bridges, which were out in the construction area, the first was west of the Goodrich Road barricade, and was protected by a permanent barricade with flashing warning lights and a 24" × 24" reflectorized sign on the shoulder which read "Barricade Ahead." Approximately 400 feet further there was a "saw-horse" in the middle of the road upon which hung a 36" × 36" reflectorized sign reading "Bridge Out," and a run-around or by-pass around the bridge, which claimants followed.

As they proceeded along the "rough road at about 40 to 45 miles per hour, they saw another 24" × 24" reflectorized sign on the shoulder, which read "Barricade Ahead," and 400 feet further down the road a barricade across the road with a 36" × 36" reflectorized sign on it reading "Bridge

Out” and indicating another by-pass around the bridge. Claimants proceeded on this by-pass, and continued west on Route No. 17.

Approximately two miles further, the road became “definitely bumpy and with loose gravel,” and they saw another 24” × 24 reflectorized sign reading “Barricade Ahead.” Claimants saw this, and “began to slow down, because the road was so bad at this point, and he figured there were more detours ahead,” and they proceeded west for about 400 feet at about 40 to 45 miles per hour, where they hit a “saw-horse” barricade, which was knocked down, and lying in the road. To this barricade was attached a 24 × 24 reflectorized sign reading “Bridge Out.” Claimants’ right front tire struck the “saw-horse” barricade, and “they immediately ran into building materials and debris, which were piled on the pavement.” Emm applied the brakes, and the car slid forward into a 2½ foot high concrete abutment which was the floor of the bridge. The resulting impact totally wrecked the car and caused the injuries complained of.

Emm sustained cracked ribs, contusion above his right eye, lacerations to his left elbow, and was “very badly shaken up.” His doctor bill was \$12.00 that evening, plus a later doctor and hospital bill of \$48.00, and he lost twelve working days.

Vanda’s injuries occurred as he was thrown into the windshield at the time of impact. He suffered facial lacerations, which required sixteen stitches, and a chipped tooth. He was never admitted to a hospital. His doctor bill was \$20.00, and he lost three weeks of work. He claims a vision loss in his left eye from 20/20 to 15/20, and has 20/20 vision in his right eye.

Two State Highway Engineers testified for respondent, as did the State Trooper who worked the accident. The

engineers testified as to the various road signs and construction warnings. The State Trooper verified that all warning signs were up after the accident, except for the knocked-down “saw-horse” east of the third bridge, which claimants testified they struck.

Claimant Emm testified further that they had each had six or eight small beers during the day, and had eaten supper about 10:15 P.M. in Kankakee, about **45** minutes prior to the accident. In Kankakee they had asked directions from a gas station attendant, as they were not familiar with the roads in the area, and had 60 miles to go to their home. Then, while traveling on Route No. **17** prior to the accident, both Claimants had discussed the fact that they were in a construction area, and questioned whether they had been given correct directions.

It is undisputed that in the 10.2 miles prior to the construction zone there were nine warning signs indicating that the road was closed, and also indicating an alternate route. Prior to entering the actual construction zone, there were **5** roads on which to turn and take an alternate route, and thus avoid the construction zone.

The construction zone itself began behind a permanent-type barricade, which extended across the middle of Route No. 17, and was illuminated by flashing warning lights. Claimants went around the barricade, and traveled approximately **2.8** miles in the construction area, by-passing two “Bridge Out” and warning signs before reaching the scene of the accident at the third bridge.

The evidence is ample that both the driver of the car, Donald Emm, and his passenger, John Vanda, were aware of the prohibition against entering the construction zone prior to the time of their entry, and discussed the fact that the road was closed to traffic; that there were warning signs

all along the road; and that they were definitely going the wrong way.

The contention of claimants is that the State of Illinois was negligent in maintaining this particular portion of Route No. 17, and they allege their freedom from contributory negligence. The evidence fails to establish that claimants were in the exercise of due care. The record and claimants' own testimony prove that the proximate cause of the accident was the negligence of claimants, and that there was no negligence on the part of respondent.

We have previously held that the burden of proof is upon a claimant to show freedom from contributory negligence, and, where he fails to meet such burden, his claim will be denied. (*Paul I. Howell, as Administrator of the Estate of Luella Howell, Deceased, vs. State of Illinois*, 23 C.C.R. 141 at 145). A party has no right to knowingly expose himself to danger, and then to recover damages for an injury which he might have avoided by the exercise of reasonable and ordinary care. (*Withey vs. Ill. Power Co.*, 1961, 32 Ill. App. 2d 162). Each of the claimants saw, and knew of the existence of the signs. They also knew of the danger of traveling on a closed road with bridges out and that they were going the wrong way. Yet they ignored all of the warnings, and at 11:00 P.M., after spending a day, which included drinking some six to eight beers apiece, they sped down an unfamiliar road, which was under construction, all the while discussing but disregarding numerous signs stating "17 Closed West Detour," "Road Closed," "Barricade Ahead," and "Bridge Out."

The State of Illinois is not an insurer against all accidents upon its highways, but, as we have previously held, it is required only to keep them in a reasonably safe condition for the purpose to which the portion in question is devoted, and the placing of adequate signs warning of the

conditions to be met fulfills the obligation of the State to the users of the highway. (*Grant, Et Al, vs. State of Illinois*, 21 C.C.R. 563).

It is evident that claimants have failed to prove their asserted causes of action by a preponderance or greater weight of the evidence.

Awards to claimants, Donald Emm and John Vanda, are hereby denied.

(No. 4990—Claim denied.)

JOEL RESNICK, A Minor, By SAMUEL RESNICK, His Father and Next Friend, and SAMUEL RESNICK, Individually, DOROTHY RESNICK, LILLIAN ALPERT, and SHIRLEY ALPERT, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 29, 1965.

Petition of claimants for *rehearing* denied June 25, 1965.

ANGELOS AND ANGELOS, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; SAMUEL I. NEIBERG and GERALD S. GROBMAN, Assistant Attorneys General, for Respondent.

NEGLIGENCE—*scope of employment.* If a State employee commits a tortious act while on “frolic of his own,” and for purpose unconnected with work he was hired to perform, claimant will be denied recovery.

EVIDENCE—*burden of proof.* Evidence disclosed claimant failed to sustain burden of proving respondent’s employee was acting within **scope** of **his** employment when accident occurred.

DOVE, J.

Claimants bring this action to recover damages for injuries to their persons and property, which were sustained on December 3, 1960 at the intersection of Mannheim Road and Washington Boulevard, near the Village of Bellwood in Cook County, Illinois,

From the transcript of the evidence, it appears that on

said date, at about 7:45 P.M., Joel Resnick, a minor, age 18, was driving Dorothy Resnick's automobile in a northerly direction on Mannheim Road, and caused it to come to a stop at the intersection of Washington Boulevard and Mannheim Road. The front seat was occupied by Joel Resnick, the driver, and his mother, Dorothy Resnick. The rear seat was occupied by Samuel Resnick, father of the driver, and Shirley and Lillian Alpert, sisters of Dorothy Resnick. On February 8, 1963, subsequent to the filing of this action, Claimant Shirley Alpert died, and her claim has been abated.

While stopped, waiting for the traffic signal to change, claimant's automobile was struck on the left rear and side by a truck, which was owned by the State of Illinois, and was driven by one Arthur Cihlar, a maintenance worker for the State of Illinois, Division of Highways. On this particular day, Saturday, he was working as a watchman in the Highway Department Garage, having volunteered for said assignment at the close of work the day before.

A Departmental Report was filed by respondent. It states that the driver of the truck was a maintenance worker; that the scope of his duties did not include the operation of a division-owned automobile or truck; and, that his use of the truck on the day of the accident was unauthorized.

Dorothy Resnick testified that, as a result of the collision, she received injuries to her chest, neck and head; that she saw Dr. Peter Hatzis on the evening of the accident, on two other occasions at her home, and about twelve times at his office. She also testified that she was employed as a clerk for the Chicago Police Department at a salary of \$66.00 for a five-day week; that, as a result of this accident, she was off work for seven days, which amounted to the sum of \$92.00.

Lillian Alpert testified that she was sitting in the center of the rear seat at the time of the accident; that she sus-

tained injuries to the left side of her face and cervical spine; that she was attended at home by Dr. Peter Hatzis on the evening of the accident, twice more at home, and several times at his office.

Joel Resnick testified that he was driving the automobile on the night in question; that he sustained injuries to his chest, shoulder and elbow; that he was attended by Dr. Peter Hatzis at home on the night of the accident, and saw Dr. Hatzis at his office six or seven times thereafter. He stated that he now feels fine, and apparently has no ill effects from the accident.

Samuel Resnick testified that he was sitting in the rear seat of the automobile at the time of the accident; that he sustained injuries to his left jaw, chest and neck; that he was seen by Dr. Hatzis at home on the evening of the accident, and saw the doctor at his office eight or ten times thereafter; and, that he lost one day from work.

Dr. Peter Hatzis, a physician and surgeon, testified that he treated all of the claimants, attending them at their home on the night of the accident, and at his office on various other occasions. His diagnosis of each of the claimants substantiated their injuries.

Arthur Cihlar was called as a witness for claimants, and testified that he was employed by the State of Illinois from the end of 1959 until 1961; that he was employed as a maintenance worker in the Maintenance Department of the Division of Highways; that, at the time and place in question, he was operating the dump truck that struck the claimants' vehicle; that he received a phone call regarding a hole in a road; that he loaded the truck with sand and gravel, and was proceeding to the location when he struck the car while making a left turn at the intersection of Mannheim Road and Washington Boulevard; and, that on the day of the accident he had no driver's or chauffeur's license. The

witness further testified that he volunteered to work on Saturday, and received the keys from the superintendent; that this was the first time that he had done this type of work, and, although he reported for work at four o'clock in the afternoon, he had had four or five highballs at a bowling alley before reporting. The witness further testified that he received a telephone call from a man in the State Highway Office saying that "traffic is tied up on Washington and Mannheim, that I am to take the bombs and flares away and fill the hole with gravel so that the cars can ride over it."

Arthur Cihlar further testified that he did not know who called him, and that he never found the hole or the lights and flares mentioned by the party on the telephone. After the accident, the police charged the witness, Cihlar, **with** driving under the influence of intoxicating liquor, negligent driving, and with having no driver's license.

Steven Komerek was called as a witness for respondent. He testified that he is now retired, but on the day of the accident was supervisor for the Illinois Division of Highways at the Hillside Garage; that he was Arthur Cihlar's supervisor, and picked him for the job as watchman on the Saturday in question, after Cihlar had volunteered to work. He further testified that he gave Cihlar verbal instructions as to his duties; that he showed him the telephone, the maps, and the names of the men in each district that he was to call in case of trouble; that if he couldn't get a certain man, he was to call the witness; and that, as watchman, he was not supposed to leave the garage. The witness, Komerek, further testified that he never received a report of any damage or hole on Mannheim Road or Washington Boulevard.

The record raises serious doubt as to the credibility of Arthur Cihlar's testimony that he drove respondent's vehicle, while endeavoring to promote the State's business.

The evidence discloses that the witness, Cihlar, had four or five drinks a few hours prior to his reporting for work on the evening in question, and we are of the opinion that Arthur Cihlar committed his tortious act, while on a “frolic of his own,” and for a purpose wholly unconnected with the work he was hired to perform. Where an employee, without the express or implied consent, has his employer’s vehicle on a journey of his own, for a purpose wholly unconnected with the work he is hired to perform, his relationship is suspended during the whole of such journey. *Cohen vs. Fayette*, 223 Ill. App. 458.

The Court finds that claimants have wholly failed to sustain their burden of proving that they are entitled to an award for injuries and property damage, which were sustained as a result of this accident, and the complaint is hereby dismissed.

(No. 3025—Claimant awarded \$3,533.65.)

ELVA JENNINGS PENWELL, Claimant, OS. **STATE OF ILLINOIS**,
Respondent.

Opinion filed November 9, 1965.

GOSNELL AND BENECKI and **JOHN W. PREIHS**, Attorneys
for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
Assistant Attorney General, for Respondent.

WORKMEN’S COMPENSATION ACT—*supplemental award*. Under the authority of *Penwell vs. State of Illinois*, 11 C.C.R.365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period from February 1, 1963 to February 1, 1964.

PEZMAN, J.

On June 3, 1964, claimant filed her petition for reimbursement of monies, expended for nursing care and help, medical services, and expenses for a period of time from February 1, 1963 to February 1, 1964.

Claimant was injured on February 2, 1963 in an accident arising out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness, and general paralysis. The facts are fully detailed in the case of *Penwell vs. State of Illinois*, 11 C.C.R. 365, in which an initial award was made, and at which time jurisdiction was retained to make successive awards in the future.

The present petition alleges that there has been no improvement in the physical condition of claimant; that she is still bedridden; that complete paralysis of her lower abdomen and legs has continued; that she remains confined to bed; that her condition generally continues as it has been related to be in the petition; and, that she required constant care by physicians, registered and practical nurses, and other practical help during the period of time claimed above. Attached to the petition and made a part thereof by reference is an itemized statement or bill of particulars, marked Exhibit No. 1, showing all expenses incurred by claimant from February 1, 1963 to February 1, 1964 for said medical, nursing, and other expenses, and, in explanation thereof, affidavits have been filed in said cause by Walter W. Hutton, a Doctor of Osteopathy, practicing at Springfield, Missouri, and Hugh A. Townsley, a Doctor of Osteopathy, practicing at Dayton, Ohio.

An evidentiary deposition of Elva Jennings Penwell, claimant, was taken at the request of respondent. It was taken at Barnes Hospital in St. Louis, Missouri, and substantiates the claim of Elva Jennings Penwell with relation to her need for medical and nursing services. Testimony contained in the deposition indicates that claimant spends a great deal of time with her children in different locations throughout the country. Claimant testified, "Well, I go to

live with my children when I don't have any money. Just as of the last year I have been in Norfolk, Virginia. I have one daughter whose husband is in the Navy that is there. And then on up to Rhode Island, I was there last spring and last summer, and I returned to Dayton, Ohio, and I stayed there all winter until May when I came back to Beecher City."

The Workmen's Compensation Act provides that 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 accidental injury, shall be furnished to the injured person. The only limitation involved would be whether or not the services rendered were reasonably required to cure or relieve the claimant. Inasmuch as claimant's condition is incurable, we must assume that the care required will be necessary for her lifetime. Claimant submitted the affidavits of two professional men who state under oath that the services claimed for in claimant's petition are all necessary medically.

The Bill of Particulars attached to the petition discloses the amounts expended by the petitioner for the period of time claimed, from February 1, 1963 to February 1, 1964, to be as follows:

1. Nursing and practical help.\$1,123.10
2. Room and meals.....	638.75
3. Drugs and supplies	485.34
4. Physicians and professional services.....	1,286.46
	<hr/>
Total.	\$3,533.65

Respondent, by the Attorney General, directed the Court's attention to Sec. 138.8, sub-paragraph (a), of Chap. 48, 1963 Ill. Rev. Stats., which provides that 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 accidental injury shall be furnished to the injured person. It was the Attorney General's opinion that the only limitation on the amount of care to be furnished in the case at hand would be that which is reasonably required to cure or relieve claimant and further stated "that, since claimant's condition is incurable, then, of course, it follows that the care required will be necessary for her lifetime."

An examination of the petition and the supporting exhibits, as well as the testimony of claimant contained in the deposition, indicates that claimant's condition has not improved, and that the expenditures of the sums of money set forth above were reasonably required to relieve claimant from the effects of the original accidental injury, which was previously determined by this Court to be compensable in the case of *Penwell vs. State of Illinois*, 11 C.C.R. 365.

An award is, therefore, made to claimant in the amount of **\$3,533.65** for the period of time from February 1, 1963 to February 1, 1964.

This Court reserves jurisdiction for further determination of claimant's needs for additional care.

(No. 4856—Claimant awarded **\$5,500.00.**)

HATTIE MITCHELL, Administratrix of the Estate of **SELMA MITCHELL**, Deceased, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

Opinion filed November 9, 1965.

PERRY, EUBANKS AND WOOLFORD and **CHAUNCEY ESKRIDGE**, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **EDWARD A. WARMAN** and **LESTER SLOTT**, Assistant Attorneys General, for Respondent.

PRISONERS and INMATES—*duty of care owed to patients.* Where evidence disclosed that the State, through its employees, failed to meet its responsibility to provide a reasonable and humanitarian care for the patients of a State institution, an award will be made.

DOVE, J.

Claimant, Hattie Mitchell, as Administratrix of the Estate of Selma Mitchell, deceased, filed her complaint in this Court on January 29, 1959 seeking an award for the wrongful death of her daughter, Selma Mitchell, who died on November 17, 1958, while a patient at the Chicago State Hospital, an institution for the mentally ill, operated by the State of Illinois. Claimant seeks an award of \$25,000.00.

From the evidence it appears that the decedent, Selma Mitchell, at the age of twenty-two, died at the Chicago State Hospital following a fight on November 17, 1958 between the decedent and one Alice Ambrose, a ward attendant; that the decedent was subdued into unconsciousness by the use of wet towels wrapped around her neck; and, that she was given an injection of a drug after she had been subdued, and was pronounced dead approximately three hours later.

The evidence further discloses that Selma Mitchell, the decedent, had had a normal birth, and appeared to be a normal child in every way until the age of eight, at which time she began to have epileptic seizures. When she was nine years of age, she fell into the stove, and her clothing caught fire, seriously burning and disfiguring her from the neck down to her hips. From the age of nine through twenty-one, she was a patient at the Dixon State Hospital as a result of epileptic seizures, and her mother's inability to properly care for her at home. The evidence discloses that Selma's mental age was between five and seven years, and that she could take care of her own self, i.e. eating, washing, and dressing. She could do menial labor tasks such as cleaning and mopping floors. The evidence further dis-

closes that, as Selma reached adolescence and physical maturity, she developed, emotional and antagonistic behavioral patterns, and occasionally had fights with other patients and supervisory personnel. As a result of the behavioral patterns, and upon request of Hattie Mitchell, Selma was transferred from the Dixon to the Chicago State Hospital in September, 1958.

The full medical history of Selma Mitchell was transferred with her to the authorities at the Chicago State Hospital, and the medication for her tantrums and the control of her epilepsy seizures was prescribed and continued. Selma was assigned to Ward CW9 in the Chicago State Hospital, which was considered to be the control ward for the seriously disturbed epileptic patients.

Ward CW9 on the day in question had forty-five patients and one ward attendant, Mrs. Alice Ambrose, age forty-one. At approximately 9:00 A.M., Mrs. Ambrose told Selma and two other girls to start swabbing the floor. Selma did not want to do so, but reluctantly complied. The evidence discloses that some discussion was had between them, and that Selma called Mrs. Ambrose a "bitch." The evidence further discloses that Mrs. Ambrose then called Selma a "bitch," and a fight ensued. When other patients attempted to help Mrs. Ambrose, she said she would take care of Selma herself. She asked another patient to get the "persuader," which was a wooden-handled radiator brush approximately eighteen inches long. One of the patients brought Mrs. Ambrose the "persuader," and the evidence then discloses that Mrs. Ambrose got on top of Selma Mitchell, and commenced hitting her upon the head and body with the "persuader," eighteen to twenty times until she broke the "persuader." Then Mrs. Ambrose told another patient to go get a wet towel, which was put around Selma Mitchell's neck, and twisted in the back until it was tight.

Mrs. Ambrose then got behind Selma, pulled her to her feet, and asked her if she would stop fighting. One of the witnesses stated that at this time Selma was clawing at the towel, her mouth was open, and her eyes protruded. She made no answer, and Mrs. Ambrose then said: "Well, when I get you restrained against the post you will stop," and proceeded to walk Selma to the post in the center of the room about eighteen feet away. While they were approaching the post, Selma was clawing at the towel, her mouth was open, and her eyes protruded. When they got about a foot from the post, Selma collapsed. Mrs. Ambrose then had another patient go to the clothes room to get restraints, and tied Selma to the post in a squatting position. At this time Selma's head was hanging down, and Mrs. Ambrose told another patient to hold the towel around Selma's neck while she went to prepare a needle, she administered a tranquilizer to Selma by injection in the buttocks.

The evidence further discloses that Mrs. Ida Booten, R.N., a supervisor, came into room about this time together with a Mrs. Fleming, an attendant in another ward, and a Mrs. Oxford. One of the attendants helped Mrs. Ambrose administer the tranquilizer. Mrs. Booten, the supervisor, did not say anything, and they took Selma out of the restraints, and helped put her to bed. At the hearing, a witness testified that Mrs. Ambrose was trying to get Selma's pulse, but was unable to do so.

About 11:00 A.M., or approximately an hour after Selma was choked into unconsciousness, and before the patients went down to eat, one went over to Selma's bed, and said she could not get a pulse, and stated "she is cold." Mrs. Ambrose said: "Well, that is because the door is open."

The doctor was not called, but came on his ward rounds at 1:15 P.M. At that time Mrs. Ambrose met him at the door, and told him what had happened. He wrote in the

day book, and then went off the ward without looking at Selma who was still in bed. Mrs. Ambrose then went over to Selma's bed, and said to another patient: "Call the doctor back. I can't get a pulse on Selma." The doctor returned in about fifteen minutes, and pronounced her dead.

The evidence further discloses that such treatment of patients by the ward supervisor in question and other hospital personnel, i.e., beating them with a "persuader," and subduing them into unconsciousness by twisting a wet towel around their necks, was not an unusual occurrence **at** the Chicago State Hospital, and that Mrs. Ambrose had done this many times before.

Following the pronouncement of Selma's death, no investigation was made by the Chief Nurse, Frieda Axen, R.N., until **the** next day when Mrs. Booten told Miss Axen that "her conscience wouldn't let her rest; that it wasn't right." The Superintendent, Dr. J. H. Maltz, had an informal discussion with Mrs. Ambrose and other personnel to try to determine the facts. The original medical certificate of death, listing the cause of death as natural causes was superseded by the pathological report or autopsy showing, that the immediate cause of death was acute pulmonary edema.

On July 2, 1958, the Superintendent of the Dixon School had advised Selma's mother as follows:

"Dear Mrs. Mitchell:

"In reply to your letter regarding your daughter, Selma, we wish to inform you that she is in good physical condition. She eats and sleeps well, but her psychic condition is stationary.

Very truly yours,

DIXON STATE SCHOOL,
W. R. HANDY, Acting Superintendent

By: /s/ V. ULUHOGIAN, M.D."

Some five months later, Selma was dead.

Included in the pathological report of the Cook County

Coroner was the statement: "Died at 1:30 P.M. under odd circumstances."

Handicapped though she was with a stiffened arm as a result of her burns as a child, there is evidence that Selma was able to do menial labor and cleaning, and was able to take care of herself, both inside and outside the institution.

It is not conclusive, in the Court's opinion, that Selma would not be able to contribute to her mother's financial support in the latter's old age.

This Court is appalled by the unconscionable conduct and negligence in this instance of persons entrusted by the State of Illinois with the care of inmates of a State institution. It is difficult to understand, and impossible to accept, the course of conduct reflected by the evidence in this case. It is the responsibility of the State and its employees to provide a reasonable and humanitarian care for these less fortunate persons, and this responsibility was not met.

The evidence indicates that Selma's life expectancy would be approximately eight to thirteen years. If employed for ten years, and able to work one-half of the time at wages of \$40.00 per week, Selma could have earned approximately \$1,040.00 per year, or in ten years a total amount of \$10,400.00. Approximately one-half of this amount for the mother's support would justify an award of \$5,000.00; a further allowance of \$500.00 for funeral expenses, which were incurred by Selma's mother, should also be made.

An award to claimant, Hattie Mitchell, as Administratrix of the Estate of Selma Mitchell, Deceased, is, therefore, made in the sum of \$5,500.00.

(No. 5001—Claim **denied.**)

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

Opinion filed November 9, 1965.

ANTHONY HASWELL AND JOHN T. BURKE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; DANIEL N. KADJAN, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*wrongful incarceration*. Where claimant failed to sustain his burden of proving his complete innocence of the acts or fact of the crime by a preponderance of the evidence, he will be denied recovery for wrongful imprisonment.

PEZMAN, J.

Claimant, James Strong, was convicted in the Criminal Court of Cook County on August 11, 1959 of unlawfully selling, dispensing, and possessing narcotics in violation of Sec. 3 of the Uniform Narcotic Drug Act (at that time Sec. 192.28 of the old Criminal Code), and was sentenced to the penitentiary for a term of twenty-five years to life. On appeal to the Supreme Court of the State of Illinois, his conviction was reversed on the ground that it was obtained upon evidence procured by entrapment. *People vs. Strong*, 21 Ill. 2d. 320. Claimant was released from the penitentiary in April of 1961.

The facts in this cause seem to be well settled. Claimant testified that, between 3:30 and 4:00 P.M. on September 29, 1958, one James Reynolds paid a visit to claimant's apartment. Claimant stated that he was lying in bed at the time. Claimant got out of bed, opened the door for Reynolds, and got back in bed. Reynolds threw a package on claimant's dresser, and told claimant that he was going down to the corner for coffee, and would leave the package in claimant's apartment until he got back. Reynolds then left the apartment. Claimant further testified that Reynolds later returned with another man, Anthony Johnson. Reynolds at that time asked claimant to give the package to Johnson, which claimant did. Johnson then passed money to claimant who in turn passed it to Reynolds. However, Reynolds refused to take the

money, but, instead, told claimant to keep it for a while, and bring it over to Reynolds' house later. Claimant testified that he did not know at the time what was in the package. Claimant was later arrested on the narcotics charge in January of 1959, and spent three or four days in jail before getting out on bond. He was returned to jail in April of 1959, and again was released on bond on May 29, 1959. In July of the same year he was re-incarcerated, tried, and convicted. He remained in prison until his release on April 6, 1961 upon reversal of the conviction as referred to herein-above.

Respondent contends through its witness, Anthony D. Johnson, that the facts, as testified to by claimant, are erroneous. Johnson stated that on September 29, 1958, he and an informer by the name of Reynolds proceeded to the Greenbriar Hotel located at 63rd and Greenwood Streets, Chicago, Illinois, where they were admitted to Room 316, and in the presence of one James Strong, claimant herein. Johnson testified that he negotiated with Strong for the purchase of a certain narcotic drug for which he paid the sum of \$50.00. He stated that, to his knowledge neither he nor any other federal employee supplied claimant herein with the drugs in question, which were purchased by him. This information is related here only to show the dispute in the facts of the case as presented in the Court of Claims.

Claimant contends that proof of entrapment amounts to proof of innocence of the crime, in accordance with the requirements of Chapter 37, Sec. 439.8C.

Respondent contends that claimant has failed to sustain the burden of proof by a preponderance of the evidence, as required in this type of case. Respondent contends that claimant was not a fully creditable witness, inasmuch as the record discloses that, in addition to his conviction for the crime forming the subject matter of the claim in this

Court, he had been previously guilty on two occasions of certain narcotic violations.

This Court will not be placed in the position of retrying the evidence in the original criminal trial. The issues involved herein have been enunciated time and time again in cases before this Court. Claimant had the burden of proving by a preponderance of the evidence that the time served in prison was unjust, that he did not commit the acts for which he was wrongfully imprisoned, and the amount of damages to which he would be entitled. Claimant has not proven his innocence of the acts or the fact of the crime. The Legislature, when it created Section 439.8C, of the Court of Claims Act, intended to create a humane manner by which a person completely innocent of the acts for which he was charged could seek redress in the form of money damages for the time that he served unjustly. It was not the intent of the lawmakers to open the pocketbooks of the State to known and acknowledged peddlers of dope because of a technical reversal of a conviction in the original criminal trial. (*Dirkans vs. State of Illinois*, No. 4904, Court of Claims; *Tute vs. State of Illinois*, No. 5100, Court of Claims).

Claimant in this cause of action has clearly failed to sustain his burden of proving that he was innocent of the fact of the crime, and the claim is, therefore, denied.

(No. 5014—Claim denied.)

WILLIAM HOSKINS, A Minor, By his Father and Next Friend,
EDDIE HOSKINS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1965.

EDWARD I. ROSEN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD A. WARMAN, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*personal injuries—contributory negligence.* Evidence disclosed that, notwithstanding the State's negligence, claimant failed to sustain the burden of proving that he was free from contributory negligence.

PEZMAN, J.

Claimant, William Hoskins, by his father and next friend, seeks to recover from the State of Illinois the sum of \$25,000.00 for personal injuries allegedly sustained as a result of respondent's negligence, whereby claimant was severely and permanently injured.

William Hoskins, on June 20, 1960, was fifteen years of age, and an inmate of the Illinois State Training School for Boys, St. Charles, Illinois. On that particular date, he had been assigned to work in the cannery, which was part of the school, and was under the supervision of William Dawson, an employee of respondent.

On June 20, 1960, claimant was operating a vegetable washing machine, and at the end of the working day, while attempting to clean the machine in question, his left hand was caught in the chain and sprocket, which powered the washing barrel, causing severe injuries to claimant's hand. Claimant received treatment at the institution hospital, and approximately four days later was taken to the Illinois Research Hospital in Chicago, Illinois, where he remained over night for additional treatment. It appears that he was disabled for approximately a month. Thereafter he returned to work at the cannery doing a similar type of task to that which he had been doing before the accident. Testimony reveals that claimant had an "L" shaped scar on the back of **his** left hand, approximately $\frac{1}{2}$ " to 1" wide and 4 inches in length, and suffers some stiffness of the hand on occasion.

Claimant's action for recovery is based upon certain alleged acts of negligence on the part of respondent, more particularly set forth as follows:

- (a) Negligently and carelessly failed to properly instruct claimant in the full proper usage of the washing machine;
- (b) Negligently and carelessly failed through its employee to properly supervise and direct, or to supervise and direct at all the cleaning operation of said machine being performed by claimant;
- (c) Negligently and carelessly, and with the specific knowledge and direction of its employee, permitted the cleaning of **said** washing machine while still in the operation, so as to hasten the cleaning operation and enable the employee and staff to leave.

Respondent does not dispute the facts related in claimant's brief, nor does respondent offer any particular evidence to rebut the allegations on the part of claimant that it was negligent. The entire defense of respondent is based upon its contention that claimant has clearly not sustained his burden of being free of contributory negligence,

This Court finds that the issue in this cause can be simply stated as whether or not claimant has proven that the injuries he sustained were the direct and proximate result of a negligent act or omission on the part of respondent, and that claimant himself must be proven to be free from contributory negligence. Claimant alleges that William Hoskins was a minor of the age of fifteen years at the time of the occurrence complained of, and was only chargeable with that degree of due care and caution properly to be expected from one of his age, intelligence, and experience. The law in Illinois is quite clear as to the accountability of children for contributory negligence. Our State follows the common law rule that a child under the age of seven years is conclusively presumed not to be responsible for his acts. (*Moser vs. East St. Louis and I. W. Company*, 325 Ill. App. 543, 546, 62 N.E. 2d 558, 560; *Wolczek vs. Public Service Company*, 342 Ill. 482, 493, 174 N.E. 577, 582.) The degree of care to be exercised by a minor over the age of seven years is that which a reasonably careful person of the same age, capacity, and experience would exercise under the same or similar circumstances. (*Wolf vs. Budzyn*, 305 Ill. App. 603,

605, 27 N.E. 2d 571, 572; *Wolczek vs. Public Service Company*, 342 Ill. 482, 497, 174 N.E. 577, 583.) Duties delegated or tasks assigned to a minor of tender age should be carefully guarded. A minor's activities must be carefully planned and supervised in order to assure that his activities are commensurate with his ability to comprehend and absorb, and to protect himself from injury. Disregard for these precautions should not be treated lightly. However, some liberalities should be applied as the minor progresses toward adulthood, for we can assume that, through his environment and everyday experience, some knowledge has been gained. A young man at the age of fifteen has come to know fear, danger, hurt, and subsequent pain. Claimant, by reason of his association with other machine operators, and by the fact that he personally operated this machine and other machines on various occasions, must have gained certain skills and knowledge with relation thereto. During the six week period prior to the injury on June 20, 1960, claimant must have had the experience of seeing all of the machines turned off and on at various times, and the dangers of working on these machines while operating must have been present in his mind. Claimant admitted, during the taking of the deposition under oath, that he had forgotten to turn the machine off.

On the other hand, the facts, as presented by claimant, clearly indicate that at the time of the accident on June 20, 1960 the Illinois State Training School for Boys needed an adequate training and supervision program in regard to the operating mechanism of the machinery in use at the cannery. The State cannot escape its duty to an individual merely because **he** or she is an inmate of an institution. This Court has held on numerous occasions that the State must meet the same standards of care and safety as are required of private industry.

From the record in this cause, we find that claimant was injured while in the course of his employment, and as an inmate in the Illinois State Training School for Boys at St. Charles. We further find that the injury was sustained while claimant was operating a machine without proper and adequate supervision and training, and that, as a direct result of these negligent acts or omissions, an injury was sustained by claimant. To sustain an award, claimant must sustain the burden of proving that respondent was guilty of negligence, and that he, claimant, was free from contributory negligence. (*Harold E. Moe vs. State of Illinois*, 23 C.C.R. 14.) We further find that claimant has failed to sustain the burden of proving that he was free from contributory negligence. The evidence discloses that claimant was familiar with the machine, its method of operation, and the fact that it was to have been turned off before it was cleaned. Claimant admitted that he forgot to turn it off. The age of claimant was not that of a person totally unable to comprehend the dangers about him, as he did his daily task. The mere fact of his age of fifteen would not be sufficient to purge him of the duty imposed by law to be free of contributory negligence.

Petition of claimant is denied.

(No. 5037—Claim denied.)

JAMES EDWARD HELTON, Claimant, *vs.* **THE BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY**, Respondent.

Opinion filed November 9, 1965.

R. W. HARRIS, Attorney for Claimant.

C. RICHARD GRUNY, Attorney for Respondent.

NEGLIGENCE—duty to licensee—burden of proof. Where evidence disclosed that claimant was merely a licensee, he was required to take the premises **as** he found them, and in order to recover must prove respondent **guilty** of wilful and wanton misconduct.

PERLIN, C. J.

Claimant, James Edward Helton, seeks recovery of \$25,000.00 for injuries allegedly suffered on property used for a Southern Illinois University Camp for handicapped children.

Claimant contends that respondent failed to maintain the walkway leading to the Southern Illinois University Water Purification Plant at the Camp in a reasonable and suitable condition for pedestrian travel in that he fell on a rough, uneven and rocky portion of the walkway.

The testimony reveals that on the afternoon of July 9, 1960 claimant was fishing in a boat on Little Grassy Lake with George Twomey and his six year old son, Michael. Claimant was operating the boat when young Twomey complained of being thirsty. The father requested that the boat be turned into the Southern Illinois University Grassy Lake Camp site. The boat was landed near the shore, and one of the counselors who was patrolling pulled the boat to the shore line. Twomey testified that he asked if they could stop to get a drink of water: "I told her my son was very, very thirsty. I asked if we could get him a drink of water. She agreed to let him have a drink of water." The counselor then told Mr. Helton to "Come on and have a drink with everyone else."

Helton testified that he knew that Southern Illinois University leased and controlled the camp site for handicapped children. With the counselor leading the way, Twomey and his son walked side by side, and Helton followed. Twomey testified he heard a noise as Helton fell. They had been walking on a smooth asphalt path, which was slightly uphill. As Helton stepped off the asphalt path, apparently onto a secondary path, consisting of loose gravel with some rocks, both of his feet flew out from under him,

and he fell, breaking his ankle, for which injury he claims damage.

Donald R. Cross, Assistant Co-ordinator for Southern Illinois University, testified that he was working with the water purification facility in the summer of 1960. He stated that the purpose of conducting the camp for handicapped children was mainly for therapy, and that the counselors are student employees being trained as counselors. He further testified that the camp is not open to the public, and that the instructions to the staff and water front personnel are that no one is allowed on the beach area. There are signs posted at all beaches with 3 feet by 1 foot signs saying "Unauthorized personnel keep off." There was no drinking faucet or dipper at the water spigot of the filtration plant. Plant personnel would secure water by cupping their hand **under it**. **No one was allowed at the plant, other than the personnel who operated it.**

Claimant has already received \$875.00 from respondent's liability insurer in consideration of which claimant's suit in the Circuit Court of Williamson County was dismissed, and claimant covenanted not to sue respondent, but reserved the right to proceed under the terms of the law governing actions before the Court of Claims.

In this case, the only alleged tort-feasor involved is Southern Illinois University. A covenant not to sue, while technically not a release, may be pleaded in bar of the cause of action to which it relates where it is made with a sole tort-feasor. (*45 Am. Jur., Release, Sec. 3, 53 A.L.R. 1463.*) Therefore, having covenanted not to sue respondent, its officers, agents or employees, or its liability insurer on account of the instant claim, the Court of Claims must question the propriety of permitting a claim in violation of such covenant.

Without regard to this question, however, it is the

Court's opinion in the instant case that liability has not been factually established.

An owner or occupant of lands who directly or impliedly invites others to enter for some purpose of interest or advantage to him owes to such persons a duty to use ordinary care to have his premises in a reasonably safe condition, but a permissive or bare licensee upon the property of another cannot recover for injuries sustained from defects, obstacles or pitfalls upon the premises except where such defects were caused by the active negligence of the owner or occupant. (*38 Am. Jur., Negligence*, Secs. 96, 105.) Claimant's contention that respondent was under a duty to exercise reasonable care towards him is without merit, since he was at most a mere licensee.

An invitee is a person who is invited or permitted to enter or remain on land for a *purpose of the occupier*, while a licensee is a person who is privileged to enter upon the land *by virtue of the possessor's consent*. (Prosser, Torts, Secs. 77, 78. Emphasis supplied.) This Court in the case of *Edith Burris vs. State of Illinois*, 24 C.C.R. 282, stated: "In the case of an invitee proof of ordinary negligence is necessary. In the case of a licensee, the burden of proof is upon claimant to prove respondent guilty of wilful and wanton misconduct."

The facts clearly demonstrate that claimant's status could not be that of an invitee, since he was on the property solely for the benefit of himself and the members of his party, and not for the benefit or purpose of Southern Illinois University, which had in fact posted signs to discourage "unauthorized personnel" from approaching the camp. Nowhere has claimant alleged that respondent set a trap for him or exposed him to danger recklessly or wantonly, nor is there any evidence of such conduct on the part of respondent. Therefore, claimant, as a licensee, was required to take

the premises as he found them. (*Dent vs. Great Atlantic and Pacific Tea Co.*, 4 Ill. App. 2d 500, 124 N.E. 2d 360 (1955).)

For the foregoing reasons, claimant is not entitled to recovery, and an award is hereby denied.

(No. 5062—Claimant awarded \$12,550.00.)

VILLAGE OF KINGSTON MINES, A MUNICIPALITY, Claimant, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1965.

LEITER, NEWLIN, FRASER, PARKHURST AND McCORD, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—damages from surface water flooding. Where a highway engineer, working under the State's direction and control, should reasonably have foreseen that the use of a precipitous hillside as a borrow pit would accelerate the velocity of surface waters so as to cause damage to claimant's streets and drainage system, it constitutes negligence on the part of the State, for which an award will be made.

DOVE, J.

Claimant, Village of Kingston Mines, filed its complaint in this Court on September 17, 1962, seeking an award of \$9,550.00 for damages to its streets, drainways and storm sewer system caused by the failure of the State of Illinois to properly build a new highway with its attendant slopes and storm drainage system. Subsequently, claimant filed an amendment to the complaint alleging additional damages of \$16,500.00, and praying for a total award of \$25,000.00.

The Village of Kingston Mines is in Peoria County, and is located along the bank of the Illinois River. Prior to the time of the matters complained of, State Bond Issue Route No. 9 extended through the north side of the village, running east and west. North of the highway was a bluff of approxi-

mately 100 feet in height, which was covered with trees and brush. Water from the hillside drained primarily through three gullies to a ditch along the north side of State Bond Issue Route No. 9, and thence into four 2' × 2' box culverts under the highway, and from the culverts emptied into the drainage system of the Village, consisting of storm sewers, culverts, inlets, and sodded ditches. The sewers varied in size from 10 to 18 inches, and were located on the east and west sides of the north and south streets, and drained southward to the river. From the evidence, it appears that the storm drainage system was adequate to carry all water prior to the construction of the new highway.

Construction was started on a new highway in June, 1960, designated as U.S. Route No. 24, through the north edge of the Village, parallel to State Bond Issue Route No. 9, and located approximately 120 feet south of the latter. The new road was from 9 to 14 feet lower than the old highway. The road was officially finished in June, 1962, but was opened to traffic during most of the construction period.

U.S. Route No. 24 was constructed by an independent contractor pursuant to plans and specifications, and was under the direction and control of the Highway Department of the State of Illinois. The plans and specifications did not designate the location of borrow ground, but provided for all required earth and grading necessary in the construction of the new highway. The contractor, in building the highway, procured earth for fills from the hill located on the north side of the old highway No. 9, and, in the course of his work, removed trees and vegetation from the hillside in such manner that there was no restraining vegetation to hold back or diffuse the flow of water. This resulted in the washing of large amounts of mud and earth from the hillside into the ditch along the old highway.

The evidence shows that concrete run-offs were con-

structed on the new project along the new highway at a steep slope, and the surface water was carried at a high velocity into the storm drainage system of the Village. The result of the construction project, removal of restraining vegetation from the steep hillsides, and the increased velocity with which the runoff water was thereafter carried, caused several floods, and caused a great deal of damage in **1961**, in the course of which the storm drains of the village were filled with sticks, mud, and silt. The water and debris were then forced to flow down the streets of the village and over the lawns and yards of the residents.

The record shows that, upon complaint by the Village officials during construction, the plans and specifications were varied during the course of construction by adding a new **36"** sewer. This new sewer extended from the north on Third Street to the river with clean-outs in each **block**. A second **24"** sewer was added, which extended east on Third Street from Adams to Jefferson, and into a **36"** sewer. Flood damage was caused by mud and debris flowing down Adams, Monroe, and Washington Streets. After a heavy rain in June, **1961**, the entire town was covered with a sheet of water, mud, and other debris.

It seems quite apparent from the evidence that the plans and specifications for the construction of the new highway did not make adequate provisions for the drainage of water, and the Village has suffered damage as a result thereof. The extent of the damage, itemized in the complaint, is supported by the evidence, and is not controverted by respondent.

Our court has previously held that surface water flooding and damages occasioned by negligence of the State of Illinois is compensable in the Court of Claims. (*Doerr vs. State of Illinois*, C.C.R. 314; *Kroencke vs. State of Illinois*, 21 C.C.R. 193.) It is apparent that the highway engineer

should reasonably have foreseen that the use of a precipitous hillside as a borrow pit would accelerate the velocity of surface waters so as to cause damage to the streets and drainage system of the Village of Kingston Mines, and we are of the opinion that the State of Illinois should be responsible therefor.

The Village of Kingston Mines has been damaged in the amount of \$9,550.00, and in addition thereto, it was necessary for the Village to extend the sewer system on the west side of Adams Street and the east side of Jefferson Street at a cost of \$3,000.00.

An award is, therefore, entered in favor of claimant in the amount of \$12,550.00.

(No. 5100—Claim denied.)

NATHANIEL TATE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1965.

HAMPER AND REISER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **DANIEL N. KADJAN**, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*wrongful incarceration.* Where claimant failed to establish his complete innocence of the “fact” of the crime for which he was imprisoned, he will not be entitled to an award for wrongful incarceration in pursuance of Chap. 37, Sec. 439.8C, Ill. Rev. Stats.

PEZMAN, J.

Claimant, Nathaniel Tate, seeks to recover from the State of Illinois the sum of \$15,000.00 allegedly due to him by reason of the provisions of Chap. 37, Sec. 439.8C, Ill. Rev. Stats. This statute allows recovery to anyone who shall have been unjustly imprisoned in this State, provided the incarcerated person proves his innocence of the crime for which he was incarcerated. The amount of recovery is limited to

not more than \$15,000.00 for the “unjust” imprisonment of 5 years or less.

It is alleged that, on the night of November 2, 1960, Nathaniel Tate met Jesse Jennings at Walton’s Corner, a tavern, where they engaged in normal social activities. Shortly before closing, claimant asked the said Jesse Jennings if she would drive him home. Therefore, later, claimant and Jesse Jennings, in the company of Lulabell Williams and Benny Turner, left Walton’s Corner at approximately 4:00 to 4:15 A.M. on November 3, 1960, and proceeded on the supposed route home. Mrs. Jennings sat in the front seat with claimant, while Miss Williams and Mr. Turner sat in the back seat. From this point on the facts seem to be in dispute. Claimant’s position is that Turner and Miss Williams were discharged from the automobile at the corner of Springfield and Roosevelt Road, and that Mrs. Jennings and claimant then proceeded to Tate’s place of employment, the L & L Barbecue House at 3111% West Roosevelt Road, where they parked in an alley behind the restaurant. Claimant further alleges that he went around to the front door of the restaurant and entered in this manner. The back door was then opened by claimant, and Mrs. Jennings was allowed to enter. It was then approximately 4:35 A.M., and they proceeded to the rear of the restaurant. It is contended she disrobed there, and they engaged in sexual relations. After the act, it is then alleged that she went into the bathroom, and, while she was gone, claimant removed from her purse \$20.00, he purportedly had given her. Later claimant was arrested when Mrs. Jennings arrived at the restaurant the next evening with two policemen and accused him of having raped her. He was subsequently indicted in the Criminal Court of Cook County on the charge of rape and robbery, and he entered a plea of not guilty to both charges. He waived his right to trial by jury, and was found guilty

by the court on both charges. Claimant was sentenced to serve a term of 15 years in the Illinois State Penitentiary for the crime of rape, and was further sentenced to not less than one nor more than five years for the crime of robbery. Said sentences were to run concurrently. Claimant remained at the prison for 2 years and 4 months.

Respondent alleges facts quite similar to that of claimant, with the exception that claimant is related to have pulled a gun and forced her to discharge the other passengers in the car and to accompany him to his place of employment. It was alleged that she was under his pressure, control, and coercion at all times, including the period when the alleged sexual intercourse took place. The State contended that he forced her to engage in sexual activities and that subsequently he forceably removed the money from her purse.

The Supreme Court of Illinois reversed the conviction of claimant in his original criminal trial in *People vs. Tate*, 26 Ill. 2d 588, stating "we are of the opinion that the people failed to prove beyond a reasonable doubt that the sexual intercourse was without consent of the prosecutrix, or that the money was taken from purse by force or intimidation. The judgments of the Criminal Court of Cook County are accordingly reversed."

We do not disagree with the Supreme Court and its findings of reversal in relation to the civil rights of claimant, Nathaniel Tate. The cause at hand is brought under a specific statute, i.e., Sub-par. C of Par. 439.8, Chap. 37, Ill. Rev. Stats. The burden of proof in the Court of Claims is upon claimant to prove all of the material allegations of his claim by a preponderance of the evidence. Claimant must prove that the time he served in prison was unjust; that he was innocent of the crime for which he was imprisoned; and, the amount of damages to which he would be entitled. *Jack*

Flint vs. State of Illinois, 21 C.C.R. 80; *George A. Pitts vs. State of Illinois*, 22 C.C.R. 258.

This Court has taken the position that the “fact” of the crime alleged to have been committed must be proven by a preponderance of the evidence not to have been committed by claimant. This position is clearly set forth in the case of *Jonnia Dirkans*, Claimant, vs. *State of Illinois*, No. 4909, where this Court stated: “We find that claimant, Jonnia Dirkans, has substantially failed to prove his innocence of the crime for which he was imprisoned. It is the studied opinion of this Court that the legislature of the State of Illinois in the language of Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that a claimant must prove his innocence of the “fact” of the crime. It was not the intention of the General Assembly to open the Treasury of the State of Illinois to inmates of its penal institutions by the establishment of their technical or legal innocence of the crimes for which they were imprisoned. It is our opinion the legislators intended to provide a manner of recourse in the Court of Claims, with a specific amount of recovery provided, for a claimant who is able to establish his complete innocence of the “fact” of the crime for which he was imprisoned. The lawmakers of this State would not have intended to grant that recourse to the narcotic addicts, murderers, kidnappers, rapists, and other felons who obtain a reversal of their convictions upon a legal or technical basis, such as insanity at the time of the commission of the crime, or the running of the Statute of Limitations against said crime. We believe it was the intention of the legislature in creating Sec. 439.8C of the Court of Claims Act to provide a method of indemnification of persons innocent of the “fact” of the crime who have been unjustly imprisoned.” In that case, Jonnia Dirkans failed to clearly establish “proof of his innocence,” bringing forth no new evidence other than the testimony of his

nightly female companion whose statements respondent proceeded to discredit.

We find that claimant, Nathaniel Tate, has failed to prove his innocence of the fact of the crime by a preponderance of the evidence. The claim is, therefore, denied.

(No. 5113—Claimants awarded \$18,500.00.)

ALLENE WILLIAMS AND BUEL WILLIAMS, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion fled November 9, 1965.

HANAGAN AND DOUSMAN, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

DAMAGES—credit for amount received under a covenant not to sue. Claimant is entitled to only one satisfaction, and any amount received in exchange for covenant not to sue must be deducted from the specified statutory limit.

SAME—recovery of expenses incurred for the benefit of injured claimant. The husband of an injured claimant may not recover any expenses incurred for the benefit of such claimant.

SAME—separate cause of action by spouse of injured claimant. The spouse of an injured claimant has a separate cause of action for loss of consortium under the Court of Claims Act.

PERLIN, C. J.

Claimants Allene Williams and Buel Williams seek recovery of \$25,000.00 each for damages incurred as a result of an automobile collision with an employee of the State of Illinois Youth Commission on December 17, 1962.

The record shows that on the date in question Mrs. Allene Williams was traveling north along Illinois State Route No. 37, a through highway, at about 3:30 P.M. She was approaching its intersection with State Route No. 183, which is controlled by stop signs for both westbound and eastbound traffic. No stop signs control the northbound or

southbound traffic on Route No. 37 at this intersection. Charles Weiser, an employee of the State of Illinois Youth Commission, Division of Community Services, who was returning from an interview with a ward of the Franklin County Court assigned to him, was driving his 1959 Chevrolet westbound on Route No. 183. According to witnesses, Weiser failed to stop at the sign controlling traffic on Route No. 183 at the intersection, and either failed to slacken the speed of his automobile, or, in fact, accelerated and collided with the vehicle being operated by claimant Allene Williams. Charles Weiser was killed as a result of this collision, and Allene Williams suffered severe injuries, including permanent total loss of the use of both legs and virtually complete loss of the use of both arms.

Several fellow employees of Allene Williams, who were either passengers in her car or were in cars immediately behind, testified that Mrs. Williams was traveling at about 50 to 55 miles per hour when the Weiser car ran the stop sign, and collided with the Williams car. There was no evidence of contributory negligence on the part of Mrs. Williams.

A letter from the Chairman of the Youth Commission establishes that Weiser was in the course of his employment with the State of Illinois at the time of the accident.

In exchange for a covenant not to sue the Estate of Charles Weiser, with reservation of the right to sue the State of Illinois, claimant Allene Williams received the sum of \$14,000.00, and claimant Buel Williams received the sum of \$1,000.00. The total amount of \$15,000.00 constituted the entire amount of Weiser's insurance policy coverage for injuries to one person.

Dr. Alan Anderson who treated Mrs. Williams since March 1, 1963 testified that, based upon a reasonable degree of medical certainty, Mrs. Williams will require nursing or

attendant's care for the rest of her life to provide for her needs, such as feeding, She will endure permanent pain from being bedridden. The doctor further testified that the bills submitted for her medical care were the usual and customary charges for such services.

Claimant Buel Williams who was not present at the accident testified that he was the husband of Allene Williams for about 22 years at the time of the hearing, and that before the accident his wife's general physical condition was good, and she was able to perform duties as a housewife, and also work at a dress factory earning about \$3,000.00 per year. He further testified that, when he is not working, he performs services for his wife, which are normally performed by a practical nurse or attendant.

Judicial notice was taken of the life expectancy tables of *American Jurisprudence*, 2d, that a woman born on February 20, 1918, as of January 24, 1964 has a life expectancy of **32.1** years, and that a man born on June 13, 1914, as of January 22, 1963 has a life expectancy of 23.8 years.

Evidence was further submitted of bills incurred on behalf of Allene Williams, which her husband is obligated to pay, and for which he has already made partial payment in the amount of \$7,631.84.

Claimants allege the following "actual" damages:

DAMAGES OF ALLENE WILLIAMS

Loss of earnings:

Past loss: 12/17/62—1/22/64	
Weekly average: \$61.21 per week	
Weeks lost: 55	\$ 3,366.55
55 weeks pain and suffering:	\$ 5,500.00
(Using Illinois Workmen's Compensation Computer as guide, on all loss of use of extremities)	
Total loss of use of both legs	\$ 20,800.00
90% loss of left arm	\$ 10,998.00
80% loss of right arm	\$ 9,776.00

Future loss of earnings—	
\$3,000.00 per year for 20 years	\$ 60,000.00
TOTAL DAMAGES (not including future pain and suffering):	\$110,440.55

DAMAGES OF BUEL WILLIAMS

Medical expenses to date for care of wife	\$ 7,631.84
Nursing and attendance care from 1/22/64 for <i>shorter</i> life expectancy of husband, based upon average monthly expense for <i>nursing and attendance care alone</i> .	
\$117.78 per month X 12 months	\$ 1,413.36
\$1,413.36 X 23.8 years	\$ 33,637.97
Loss of wife's services for 23.8 years	\$ 23,800.00
TOTAL DAMAGES (Not including medical ex- penses for wife's longer life expectancy):	\$ 65,069.81

There are three issues to be determined: (1) Whether the amount of \$15,000.00, (\$14,000.00 and \$1,000.00) received for claimants' execution of covenants not to sue the Estate of Charles Weiser must be deducted from the statutory ad damnum limit of \$25,000.00 or whether the total damages should be the base for determination of the final award, although they exceed the statutory limit; (2) whether the husband of an injured claimant may recover for monies spent for her benefit; (3) whether the spouse of an injured claimant has a separate cause of action for loss of consortium under the Court of Claims Act in which he could conceivably recover up to \$25,000.00 over and above the amount granted to the injured claimant.

The relevant statutory provision provides as follows:

"The Court shall have jurisdiction to hear and determine the following matters: . . .

"D. All claims against the State for damages in cases sounding in tort, in respect of which claim the claimant would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable . . . ; provided, that an award for damages in a case sounding in tort shall not exceed the sum of \$25,000.00 to or for the benefit of any claimant." (Emphasis supplied) (Ill. Rev. Stats., Chap. 37, Sec. 439.8.)

Respondent contends that any award made by this Court must be subject to the limitation of \$25,000.00 to or

for the benefit of any claimant and from the amount of any award made must be deducted the damages recovered by claimants for which they have given covenants not to sue. Respondent cites *Aldridge vs. Morris*, 337 Ill. App. 369, which holds that, where the plaintiff receives payment for a covenant not to sue from one against whom tort liability could lie, such payment may be deducted from the damages recoverable from persons whose tort liability arises out of the same circumstances, irrespective of whether the covenant is made a party to the suit; and *Flisk vs. State of Illinois*, 21 C.C.R. 363, where the Court stated:

“The maximum tort liability of respondent in **this** case is \$2,500.00. It is admitted claimant has received the sum of \$6,300.00 from persons deemed jointly responsible for **his** injuries. This amount, under the authority of the State of Illinois, would have to be deducted from any **sum** allowed by this Court, and hence no damages could be awarded.”

This Court in *Laboda and Anzalone vs. State of Illinois*, 24 C.C.R. 172, states the following:

“In determining the matter of damages, the Court is confronted with a problem apparently never decided before. The statutory limit for cases sounding in tort in the Court of Claims in 1957 was \$7,500.00. The statutory limit for cases under the wrongful death statute in 1957 was \$20,000.00.

“Dolores Laboda received the sum of \$20,000.00 under a covenant not to sue, and Sam Anzalone, Administrator of the Estate of Sam Anzalone, Jr., received the sum of \$5,969.00 under a covenant not to sue.

“The law is clear that there can be but one satisfaction for **a wrong**, and, where there are joint tort feasons, and one is released under a covenant not to sue, the person who is sued is entitled to a credit of such amount on the judgment rendered against him. (*Puck vs. City of Chicago*, 281 Ill. App. 6.)”

The Court then considered the New York rule, which states that when the plaintiff has accepted satisfaction in full for the injury done him from whatever source it may come, he is *so far* affected that the law will not permit him to recover again for the same damages. But, it is not easy to see how he is *so affected* until he has received full satisfaction, or that which the law must consider as full.

The Court continued:

“The doctrine would be of persuasive authority in a court of record in this State where the matter of damages was not limited by statute, but the Court of Claims is a creature of statute, and the amount allowable in matters sounding in tort is limited by the Act.

In a recent case, *Price vs. Wabash R. R. Company*, 30 Ill. App. 2d 115, the court held that, where a plaintiff received a payment for a covenant not to sue, such payment may be deducted from the damages recoverable from persons whose tort liability arises out of the same circumstances, irrespective of whether the covenantee is made a party to the suit.

The Court, therefore, concludes that it must deduct any payments made under a covenant not to sue from the statutory limits of the Court of Claims Act.”

Claimants, on the other hand, cite the recent case of *Valentine vs. Peiffer*, 203 N.E. 2d 179, at 182 and 183, as follows:

“It is not every award, which fixes the total damages sustained by a party. *It should be obvious to all that in those cases where the legislature has placed an arbitrary limit upon a statutory recovery, a maximum verdict does not necessarily fix total damages.* For instance, in the case of *Trans World Airlines, Inc. vs. Shirley*, 9 Cir., 295 F. 2d 678, an award of \$200,000.00 for death was returned. In Illinois, a maximum recovery would have been \$30,000.00, even though the evidence would have been identical. Thus it is apparent that every verdict does not represent an adjudication of total damages, especially where there is a statutory limitation on recovery.” (Emphasis supplied.)

Although the court in the *Valentine* case did not deduct the amounts received for prior settlements with common law defendants in a case under the Dram Shop Act, and did allow plaintiff to collect the maximum amount from the Dram Shop defendants, the rationale upon which the court relied was that the defendants did not raise the issue of total damages until post-trial proceedings and that this was an affirmative defense, which the defendants had the burden of proving before a verdict was reached by the jury.

Claimants also cite the case of *Slone vs. Morton*, 188 N.E. 2d 493, in support of their claim that any set-off should be against total damages and not the statutory limit of

\$25,000.00. In that case maximum recovery was allowed under the Dram Shop Act, notwithstanding that payments had also been made under the Wrongful Death Act. The court held that the Dram Shop Act and the Wrongful Death Act create different statutory rights and duties and that the nature and amount of damages provided for in the Dram Shop Act are not to be limited by the provisions of the Wrongful Death Act.

In the instant case there is no question of timeliness in raising the issue of set-off as in the *Valentine* case, nor are two separate and distinct statutory rights to be pursued as in the *Slone* case. Both cases are clearly distinguishable from the case at hand, as are the statutes involved in the Wrongful Death and Dram Shop cases different from that applicable to the instant case.

It is, therefore, the opinion of this Court that any amount received by claimants in exchange for a covenant not to sue must be deducted from the statutory limit specified in the Court of Claims Act of \$25,000.00.

A husband has a separate right of action to recover damages for loss of services and consortium of his wife occasioned by personal injury to her according to the cases of *Stephens vs. Weigel*, 336 Ill. App. 36, 82 N.E. 2d 697, and *Blair vs. Bloomington & Normal Railway, Electric and Heating Co.*, 130 Ill. App. 400. However, this separate right is limited by the Court of Claims Act, which allows only one recovery of up to \$25,000.00 to or for the benefit of any claimant. In *Bovey vs. State of Illinois*, 22 C.C.R. 95 at 125, the husband of the injured claimant was not allowed to recover for his wife's medical expenses, since they directly benefited the wife who had already received the maximum recovery allowable under the Court of Claims Act. The Court also denied any portion of housework expenses incurred for the benefit of the injured claimant and allowed

only those damages proven by the husband which could not be considered as benefiting the injured wife.

Therefore, no part of Mrs. Williams' medical expenses may be included in Mr. Williams' claim. However, the Court recognizes that Mr. Williams has suffered extensive loss of his wife's services resulting from the negligence of respondent's agent.

Claimant Allene Williams is, therefore, awarded the sum of \$25,000.00, less the \$14,000.00 received for the covenant not to sue, or a total of \$11,000.00.

Claimant Buel Williams is awarded the sum of \$8,500.00, less the \$1,000.00 already received for the covenant not to sue, or a total of \$7,500.00.

(No. 5124—Claim denied.)

LINDA EVELAND SHIRAR, Administrator of the Estate of DUANE WELCH EVELAND, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* November 9, 1965.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence-failure *to* maintain a "STOP AHEAD" *sign*. Evidence disclosed that the erection of a "STOP AHEAD" sign at the location in question was not mandatory, but permissive, and consequently failure to maintain such a sign did not constitute negligence on the part of respondent.

PERLIN, C. J.

Claimant, as Administrator of the Estate of Duane Welch Eveland, seeks recovery of \$25,000.00 for his death, which occurred as a result of an accident on March 8, 1963 at the intersection of State Route No. 133 and a road known as Jonathan Creek Road in Moultrie County, Illinois.

Claimant contends that the failure of respondent to maintain a "Stop Ahead" warning sign approximately 1,000 feet from the intersection constituted negligence, and that such negligence was the proximate cause of the collision, in that one Rheta J. Hobbs was not sufficiently warned of her obligation to stop at the intersection, and thus collided with the automobile driven by Duane Welch Eveland. It appears that claimant received \$4,000.00 from the insurance company, which issued a liability policy to Rheta J. Hobbs.

In order to recover in the present action, claimant must prove by a preponderance of the evidence (1) that claimant's intestate was free from contributory negligence; (2) that respondent was negligent; and (3) that such negligence was the proximate cause of the damage alleged.

The record shows that on March 8, 1963 at approximately 1:30 P.M., Duane Welch Eveland, age 20, was driving a red 1960 Valiant in a westerly direction along and upon Route No. 133. At the same time, Rheta J. Hobbs, age 21, was driving a white 1959 Ford automobile in a northerly direction along Jonathan Creek Road near its intersection with Route No. 133. Route No. 133 is a preferential highway to Jonathan Creek Road. A stop sign controls Jonathan Creek Road at its intersection with Route No. 133. Other signs controlling the traffic on Jonathan Creek Road included a broken "Stop ahead sign 750 feet south of the intersection, a "Junction-Information" sign 500 feet south of the intersection, and a directional sign 300 feet south of the intersection.

Eyewitness Lester Schrock testified as follows: He was stopped at a sign controlling the traffic going south at the intersection of Jonathan Creek Road and Route No. 133. He saw a westbound red Valiant (driven by Eveland) approach the intersection on Route No. 133, and a 1959 white Ford (driven by Rheta J. Hobbs) coming towards him north on Jonathan Creek Road. Both cars entered the intersection at

the same time and collided, the left front fender of the Valiant striking the right front fender of the Ford. The white Ford did not appear to stop prior to entering the intersection, nor did Schrock hear a horn 'or the sound of brakes. He saw no skid marks at the scene subsequent to the collision. There was a stop sign in place governing Jonathan Creek Road as it entered the intersection of Route No. **133**. The day was sunny and bright. Schrock had no trouble seeing the intersection or the stop sign. Within a distance of at least 500 feet from the intersection the terrain is level in all directions. The "Stop Ahead" sign governing the northbound traffic on Jonathan Creek Road was down, but the "Junction with Route No. **133**" and a directional sign were in place at the time of the accident. Schrock estimated that the red Valiant was traveling at approximately 60 to 65 miles per hour, and that the Ford was perhaps traveling at a lesser rate, but he could not tell accurately, since he was in front of the Ford.

Robert Davison, testified that he lived four miles from *the* intersection, and had observed that the "Stop Ahead sign was down both the day of the accident and the weekend before it occurred. The stop sign at the intersection of Route No. **133** and Jonathan Creek Road was standing in place on the day of the accident. The stop sign is red and silver, and is not concealed, although it does not stand out against the horizon. The Junction sign and the directional signs were in place the day of the accident. They were black and white signs, and the broken sign was yellow with black letters.

William C. Hays testified he observed that the "Stop Ahead" sign in question was broken off the post on December **27, 1962**, and on the day of the accident when he was taking pictures of the accident scene. The junction sign and the directional sign, as well as the stop sign, were in place

on March 8, and are signs meant for traffic going north on Jonathan Creek Road. He stated that the stop sign is the ordinary and customary stop sign, red with white lettering; it is octagonal in shape, a fairly large regulation sign, and was in place right after the accident occurred.

A deposition of Rheta J. Hobbs revealed that she remembered nothing about the accident or any events occurring prior to the time of the collision. Unfortunately, the two adult passengers in her car were also killed. The two minor passengers were children too young to testify. Miss Hobbs stated she had never traveled by automobile in the area where the accident occurred.

Harold Roberts, District Traffic Engineer, Illinois Division of Highways, testified that a 30 inch "Stop Ahead" sign was placed 750 feet south of the intersection; a combination junction-information sign was placed 500 feet south of the intersection; a directional sign was erected 300 feet south of the intersection; and a 24 inch "Illinois Route No. 133" sign with double arrows was placed near the intersection. All of these signs faced south on Jonathan Creek Road. He further testified that at 65 miles per hour a vehicle's stopping distance is 380 feet, with an additional 72 feet allowance for traveling distance and reaction time, for a total stopping distance of 452 feet. In response to the question as to whether the construction of the "Stop Ahead" sign at the location was consistent with the policy of his office, Roberts replied: "There was a choice, and I chose to erect it."

Donald R. Goodwin, District Safety Representative for the Illinois Division of Highways, testified that he investigated the accident in question, and went to the site on March 11, 1963. He stated that Illinois Route No. 133 was the preferential road, and that the traffic on Jonathan Creek Road is required to stop by a stop sign located just to the

right of the northbound lane on Jonathan Creek Road. The "Stop Ahead sign was broken off the post, but the other signs were in place. The sight distance to one traveling north on Jonathan Creek Road is clearer than a thousand feet, and the road is straight for that distance, with a slight downgrade from the south of Route No. 133 on Jonathan Creek Road, according to Mr. Goodwin.

Whether respondent has breached a statutory duty in its failure to maintain the "Stop Ahead" sign may be determined by the following:

Chap. 95½, Secs. 125, and 126, Ill. Rev. Stats.

"Department to adopt sign manual. The Department shall adopt a manual and specifications for a uniform system of traffic control devices consistent with the provisions of this Act for use upon highways within this State. The manual shall also specify insofar as practicable the minimum warrants justifying the use of various traffic control devices."

"The Department to Place Signs on All State Highways. (a) The Department shall place and maintain such traffic control devices, conforming to its manual and specifications, on all highways under its jurisdiction, as it shall deem necessary to indicate and to carry out the provisions of this Act, or to regulate, warn, or guide traffic."

Manual of Uniform Traffic Control Devices for
Streets and Highways (January, 1958), P. 23.

"The STOP AHEAD (S-32 or S-32A) sign shall be used in advance of a Stop sign that is not visible for a sufficient distance to permit the driver to bring his vehicle to a stop at the Stop Sign. It *may* also be used for emphasis on a State route when there is poor observance of the Stop Sign. When used in this manner in advance of a junction of another State route, it shall be erected 400 feet in advance of the 1-8 or I-8A sign. (Stop Ahead-Junction.)" (Emphasis supplied.)

Testimony detailed above has established that the stop sign in question was visible for a distance of 1,000 to 500 feet. It was further established that the total stopping distance required for a vehicle traveling at 65 miles per hour is 452 feet. Therefore, the "Stop Ahead sign in question was not mandatory within the foregoing statutory requirements, but only permissive and need not have been placed at the location in question at all. The Court concludes it must follow that failure to maintain a sign which was not required

to be placed in the first instance, in no way constitutes negligence.

The Motor Vehicle Act, Chap. 95½, Ill. Rev. Stats., also provides that it shall be unlawful for any person to operate a motor vehicle on the public highways of this State without complying with the Illinois Motor Vehicle Law (Sec. 3-811); that the driver of a vehicle approaching a stop sign shall stop before entering the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting highway (Sec. 183); and that the driver of a vehicle shall stop, as required by Sec. 183, at the entrance to a through highway and shall yield the right-of-way to other vehicles, which have entered the intersection from said through highway (Sec. 167b.)

The Court further notes that the Junction sign was placed 500 feet before the stop sign, which gave Rheta J. Hobbs sufficient warning of the crossroad to have stopped her vehicle had she not been grossly negligent in disregarding all signs, including the clearly visible stop sign. It appears to have been her negligence and her negligence alone, which prevented her from stopping her vehicle at the stop sign of the intersection, and apparently caused the tragic accident resulting in the death of Duane Welch Eveland. The Court cannot indulge in pure speculation to ascertain facts, which cannot be adduced by competent evidence.

Because claimant has failed to prove that respondent was negligent, or that its negligence was the proximate cause of the accident, the claim must be and is hereby denied.

(No. 5218—Claimants awarded \$2,298.38.)

**O'LEARY'S CONTRACTORS EQUIPMENT AND SUPPLY, INC., and
INTERSTATE FIRE AND CASUALTY COMPANY, Claimants, vs.
STATE OF ILLINOIS, Respondent.**

Opinion filed November 9 1965.

CLAUSEN, HIRSH, MILLER AND GORMAN, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—damages. Evidence disclosed that claimants were entitled to an award in pursuance of their lease agreement with the State of Illinois.

DOVE, J.

A claim in the amount of **\$2,298.38** for certain personal property stolen while in the possession of the State of Illinois Highway Division, Expressway Maintenance, and leased from OLeary's Contractors Equipment and Supply, Inc. was filed on February 8, 1965.

A joint motion has been filed submitting this matter on stipulation, which is as follows:

"1. O'Leary's Contractors Equipment and Supply, Inc., is in the business of owning and leasing construction equipment and supplies.

"2. On June 5, 1964, claimant, OLeary's Contractors Equipment and Supply, Inc., was the owner of certain personal property, to-wit:

- 1 Jaeger Compressor, Serial No. RC21437
- 1 Ingersoll Rand Pavement Breaker
- 2 50 ft. lengths of 3/4" air hose
- 2 Moil points

"3. On that date, the State of Illinois, acting by and through Nick Matechick, its employee, requested the lease to the State of Illinois of the aforesaid equipment.

"4. The said equipment was delivered to the State of Illinois at the Highway Department, Northwest Yard, 5027 North Central Avenue, Chicago, Illinois, and Nick Matechick signed the lease agreement, which was attached to claimant's complaint, and which was properly identified and admitted into evidence at the hearing.

"5. Among the terms and conditions of the lease is the following part of paragraph 3:

'The equipment shall be at the sole risk of the lessee from loss, destruction or damage, and in case any part thereof be lost, destroyed or damaged, whether with or without fault of the lessee, lessee agrees to pay to the company the full value of such part in cash, except that if not damaged beyond reasonable repair, the lessee shall pay an amount equal to the reasonable cost of repairing the same.'

“6. The said property of claimant has never been returned to claimant.

“7. On the basis of testimony adduced at the hearing of David Hunter, Manager of O’Leary’s Contractors Equipment and Supply, Inc., and of Insurance Adjuster, William Marth, I. S. Frigon and Company, the value of the property is stipulated as follows:

1 Jaeger Compressor	\$2,000.00
1 Ingersoll Rand Pavement Breaker	275.00
2 50 ft. lengths of ¾” air hose, @ \$17.00 each, less depreciation, \$14.00	20.00
2 1½” Moil Points @ \$3.19 each, less depreciation of \$3.00	3.38
<hr/>	
TOTAL	\$2,298.38

“8. Claimant, Interstate Fire and Casualty Company, paid O’Leary’s Contractors Equipment and Supply, Inc., \$2,248.38, and thereby became subrogated to any recovery, which claimant, O’Leary’s Contractors Equipment and Supply, Inc., would recover, up to said sum.

“9. There is now due and owing to claimant, O’Leary’s Contractors Equipment and Supply, Inc., the sum of \$50.00 and to Interstate Fire and Casualty Company, as Subrogee, the sum of \$2248.38. Claimant, O’Leary’s Contractors Equipment and Supply, Inc., and Interstate Fire and Casualty Company, by their attorneys, Clausen, Hirsh, Miller and Gorman, again represent that no assignment or transfer of the claim in this cause, or of any part thereof, or interest therein, except as stated herein, has been made by either of the claimants, and that O’Leary’s Contractors Equipment and Supply, Inc., is justly entitled to the sum of \$50.00, and Interstate Fire and Casualty Company is entitled to the sum of \$2,248.38 from the State of Illinois.”

Based upon the stipulation, an award is hereby made to O’Leary’s Contractors Equipment and Supply, Inc., in the amount of \$50.00, and to Interstate Fire and Casualty Company, in the amount of **\$2,248.38**.

(No. 5227—Claimant awarded \$120.00.)

GERALD W. HALL, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion fled November 9, 1965.

GERALD W. HALL, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

PURCHASES—*award* on stipulation. Where respondent **filed** a stipulation that claimant's claim is justly due and owing, an award will be granted.

DOVE, J.

A claim in the amount of \$120.00 for twelve grave markers, which were purchased by respondent, was filed on May 6, **1965**. Attached to the complaint is the certificate of claimant to the Illinois Veterans' Commission, War Veterans' Graves Registration Division, certifying that twelve free government headstones had been erected.

A joint motion has been filed submitting this matter on stipulation, which in substance is as follows:

(1) The report of the Illinois Veterans' Commission to the Illinois Attorney General, dated May 19, 1965, (a copy of which is attached hereto, marked Exhibit A, and by this reference incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without **objection by either** party.

(2) That claimant's claim totaling **\$120.00** is justly due and owing to claimant by respondent.

Based upon the stipulation and the Departmental Report filed herein, an award is hereby made to claimant in the amount of \$120.00.

(No. 5229—Claimant awarded \$657.05.)

H. L. ALLISON, d/b/a **BEAL SUPPLY COMPANY**, Claimant, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion *filed November 9, 1965*.

BRIGGLE AND THOMAS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
 Assistant Attorney General, for Respondent.

CONTRACTS—*retailers* occupation tax *on state* purchases. Evidence disclosed that claimant was entitled to a refund in the amount of the retailers occupation tax paid to the Department of Revenue.

DOVE, J.

This action was instituted by claimant, H. L. Allison,

d/b/a Beal Supply Company, of Springfield, Illinois, for refund of \$695.64 for Retailers Occupation Tax, which was assessed and paid by claimant on sales of commodities and supplies furnished to the Department of Public Safety, Illinois State Penitentiary, Menard, Illinois. Subsequently a stipulation was entered into by and between the attorneys for claimant and the Attorney General of the State of Illinois, representing respondent.

The stipulation sets forth the Departmental Report, which is in the following words and figures, viz:

“Memo to: Hon. James A. Ronan
Director of Finance

“Subject: Reg. No. **612-621**
H. L. Allison
d/b/a Beal Supply Co.
409 ½ E. Capitol Ave.
Springfield, Illinois

“In answer to your memorandum directed to Mr. Leo Nickelson, Supervising Tax Auditor, District No. 7, Springfield, Illinois outlined herein are the facts as indicated after an examination of the audit papers by Mr. Richard Mentel, District Administrator, Mr. Leo Nickelson, District Supervising Tax Auditor, and myself.

“The audit examination on this account was concluded by the Department’s Auditor, Mr. Victor Wilkinson, on December 5, 1963. A tax deficiency of \$732.79 was found at that time, and payment of the amended return was made by two (2) checks, one in the amount of \$695.64, check No. 4618, dated December 5, 1963, and indicated in your file as exhibit No. 28.

“The audit papers indicate the following:

1. Total Amount of Taxable Sales	\$17,664.73
Tax Paid R.O.T.	644.47
Tax Paid M.T.	88.32
	\$ 732.79
2. Sales to Menard Penitentiary claimed as SB 503 by Beal, and disallowed in the audit for period 8/1/61 thru 1/31/63.	
Total Sales and reconciled by exhibits Nos. 1 thru 27	
Total Sales	\$16,426.36
Tax Paid on this Amount R.O.T.	574.92
Tax Paid on this Amount M.T.	82.13
	\$ 657.05

Exhibits as follows:

Exhibit Nos.	Invoice Date	Amount
1 and 13	8/61	\$ 655.00
2 and 14	12/61	1,482.00
3, 15, 16, and 17	2/62	\$1,335.35)
		\$ 380.75)
		\$ 837.65)
4 and 18	2/62	\$ 325.00
5 and 19	3/62	761.50
6 and 20	4/62	941.61
7 and 21	4/62	1,088.64
8 and 22	5/62	1,510.00
9 and 23	7/62	1,058.94
10 and 24	10/62	2,957.56
11, 25, and 26	10/62	1,185.00)
	1/63	1,185.00)
12 and 27	11/62	722.36
		<hr/>
		\$16,426.36

The **tax** rate used to compute the **tax** was at 3% and 3½%.

Therefore, it is our considered judgment that the total tax collected by the Department of Revenue on the items in question amounted to a total of \$657.05, of which \$574.92 was **R.O.T.** and \$82.13 was Municipal Tax.

Attached is the file forwarded to Mr. Nickelson, and if the Department can be of any further service, please so advise.

/s/ CJF

Claude J. Flynn
Chief of Field Operations"

The stipulation further provided that claimant was entitled to, and the State of Illinois should refund, the said sum of \$657.05.

In view of the stipulation of the parties hereto, supported by the Report of the Department of Revenue, an award is entered in favor of claimant in the sum of \$657.05.

(No. 5239—Claimant awarded \$370.00)

HAVANA POST No. 138, THE AMERICAN LEGION, A Not-For-Profit Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1965.

HAVANA POST No. 138, THE AMERICAN LEGION, A Not-For-Profit Corporation, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

PURCHASES—award on stipulation. Where respondent filed a stipulation that claimant's claim is justly due and owing, an award will be granted.

DOVE, J.

A claim in the amount of \$370.00 for 37 grave markers, which were purchased by respondent, was filed on June 30, 1965. A joint motion has been filed submitting this matter on stipulation, which in substance is as follows:

(1) The report of the Illinois Veterans' Commission to the Illinois Attorney General, dated July 14, 1965, (a copy of which is attached hereto, marked Exhibit A, and by this reference incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

(2) That claimant's claim totaling \$370.00 is justly due and owing to claimant by respondent.

Based upon the stipulation and the Departmental Report filed herein, an award is hereby made to claimant in the amount of \$370.00.

(No. 5242—Claimant awarded \$1,100.76.)

CITIES SERVICE OIL COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1965.

KRALIK AND JORDAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

PURCHASES—lapsed appropriation. Where evidence showed that the only reason for non-payment was that appropriation had lapsed before the bills were presented, an award will be made.

DOVE, J.

A claim in the amount of \$1,100.76 for materials, which were purchased by respondent, was filed on August 10, 1965. Attached to the complaint are various purchase orders given to claimant by the Department of Public Works and Buildings, Division of Highways, from the Stockton State Garage, the Dixon State Garage, and the Appellate Court for the Second District located at Ottawa, Illinois.

A joint motion between claimant and respondent, by their respective attorneys, was entered into to the effect that this cause be submitted on the complaint, the Departmental Report of the Division of Highways, and the Report received from the Chief Clerk of the Appellate Court in Ottawa. There is no dispute of law or facts, and the Reports above referred to state that the matters alleged in the complaint are true and correct. Claimant and respondent have entered into a stipulation to the effect that claimant is justly entitled to the sum of \$1,100.76 from respondent. The filing of briefs and abstracts under these conditions would serve no useful purpose.

This is a case where the reason for non-payment was that the appropriation had lapsed before the bills were presented, There is no question but what the merchandise was delivered, and was satisfactory.

It is, therefore, the order of this Court that an award be made to claimant, Cities Service Oil Company, A Corporation, in the amount of \$1,100.76.

(No. 5256—Claimant awarded \$197.00.)

GRAVELY-ILLINOIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1966.

GRAVELY-ILLINOIS COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where evidence showed that the only reason for non-payment was that appropriation had lapsed before the bills were presented, an award will be made.

DOVE, J.

A claim in the amount of \$197.00 for material, which was purchased by respondent for the Department of Public Safety, was filed on November 26, 1965. Attached to the complaint is a purchase order given to claimant by the Department of Public Safety for three rotary lawn mowers, less trade-in of one Eclipse Parkhound mower. The new mowers were delivered to State Police Headquarters at Maryville, Cairo, and Metamora, Illinois.

A joint motion by the claimant and respondent was entered into requesting that this cause be submitted on the complaint and Departmental Report. The Departmental Report, above referred to, provides in part as follows:

“The claim for payment against the State of Illinois in the sum of \$197.00 appears to be in order, inasmuch as said claim represents the agreed purchase price of three lawn mowers ordered under Purchase Order No. 664474, dated April 21, 1965.

The lawn mowers were received during May, 1965, but an Invoice Voucher was not received by this Division covering the agreed price prior to the lapse of the appropriations for the 73rd biennium.”

Subsequently claimant and respondent entered into a stipulation that claimant is entitled to the sum of \$197.00 from respondent, and that the filing of briefs and abstracts under these conditions would serve no useful purpose. From the Departmental Report it appears that the reason for non-payment was that the appropriation had lapsed before the statement for materials furnished was presented. There is no question but that the merchandise was delivered, and was satisfactory.

It is, therefore, ordered by this Court that an award be made to claimant, Gravely-Illinois Company, in the amount of \$197.00.

(No. 5057—Claimant awarded \$25,000.00)

MAVIS J. WELCH, Administratrix of the Estate of ROBERT REED WELCH, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 24, 1966.

BRUNSMAN AND GIFFIN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—maintenance of shoulder. Since road shoulder is both necessary and convenient for vehicular traffic, State is required by statute to maintain such shoulder with reasonable care.

SAME—contributory negligence-negligence. Where evidence showed that respondent was negligent in failing to maintain the shoulder in a safe condition, and claimant was free from contributory negligence, an award will be made.

PERLIN, C. J.

Claimant, Mavis J. Welch, Administratrix of the Estate of Robert R. Welch, seeks recovery of \$25,000.00 in damages arising out of the death of Robert R. Welch on October 13, 1961.

On that date, Robert Welch was operating a truck, consisting of a tractor and a trailer, in a westerly direction on Route No. 144 about two miles west of Murphysboro, Jackson County, Illinois. Claimant alleges that respondent “negligently and carelessly” permitted Route No. 144 to become dangerous and hazardous to the public by allowing a hole, which was seven feet wide and three feet deep, to remain on the shoulder of the road. Claimant further alleges that, as a direct and proximate result of respondent’s negligence, Robert Welch was caused to violently collide with the hole in the shoulder, and, as a proximate result of such collision, he died.

Route No. 144 consisted of two lanes, and, according to the Report of the Division of Highways, was built of cement, eighteen feet wide with a shoulder eight feet wide,

and a guard fence six feet from the edge of the pavement. The general location of the accident was about 100 feet east of the Indian Creek Bridge. The highway alignment is a straight line for more than 1,000 feet both east and west of the site of the accident.

Mr. Elvie Benefield testified that he and Mr. Welch had been employed by Gordon Transport Company for many years as drivers and that Benefield usually drove his truck behind the one operated by Welch. Benefield observed that on the morning of the accident Welch was in good health, and testified that the trucks had been inspected **before the trip, and were found to be** in good condition. Both Welch and Benefield made three round trips per week between Centralia, Illinois and Memphis, Tennessee.

Immediately prior to the accident, Benefield was driving a few minutes behind Welch. As they approached Murphysboro, there was a light sprinkle of rain, which stopped, but the pavement was wet. Welch was driving at about **45** miles per hour. As Benefield came over the hill located before the point of the accident, he saw two or three people standing in the middle of the highway. He then saw the Gordon Transport sign in the ravine on the right side of the road. The truck containing Welch was 35 to 40 feet down in the ravine. Benefield saw tire tracks on the road, which led into a hole in the shoulder. Benefield climbed into the hole, and estimated it was about four feet deep and three feet wide, and contained grass and leaves. The tracks showed that, after the truck hit the hole, it went into the guard rail, and from there into the ravine. Benefield was able to see the tracks leading from the pavement to the truck driven by Welch. He examined the tracks about 150 feet back, and none were over the center line.

According to Benefield, the tracks first left the road about 100 feet back from where they ran into the hole, and

gradually pulled off the road until they hit the hole, although the wheel on the left hand side did not go off the pavement until the truck turned over, which appeared to be at the point where it hit the hole.

On the opposite side of the road about **150** feet from the truck, there were tire marks of a car and a dented guard rail, which indicated that a car had hit the guard rail and bounced away. There was a gap where the vehicles left the road, which indicated that they did not come in contact with each other, nor did they pass each other.

Berdel Hasemeyer, the State Highway patrolman called to the scene of the accident on the day in question, confirmed Mr. Benefield's testimony. He saw the Gordon tractor-trailer in the embankment on the north side of the road, and determined that there had been no contact between the car, which was parked on the south shoulder, and the truck, which was driven by Welch. He saw tire marks from the truck on the wet pavement, but no skid marks. The tire marks were very clear. Going down the hill the tracks were never any closer than six inches from the center line. They were not on the wrong side. Towards the bottom of the hill, according to Trooper Hasemeyer, the tracks veered slightly towards the shoulder, then to the guard rails, and on into the hole and down to where it stopped. The hole in question was on the shoulder about two and one half feet from the edge of the concrete. It contained weeds and leaves and did not appear to have been a fresh hole. Hasemeyer said he measured the tracks where the truck began to leave the road about **122** feet from the hole. The measurements of the hole were seven feet, six inches wide and three feet deep. The shoulder was generally rough at a normal speed. The tire marks of the truck looked like the driver was attempting to pull back onto the pavement. The tracks indicated that the left drive wheel was on the edge of the

pavement, and the other track was on the shoulder. Trooper Hasemeyer explained that Welch's tracks were visible because he was braking, thus squeezing the moisture out of the tires, and there was no question but that the tracks were made by the Welch truck. In Trooper Hasemeyer's opinion, from an observation of the tracks, the truck lost its balance from striking the hole. Hasemeyer further testified that he knew the deceased, and, having observed his driving, thought he was one of the "very safest of drivers."

State Trooper William Maurizio testified that he accompanied Trooper Hasemeyer in investigating the accident. From his observation, the hole in question had been there quite a while. He also saw the line of tire tracks, and had no doubt but that they were made by the Welch truck. He stated: "We followed the line of tracks right down to the hole, and to the truck." The marks from the Welch truck led off gradually on the shoulder, and there was no sharp turn in the tracks at any point. The tracks were six to eight inches from the center line when they were on the pavement. According to Trooper Maurizio, the railing on the other side of the road had been hit and scraped to the west, or ahead of where the truck was going. There were no tire marks on that side of the road except at the damaged guard rail.

Dallas Hawk, section man for the area for the State of Illinois, testified that his duties consisted of fixing the road, including holes in the shoulder. He had been over the portion of Route No. 144 in question the morning of the accident looking for anything that might hinder traffic, but found nothing unusual. He had never seen the hole, but stated there was a possibility that the weeds, leaves and honeysuckle had filled up the hole, and that it was not easily distinguishable. The shoulder had not been mowed since August, according to Hawk.

Irving Lee Ferringer, the second man on the maintenance truck with Mr. Hawk, did not see the hole when he had driven by that morning.

The maintenance men testified that the road washes badly at that point, and the area had been flooded in May.

Charles Gillooley testified that he was a witness to the accident. He was driving east on Route No. **144** at about 8:30 or 9:00 A.M. He estimated his speed at about **50** miles per hour. It was drizzling. Another car passed him, as he was proceeding east. He subsequently learned that this car was driven by Frankie Edwards. He saw the Edwards car go into a skid. The driver temporarily lost control of his car, went over the shoulder on his side, and ran into the guard rail. Finally getting the car under control, he got back onto the highway. Edwards had already passed Gillooley when he went into the skid, according to Gillooley. Gillooley saw a Gordon Transport truck coming from the other direction shortly after the Edwards car skidded. He noticed the truck because the lights were flashing on it. The Edwards car was about **100** feet ahead of him at the time he saw the truck, and had come back onto the pavement. The truck and the car did not come together, but the truck hit the shoulder, and took off the fence. As far as he could see, the truck seemed to lose control, hit the shoulder, and appeared to go off suddenly. The witness was about **100** feet from the westbound truck when it left the road. He estimated that Edwards was going about **60** miles per hour when he went into a skid on the wet pavement, and thought the skid stopped at about the center line. Gillooley thought the truck driver could have seen the Edwards car as the truck came down the hill, since his headlights flashed.

Frankie Edwards testified he was driving east on Route No. **144**, and had passed a car, "After I got past and back on my side of the road this truck was coming down the road

towards me. He blinked his headlights twice, and appeared to be over the black line.” Edwards testified that he put on his brakes, pulled over to the shoulder, crashed into the guard rail, and then pulled back onto the pavement on his own side. He did not see the truck go off the road. He estimated his speed to have been **40** or **45** as he passed the Gillooley car. It was hazy, and had been raining, or had just stopped. The pavement was wet. Edwards stated that he did not start skidding until he was back on his side of the road, and then he applied his brakes, and skidded into the guard rail. The truck was blinking his headlights, and appeared to be riding on the center line.

Claimants may not recover unless they prove by a preponderance of the evidence that (1) Robert Welch was free from contributory negligence; (2) that respondent was negligent; and, (3) the negligence of respondent was the proximate cause of the accident.

Three witnesses, including the two State Troopers who were at the scene of the accident immediately after it occurred, testified that they could clearly see the tracks of Welch’s truck going along the highway, and then gradually easing off onto the shoulder and right into the hole, and thence down to the point where the truck was located in the ravine. They explained the tracks were visible because of Welch’s action in pumping his brake. They all testified that the tracks were never closer than six inches to the center line. Both Benefield and Trooper Hasemeyer testified that Welch was an extremely safe driver.

Witnesses Edwards and Gillooley both testified that the Edwards car passed the Gillooley car on a two lane highway coming towards Welch’s truck. Edwards passed the Gillooley car, and then put on his brakes. He skidded onto the shoulder, and crashed into the guard rail before passing the Welch truck, which had by then gone off onto the

shoulder. It was a hazy day, and Gillooley thought that the truck went off suddenly. Edwards testified that it “appeared to be over the center line. However, the clearly visible tracks showed that the truck was not over the center line, and had, in fact, gone off the road gradually.

It is not unreasonable for a driver to pull over to the shoulder of the road after seeing a car in his own lane coming towards him, which apparently is what happened when Welch saw the Edwards car pass the Gillooley car. This is indicated by the fact that Welch blinked his headlights in warning, as he came over the hill.

That the hole caused the truck to go into the ravine, killing Welch is shown by the fact that the tracks ran gradually into the hole, and then abruptly veered over the guard rail. The witnesses testified that the hole appeared to have been there a long time, as shown by the vegetation growing in it. The State’s maintenance men testified that the last mowing had been in August, two months before the accident, and that the area washes badly from floods. Therefore, the State should have known of the defective condition of the shoulder by the exercise of reasonable care, which would encompass frequent mowing of the vegetation at a spot, which is likely to develop holes and defects. It would seem that the dangerous holes on the shoulders are not those, which can be readily seen from driving along the road, but are those which are hidden by vegetation.

“Highway” is defined as any public way for vehicular traffic, which has been laid out pursuant to State law (Ill. Rev. Stats., Chap. 121, Sec. 2-202), and includes “appurtenances necessary or convenient for vehicular traffic.” Since a road shoulder is both necessary and convenient for vehicular traffic, it follows that reasonable care by the State of such shoulder is required.

In the instant case, the shoulder was being used for

an intended purpose—that of avoiding an apparent accident due to the Edwards car being on the wrong side of the highway in passing Gillooley and skidding out of control.

The law of the United States, in absence of specific state statutory provisions, requires travelers in vehicles each to turn to the right, if reasonably practical, when they meet each other upon a highway. (25 *Am. Jur.* 2d, Highways, Sec. 206.)

Therefore, there was no contributory negligence on the part of Robert Welch in gradually pulling off to the right, and leaving the pavement in order to pull onto the shoulder. There was negligence on the part of the State in not maintaining the shoulder in a safe condition for the use to which it was devoted.

We do not by this opinion purpose to expand the degree of responsibility imposed upon the State in the maintenance of a shoulder. This Court has long held that respondent is not bound to maintain a shoulder in the same condition as the paved surface of the highway. (*Sommer, Et Al*, vs. *State of Illinois*, 21 C.C.R. 259; *Howell* vs. *State of Illinois*, 23 C.C.R. 141; *Lee vs. State of Illinois*, No. 5076.)

For example, a shoulder, which is a few inches lower than the pavement, does not amount to negligence *per se*. This Court further held in the above cited cases that the State has no duty to maintain the shoulder in such a manner as would insure the safety of vehicles, which turn onto the shoulder, and then attempt to return to the pavement without slackening speed.

Mr. Welch's death left his widow and five minor children without support, His income for 1960 was \$9,071.89, and for 1961 was \$7,149.98. His life expectancy was 23.1 years.

Therefore, claimant is awarded the sum of \$25,000.00.

(No. 5259—Claimant awarded \$2,505.75.)

ST. MARY'S HOSPITAL, DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 24, 1966.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, Claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Letha Roney for the period from April 25, 1965 to June 11, 1965.

The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the instant claim on October 29, 1965 on the basis that it was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. Thereafter, on December 9, 1965, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$2,505.75, representing charges for the hospital services furnished said Letha Roney during the above mentioned period of time.

A Departmental Report was filed in this matter, and received in the Attorney General's office on January 14, 1966, which stated: "We admit claimant is justly entitled to the amount claimed.)' Thereafter a written stipulation was

entered into between claimant and respondent by their respective attorneys, which found that claimant furnished services to the said Letha Roney; that the reasonable and equitable charges for the services so provided by claimant amounted to the sum of \$2,505.75; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Memorial Hospital of Du Page County, a Corporation, vs. State of Illinois*, Case No. 5196, opinion filed January 29, 1965. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$2,505.75.

(No. 5260—Claimant awarded \$118.34.)

ST. MARY HOSPITAL, DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 24, 1966.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Naomi F. Phelps for the period from May **26, 1965** to May **30, 1965**. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the instant claim on November **17, 1965** on the basis that it was for services rendered prior to July **1, 1965**, and that the appropriation for that biennium had lapsed. Thereafter, on December **9, 1965**, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of **\$118.34**, representing charges for the hospital services furnished said Naomi F. Phelps during the above mentioned period of time.

A Departmental Report was filed in this matter, and received in the Attorney General's office on January **14, 1966**, which stated: "We admit claimant is justly entitled to the amount claimed." Thereafter a written stipulation was entered into between claimant and respondent by their respective attorneys, which found that claimant furnished services to the said Naomi F. Phelps; that the reasonable and equitable charges for the services so provided by claimant amounted to the sum of **\$118.34**; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Memorial Hos-*

pital of Du Page County, a Corporation, vs. State of Illinois.
It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$118.34.**

(No. 5261—Claimant awarded \$318.20.)

ST. MARY'S HOSPITAL, DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent,

Opinion filed February 24, 1966.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Myrtle Strickler for the period from June 6, 1965 to June 15, 1965. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the instant claim on November 18, 1965 on the basis that it was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. Thereafter, and on December 9, 1965, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of **\$318.20**, representing

charges for the hospital services furnished said Myrtle Strickler during the above mentioned period of time.

A Departmental Report was filed in this matter, and received in the Attorney General's office on January **14, 1966**, which stated: "We admit claimant is justly entitled to the amount claimed." Thereafter a written stipulation was entered into between claimant and respondent by their respective attorneys, which found that claimant furnished services to the said Myrtle Strickler; that the reasonable and equitable charges for the services so provided by claimant amounted to the sum of **\$318.20**; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance **with such contract**; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Memorial Hospital of Du Page County, a Corporation, vs. State of Illinois*. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$318.20**.

(No. 5262--Claimant awarded \$612.00.)

ST. MARY'S HOSPITAL, DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 24, 1966.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Flossie Barbetti for the period from February 11, 1965 to February 27, 1965. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the instant claim on November 18, 1965 on the basis that the claim was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. Thereafter, on December 9, 1965, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$612.00, representing charges for the hospital services furnished said Flossie Barbetti during the above mentioned period of time.

A Departmental Report was filed in this matter, and received in the Attorney General's office on January 14, 1966, which stated: "We admit claimant is justly entitled to the amount claimed." Thereafter a written stipulation was entered into between claimant and respondent by their respective attorneys, which found that claimant furnished services to the said Flossie Barbetti; that the reasonable and equitable charges for the services so provided by claimant amounted to the sum of \$612.00; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was

entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Memorial Hospital of Du Page County, a Corporation, vs. State of Illinois*. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$612.00.

(No. 3025—Claimant awarded \$6,581.64.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed April 7, 1966.

GOSNELL AND BENECKI and JOHN W. PREIHS, Attorneys
for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—supplemental award. Under the authority of *Penwell vs. State of Illinois*, 11 C.C.R.365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period from February 1, 1964 to January 1, 1966.

PEZMAN, J.

On February 2, 1966, claimant filed her petition for reimbursement for monies expended for nursing care and help, medical services and expenses from February 1, 1964 to January 1, 1966. Claimant seeks reimbursement in the sum of \$6,581.64.

Claimant was injured on February 2, 1936 in an accident arising out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the original case of *Penwell vs. State of Illinois*, 11 C.C.R. 365, in which an initial award was made,

and at which time jurisdiction was retained to make successive awards in the future.

Claimant has attached to her petition as Exhibit No. 1 a bill of particulars, which discloses the amounts expended from February 1, 1964 to January 1, 1966 to be as follows:

1. Nursing and practical help	\$ 1,853.95
2. Room and board for nurses and practical help. ...	\$ 1,223.25
3. Drugs and supplies	\$ 934.61
4. Physicians, hospital, and professional services	\$ 2,569.83
	<hr/>
Total Expenses	
to January 1, 1966	\$ 6,581.64

A joint motion of claimant and respondent was filed herein on February 15, 1966, asking the Court for leave to waive the filing of briefs and arguments therein. On February 21, 1966, an order was entered granting the prayer of said motion.

Claimant's petition clearly alleges that there has been no improvement in her physical condition since the last award, and that her condition requires constant care by physicians and practical nurses. Exhibit No. 2 attached to said petition contains receipts and vouchers for the monies detailed as having been spent in Exhibit No. 1. From an examination of the petition and the exhibits, as well as the file in this cause, the Court is of the opinion that the expenditure of such sums of money was necessary for the 'care of claimant.

An award is, therefore, made to claimant in the amount of \$6,581.64 for the period of time from February 1, 1964 to January 1, 1966.

This Court reserves jurisdiction of this matter for further determination of claimant's need for additional care.

(No. 4913—Claim denied.)

ROLAND MUNROE, JR., Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed April 7, 1966.

MORRIS J. WEXLER, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; DANIEL N.
KADJAN, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*wrongful incarceration.* The legislature intended to provide recourse in the Court of Claims only for those who were imprisoned for **an** act which they did not commit.

SAME—*evidence.* Where evidence showed that claimant had in “fact” committed a criminal act, but could not be held **criminally** responsible due **to** a mental condition, no reward will be made for wrongful incarceration.

PEZMAN, J.

The issues that surround this claim commenced on the 29th day of August, 1936 when claimant, a 15 year old Chicago newspaper boy, called at the apartment of Agnes Roffies, a woman of the age of 66 years, in order to collect from her the weekly payment for the delivery of a newspaper. Claimant was invited into the home of Agnes Roffies to rest and have **a** soft drink. The evidence discloses that, at the request of Mrs. Roffies, claimant straightened a key to one of her doors, and, in so doing, made use **of** a hammer, which later was introduced in evidence as the weapon, which caused her death.

From the transcript of evidence on file, we find that claimant, while in said apartment and performing said task, noticed Mrs. Roffies placing a box on the dining room table, which contained certain trinkets, jewelry, buttons, and various articles of gold or gold plate. There was some discussion between the parties **as** to the sale of these items. During such discussion and while Mrs. Roffies was walking around her apartment, she stumbled and fell. Claimant struck her on the head with the hammer, which he still had

in his possession, and when the hammer broke claimant seized Mrs. Roffies's cane, and struck her with it. He seized the various items of jewelry and trinkets, fled from the apartment, and attempted to remove stains of blood from his clothing and various other items, and proceeded to dispose of the jewelry. While the attack was in process, three passers-by on the darkened street heard Mrs. Roffies scream, and observed claimant in the act of striking her. Later he was arrested at his home. Shortly thereafter he admitted to the killing, and signed a confession thereto.

Roland Munroe, Jr., claimant herein, was indicted by the Grand Jury of Cook County on September 1, 1936 for the murder of Agnes Roffies. Claimant was arraigned in the Criminal Court of Cook County on September 7, 1936, and entered a plea of not guilty. A jury trial was held, and, on October 21, 1936, the defendant-claimant was found guilty of the crime of murder. He was then sentenced to the Illinois State Penitentiary for a term of 199 years. The first two months of his incarceration were spent in the diagnostic depot at the Joliet State Penitentiary. He was then transferred to the Psychiatric Division of the Illinois State Penitentiary at Menard. On July 9, 1945, he was transferred from the Psychiatric Division of the Menard branch to the General Division of the Penitentiary at Menard.

Claimant petitioned the Criminal Court of Cook County for a transcript of the proceedings of his trial and the common law record. On January 26, 1956, the petition for the common law record was granted, but it was denied as to the transcript of the proceedings of the trial. Prentice H. Marshall was appointed as claimant's attorney on November 13, 1956 by the Illinois Supreme Court. On January 18, 1957, the Criminal Court of Cook County granted the petition of claimant that he be furnished with the transcript of the proceedings of his trial (pursuant to Rule 65-1 of the Su-

preme Court of Illinois). In January of 1958, the transcript of the proceedings was filed with the Illinois Supreme Court, and, in May of 1958 the Supreme Court issued a Writ of Error. On November 26, 1958, the Supreme Court reversed the finding of guilty of claimant, and remanded the case to the Criminal Court of Cook County for a new trial. On December 31, 1958, Roland Munroe, Jr., was re-arraigned in the Criminal Court of Cook County, and entered a plea of not guilty. On May 26, 1959, a bench trial before Judge Grover C. Niemeyer of the Criminal Court, found Roland Munroe, Jr., not guilty of the crime of murder, and discharged him for the reason that at the time of the commission of the act Claimant was insane, but at the time of his second trial he was sane, and, therefore, should be discharged.

On May 23, 1963, claimant, Roland Munroe, Jr., filed his cause of action in the Court of Claims against the State of Illinois based upon the theory that claimant was and is innocent of the murder of Agnes Roffies, and was unjustly imprisoned in the State of Illinois for a period in excess of 22 years. It is further contended that by reason of the unjust imprisonment claimant was damaged in the amount of \$35,000.00. The complaint contains a prayer for judgment against respondent in the sum of \$35,000.00, together with attorney's fees not to exceed 25% of the judgment granted and the cost of the suit.

Claimant contends that, by reason of his mental condition at the time of the consummation of the act, he could not determine right from wrong, or that, if he did retain such an ability, he could not restrain himself from so acting. Claimant's position is based upon the point that at the original trial, due to his mental condition, he should have been found innocent by reason of insanity, and, therefore, his incarceration was unjust. Claimant further contends that the

decision at the second trial by the Criminal Court of Cook County, which found claimant, Roland Munroe, Jr., to be innocent, is free from the collateral attack of the State of Illinois in this cause. The claim is based upon the fact that claimant was insane at the time he committed the act for which he was imprisoned, and, therefore, was innocent of the crime for which he was imprisoned.

Respondent bases its primary defense on Par. 3 of Sec. 8 of the Court of Claims Act. This Act clearly sets forth that the Court of Claims has jurisdiction in such matters only if claimant proves his innocence of the crime for which he was imprisoned, and further proves that he has a claim against the State for time unjustly served in prison. It is contended by the State that a finding of claimant's innocence, based upon insanity, by the Criminal Court of Cook County is proof neither of the fact that claimant is ~~or~~ was innocent, nor of the fact that the years he spent in prison were unjustly spent. It is the position of respondent herein that, by reason of the confession signed by claimant, the act for which claimant was incarcerated was admitted, and that on further evidence and testimony of claimant at the latter trial such act was not denied.

It seems that the primary issues for the Court to determine herein are whether claimant has proved all the material allegations of his claims, i.e., that the time served in prison was unjust; that he was innocent of the crime for which he was imprisoned; and the amount of damages to which he is entitled. (See *Jack Flint vs. State of Illinois*, 21 C.C.R. 80, *Pitt vs. State of Illinois*, 22 C.C.R. 258, *People ex rel Rusch vs. Fusco, et al*, 397 Ill. 468.) It is quite helpful in determining these issues to carefully analyze the intention of the legislature in passing the legislation, which is the basis of this claim. It is abundantly important that claimant herein prove not only his innocence, but also prove

that his particular set of facts places himself within the realm of the relief granted by the statute.

The evidence clearly indicates the mental illness of claimant at the time of the original act in question. At the time of the original act, the science of mental and psychiatric treatment had only commenced to emerge into that which is now available in this field. Evidence shows that defendant was in need of psychiatric help and institutional care, and such advice was given to claimant's stepmother prior to the act, which is the basis of the criminal matter. The advice in itself should have immediately required some type of action on the part of the parents or the related community social authorities. Testimony of the doctors at the time of incarceration indicated that claimant was of such a mental condition that he required institutionalized care, extensive rehabilitation, and psychiatric care. Claimant contends that because of these conditions the original finding of guilty was unjust; that the subsequent finding of not guilty by the Cook County Criminal Court is decisive; that such finding of innocence cannot be collaterally attacked, since claimant was found innocent of this act; and, that any confinement or incarceration was unjust. The findings of the Criminal Court of Cook County in the criminal trial cannot be attacked collaterally by the State, and their findings can only be challenged or attacked if some fraud or lack of jurisdiction has been raised. (See *Bell vs. Senneff*, 83 Ill. 122.)

There is little doubt that the mental condition of claimant was such at the time of the act itself that the mind and the body could not be held responsible, and a decision of innocence by reason of insanity was justified. The finding of innocence by reason of insanity needs questioning to see if it meets the test established by *Jonnia Dirkans vs. State of Illinois*, Case No. 4904, opinion filed February 25, 1965.

"The law in Illinois is clear that claimant must prove his innocence

in order to be entitled to an award by the Court of Claims. The burden is upon claimant to prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed by him (emphasis supplied); and (3) the amount of damages to which he is entitled."

There is no doubt from the evidence and the confession introduced that the act of striking the deceased by claimant did occur.

This Court in the Dirkans case held that a claimant must prove his innocence of the "fact" of the crime. It is the belief of this Court that the legislature intended only to provide a manner of recourse in the Court of Claims, with the amount of recovery specified, for those who were imprisoned for an act, which they did not commit. The legislature did not intend to establish a means of recourse for an individual who in "fact" had committed a criminal act, but an act for which one could not be held "criminally" responsible due to a mental condition. Based upon the evidence and the facts herein, the Court must find that the act for which claimant was wrongfully imprisoned was in fact committed **by** him, and that he was not innocent **of** the crime, as such "innocence" is interpreted by this Court.

Claim is hereby denied.

(No. 4928—Motion of respondent for a summary judgment allowed—Claim dismissed.)

VERA SEATON AND LENAR SEATON, Claimants, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed April 7, 1966.

ARTHUR S. GOMBERG, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; SHELDON K. RACHMAN, Special Assistant Attorney General, for Respondent.

PRACTICE AND PROCEDURE—*notice as condition precedent.* The giving

of **notice** is condition precedent to maintenance of suit against State, and failure to sufficiently meet statutory notice requirements will result in dismissal of claim.

SAME—Defective notice. When actual location or place where accident occurred was at substantial variance with that set forth in the notice, respondent's motion for summary judgment was allowed and claim dismissed as notice was legally insufficient.

PERLIN, C. J.

On motion for a summary judgment, the State of Illinois, respondent, has moved that the claim of Vera and Lenar Seaton, claimants in this action, be dismissed because the notice of claim for personal injuries is fatally defective.

The record reveals the following:

Claimant, Vera Seaton, alleges that she was injured when a car, which was driven by Lenar Seaton, ran into a hole in the pavement of Illinois State Highway Route No. **45** on August **3**, 1959.

Section **22-1** of the Court of Claims Law requires that any person who is about to commence any action in the Court of Claims against the State of Illinois for damages on account of injury to his person shall file notice within six months from the date the injury was received, giving, among other requirements, "the place or location where the accident occurred."

The notice of claim filed by claimant contains the following statement:

"5. Location or place where the accident occurred:

On Illinois State Highway Route No. **45**, approximately between **two** or three blocks north of Route No. **83**, at the hole or defect of the road on the northbound portion thereof, at or near Palos Park, Illinois."

The complaint, which was filed on August 8, 1960, also contains the description of the hole as being "on Route No. **45**, approximately *two* or three blocks north of Route No. **83**, at or near Palos Park, Illinois."

In support of its motion for a summary judgment, respondent states that a stipulation of fact was entered into covering the hearing in this matter, which was held on April 8, 1964, wherein four witnesses on behalf of claimants testified that the location of the alleged defective roadway condition was on Route No. 45, between a minimum of two and a maximum of three *miles*, all north of Route No. 83.

Respondent, therefore, contends that the notice of claim for personal injuries is fatally defective in that the location or place where the accident occurred, as set out in the notice, is at substantial variance with the evidence adduced relating to the location or place where the accident occurred, and thus the notice is legally insufficient.

That the notice in the instant case is insufficient is amply demonstrated by the following cases:

In *Reichert vs. City of Chicago*, 169 Ill. App. 493, the notice to the city stated that the accident happened "at and near the intersection of La Salle Street with Madison Street . . ." In rejecting the notice, the court stated at p. 496:

"The purpose of the notice is not only to enable the city to intelligently investigate the alleged claim, but that it may prepare its defense thereto. It is impossible to say that this notice furnished such particulars. If the accident was due to a defective lamp "at or near" the intersection of two streets, must the city be prepared, at its peril, to meet proof of an accident occurring by reason of some defective street lamp on or near any of the four corners of the street intersection in question? We do not think so.

"Can a description, which applies equally to one of four several places, accurately be said to specify the place or location of the accident?"

In its opinion, the court further cited the case of *Benson vs. City of Madison*, 101 Wis. 312, 77 N.W. 161, in which the Supreme Court stated:

"But to be legally sufficient, a notice must contain a sufficiently definite description of the place of the accident to enable the interested parties to identify it from the notice itself. . . ."

It further cited an excerpt from the case of *Barribeau vs.*

City of Detroit, 147 Mich. 119, in which the Supreme Court used the following language:

“When parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has been given to the city.”

In *Swenson vs. City of Aurora*, 196 Ill. App. 83, plaintiffs suit was dismissed in an action to recover damages for injuries allegedly received from stepping into a hole in a defective sidewalk. The notice in that case set forth the place of the hole as being on the “west side of said La Salle Street, between North Avenue, and Washington Street, and opposite Jennings Seminary, in the city aforesaid.” The court stated: “In the area of sidewalk covered by the description, there may have been a large number of holes.” The court further ruled that there was no reason why the plaintiff could not have stated in the notice, as was done in later testimony, that the hole was located in the sidewalk, about fifty-five feet north of the corner of North Avenue, which fixes the location with sufficient definiteness.

In *Keller vs. Tomaska, Et Al*, 299 Ill. App. 34, 19 N.E. 2d 442, a motorist counterclaimed against the city for an accident, which was allegedly caused by a defective street. A notice, which gave the place of the accident at a point almost a quarter of a mile from where the accident actually occurred, was fatally defective in its specification of place of accident. The notice was held insufficient, although in the same case plaintiff had, in fact, filed the proper notice of place. The court held that the right to maintain a party’s action depends on the sufficiency of his notice, and that it was immaterial what notice the defendant may have had from other sources. (*Ouimette vs. City of Chicago*, 148 Ill. App. 505, 508.)

There are cases, which indicate that a notice would not be deemed fatally defective if, as a matter of fact, the city or state authorities could, without further information

from claimant, determine the exact place of the alleged incident. (*Bryant vs. City of Chicago*, 319 Ill. App. 524, 49 N.E. 2d 654; *Reed vs. City of Chicago*, 309 Ill. App. 129, 32 N.E. 2d 680.) However, the difference in the instant case between two and three *blocks* and two or three *miles* is so substantial as to incapacitate respondent in its ability to make any investigation, or to prepare any defense whatsoever.

Claimant contends, however, that a deposition, which was taken on October 31, 1961 by respondent, cured any defects in the notice. This allegation is without merit. The giving of notice within the six month period in accordance with statutory requirements is a condition precedent to the maintenance of a suit for personal injury against the State, and failure to meet the notice requirements must result in dismissal of any claim. That a deposition, which was taken more than two years after the accident, does not repair a defective notice is enunciated by the court in the Swenson case at p. 92, as follows:

“The object of the statute is to furnish timely notice to the **city**, village, or **town** of the fact that the party claims to have sustained an injury, and that he proposes to enforce his claim for damages against said city, village, or town by suit, and thereby enable the city, village, or town to investigate the claim while the facts are fresh, and the justice of the claim can be readily ascertained.” *Donaldson vs. Village of Dieterich*, 247 Ill. 526.

For the aforesaid reasons, the motion of respondent for a summary judgment is hereby allowed, and the claims of Vera Seaton and Lenar Seaton are dismissed.

(No. 4993—Claim denied.)

JOSEPH KARULSKI, Administrator of the Estate of ADELLA KARULSKI, Deceased, Claimant, *vs.* THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Respondent.

Opinion filed April 7, 1966.

DOWD, DOWD AND DOWD, Attorneys for Claimant.

RAYMOND, MAYER, JENNER AND BLOCK, Attorneys for Respondent.

PRISONERS AND INMATES—*duty of care owed to patients.* A hospital is not an insurer of a patient's **safety**, but owes the patient the duty of protection, and must exercise such reasonable care **as** the patient's known condition may require.

SAME—*evidence.* Where claimant failed to prove by a preponderance of the evidence that respondent did **not** exercise the degree of care owed to its patient, the claim will be denied.

PEZMAN, J.

This **is** an action brought by Joseph Karulski, **as** Administrator of the Estate of Adella Karulski, deceased, against the Board of Trustees of the University of Illinois under the Illinois Wrongful Death Act, 1961 Ill. Rev. Stats., Chap. 70, Sec. 2, and the Court of Claims Act, 1961 Ill. Rev. Stats., Chap. 37, Sec. 439.8.

The facts of this case are as follows:

Approximately twenty-five years ago, when she was nineteen years old, Adella Karulski sustained head injuries in an automobile accident. After the accident she began experiencing severe head pains. About 1947, Mrs. Karulski began to have fainting spells. Between 1947 and May of 1960, Mrs. Karulski experienced six such fainting spells, several of which lasted approximately eight hours each. During this thirteen year period Mrs. Karulski received various treatments for her headaches and fainting spells, including operations, and radiation treatments.

By 1958, the headache pains had become so severe that they could only be relieved by increasingly larger doses of Levodromoran, a narcotic. Eventually Mrs. Karulski became addicted to Levodromoran. Her physician refused to give her any more, and referred her to the University of Illinois Research Hospital.

Mrs. Karulski was admitted to the University of Illinois

Research Hospital on July 27, 1960 at about 1:00 P.M. At the time she was anxious, but in no distress. The admitting diagnosis was "Cushing's syndrome." Mrs. Karulski was placed in Medical Ward 10 under the care of Dr. Alf Tannenberberg.

On July 28, 1960, Mrs. Karulski complained of a headache, and wanted her "medication." Later that afternoon Mrs. Karulski told nurse Blackburn that, if her headache was not relieved, she would jump out of the window. As a result of this threat, Mrs. Karulski was transferred to a screened room, placed in restraints, and a psychiatric consultation ordered.

Mrs. Karulski was examined by two psychiatrists, Drs. Mary Samos and William J. Piper. After talking to Mrs. Karulski on July 28, 1960, Dr. Samos concluded she was having a withdrawal reaction from the narcotic addiction. She recommended that a narcotic be reintroduced, and a gradual withdrawal made. Dr. Tannenberberg concurred with Dr. Samos' diagnosis. Dr. Piper noted that Mrs. Karulski was depressed and discouraged, but, in his opinion, was not psychotic or a suicide risk.

On July 30, 1960, a narcotic was reintroduced, and a program of gradual withdrawal begun. On July 31, 1960, Dr. Reynolds ordered the restraints removed, Mrs. Karulski's ward privileges were restored, and she was allowed to go about freely in the ward. Dr. Piper concurred in the judgment that there was no further reason to keep Mrs. Karulski under restraints.

The withdrawal program was successful, and by August 5, 1960, in the opinion of the doctors and nurses treating her, Mrs. Karulski was much improved. On the morning of August 6, 1960, Mrs. Karulski was given a tranquilizer. Later that morning she complained of difficulty in breathing. She

was examined by Dr. Tannenberg, and advised that there was nothing wrong with her.

At about 10:00 o'clock on the morning of August 6, 1960 Mrs. Karulski jumped or fell from the tenth floor window of the sun porch where she had gone alone. The record in this case indicates that there were no witnesses to the acts of Mrs. Karulski on the sun porch, which resulted in her death.

The Court desires to voluntarily state that the doctrine of *res ipsa loquitur* does not apply to this case. Claimant does not urge its application in his complaint or brief. Conditions usually stated as necessary for the application of the principle of *res ipsa loquitur* are three: (1) the accident must be a kind, which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused **by** an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. With the question of whether Mrs. Karulski accidentally fell or intentionally jumped from the window on the sun porch unanswered by the evidence in this case, and the mental state of Mrs. Karulski at issue, the Court feels that the three conditions set forth above for the application of the doctrine of *res ipsa loquitur* have not been satisfied.

In his complaint, claimant appears to set forth *two* separate hypotheses concerning the death of Mrs. Karulski, for which claimant seeks to recover damages. Claimant's first hypothesis, or theory, is that respondent was negligent in failing to prevent Mrs. Karulski from committing suicide when her propensity to commit suicide was known, or by the exercise of ordinary care should have been known to respondent.

Claimant's second hypothesis, or theory, is that Mrs. Karulski accidentally fell out of the window, as a result of tripping or stumbling, and that respondent was negligent in

failing to keep and maintain proper retaining screens or bars on the windows of the hospital for the protection of patients in the hospital from falling from said windows.

The Court will consider claimant's second hypothesis first. It raises a question of fact, which claimant fails to answer. In fact, claimant's brief and the testimony elicited from claimant's witnesses appear to be based solely on and directed toward the substantiation or proof of claimant's first hypothesis, namely, that Mrs. Karulski committed suicide. Claimant did not consistently pursue his second hypothesis, and has failed to prove the same by a preponderance of the evidence.

The Court will now consider claimant's first hypothesis. In order to recover damages for the death of Mrs. Karulski, claimant must prove by a preponderance of the evidence that respondent failed and neglected to render the degree of care owed to Mrs. Karulski as a patient in the University of Illinois Research Hospital. Having proved that respondent failed to render the degree of care owed Mrs. Karulski as a patient, claimant must also prove by a preponderance of the evidence that Mrs. Karulski was not guilty of contributory negligence.

In *Mounds Park Hospital vs. Von Eye*, 245 F. 2d 756 (1957), the court held that a hospital is not an insurer of a patient's safety, but owes the patient the duty of protection, and must exercise such reasonable care as the patient's known condition may require. In *Peterson vs. State of Illinois*, 22 C.C.R. 381, this Court recognized and reaffirmed the rule that the extent and character of the care, which a hospital owes its patients, depends on the circumstances of each particular case. However, this rule is limited by the rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen.

The principal question in the case at bar is whether

respondent hospital took reasonable precautions, and exercised reasonable care for Mrs. Karulski's safety following her suicide threat to nurse Blackburn on July 29, 1960. Immediately after the threat of suicide Mrs. Karulski was transferred to a screened room, and restrained. Two trained psychiatrists, Dr. Samos and Dr. Piper, were called, and both examined Mrs. Karulski. It was the opinion of the two psychiatrists, based upon their examination of Mrs. Karulski, that she was suffering a withdrawal reaction from a narcotic addiction, and, while depressed and discouraged, she was not psychotic or a suicide risk. Mrs. Karulski responded quickly to the treatment administered, which consisted of a program of gradual withdrawal from narcotic addiction, and the administration of certain tranquilizing drugs.

By July 31, 1960, it was the opinion of the two psychiatrists, concurred in by the physicians and nurses who had been treating, and who continued to treat Mrs. Karulski on a day to day basis, that the risk of suicide, if any had ever existed, was gone, and it was considered by them safe to permit her to resume the normal status of a patient in the ward, As the days progressed Mrs. Karulski's condition, in the opinion of the hospital personnel, continued to improve. Mrs. Karulski's husband and son both testified that Mrs. Karulski had never expressed any intention or desire to take her own life. From all outward signs there was apparently no reason to anticipate that Mrs. Karulski would commit suicide.

It is the opinion of this Court that claimant has failed to prove by a preponderance of the evidence that respondent failed to exercise the degree of care owed Mrs. Karulski. It is our opinion that respondent took all reasonable precautions with regard to Mrs. Karulski's safety, and rendered that degree of care owed Mrs. Karulski as a patient.

Claim is, therefore, hereby denied.

(No. 5027—Claimants awarded \$1,513.90.)

CECIL HOUT AND MOTORS INSURANCE CORPORATION, A CORPORATION, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 7, 1966.

ROLAND J. DE MARCO, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence—duty to erect adequate warning signs. The State is under a duty to give warning by erecting proper and adequate signs at a reasonable distance from a dangerous condition of which it had notice, and failure to erect such signs constitutes negligence, for which an award will be made.

PERLIN, C. J.

Cecil Hout and Motors Insurance Corporation, claimants, seek recovery of \$60.00 and \$1,463.90, respectively, for damages to a 1959 Chevrolet automobile, which was owned and driven by Cecil Hout, and insured by the Motors Insurance Corporation.

On March 31, 1960, Cecil Hout was driving the above mentioned automobile in a northerly direction on a section of Old Route No. 45, several miles south of Effingham, Illinois. At approximately 7:00 P.M. he crashed into a pile of crushed rock, which covered the width of the road, and had been placed there by the State Division of Highways.

A Departmental Report, which was submitted by the Division of Highways, describes the area of the accident as follows:

“Marked U.S. Route No. **45**, south from the southerly limit of the city of Effingham, Effingham County, for a distance of slightly more than four miles, was constructed by the State of Illinois, Department of Public Works and Buildings, Division of Highways, in the year 1924 as a part of State Bond Issue Route No. 25. The construction consisted of an **18** foot Portland cement concrete pavement having a thickness of 9 inches, and a **six** foot earth shoulder on each side.

“In the year 1952 the southerly 4,000 feet of the above described section of highway was relocated to the east, and widened to **22** feet. The

old pavement within the next above limits was disconnected from the new pavement by the complete removal of sections of the old pavement at the north **and** south ends. The north end of the old pavement **is** closed to **all** traffic; however, a gravelled connection of approximately 50 feet in length was made between the old and new pavements at the south end. **All Route U.S. No. 45** traffic direction signs were removed from the old section of pavement in 1952, and re-erected immediately along the newly located pavement. The old section of pavement intersects **an** east-west county road, and serves as an access road for local traffic only in the immediate vicinity.

“The easterly half of that part of the old pavement located north of the county road was and **is** used for the open storage of stone, broken concrete, cinders, and other materials used in highway maintenance.”

Claimants allege that respondent was negligent because (1) it failed to have the old section of Highway No. 45 properly barricaded; (2) it failed to have the highway properly marked with warning, danger, or other appropriate signs to alert claimant to the fact that the road was closed or dangerous; (3) it failed to have flares, lights, or other warning signals to warn claimant that there was a danger in the road, to-wit: pile of crushed lime rock, or that there was a dangerous condition ahead.

Cecil Hout testified that on the day in question he had stopped at the home of the Secretary of his Union, which was located at the south end of Old Route No. 45. When Hout left the home he traveled north on Old Route No. 45. When Hout crossed Dutch Lane, which intersects Old Route No. 45, he did not see it because of the darkness, nor did he see any signs or barriers. **As** he proceeded on Old Route No. 45, Hout testified he was abruptly stopped by a rock pile, which ran the width of the road, and was 7 or 8 feet high. The rock pile was not visible, according to Hout. He stated that the glare from the lights of the cars traveling south on New Route No. 45 prevented him from seeing the obstruction.

At no time, Hout testified, did he see a sign, light, or marking indicating that Old Route No. 45 was not in use,

or that the rock pile was there. The road on which he was traveling was made of concrete. Hout stated that he had his bright headlights on at the time of the accident, and was going about **40** to **45** miles per hour. The impact demolished the car.

Hugh Osborn, Traffic Engineer for the Division of Highways, testified that Dutch Lane led to the New Route No. **45** from Old Route No. **45**. He also stated that Old Route No. **45** was intended to be used for local traffic, and that there are residences located on Old Route No. **45** at the point where it intersects with New Route No. **45**.

Respondent presented no testimony or evidence disputing the fact that a rock pile was across Old Route No. **45** at the time of the accident, nor did it attempt to prove that there were warning signs or barriers to advise the traveling public of the existence of the rock pile.

Recovery will not be granted unless claimants prove **by** a preponderance of the evidence that (1) Cecil Hout was free from contributory negligence; (2) that respondent was negligent; and, (3) that respondent's negligence was the proximate cause of the accident.

Respondent contends that Cecil Hout was contributorily negligent in that he continued to drive without slackening his speed or stopping when he was allegedly blinded by lights from other cars, Hout stated: "Well, I was going north. I came to a cross road, and the lights from the new highway were shining through there. I couldn't see, and I ran into this pile of rock." In other testimony Hout stated that the lights were shining over the rock pile, and he couldn't see the rock pile. The question to be determined is whether Hout negligently proceeded for 200 or 300 feet at **45** miles per hour without being able to see anything as a result of being blinded by the lights altogether, or whether the lights merely prevented him from seeing the rock pile.

It is contended by respondent that, where the driver of a motor vehicle is so blinded by the lights of an approaching car that he cannot see the road upon which he is traveling for a reasonably safe distance ahead, ordinary prudence and care require that he shall stop, or proceed very slowly until the approaching car has passed. (60 C.J.S., Sec. 201 (h), pp. 541-542.) Respondent further asserts that the driver of a motor vehicle is required to exercise ordinary care to observe or discern dangerous obstructions in the highway, and to avoid running into them.

Photographs were introduced into evidence purporting to show the scene of the accident immediately after its occurrence. The pile of gravel, which stretches across the road, is not clearly visible. A prudent and careful driver could not reasonably anticipate this obstacle in the darkness in absence of warning signs or signals. Instead, he could reasonably assume that the cement highway would not end abruptly without warning.

There is no question but that respondent was negligent in placing a large pile of gravel across the width of a cement highway, little used as it may have been, without any warning signs, lights, or signals. This Court has long held that "although the State is not an insurer of the safety of persons in the lawful use of the highways, it is nevertheless under a duty to give warning by the erection of proper and adequate signs at a reasonable distance of a dangerous condition of which the State had notice either actual or constructive." (*Mammen vs. State of Illinois*, 23 C.C.R. 130, 135, citing *Bovey vs. State of Illinois*, 22 C.C.R. 95.)

In the *Mammen* case the Court held that a "No Outlet" sign was insufficient to warn the motoring public of a barricade across the road. In the instant case there were no signs whatsoever, and nothing to warn a reasonably prudent person of the danger created by respondent.

A staff adjuster for Motors Insurance Corporation testified that his company sustained a net loss of \$1,463.90, which reflects the salvage recovery on the 1959 Chevrolet Station Wagon. Hout testified that his loss was \$50.00, which was the amount deductible under his insurance policy.

Claimant, Cecil Hout, is hereby awarded the sum of \$50.00, and claimant, Motors Insurance Corporation, is awarded the sum of \$1,463.90.

(No. 5245—Claimant awarded **\$113.48.**)

RICHARD F. SCHOLZ, JR., Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed April 7, 1966.

RICHARD F. SCHOLZ, JR., Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—lapsed appropriation. Where evidence showed that the only reason for not paying claimant was that the appropriation had lapsed, an award will be made.

DOVE, J.

Richard F. Scholz, Jr., claimant, presented his statement to the State of Illinois Youth Commission, Division of Community Services, for expenses incurred by him for travel, meals, and lodging from May 8, 1963 to June 8, 1963 in the amount of \$113.48 in connection with his services as a member of the Advisory Board to the Division of Community Services.

Claimant prepared and filed with the Illinois Youth Commission a travel voucher for said amount, but the payment of said claim was denied for the reason that there were no funds available, as the appropriation for the 73rd biennium had lapsed.

A Departmental Report was filed, which stated that the

Division of Community Services had investigated the facts set forth in the complaint, and that claimant was entitled to be reimbursed for his incidental expenses. Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant had expended the amount of \$113.48 for travel, meals, and lodging in connection with his services as a member of the Advisory Board of the Division of Community Services, and that claimant was entitled to be reimbursed in that amount.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of \$113.48.

(No. 5267—Claimant awarded \$453.40.)

ST. MARY'S HOSPITAL), DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 7, 1966.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN,** Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, claimant, presented its statement to the Department of Pub-

lic Aid for hospitalization services rendered one Elmer Briscoe for the period from June 11, 1965 to July 23, 1965. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim in relation to that portion thereof for services rendered from June 11, 1965 through June 30, 1965 on the basis that the claim was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. On January 7, 1966, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of **\$453.40**, representing charges for the hospital services furnished the said Elmer **Briscoe** during the period of June 11, 1965 through June 30, 1965.

A Departmental Report, which was received in the Attorney General's office on February 2, 1966, was filed in this matter. It stated: "The Department admits claimant is justly entitled to the amount claimed." Subsequently, a written stipulation was entered into between claimant and respondent, by their respective attorneys, which found that claimant had furnished services to the said Elmer Briscoe, that the reasonable and equitable charges for the services so provided by claimant amounted to **\$453.40**, and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been: (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid has lapsed, it would enter an order for the amount due. *Memorial Hospital of Du Page County, A Corporation vs. State of Illinois*, Case No. 5196, opinion filed January 29, 1965. It appears

that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$453.40**.

(No. 5274—Claimant awarded \$135.55.)

JAMES HERMAN **GAA**, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed April 7, 1966.

JAMES HERMAN GAA, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where services have been satisfactorily performed, adequate funds were available at the time of such performance, and the appropriation from which claim therefor could have been paid had lapsed, an award will be made.

DOVE, J.

James Herman Gaa, claimant, presented his statement in the amount of **\$135.55** to the Illinois Department of Public Aid, Sangamon County, for services rendered and salary due him as a case worker for the period from April 16, 1965 to April 30, 1965, inclusive.

The Department of Public Aid mailed a warrant in the amount of **\$135.55** to claimant. The warrant was returned, and on September 17, 1965 was redeposited. Thereafter, and on February 10, 1966, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of **\$135.55** for services rendered during the above period of time.

A Departmental Report was filed in this matter, which stated:

“Mr. Gaa was employed by this agency as a Public Aid Caseworker. He was discharged in April, 1965, after he reported he would not return to work from sick leave. **This** agency was unable to locate him in order

to obtain a resignation, so the discharge was the only method by which we could terminate his employment.

"Vacation was due Mr. Gaa in the amount of \$135.55, and this amount was issued to him in warrant No. 474656. We were unable to deliver the warrant after attempts to locate him by phone and registered mail. On September 17, 1965, the warrant was redeposited.

"This Department cannot re-issue the warrant because funds appropriated for such services have lapsed.

"This Department admits that it is a just claim, and the amount is properly due claimant."

Thereafter a written stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant had been employed by the Department of Public Aid as a Caseworker I; that claimant was entitled to the sum of \$135.55; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where services have been satisfactorily performed; where adequate funds were available at the time the services were rendered; and, where the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due.

Claimant is hereby awarded the sum of \$135.55.

(No. 4971—Claimant awarded \$5,775.43.)

JOAN GILLESPIE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1966.

DOYLE AND BERDELLE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

NEGLIGENCE—*constructive notice of defect*. Respondent had constructive notice of the defective condition of the parkway, when evidence disclosed that such condition had existed four months prior to the accident.

SAME—*proximate cause-contributory negligence*. Where evidence showed respondent was negligent, such negligence was directly responsible

for the injury, and claimant was free from contributory negligence, an award will be made.

DOVE, J.

Joan Gillespie, claimant, filed her complaint in this Court on March 1, 1961 in which she seeks an award of \$25,000.00 for the fracture of her right ankle, which required two surgical operations. The injury resulted from a fall, which she experienced when she stepped over a curb into an asphalt parkway in a crosswalk in Evergreen Park, Illinois, which was maintained and controlled by the State of Illinois.

From the evidence it appears that claimant is a white female, thirty-two years of age, a housewife, and mother of three children. She testified that on February 23, 1959 she was crossing 95th Street in a southerly direction in the west crosswalk of South Kedzie Avenue, which intersection was located in Evergreen Park, Illinois. When she arrived at the southwest corner she stepped over a small slanting curb into an asphalt parkway in said crosswalk. The lighting at the intersection was poor, and, as she stepped into the area, her right foot was caught in the hole or cracked asphalt area, which caused her to be thrown to the pavement. As a result, she sustained a fracture dislocation of the right ankle. She was taken by ambulance to the Little Company of Mary Hospital. Subsequently, under a general anesthetic, the fracture was reduced by open surgery, and a cast was placed on her right leg. She remained in the hospital for approximately two weeks, and then was confined to her home with her right leg in a cast. Claimant further testified that she re-entered the hospital on May 31, 1959 and again on June 2, 1959, and, under a general anesthetic, had additional surgery on her right foot for the removal of the screw, which had been inserted in her ankle in the reduction of the fracture. She stated that she still has swelling, pain, and

cramps in her foot and toes, and that she has an occasional limp. She testified that her medical expenses and specials totalled \$1,175.43.

Medical testimony elicited the fact that the cast remained on her leg for approximately three months, and that, when removed, it was found necessary to remove the screw in her ankle. The condition of pain, discomfort, and swelling of the ankle, as a result of the injury, was believed by the doctor to be permanent.

A disinterested witness who assisted claimant into the drug store, which was located at the intersection where the accident occurred, testified as to the defective condition of the parkway in the crosswalk at the southwest corner of 95th Street and Kedzie Avenue. He stated that this condition had existed for at least four months prior to the date of the accident, and that the lighting at the intersection was poor.

Claimant was also examined by a medical doctor on behalf of respondent. His report confirms claimant's injury, and likewise finds some loss of use of the right ankle.

Claimant had previously filed a common law action against the Village of Evergreen Park in the Circuit Court of Cook County, Illinois. The Village of Evergreen Park defended itself in the said lawsuit on the grounds that it did not have jurisdiction over the area where claimant allegedly fell. The lawsuit was dismissed by stipulation, and claimant received \$400.00 in settlement thereof on a covenant not to sue the Village of Evergreen Park.

Numerous pre-trial motions were filed by the State of Illinois in this cause, which dealt primarily with the jurisdiction of the State over the area where claimant fell. The motions were supported by various affidavits, plats, and charts, all of which have been read, and examined closely by this Court. From such examination, and from the testi-

mony at the hearing, we are of the opinion that the area where claimant fell was a part of the highway system of the State of Illinois, and was under the jurisdiction of respondent and its agents.

From the evidence, photographs, plats, and charts, we find that a defective condition was present in the parkway and crosswalk, and that there was negligence on the part of the State of Illinois in the maintenance of the parkway in the crosswalk in question, which negligence was directly responsible for the injuries sustained by claimant. Knowledge of the condition was had by the State by reason of the lapse of more than four months, which was certainly sufficient time within which to make repairs or to barricade the same from use by pedestrian traffic. *Visco vs. State of Illinois*, 23 C.C.R. 149.

Claimant had made a purchase in the commercial area, and was using the west crosswalk to return to her parked automobile. She was crossing with the green light. She had not traversed the intersection on a prior occasion, and found the intersection dimly lighted. Claimant was watchful of the stopped traffic, and was looking ahead as she walked across 95th Street. She was wearing flat, heavy-soled shoes, and the ground was dry. Upon arriving at the south curbing, which was slanted and several inches higher than the adjoining pavement, she placed her right foot over the curbing, and immediately caught it on the cracked section of the parkway, which was just on the other side of the curbing. She fell in a heap with her right foot directly beneath her. Certainly nothing in her actions immediately before or at the time of the occurrence would give rise to any question as to due care for her own safety. We find no evidence of any contributory negligence on the part of claimant.

Claimant has sustained a serious fracture of her ankle, and has undergone multiple operations thereon. She'has a

disfiguring scar on her ankle, and the evidence indicates that she is unable to wear high heels for normal walking or when driving an automobile. Her ankle continues to swell several times weekly, which causes cramps. These conditions are permanent, as is a loss of motion in the ankle, a permanent scar, and a grating sound on circumduction. We are of the opinion that claimant is entitled to just and fair compensation for said injury.

The question now remaining for the Court to decide is the amount of claimant's damages. The medical expenses, as previously indicated, totaled \$1,175.43. The Court believes claimant is further entitled to an additional award of \$5,000.00 for pain, suffering and impairment to her ankle, less the sum of \$400.00, which she received from the Village of Evergreen Park.

An award is, therefore, made to claimant, Joan Gillespie, in the sum of \$5,775.43.

(No. 5250—Case partially dismissed.)

JACK L. MUNCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Order filed May 10, 1966.

WILLIAM H. EDWARDS, JR., Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

PRACTICE AND PROCEDURE—notice of intent to sue for personal injuries. The notice requirements of Sec. 22-1 are a condition precedent to the filing of a complaint against the State, and where complainant fails to show complete compliance, the claim will be summarily dismissed.

SAME—property damage. There is no statutory notice requirement with regard to property damage, although suit must be filed with the clerk of the Court within two years after the action first accrues.

SAME—construction of statute. Where the last day of the two year limitation is Sunday or a holiday, it shall be excluded and suit for property damage may be filed on the following day.

PERLIN, C. J.

O R D E R

On November 8, 1965, claimant filed a complaint with the Court of Claims seeking \$10,000.00 from respondent as a result of personal injuries and property damage incurred in an accident, which allegedly involved a car owned by respondent. The accident occurred on November 7, 1963.

Respondent has moved to dismiss the action because of the failure of claimant to file notice within six months from the date of his alleged injury as required by Sec. 22-1 of the Court of Claims Law. The pertinent sections of the Court of Claims Law (Chap. 37, Sec. 439, 1963 Ill. Rev. Stats.) provide as follows:

“Sec. 22-1. Within *six* months from the date that such an *injury* was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against the State of Illinois for damages on account of any injury to his person shall file in the office of the Attorney General and also in the office of the clerk of the **Court** of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

“Sec. 22-2. If the notice provided for by Sec. 22-1 is not filed as provided in that section, any such action commenced against the State of Illinois shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury.”

It should also be noted that Rule 5B of the Court of Claims requires the following procedure:

“Where a claim alleges damages as *a* result of personal injuries, claimant must attach to his complaint copies of the notices served by him as required by Chap. 37, Sec. 439.22-1, 1963 Ill. Rev. Stats., showing how and when such notice was served.”

There appears to be no question but that claimant has failed to comply with any of the above statutory notice requirements. However claimant asks denial of respondent's

motion to dismiss on the grounds that claimant had notified at least two agencies of the State of Illinois of the accident within thirty days after it occurred. The complaint states that claimant had no intention of suing the State of Illinois until the insurance company, which insured the driver of respondent's car, became insolvent.

This Court has long held that the notice requirements of Sec. 22-1 are a condition precedent to the filing of a complaint against the State of Illinois, and that, where claimant does not show complete compliance, this Court has no jurisdiction to hear the claim.

In *Thomas vs. State of Illinois*, 24 C.C.R. 137, 139, the Court held that the burden is on claimant to give the notice required by the statute, and that notice given to a State employee will not constitute compliance. In that case, a report of the accident, which was filed with the Department of Conservation, was not regarded as a notice to the Attorney General and the clerk of the Court of Claims.

In *Frey vs. State of Illinois*, 24 C.C.R. 338, the case was dismissed because statutory notice was not filed in either the office of the Attorney General or the clerk of the Court of Claims until 7% months after the date of the alleged accident.

The Court in *Telford vs. The Board of Trustees of Southern Illinois University*, 24 C.C.R. 416, 418, held:

"The patent purpose of notice requirements is to afford respondents an opportunity to promptly and intelligently investigate a claim and prepare a defense thereto, and to thereby protect governmental bodies from unfounded and unjust claims."

Where a claimant does not allege that he has filed a notice, as provided by the statute, the Court has ruled that such a complaint does not state a cause of action, which would entitle the claimant to recover from respondent. (*McDonald vs. The Teachers College Board*, 24 C.C.R. 438.)

All claims on account of personal injury must be summarily dismissed where, as in the instant case, the statutory notice requirements have not met with exact compliance.

It appears from the complaint, which was submitted in the instant case, that there is an element of property damage as well as that of personal injury. There is no statutory notice requirement with regard to property damage, although Sec. 22 of the Court of Claims Law requires the filing of a suit with the clerk of the Court within two years after the action first accrues. Respondent contends that two years had already passed before the complaint in this case was filed. We cannot agree with respondent.

Sec. 22 of the Court of Claims Law (Chap. 37, Sec. 439.22, 1963 Ill. Rev. Stats.) provides that "every claim . . . cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the Court within two years after it first accrues . . ." The interpretation of this section of the statute may be found in Chap. 131, "Construction of Statutes," Sec. 1.11, 1965 Ill. Rev. Stats., which provides as follows:

"The time within which any Act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday or is a holiday . . . and then it shall also be excluded."

In the instant case, therefore, the fact that November 7, 1965 fell on a Sunday would extend the filing deadline to Monday, November 8, 1965. Since claimant's action was timely, he may prosecute his claim as to property damage in this Court.

Accordingly, claimant's action for damages incurred as a result of personal injury is dismissed, but the action for alleged property damage will be allowed to remain in this tribunal.

(No. 5257—Claimant awarded \$125.00.)

A. MICHAEL HESS, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed May 10, 1966.

A. MICHAEL HESS, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; **GERALD S. GROBMAN**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

Dr. A. Michael Hess of Rockford, Illinois seeks to recover for services rendered to one Noah Motsinger of Loves Park, Illinois, on March 1, 1965. Claimant sought to recover the sum of \$400.00 for surgical services rendered said patient under the program of Aid to the Medically Indigent. It appears that the claim was originally presented to the Winnebago County Department of Public Aid in September of 1965. That Department determined the patient was eligible, but denied the claim upon the basis that the claim was not presented in apt time for processing payment from the appropriation for the 73rd biennium. Subsequently, on January 19, 1966, claimant filed an amended complaint reducing the amount of payment sought to \$125.00.

On May 2, 1966, a stipulation of facts between Dr. A. Michael Hess and William G. Clark, attorney for respondent, was filed with the Court of Claims. It establishes the facts in the case to be as follows:

“1. That this claim arises out of the surgical services furnished Noah Motsinger on March 1, 1965 by Dr. A. Michael Hess.

“2. That the subject patient was eligible to receive assistance under the program of Assistance to the Medically Indigent Aged, but claimant did not submit a bill to the Winnebago County Department of Public Aid until September 27, 1965, which was too late for the county department to process same within the 73rd biennium appropriation.

“3. That the Department of Public Aid in its Departmental Report,

dated January 4, 1966, admitted an amount is due to claimant in the sum of \$125.00, and the only reason this sum had not been paid was that the Doctor presented his bill too late to be processed under the 73rd biennium.

"4. Claimant again represents that there has been no assignment or transfer of the claim in this cause, or any part thereof, or interest therein, and that he is justly entitled to the sum of \$125.00 from the State of Illinois, or the Department of Public Aid, after allowing just credits."

This Court has repeatedly held that, where a contract has been: (1) properly entered into; (2) services satisfactorily performed and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Rockford Memorial Hospital, a Corporation, vs. State of Illinois, Case No. 5165*, opinion filed September 25, 1964; *Memorial Hospital of Du Page County, a Corporation, vs. State of Illinois, Case No. 5197*, opinion filed January 12, 1965. It appears that all qualifications for an award have been met in the instant case.

Claimant is awarded the sum of \$125.00.

(No. 5263—Claimant awarded \$60.00.)

RICHARD A. CARLETON, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed May 10, 1966.

RICHARD A. CARLETON, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

PEZMAN, J.

Claimant, Richard A. Carleton, seeks to recover from respondent the sum of \$60.00 for services rendered to one Mary Ellen Jackson at the request of the Division of Vocational Rehabilitation of the State of Illinois, Claimant alleges that demand for payment was made from the Division of Vocational Rehabilitation, and that such demand was refused on the grounds that the funds appropriated for the Division for such payment had lapsed.

A Departmental Report was filed in this matter on the day of February 2, 1966, which states as follows:

“An authorization was written for supervision and management during hospitalization to Dr. Richard Carelton for the period 5/21/65 to 6/16/65. This was to run four weeks with a schedule of \$25.00 for the first week, \$15.00 each for the next two weeks, and \$5.00 for the fourth week. There was no insurance participation, and the bill presented by the doctor was not received in time to clear in the grace period of this fiscal year. **This is a legal claim, the service was given, and the claim should be paid.**”

Subsequently a written stipulation was entered into between claimant and respondent clearly establishing that claimant furnished services to the said Mary Ellen Jackson; that the reasonable and equitable charges for the services furnished was the sum of \$60.00; and, that claimant is entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been: (1) properly entered into; (2) services satisfactorily performed and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Rockford Memorial Hospital, a Corporation, vs. State of Illinois*, case No. 5165, opinion filed September 25, 1964; *Memorial Hospital of Du Page County, a Corporation, vs. State of Illinois*, Case No. 5197, opinion filed January 12, 1965. It appears

that all of the qualifications, which were set forth in the case of *Memorial Hospital vs. State of Illinois*, have been met.

Claimant is awarded the sum of \$60.00.

(No. 5276—Claimant awarded \$25.78.)

THE FIRESTONE TIRE AND RUBBER COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1966.

THE FIRESTONE TIRE AND RUBBER COMPANY, Claimant,
pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant seeks to recover from respondent the sum of \$25.78 for materials delivered to the Bureau of Machinery, Division of Highways of the State of Illinois, at the State Garage in Ottawa, Illinois, and alleges that demand was made for payment of the said sum of \$25.78, and that such demand was refused on the grounds that funds appropriated for the Bureau of Machinery for such payments had lapsed.

A Departmental Report was filed in this matter by the Department of Public Works and Buildings of which the Bureau of Machinery is a part, and this Report agrees that the merchandise delivered, i.e. tires, was received in good condition, and that the charges are true and correct. Subsequently a written stipulation was entered into between claimant and respondent incorporating the Departmental Report as the sole and only evidence to be admitted in said

cause, and finding that claimant had furnished the materials, and was justly entitled to be reimbursed in the sum of \$25.78.

This Court has repeatedly held that, where a contract has been: (1) properly entered into; (2) services satisfactorily performed and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. *Rockford Memorial Hospital, A Corporation, vs. State of Illinois*, case No. 5165, opinion filed September 25, 1964; *Memorial Hospital of Du Page County, A Corporation, vs. State of Illinois*, case No. 5197, opinion filed January 12, 1965.

Claimant is hereby awarded the sum of \$25.78.

(No. 5278—Claimant awarded \$139.50.)

MEDICAL SURGICAL CLINIC, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed *May 10, 1966.*

MEDICAL SURGICAL CLINIC, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence showed that **the only** reason claim was not paid was due to the fact that, prior to **the time** a statement was presented, the appropriation lapsed, an award will **be** made.

DOVE, J.

Medical Surgical Clinic, claimant, presented its statement in the amount of \$139.50 to the Illinois Department of **Public Aid** for services rendered to **R. W. Curtis.**

Claimant had prepared and filed with the Illinois Department of Public Aid a voucher for services rendered. Payment was refused, however, for the reason that there were no funds available, as the appropriation for the 73rd biennium had lapsed.

A Departmental Report was filed, which stated that the said Department had not paid the sum of **\$139.50**; and, further, that the claim was just and valid, and claimant was entitled to payment.

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant was entitled to be reimbursed for services rendered the patient, R. W. Curtis, in the amount of **\$139.50**.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of **\$139.50**.

(No. 5279—Claimant awarded \$232.75.)

CENTREVILLE TOWNSHIP HOSPITAL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1966.

CENTREVILLE TOWNSHIP HOSPITAL, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

Centreville Township Hospital, claimant, presented its statement to the Department of Public Aid of St. Clair

County for hospitalization services rendered one Zula Elizabeth McLane, for the period from June 19, 1965 to July 1, 1965. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim on the grounds that the appropriation for the biennium had lapsed.

On February 25, 1966, a complaint in this matter was filed in the Court of Claims. It contains a request for payment of the sum of \$232.75.

A Departmental Report was filed in this matter, which stated: "The claim in the amount of \$232.75 is a just and valid amount, and has not been paid by the Department. The claimant is justly entitled to the payment of the above amount."

Subsequently a written stipulation was entered into between claimant and respondent, which found that claimant had furnished services to the said Zula Elizabeth McLane; that the reasonable and equitable charges for the services so provided by claimant amounted to \$232.75; and, that claimant was entitled to be reimbursed in that amount.

It appears that all qualifications for an award have been met in the instant case. (*Memorial Hospital of DuPage County, a Corporation vs. State of Illinois*, case No. 5196 opinion filed January 29, 1965.)

Claimant is hereby awarded the sum of \$232.75.

(No. 5280—Claimant awarded \$84.78.)

RAYMON A. OBERLANDER, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 10, 1966.

RAYMON A. OBERLANDER, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—*lapsed appropriation*. Where evidence showed that the only reason for not paying claimant **was** that the appropriation had lapsed, an award will be made.

DOVE, J.

Raymon A. Oberlander, claimant, presented his statement in the amount of \$84.78 to the Department of Financial Institutions for expenses incurred by him for travel, meals, and lodging from April 26, 1965 to June 8, 1965, in connection with his services as a member of the Board of Credit Union Advisers.

Claimant had prepared and filed with the Department of Financial Institutions a travel voucher for said amount, but payment of the claim was refused for the reason that the funds appropriated for the Department of Financial Institutions for such payment had lapsed.

A Departmental Report was filed admitting that claimant is a member of the Board of Credit Union Advisers, and that he was entitled to be reimbursed for his incidental expenses.

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant had expended the amount of \$84.78 for travel, meals, and lodging in connection with his services **as** a member of the Board of Credit Union Advisers, and that he was entitled to be reimbursed in that amount.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of \$84.78.

(No. 5282—Claimant awarded \$100.00.)

KENNETH O. GREEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* May 10, 1966.

KENNETH O. GREEN, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence showed that the **only** reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will **be** made.

DOVE, J.

Kenneth O. Green, claimant, presented his statement in the amount of \$350.00. to the Department of Public Aid of St. Clair County for cataract surgery on the right eye of R. Carl Koch.

Claimant had prepared and filed with the Department of Public Aid a statement for said amount, but payment of the claim was refused on the grounds that funds appropriated for the Department of Public Aid for such payments had lapsed.

A Departmental Report **was** filed, which states as follows:

“The amount claimed of \$350.00 is not according to our fee schedule, **as** the maximum allowable **by** the Department is \$100.00, and Dr. Green is aware of this maximum. The claim in the amount of **\$100.00 is a just** and valid claim due from the Department.”

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant should be paid the sum of \$100.00 for the services rendered to the said R. Carl Koch.

It appears that the sole reason for not paying claimant **was** that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum **of** \$100.00.

(No. 5286—Claimants awarded \$950.99.)

THE JEWISH HOSPITAL OF ST. LOUIS, ST. LOUIS, MISSOURI, A MISSOURI CORPORATION, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed May 10, 1966.

THE JEWISH HOSPITAL OF ST. LOUIS, ST. LOUIS, MISSOURI, A MISSOURI CORPORATION, Claimant, *pro se*.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

The Jewish **Hospital** of St. Louis, St. Louis, Missouri, a Missouri Corporation, claimant, presented its statement in the amount of \$950.99 to the Department of Public Aid for hospitalization services rendered one Anna Bloss, for **the period** from April 20, 1965 to **May 23, 1965**. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim on the basis that the claim was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. On March 4, 1966, a complaint in this matter was filed in the Court of Claims.

A Departmental Report was filed in this matter, which stated:

“The facts alleged in items 2 through 10 are true to the best of the Department’s knowledge, and the claimant is justly entitled to \$950.99.”

Subsequently a written stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant had furnished services

to the said Anna Bloss; that the reasonable and equitable charges for the services so provided by claimant amounted to \$950.99; and, that claimant was entitled to be reimbursed in that amount.

This Court has repeatedly held that, where a contract has been: (1) properly entered into; (2) services satisfactorily performed; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an order for the amount due. (*Memorial Hospital of Du Page County, a Corporation vs. State of Illinois*, case No. 5196, opinion filed January 29, 1965.)

It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$950.99.

(No. 5287—Claimant awarded \$49.71.)

ANGELO'S FIRESTONE, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed May 10, 1966.

ANGELO'S FIRESTONE, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where contract has been properly entered into, **all** provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Angelo's Firestone seeks from respondent payment of the sum of \$49.71 for materials delivered to the State Highway Garage of the State of Illinois, Department of Public Works

and Buildings, said Garage being located at **4051** North Harlem Avenue, Chicago, Illinois. Claimant seeks payment of said sum of **\$49.71** for said materials delivered, and alleges that its demand for payment was refused on the grounds that funds appropriated for the Department of Public Works and Buildings for such payments had lapsed.

A Departmental Report was filed in this matter, which indicated that the materials ordered were received in good condition, and that the charges were true and correct. On May **2, 1966**, a written stipulation was entered into between claimant and respondent, which found that claimant furnished said materials to the State of Illinois, Department of Public Works and Buildings; that the amount claimed, **\$49.71**, was the reasonable and equitable charge for said material; and, that claimant was entitled to be reimbursed in **that** amount.

This Court has repeatedly held that, where a contract has been: **(1)** properly entered into; **(2)** services satisfactorily performed and materials furnished in accordance with such contract; **(3)** proper charges made therefor; **(4)** adequate funds were available at the time the contract was entered into; and **(5)** the appropriation for the biennium from which such claim could have been paid had lapsed; it would enter an order for the amount due. *Rockford Memorial Hospital, a Corporation, vs. State of Illinois*, Case No. **5165**, opinion filed September **25, 1964**; *Memorial Hospital of DuPage County, a Corporation, vs. State of Illinois*, case No. **5197**, opinion filed January **12, 1965**. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$49.71**.

(No. 5288—Claimant awarded \$72.03.)

BURNHAM CITY HOSPITAL, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 10, 1966.

BURNHAM CITY HOSPITAL, Claimant, *pro se*.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation*. Where evidence showed that the **only** reason claim was not paid **was** due to **the fact** that, prior to the **time** a statement was presented, the appropriation lapsed, an award will be **made**.

DOVE, J.

Burnham City Hospital, Champaign, Illinois, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Mayme M. Hatter for the period from June 6, 1965 to June 19, 1965. The Department of Public Aid of Ford County had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim on the basis that the funds appropriated for such payment had lapsed. On March 7, 1966, a complaint in this matter was filed **in** the Court of Claims, which requested payment of the sum of **\$72.03**.

A Departmental Report was filed in the matter, which stated: "Claimant is justly entitled to the payment of **\$72.03**"

Subsequently a written stipulation was entered into between claimant and respondent, which found that claimant had furnished services to the said Mayme M. Hatter; that said charges were reasonable and equitable; and, that claimant was entitled to be reimbursed in the amount of **\$72.03**.

It appears that all qualifications for an award have been met in the instant case. (*Memorial Hospital of DuPage*

County, a Corporation. vs. State of Illinois, No. 5196, opinion filed January 29, 1965.)

Claimant is hereby awarded the sum of **\$72.03.**

(No. 5290—Claimant awarded \$45.00.)

JOSE MORALES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1966.

JOSE MORALES, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

Jose Morales, Claimant, presented his statement in the amount of \$45.00 to the Department of Public Aid of St. Clair County for professional services rendered to Beatrice R. Egbert on April 2, 1965.

Claimant had prepared and filed with the Department of Public Aid a statement for said amount, but payment was refused on the grounds that funds appropriated for the Department of Public Aid for such payments had lapsed.

A Departmental Report was filed admitting that claimant was justly entitled to payment in the amount of \$45.00.

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant was entitled to the sum of \$45.00 for professional services rendered, as above set forth.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of \$45.00.

(No. 5292—Claimant awarded \$100.00.)

WILLIAM F. ROSE, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed May 10, 1966.

WILLIAM F. ROSE, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

Comas — -lapsed appropriation. Where evidence showed that the **only** reason claim was not paid was **due** to the fact that, prior to the time a statement was presented, the appropriation lapsed, **an** award will be made.

DOVE, J.

William F. Rose, claimant, presented **his** statement in the amount of \$125.00 to the Department of Public Aid of St. Clair County for surgery on one Arthur Steininger.

Claimant had prepared and filed with the Department of Public Aid a statement for said amount, but payment of the claim was refused on the grounds that funds appropriated for the Department of Public Aid for such payments had lapsed.

A Departmental Report was filed, which states as follows:

“The amount due from Department is **\$100.00. This is** established by the Department’s **fee** schedule, and cannot be exceeded, but claimant is **justly** entitled to the payment of \$100.00.”

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant was entitled to the sum of \$100.00 for services rendered the said Arthur Steininger.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of \$100.00.

(No. 5294—Claimant awarded \$489.75.)

THE MEMORIAL DISTRICT HOSPITAL OF MATTOON, A MUNICIPAL CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1966.

CRAIG AND CRAIG, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence showed that the only reason claim was not paid was due to the fact that, prior to the time a statement was presented, the appropriation lapsed, an award will be made.

DOVE, J.

The Memorial District Hospital of Mattoon, Illinois, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Bessie B. Sampson for the period from June 23, 1965 to June 30, 1965. The Department of Public Aid for Moultrie County had determined that the recipient was eligible to receive aid under its program to the Medically Indigent Aged, but the Department denied the claim on the basis that the funds appropriated for such payments have lapsed. On March 25, 1966, a complaint in this matter was filed in the Court of Claims requesting payment of the sum of \$489.75.

A Departmental Report was filed in the matter, which stated “The Department further admits that \$489.75 is a valid and just amount due claimant.”

Subsequently a written stipulation was entered into between claimant and respondent, which found that claimant had furnished services to the said Bessie B. Sampson; that said charges were reasonable and equitable; and, that claimant was entitled to be reimbursed in the amount of \$489.75.

It appears that all qualifications for an award have been

met in the instant case. (*Memorial Hospital of DuPage County, A Corporation vs. State of Illinois*, No. 5196, opinion filed January 29, 1965.)

Claimant is hereby awarded the sum of \$489.75.

(No. 5077—Claimant awarded \$3,000.00.)

LAZAR NIKOLIC, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed July 14, 1966.

HUGH B. ARNOLD, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **SHELDON K. RACHMAN**, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—duty of care owed by State. Agents of the State are required to use ordinary care to protect persons and their property from being damaged by those placed under their charge.

SAME—contributory negligence. Evidence showed claimant was not guilty of contributory negligence where he was mentally ill, and could not be charged with the same degree of care for his own safety as a mentally competent person.

DOVE, J.

Claimant, Lazar Nikolic, filed his complaint in this Court on November 30, 1962 seeking an award in the amount of \$25,000.00 from the State of Illinois for personal injuries sustained by him when he was attacked by a fellow patient at the Illinois State Psychiatric Institute on November 10, 1961.

From the evidence it appears that claimant and James Watt were patients on the eighth floor of the Illinois State Psychiatric Institute, which is located at 1601 West Taylor Street in Chicago. At approximately 5:00 A.M. on November 10, 1961, Patient Watt who was returning from the bathroom in the company of a female aide ran into claimant's room, and attacked Nikolic who was sleeping. Nikolic's nose was broken. There was a cut over his nose and right eye, and he had two black eyes.

Claimant was committed to the Institute on May 23, 1961. It is not a maximum security type institution. Primarily it is a teaching and research institution, and secondarily serves the community. Patients are selected for the purpose of teaching residents in the art of psychotherapy, as well as for the benefit of the patients. It is jointly run by the State of Illinois, the five medical schools in the area, and the Michael Reese Hospital. There were eighteen patients in the ward to which claimant was committed, and each has his own room. The entrance to the ward was locked, but normally each patient's room was kept unlocked at all times. The rooms could only be locked from the outside.

James Watt was also a patient in claimant's ward. Watt was diagnosed as a disturbed man who was somewhat subdued, and had a delusion of persecution. He had homosexual fears that either people would call him a homosexual, or that people would attack him sexually. The Psychiatric Resident at the Institution testified that Watt had attacked claimant on two occasions, the first being approximately a month before the attack in November, which resulted in claimant's broken nose. On the first occasion, as on the second, claimant was sleeping. He was struck in the left eye by Watt, as a result of which he sustained a black eye, which was discolored for approximately three weeks. Following this first instance, the staff "talked the matter over with Mr. Watt." The evidence further discloses that Watt's condition was one of having delusions of being persecuted, and a paranoid personality with homosexual feelings. Following the first attack on claimant, a female aide was assigned to Watt. Her function was to supervise his activities, but not to physically control them.

The Psychiatric Resident, a medical doctor, testified that he was aware of the possibility that Mr. Watt might attack either claimant or other patients. He discussed the

matter with the staff, and more medication was prescribed for Mr. Watt to quiet his anxieties, but no recommendation was made for tighter security measures, although he was assigned an aide to take care of him, but not for the purpose of physically controlling him. During this period of time, Watt attacked two or three patients. Maximum medication was given to Watt, and he was secluded to his room for a week; then the door was unlocked during the day, and locked only at night. The doctor testified also that he could not predict that Watt would attack claimant again, but that there was a likelihood he would. Although the record contains corroborated and uncontradicted testimony of two physical assaults and battery by Watt on claimant while he was sleeping, the first resulting only in a black eye, the second resulting in *two* black eyes and a broken nose, and assaults on at least two other patients, still the three witnesses from the Institution did not consider Watt to be a dangerous person. They distinguished this by saying that he was a potentially dangerous person. The doctor could have recommended that Watt be transferred to a maximum security unit, but did not do so.

In the case of *Maloney vs. State of Illinois*, **22 C.C.R. 567**, we held that the agents of the State are required to use ordinary care to protect persons and their property from being damaged by those placed under their charge.

In view of the facts that Watt was described as being "a little impulsive," was known to have destroyed property, had attacked claimant the month before, had attacked two or three other patients, and the staff knew that Mr. Watt "might attack"; and, in view of the fact that Watt passed within a few feet of Nikolic's room in going to and from the bathroom, this should have been enough of a warning to the attendant to escort him manually past claimant's door. The fact that Watt was in the company of a female aide

who probably could not have controlled him does not relieve respondent of its obligation to safeguard claimant, but only calls into question respondent's failure to transfer Watt to a different type institution in order to protect the safety of claimant and other patients.

Claimant was not guilty of contributory negligence. **He** was mentally ill, and could not be charged with the same degree of care for his own safety as a mentally competent person. However, there was nothing he could have done to protect himself, as he was attacked when asleep in the room assigned to him with the door open according to the rules of the hospital.

An award to claimant, Lazar Nikolic, is, therefore, made in the sum of **\$3000.00**.

(No. 5266—Claimant awarded \$69.40.)

WATLAND, INC., Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed July 14, 1966,

WATLAND, INC., claimant, pro se.

WILLIAM G. CLARK, Attorney General; **GERALD S. GROBMAN**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence disclosed that the only reason claim was not paid was because the appropriation lapsed prior to the **time** a statement was presented, an award will be made.

DOVE, J.

Watland, Inc., claimant, presented its statement to the Department of Public Health for Verifax supplies in the amount of **\$69.40**.

Claimant had prepared and filed with the Department of Public Health a statement for said amount, but payment of said claim was refused on the grounds that funds appropriated for the Department of Public Health for such payments had lapsed.

A Departmental Report was filed, which stated that the Verifax supplies had been received, and that said claimant was entitled to payment of the above amount.

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant was entitled to the sum of \$69.40 for the Verifax supplies so delivered.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of \$69.40.

(No. 5275—Claimant awarded \$450.00.)

DANIEL E. EDGECOMBE, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed July 14, 1966.

ARMSTRONG, WINTERS, PRINCE AND TENNEY, Attorneys
for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

MOTOR VEHICLES—*escheat of financial responsibility deposit.*—Evidence disclosed that claimant was entitled to a refund of monies escheated to State pursuant to Chap. 95½, Sec. 7-503, 1965 Ill. Rev. Stats.

PEZMAN, J.

Claimant, Daniel E. Edgecombe, seeks *to* recover from the State of Illinois the sum of \$450.00, which was deposited by him as evidence of financial responsibility in accordance with Chap. 95½, 1965 Ill. Rev. Stats., commonly known as the "Safety Responsibility Provision of the Motor Vehicle Law" of the State of Illinois. Claimant alleges that, as the result of an automobile accident in which he was involved on the 21st day of November, 1960, he deposited as respon-

sibility security the sum of \$450.00 with the Secretary of State, and received for the same a receipt issued by that office. Claimant further alleges that all claims of a civil nature regarding said accident have been disposed of, and that a demand was made upon the Secretary of State for the return or refund of the deposit of \$450.00, but was refused return of the money by virtue of the fact that the security deposit had been transferred to the General Revenue Fund of the State Treasury in accordance with Sec. 7-503 of the Illinois Motor Vehicle Law. No Departmental Report was filed by the Secretary of State, but attached to the complaint is a photographic copy of a letter, dated January 25, 1966, which indicates that the security was deposited on April 7, 1961, and was transferred to the General Revenue Fund in the State Treasury on September 1, 1964. In compliance with the statute, the Office of the Secretary of State, Drivers License Division, Safety Responsibility Section, did notify claimant on July 15, 1964 that such action would be taken.

Section 7-503 of Chap. 95½, Ill. Rev. Stats., provides as follows:

“During July, annually, the Secretary of State shall compile a list of all securities on deposit, pursuant to this Article, for more than *three* years and concerning which he has received no notice as to the pendency of any judicial proceeding that could affect the disposition thereof. Thereupon, he shall promptly send a notice by certified mail to the last known address of each such depositor advising him that his deposit will be subject to escheat to the State of Illinois if not claimed within thirty days after ~~the~~ mailing date of such notice. At the expiration of such time, the Secretary of State shall file with the State Treasurer an order directing the transfer of such deposit to the General Revenue Fund in the State Treasury. Upon receipt of such order, the State Treasurer shall make such transfer, after converting to cash any other ~~type~~ of security. Thereafter any person having a legal claim against such deposit may enforce it by appropriate proceedings in the Court of Claims subject to the limitations prescribed for such Court. At the expiration of such limitation period such deposit shall escheat to the State of Illinois.” (Added by act approved Aug. 7, 1961. L. 1961, p. 2868.)

On March 28, 1966, a written stipulation was filed with

this Court, the same having been entered into between claimant and respondent by their respective attorneys, whereby the evidence mentioned herein above as being attached to the complaint of claimant was admitted into evidence without objection by either party. The stipulation further agreed that no oral or written evidence would be introduced, and that briefs would be waived by both parties. It further stated that both parties would waive notice of any hearing, and agreed that the aforesaid order could be entered without either party being present.

Pursuant to this stipulation, and by authority of the language contained in Sec. 7-503 of Chap. 95½, 1965 Ill. Rev. Stats., claimant is awarded the sum of \$450.00.

(No. 5284—Claimant awarded **\$387.64**.)

JOSIAH S. COOPER, JR., Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed July 14, 1966.

JOSIAH S. COOPER, JR., Claimant, *pro se*.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

TRAVEL EXPENSES—lapsed appropriation. Where a contract was properly entered into, the right to receipt of certain funds established, adequate funds were available at the time said monies were expended on behalf of the State, and the appropriation from which such claim could have been paid had lapsed, the Court will make an award.

PEZMAN, J.

Claimant, Josiah S. Cooper, Jr., seeks to recover the sum of **\$387.64** for reimbursement of expenses for travel and for meals in connection with his duties as an employee of the Division of Highways of the Department of Public Works and Buildings. Claimant alleges that he presented his claim for that amount to the Division of Highways, but that

payment of said claim was denied because the appropriation available for the 73rd biennium had lapsed.

A Departmental Report was filed in this matter and received in the Attorney General's Office on March 23rd, 1966. It stated in part:

"The **only** reason that the travel expenses have not been paid is that Mr. Cooper failed to submit the travel vouchers for the months of April, May, and June in time for them to be scheduled for payment from the 73rd biennium appropriation. If the vouchers had been submitted at the proper time, payment of the travel expenses would have been made."

Thereafter, a written stipulation was entered into between claimant and respondent, which found that claimant had furnished the money for the expenses claimed, and should be reimbursed for the same.

This Court has routinely held that, where a contract **was** properly entered into; the right to receipt of certain funds established; and, adequate funds were available at time said monies were expended on behalf of the State, then, when the appropriation for the biennium from which such claim should have been paid had lapsed, it will enter an order for the amount due.

Claimant is hereby awarded the sum of \$387.64.

(No. 5302—Claimant awarded \$148.15.)

FAIRBURY-FORREST CLINIC, Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed July 14, 1966.

FAIRBURY-FORREST CLINIC, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where evidence disclosed that **the** only reason claim was not paid was because the appropriation lapsed prior to the time a statement was presented, **an** award will be made.

DOVE, J.

Fairbury-Forrest Clinic, claimant, presented its statement to the Department of Children and Family Services for services rendered one Rodney Bailey in the amount of **\$148.15**.

Claimant had prepared and filed with the Department of Children and Family Services a statement for said amount, but payment of said claim was refused on the grounds that funds appropriated for the Department of Children and Family Services for such payments had lapsed.

A Departmental Report was filed, which stated that the services were rendered, and that claimant was entitled to payment of the above amount.

Subsequently a stipulation was entered into between claimant and the Attorney General of the State of Illinois, which found that claimant was entitled to the sum of **\$148.15** for services so rendered.

It appears that the sole reason for not paying claimant was that the appropriation for the 73rd biennium had lapsed.

Claimant is hereby awarded the sum of **\$148.15**.

(No. 5304—Claimant awarded \$100.00.)

MAYS C. MAXWELL, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

Opinion filed July 14, 1966.

MAYS C. MAXWELL, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence disclosed that the only reason claim was not paid was because the appropriation lapsed **prior** to the time a statement was presented, an award will be made.

PEZMAN, J.

Claimant, Mays C. Maxwell, M.D., presented his statement to the Department of Public Aid for surgical services rendered to one Nona Sanders on the 23rd day of June, 1965. The Department of Public Aid had determined that the recipient was eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim for the services rendered on June 23, 1965 on the basis that the claim was for services rendered prior to July 1, 1965, and the appropriation for that biennium had lapsed. On April 27, 1966, claimant filed his complaint in the Court Claims, seeking to recover the sum of \$100.00 for the surgical services furnished the said Nona Sanders on June 23, 1965.

A Departmental Report was filed in this matter as exhibit A, and, pursuant to stipulation, admitted into evidence. The Report consists of a letter from Harold O. Swank, Director, and states in part as follows:

“This is a justifiable claim. The services were performed, but the Department of Public Aid did not receive the bill before the appropriation for the 73rd biennium lapsed.”

Thereafter, a written stipulation was entered into between claimant and respondent, which found that claimant had furnished the services to the said Nona Sanders, and that the reasonable and equitable charges for the same amounted to the sum of \$100.00.

Claimant is hereby awarded the sum of \$100.00.

(No. 5309—Claimant awarded \$560.82.)

ST. MARY’S HOSPITAL, EAST ST. LOUIS, OF THE HOSPITAL SISTERS OF THE POOR HANDMAIDS OF JESUS CHRIST, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 14, 1966.

HOTTO AND MARSH, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where evidence disclosed that the only reason claim was not paid was because the appropriation lapsed prior to the time a statement was presented, an award will be made.

DOVE, J.

St. Mary's Hospital, East St. Louis, of the Hospital Sisters of the Poor Handmaids of Jesus Christ, claimant, presented its statement to the Department of Public Aid for hospitalization services rendered one Ida Silvey for the period from May 13, 1964 to June 13, 1964. The Department of Public Aid of St. Clair County had determined that the recipient was entitled to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claim on the basis that the funds appropriated for such payments had lapsed. On May 4, 1966, a complaint in this matter was filed in the Court of Claims requesting payment in the amount of **\$560.82**.

A Departmental Report was filed in this matter, which stated: "Claimant is justly entitled to the amount of **\$560.82**."

Subsequently a written stipulation was entered into between claimant and respondent, which found that claimant had furnished services to the said Ida Silvey; that said charges were reasonable and equitable; and that claimant was entitled to be reimbursed in the amount of **\$560.82**. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$560.82**.

(No. 4904—Claim denied.)

JONNIA DIRKANS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 25, 1965.

Petition of claimant for rehearing denied August 17, 1966.

JOSEPH A. DONOVAN AND KENNETH S. JACOBS, Attorneys
for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD A.
WARMAN, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*wrongful incarceration.* Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

SAME—*legislative intent.* The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the "fact" of the crime for which he was imprisoned.

PEZMAN, J.

On March 3, 1958, between 2:00 and 2:30 A.M., claimant, Jonnia Dirkans, was drinking coffee in an establishment located on 47th Street in the City of Chicago, which was known as the "Hub Restaurant." After he had been there for ten or fifteen minutes he was arrested by two police officers of the City of Chicago on the complaint of a woman and her male companion who were in the restaurant. The woman stated that Dirkans was the man who had robbed her approximately one month before at a point near Prairie Avenue and 55th Street in the City of Chicago.

Jonnia Dirkans, claimant in this cause, was indicted for armed robbery by the Cook County Grand Jury. The indictment alleged that on the 4th day of February, 1958, claimant assaulted the complaining witness, Berl Shorter, and, while armed with a dangerous weapon (indicated as being a knife), by force and intimidation robbed her of \$65.00.

Claimant pleaded "not guilty" in the Criminal Court of Cook County, and waived a trial by jury. He was defended by an attorney from the Office of the Public Defender of

Cook County in the trial before Hon. Grover C. Niemeyer, a Judge of the Criminal Court of Cook County. The trial took place on two separate dates, i.e., May 13, 1958 and June 16, 1958. Witnesses testifying in the criminal trial were Beryl Shorter, the complaining witness on behalf of the State, and Jonnia Dirkans, defendant in his own behalf. The defense offered was that defendant was not anywhere near the area of the alleged armed robbery at the time and place indicated by Beryl Shorter.

At the very beginning of the criminal trial the attorney from the Public Defender's Office informed the Court, "If the Court please, in this Dirkans' case I have two witnesses who are not here, but I am willing to go ahead and let them put in their case. And, if necessary, I will get my witnesses in later." Again, at the close of the first segment of the criminal trial, Mr. John M. Branion, Assistant Public Defender, informed the Court that he could not proceed further in the defense because he had two witnesses who were not present. One lived downstate, and the other had moved but a few months before. During the second portion of the trial, which was resumed on June 16, 1958, Mr. Branion stated as follows, "I don't know whether I have my witnesses, but I am ready to dispose of it. They are not present. I don't know whether they will be here." The Court asked him whether or not he was ready to proceed, and he stated, "I am ready to put my defendant on." He restated, "I am ready to proceed with the defense." During all of this questioning the defendant, Jonnia Dirkans, was present in open Court.

Following the conclusion of the trial on June 16, 1958, the Court entered a finding of "guilty of armed robbery," and, on July 2, 1958, fixed the sentence at from one to four years in the State Penitentiary. A motion for a new trial on behalf of the defendant was denied, as was his motion in

arrest of judgment. In November of 1959, Jonnia Dirkans brought a Petition for a Writ of Error to the Supreme Court of the State of Illinois, and, due to his financial inability, requested that the Court appoint counsel on his behalf to prosecute the Writ of Error.

In *People of the State of Illinois vs. Jonnia Dirkans*, 18 Ill. 2d 300, 164 N.E. 2d 23, the Supreme Court noted in its opinion that the Trial Judge in his decision and opinion in support of the finding of guilty against the defendant misinterpreted and misconstrued the evidence by stating that it was his recollection that the complaining witness had identified the defendant on two occasions, while, in fact, the evidence in the trial showed that she had only identified Jonnia Dirkans after the alleged robbery in the restaurant on March 3, 1958. The Supreme Court reversed the judgment of the Criminal Court of Cook County. It stated that the confusion on the point of identification was doubtlessly due to the lapse of more than thirty days between the hearing of the State's case and judgment.

Following the reversal of his conviction and release from the State Penitentiary, Jonnia Dirkans filed a petition in the Court of Claims under the provisions of Chap. 37, Sec. 439.8C, Ill. Rev. Stats., which confers jurisdiction on the Court of Claims to hear and determine "all claims against the State for time unjustly served in prisons of the State where the persons imprisoned prove their innocence of the crime for which they were imprisoned."

On January 10, 1961, Chief Justice Joseph J. Tolson and Judges Gerald W. Fearer and James B. Wham entered an order for a general continuance in this cause. Prior thereto it had been consolidated with several other cases pending in the same category, namely, *Virgil Baker vs. State of Illinois*, *Henry Napue vs. State of Illinois*, and *Roland Munroe, Jr., vs. State of Illinois*. The contents of the order are set forth below:

- “1. In 1959 the Court of Claims Act was amended as follows: (Chap. 37, Sec. 439.8, 1959 Ill. Rev. Stats.)

The Court shall have jurisdiction to hear and determine the following matters:

(a) — — — — —

(b) — — — — —

- (c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts:

For imprisonment of five years or less, not more than \$15,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00, and provided further the Court shall fix attorneys' fees not to exceed 25% of the award granted.

- “2. The above cases have been filed, and present diverse factual situations concerning ‘proof of innocence,’ and this Court is unable to determine the legislative intent insofar as ‘the persons imprisoned prove their innocence of the crime for which they were imprisoned.’
- “3. The Court, therefore, finds that it is unable to hear and determine such cases without further clarification of the statute by an act of the Legislature.

“IT IS, THEREFORE, ORDERED that all of the above cases be continued generally, without prejudice to either claimants or respondent, pending further action by the Legislature.”

This Court at the time the above order was entered felt that the Legislature would take some action to clarify the terminology “proof of innocence.” However, since no further clarification was made by the 1961 Legislature, on January 9, 1962, this Court, on its own motion, rescinded the order consolidating the several cases with that of Jonnia Dirkans, as well as its order of January 10, 1961 continuing the cases generally, and further directed that they be placed on the trial calendar for assignment to the Commissioners of the Court of Claims for hearing.

Hearings were held on August 27, September 5, October 19, and December 6, 1962, respectively, in this matter, during which claimant, Jonnia Dirkans, brought forth by subpoena the testimony of Jean Gilliland who was alleged

to have been one of the missing witnesses in the original criminal trial. She testified that claimant had spent from approximately 2:00 until 8:00 A.M. on February 4, 1958 with her and her small child in his room.

Claimant argues that he was deprived of more than two years of freedom by his incarceration in the State Penitentiary, as a result of mistaken identity by the complaining witness. He prays for recovery of an award of \$15,000.00, as prescribed by the statutory provision, and, in addition thereto, an amount not to exceed 25 percent of the award granted as fees for his attorneys.

Respondent introduced the testimony of three police officers and one Deputy Clerk in the office at the City Hall. This testimony was in relation to the question of whether or not a lounge, which was located on the first floor of the building in which claimant had a room, was legally open for business between the hours of 2:00 and 4:00 A.M. on February 4, 1958, at which time it was alleged that the said Jean Gilliland went to the lounge to make certain purchases. Respondent contends that claimant, in addition to his conviction of the crime resulting in the presentation of the claim at hand, had been guilty of larceny in the State of Michigan, and had served three to four years for said conviction. It further contends that claimant substantiated his own testimony with the discredited testimony of a female witness who testified that on February 4, 1958, the date on which the alleged criminal act occurred, she had engaged in illicit relations with claimant during the entire night, as she had done on many other occasions.

Irregardless, the most important question involved in the cause at hand is whether or not claimant, Jonnia Dirkans, did "prove his innocence" of the crime. It is believed that this is one of the first cases to be filed under the provisions of Chap. 37, Sec. 439.8C, Ill. Rev. Stats. A check of the

authorities and precedents available indicates that there is no case in Illinois in which the statute involved, or the language "prove their innocence of the crime," have been construed. The Illinois reports are devoid of authority on this point.

Reaching beyond the borders of our State, we find three cases in which the language and facts are of a similar nature. In *Bertram M. Campbell vs. State of New York*, 62 N.Y.S. 2d 638, defendant sought to recover from the State of New York for false imprisonment from May 17, 1938 to August 22, 1941. It appears that subsequently another man confessed to the crime of which defendant was convicted, and, on August 28, 1945, Thomas E. Dewey, the then Governor, pardoned defendant. The State of New York passed an enabling statute allowing him to sue and recover by presenting his claim to the Court of Claims of the State of New York.

In another case, *People vs. Hoffner*, 129 N.Y.S. 2d 833, defendant was convicted of murder in the first degree, and moved to set aside the judgment on the ground that he had been deprived of due process, inasmuch as a record of the proceedings of the lineup had been made, but thereafter was not made available to his defense counsel. In that matter the Court held that defendant was deprived of due process of law, and the judgment of conviction was vacated. Subsequently, Hoffner brought his action against the State in the New York Court of Claims for damages arising out of the wrongful conviction and imprisonment. That body held that, where defendant was erroneously convicted, the decision of the Court reversing the conviction is determinative where claims are made for wrongful conviction. The reversal apparently was a sufficient basis on which the Court of Claims could make an award. However, there was again an enabling statute granting claimant permission to bring

his action in the Court of Claims of the State of New York.

There is language of further interest to this Court in the case of *Cratty vs. United States*, 83 Fed. Sup. 897, which was brought before the United States District Court, Southern District of Ohio. This was a proceeding to secure a Certificate of Innocence, as provided for in 28 U.S.C.A., Secs. 1495 and 2513. In that situation claimant sought a Certificate of Innocence, which authorizes indemnification of innocent persons convicted of a crime. Respondent contended that claimant was not an innocent victim of a miscarriage of justice, and that a jury had found him guilty upon sufficient evidence. It was pointed out by respondent that it did not appear from the allegations of the Petition of Claimant, Judgment of Reversal of the Circuit Court of Appeals, or the Order of the District Court thereon that claimant did not commit any of the acts with which he was charged, or that claimant's conduct in connection with such charges did not constitute a crime or offense against the United States. The government further contended that claimant was not one whom the statute was intended to benefit. Claimant Cratty was convicted of a violation of the Mail Fraud Statute, but was acquitted on the conspiracy charge. The conviction for Mail Fraud was later set aside in the Circuit Court of Appeals as having been barred by the Statute of Limitations. The Court denied the right of Cratty to recover under the statute authorizing indemnification of innocent persons who have been unjustly imprisoned. The Court ruled it was satisfied that the facts and circumstances presented therein did not make out such a case as Congress meant to include within the humane provisions of the statute there under consideration.

In the first place, the New York Statute, Sec. 9-3A of the Court of Claims Act, is quite different from that of Illinois. It is as follows:

“3A. To hear and determine the claim for damages against the State of any person heretofore or hereafter convicted of any felony or misdemeanor against the State and sentenced to imprisonment, who, after having served all or any part of his sentence, shall receive a pardon from the Governor, stating that such pardon is issued on the grounds of innocence of the crime for which he was sentenced.”

This statute relieves the Court of Claims of the State of New York of a considerable burden. Nevertheless, few, if any, claims have been filed under the New York Statute, and the cases cited above from that State were filed pursuant to enabling acts passed by the Legislature.

The law in Illinois is clear that claimant must prove his innocence in order to be entitled to an award by the Court of Claims. The burden is upon claimant to prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed by him; and, (3) the amount of damages to which he is entitled. (*Jack Flint vs. State of Illinois*, 21 C.C.R. 80; *George A. Pitts vs. State of Illinois*, 22 C.C.R. 258.)

Claimant seeks to prove his innocence by the testimony of Jean Gilliland, a witness he was unable or unwilling to produce at the original criminal trial. That case was called for trial on May 13, 1958 before the Court without a jury. At the time claimant's counsel stated that defendant had two witnesses who were not present, but that he was willing to permit the State to put its case on, if he could bring in defendant's witnesses later. The State then proceeded with its case on that date, and the cause was continued until May 22, 1958. On that date it was again continued until June 16, 1958, at which time counsel for defendant stated that he did not know whether he had any witnesses, but that he was ready to dispose of the case. It appears that defendant was definitely present in open Court, and did not raise his voice or object to proceeding without the witnesses.

As claimant in this cause of action, the same defendant seeks to convince this Court that he be permitted to retry the original charge against him by introducing the testimony of the witness, Jean Gilliland, and thereby establish his right to recover the sum of \$15,000.00 from respondent.

The testimony of the said witness, Jean Gilliland, appears on page 97 of the original transcript of evidence in this cause of action, and portions of it are quoted below:

“Q. Did you ever receive after you left for Hamsburg any communication from Mr. Dirkans?

A. Well, I wrote him a letter, and—well, that was a week after I was down there, and he answered, and then I never heard any more after that.

Q. You did write him a letter?

A. Yes.

Q. About how long after you got to Hamsburg?

A. It was about a week, I'd say.

Q. Did you receive an answer to that?

A. Yes, he answered it.

Q. Within how long a period of time?

A. I'd say about three or four days.”

From this testimony it is clear that Jonnia Dirkans, at a time some two or three weeks before his arrest, knew exactly where to communicate with the witness whom he was unable or unwilling to produce at the original criminal trial.

We find that claimant, Jonnia Dirkans, has substantially failed to prove his innocence of the crime for which he was imprisoned. It is the studied opinion of this Court that the Legislature of the State of Illinois in the language of Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that a claimant must prove his innocence of the “fact” of the crime. It was not, we believe, the intention of the General Assembly to open the Treasury of the State of Illinois to inmates of its penal institutions by the establishment of their technical or legal innocence of the crimes for which they were imprisoned. It is our opinion the legislators intended to provide

a manner of recourse in the Court of Claims, with a specific amount of recovery provided, for a claimant who is able to establish his complete innocence of the "fact" of the crime for which he was imprisoned. The lawmakers of this State would not have intended to grant that recourse to the narcotic addicts, murderers, kidnappers, rapists, and other felons who obtain a reversal of their convictions upon a legal or technical basis, such as insanity at the time of commission of the crime, or the running of the Statute of Limitations against said crime. We believe it was the intention of the Legislature in creating Sec. 439.8C of the Court of Claims Act to provide a method of indemnification of persons innocent of the "fact" of the crime who have been unjustly imprisoned.

Claim is denied.

(No. 5176—Claimant awarded \$6,092.35.)

HARRY DUMERMUTH, Claimant, vs. **STATE OF ILLINOIS**,
Respondent.

Opinion filed August 17, 1966.

McCONNELL, KENNEDY, McCONNELL AND MORRIS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

STATE PARKS—duty owed to invitee. A member of the general public in a State Park is an invitee, and the State has a duty to exercise ordinary care to protect him from harm.

SAME—negligence. Where evidence disclosed that the State breached its duty to exercise reasonable care in the maintenance of its parks, and claimant was not contributorily negligent, an award will be made.

PEZMAN, J.

This is an action brought by claimant, Harry Dumermuth, against respondent, State of Illinois, to recover damages for personal injuries, which he sustained on November

8, 1963, when he fell into a concrete drainage culvert or ditch at the Dixon Springs State Park, Pope County, Illinois.

Claimant charges in his complaint filed herein that his fall and resulting injuries were caused by the negligent and careless maintenance of this particular drainage ditch, and contends that respondent was negligent in failing to warn claimant of the existence of the ditch, failing to provide proper and adequate lighting in and around the area where claimant fell, and failing to provide a guard rail or warning sign around the hole or ditch into which claimant fell.

The facts concerning the happening of the accident, as shown by the evidence, are as follows:

On November **8**, 1963, claimant went by car to the lodge at the Dixon Springs State Park for the purpose of registering for a deer hunting permit. Claimant arrived at the Park at approximately 5:00 A.M. Because of the number of hunters already there, he had to park his car about one-half mile from the lodge. He walked approximately one-third of a mile down the road toward the lodge, and then entered the Park. He left the road to take his place in a double line of hunters seeking permits. Claimant remained in this line five and one-half hours to register. The area and road in front of the lodge where he registered were crowded with people watching the deer that had been killed being checked in at a check-in point, which was located in front of the steps leading from the lodge to the road.

After registering, claimant decided to return to his motel for lunch. Because of the crowd of hunters surrounding the weighing scale in the road in front of the building, claimant did not ~~try~~ to enter the road at that point, but retraced his route over the Park grounds.

Claimant returned to the Park at approximately 3:00 P.M. The road was completely filled on both sides with

parked cars so he parked in approximately the same location as in the morning, and took the same route to the building, not walking up the road, but walking over the grounds in the Park. About 6:00 that evening, there were still seventy or more numbers ahead of his for hunting permits. He decided to go home and return in the morning. By this time it was dark. When claimant left the lodge, he could not go down the front steps to the road, because that area was full of people, so he wedged his way behind the people standing near the railing running along the concrete walk in front of the lodge, and then went down the steps at the end of the walk. He walked about ten feet, turned, stepped into the road at a vacant parking place, and fell into a concrete drainage culvert or ditch about two to two and one-half feet deep and about fourteen inches wide running along the north edge of the road. There were no guard rails or warning signs in this area, and it was not lighted.

Claimant had never been in the Dixon Springs State Park before November 8, 1963, and, prior to this fall, he had not been anywhere near this ditch, because he has always had to park his car some distance from the area, and walk in through the Park. As a result of the accident, claimant sustained a markedly comminuted fracture of the proximal phalanx of the right great toe with a dislocation of the tarsal metatarsal points, dislocation to all of the joints in the foot to some degree, and small fractures involving the proximal end of the first, second and possibly the third metatarsal. Claimant was hospitalized for two days, and a temporary cast was put on his foot. On November 15, 1963, a closed reduction of the fracture was performed under a general anesthetic. This did not hold, and, on November 26, 1963, an open reduction was performed including the use of a Steinman pin to stabilize the dislocation of the first tarsal metatarsal joint. Claimant now has a permanent restriction

of motion of the metatarsal-phalangeal joint of the great toe, which interferes with the normal function of the foot.

The question presented in this case is whether the State owed a duty to this claimant, the degree of that duty, whether this duty was breached, whether the claimant was injured as a proximate result of that breach, and, if so, the nature and extent of claimant's injuries.

Claimant was clearly an invitee, and the State had the duty to exercise ordinary care to protect him from harm. The record discloses that claimant came to the Dixon Springs State Park to register for a deer hunting permit. The State had set up a place for hunters to register in the lodge at that Park, and claimant was injured returning to his car from the lodge where the hunting permits were issued. This **Court held** in *Kamin vs. State of Illinois*, **21 C.C.R. 467**, that a member of the general public in a State Park is an invitee. In this case, the Court stated at page **472**:

“. . . although the State is not an insurer of the safety of those who make use of the park facilities, the State must exercise reasonable care in the maintenance of its parks, and in supervising the use thereof by the public.”

It would appear from the facts in this case that the duty of the State to exercise reasonable care in the maintenance of its parks has been breached. The Park officials must have known, or should have foreseen, that persons would be walking along the road's edge and crossing into it at different points in going to and from their cars, yet no guard rails, signs, or lights were put up to warn people of the existence of the ditch. In the case of *Brown vs. State of Illinois*, **22 C.C.R. 231**, the Court held that the State of Illinois was negligent in maintaining drains without covers, which were located in the walking area of a cattle barn, where the drains were littered with straw, and could not be recognized as such.

The case at hand is analogous in that the simple pre-

caution of installing an iron grating across this two and one-half foot deep concrete drainage culvert would have possibly prevented the occurrence, or at least would have reduced the seriousness of the injuries suffered. Since the culvert had been in existence for some time, the argument cannot be made that the State did not have notice of the existence of the ditch running along the side of the road. Furthermore, the State must have realized that such a deep ditch left unmarked, unguarded, and unlighted was a dangerous trap.

There is no evidence in the record to substantiate respondent's claim that claimant was contributorily negligent. Claimant had never been in the Dixon Springs State Park until the day of the accident, and had no opportunity to learn of the existence of the drainage culvert prior to his falling into it.

The State, knowing people were using the road, parking in the area, and returning to their cars after dark, had the duty to warn the public of the ditch's existence. This it failed to do, and, as a result, this claimant was permanently injured.

Claimant's Bill of Particulars indicates that he has expended \$1,222.35 for hospital and medical expenses, and has suffered the loss of wages and salary in the sum of \$1,870.00.

Direct unrefuted testimony establishes that claimant suffered permanent damage. Dr. Consigny testified that there was definite restriction of motion of the joints about the middle portion of the foot, with marked restriction of motion of the metatarsal-phalangeal joint of the great toe. He stated that these restrictions will interfere with the normal function of the foot, and cause claimant to limp during the latter part of the day.

It is the opinion of this Court that claimant is entitled to an award in the amount of \$6,092.35. It is therefore, ordered that claimant's claim in that amount **be** allowed.

(No. 5188—Claimant awarded \$503.86.)

BLACK AND COMPANY, INC., A CORPORATION, Claimant,
 vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 17, 1966.

BLACK AND COMPANY, INC., A Corporation, Claimant,
 pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
 Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PEZMAN, J.

Claimant seeks to recover the sum of **\$511.80** for certain items of hardware furnished to various departments of government of the State of Illinois. On May 19, 1965, Mr. L. D. Ryan, a Vice-president of the claimant corporation, testified in behalf of claimant concerning the original invoice tickets bearing signatures of State employees totalling **\$503.86**.

On June **17, 1966**, a stipulation was entered into by and between claimant and respondent establishing that the invoices were not paid because of the lapse of appropriations. That agreement establishes that the amount the respondent owes to claimant is **\$503.86**.

This Court has routinely held that, where an appropriation for the biennium from which a claim should have been paid had lapsed, it will enter an order for the amount due to claimant.

Claimant is hereby awarded the sum of **\$503.86**.

(No. 5195—Claimant awarded \$4,358.00.)

COLUMBIA CASUALTY COMPANY, A NEW YORK CORPORATION,
 Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 17, 1966.

FREDERICK R. PEPPERLE, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Columbia Casualty Company, a New York Corporation, surety on an indemnity bond for Krueger Construction Company, Inc., seeks to recover from the State of Illinois the sum of \$4,358.00 admittedly owed by the State to the Krueger Construction Company for construction work performed pursuant to certain contracts.

A stipulation for judgment was entered into by and between the State of Illinois, as respondent, and the Columbia Casualty Company, a New York Corporation, as claimant, on the 8th day of November, 1965. From this stipulation the undisputed facts of the cause are as follows: Respondent on the 10th day of November, 1959, by the Department of Public Works and Buildings, entered into a written contract with the Krueger Construction Company, Inc., for the resurfacing of the one mile track and construction of a Type "B" electrical conduit at the Illinois State Fairgrounds in Springfield, Illinois, for a total contract consideration of **\$21,351.04**. Subsequently, on the 2nd day of December, 1959, by mutual consent of both respondent and the Krueger Construction Company, the resurfacing of the one-half mile track at the same Illinois State Fairgrounds for the additional consideration of \$7,760.00 was added to said written contract, the contract being designated as No. 7166.

Claimant issued its indemnity bond No. SB6B238357 on

the 13th day of November, 1959, with the Krueger Construction Company as principal, claimant as surety, and respondent herein as obligee. On that same date the Krueger Construction Company, in connection with its indemnity bond, executed an indemnity agreement in favor of claimant. By virtue of the terms, conditions, and provisions of said indemnity bond, claimant paid out a total of \$11,325.18 to various claimants in the nature of subcontractors who furnished and/or rendered labor and/or material in connection with the subject matter of the written contract, and, obtained Mechanics Lien releases from said lien claimants. By the aforementioned stipulation, respondent admits that, as of the date of the completion of the contract itself, the Krueger Construction Company had a credit of \$4,358.00 for work done under the contract, which sum was completely independent of other claims by the Krueger Construction Company for alleged extras performed, and for which recovery is now being sought by said company in another cause before this Court.

The testimony of an officer of the Krueger Construction Company clearly indicates that, by virtue of claimant's payment of certain lien creditors heretofore mentioned, claimant was justly entitled to the balance of \$4,358.00 due from the State of Illinois to the Krueger Construction Company. The stipulated facts also indicate that on the 8th day of September, 1961, written application was made to respondent for payment of the sum of \$4,333.00; that such payment was not forthcoming; and, that funds for payment of the total balance due of \$4,358.00 lapsed into the General Fund of the State of Illinois.

A joint motion by claimant and respondent for leave to waive briefs was filed on the 9th day of November, 1965, and granted by the Court.

The last paragraph of the stipulation entered into by the parties states as follows:

"IT IS, THEREFORE, STIPULATED AND AGREED, by and between the above captioned parties, through their respective attorneys, that the Court, upon presentation of this Stipulation by either party thereto or the attorney for said party without notice to the other of said party or their attorney may enter judgment in favor of Claimant, COLUMBIA CASUALTY COMPANY, a New York Corporation, against Respondent, the STATE OF ILLINOIS, for the **sum** of FOUR THOUSAND THREE HUNDRED FIFTY-EIGHT and no/100 (**\$4,358.00**)Dollars and *costs*."
 DATED: November 8, 1965.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; and, (4) adequate funds were available at the time the contracts were entered into, it would enter an award for the amount due. *American Oil Company, Inc., A Corporation, vs. State of Illinois*, case No. 5109, opinion filed June 26, 1964; *The Pittsburg and Midway Coal Mining Company, A Corporation vs. State of Illinois*, case No. 5147, opinion filed July 24, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Columbia Casualty Company, is, therefore, awarded the sum of \$4,358.00.

(No. 5295—Claimant awarded \$32,555.00.)

TRAFFIC CONTROL CORPORATION, AN ILLINOIS CORPORATION,
 Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed August 17, 1966.

ENDLER, HARRIS AND BUTLER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; **GERALD S. GROBMAN,** Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and **would** have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant seeks to recover from respondent the sum of \$32,555.00, which it alleges the Department of Public Works and Buildings, Division of Highways, obligated the State for through the purchase of certain traffic signal parts. The undisputed facts indicate that on November 24, 1964, the Division of Highways, issued its purchase order No. **643458** and requisition No. TS **52-257** for certain specific traffic signal parts. The claim of Traffic Control Corporation, An Illinois Corporation, was filed on March 25, 1966. A Departmental Report of the Division of Highways in relation to this cause was filed on June 6, 1966, and states as follows:

“On November 24, 1964, the State of Illinois, through the Department of Public Works and Buildings, Division of Highways, **issued** its purchase order No. **643458**, requisition No. TS 52-257, to Traffic Control Corporation for traffic signal parts **in the** amount of \$32,555.00, **described** in the purchase order attached **to** the claim (complaint) in **this** Court of Claims case.

“Purchase of this equipment was requested by District 10 of the Division of Highways through the Central Bureau Engineer of Traffic, **W. R. Berry**, on August 25, 1964.

“The material was received in good condition in four separate deliveries between January 19 and January 26, 1965. The material was installed as part of a Cook County Highway Department Construction Project, which has received final approval by both the Cook **County** Highway Department and the Division of Highways.

“The charges were reasonable for such material in the community where furnished, and no part of the bill of \$32,555.00 has been paid.

“Claimant’s invoice would have been vouchered and paid in **the** regular course of business if it had been submitted to the proper office at the appropriate time. Appropriations had been made by the State Legislature covering all the items, and as of September 30, 1965 there were unobligated balances of sufficient amounts in the appropriations from which claimant’s invoices could and would have been paid.”

A stipulation of facts by and between respondent and claimant was filed on June 6, 1966, and clearly states, among other things, that the material was received in good condition, and that the charges were reasonable for such material in the community where furnished.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; and, (4) adequate funds were available at the time the contracts were entered into, it would enter an award for the amount due.

Claimant, Traffic Control Corporation, An Illinois Corporation, is hereby awarded the sum of \$32,555.00.

(No. 5300—Claimant awarded \$20.00.)

STUART WEISS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 17, 1966.

STUART WEISS, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PRactice AND PROCEDURE—*stipulation in lieu of record*. Court will consider case on Departmental Report where it is stipulated by the parties to constitute the record in the case.

PEZMAN, J.

Claimant, Stuart Weiss, M.D., presented his statement to the State of Illinois Board of Vocational Education and Rehabilitation for hospital care rendered to one Clarence Littig in April of 1965. The Board of Vocational Education and Rehabilitation had determined that the recipient was eligible to receive assistance. A Departmental Report was filed in this cause indicating that Dr. Stuart Weiss was entitled to the sum of \$20.00, and also indicating that the Division of Vocational Rehabilitation of the Board had denied the claim for services rendered on the basis that it was services rendered prior to July 1, 1965, and that the appropria-

tion for that biennium had lapsed. On April 6, 1966, a complaint was filed herein by claimant seeking to recover the sum of \$40.00 for services rendered to the said Clarence Littig.

Subsequently, on May 25, 1966, a stipulation was entered into by and between claimant and respondent whereby "neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$20.00."

Pursuant to such stipulation and the Departmental Report, claimant is hereby awarded the sum of \$20.00.

(No. 5316—Claimant awarded \$672.59.)

UNION ELECTRIC COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed August 17, 1966.

UNION ELECTRIC COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant seeks payment for electrical service rendered to the State of Illinois, Department of Public Works and Buildings, Division of Highways, at 7th and Bowman Avenue, East St. Louis, Illinois, for a period from October 16, 1962 to November 16, 1962 in the sum of \$672.59.

A report of the Division of Highways was filed herein on the 4th day of August, 1966, and states as follows:

"From the period October 16, 1962 to November 16, 1962 claimant, Union Electric Company, furnished electrical service for the pumping sta-

tion at 7th and Bowman Avenue, East St. Louis. The charges for the electrical service were the usual, reasonable, and customary charges for such service in the community where furnished.

“No part of this bill has been paid by the Division of Highways, Department of Public Works and Buildings, or other State agency, for the reason that the bill was not presented, scheduled, and processed until some time after September 30, 1963, when the 72nd biennium appropriations lapsed.

“The service had been ordered by persons having proper authority, and the charges are true and correct. Claimant’s invoice would have been vouchered and paid in the regular course of business if it had been submitted to the proper office at the appropriate time. Appropriations had been made by the State Legislature covering these charges, and, as of September 30, 1963, there was an unobligated balance in a sufficient amount in the appropriation from which claimant’s invoice could and would have been paid.”

A written stipulation was entered into between claimant and respondent clearly adopting the facts set forth in the Departmental Report as the sole and only evidence in this cause. From this Report, the Court establishes that the appropriation from which this claim could have been paid had lapsed.

This Court has heretofore previously held on many occasions that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. The Departmental Report establishes all of the qualifications for an award.

Claimant is hereby awarded the sum of **\$672.59**.

(No. 5318—Claimant awarded \$2,356.97.)

DECATUR AND MACON COUNTY HOSPITAL ASSOCIATION, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 17, 1966.

LE FORGEE, SAMUELS, MILLER, SCHROEDER AND JACKSON,
Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PRACTICE AND PROCEDURE—stipulation in lieu of record. Court will consider case on Departmental Report where it is stipulated by the parties to constitute the record in the case.

PEZMAN, J.

Claimant, Decatur and Macon County Hospital Association, A Corporation, presented its statements to the Department of Public Aid for services, which were rendered to the following individuals on the dates set forth thereafter:

Margaret Taylor, 829 N. Illinois, Decatur, Illinois	5/2/65-6/25/65
Ruby Jane Van Norsdale, 451 Longview, Decatur, Illinois	4/21/65-5/ 1/65
Margaret T. McDaniel, 854 W. King, Decatur, Illinois	6/29/65-6/30/65
Fern Gertrude McDaniel, R.R. No. 1, Decatur, Illinois	6/25/65-6/30/65
Charles Mount, 422 West Eldorado, Decatur, Illinois	4/28/65

The Department of Public Aid had determined that the aforementioned recipients were eligible to receive aid under its program of Assistance to the Medically Indigent Aged, but the Department denied the claims for the services rendered on the basis that the claims were for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. On June 6, 1966, claimant filed its complaint in the Court of Claims seeking to recover the sum of \$2,356.97 for hospital services rendered to the five individual recipients heretofore mentioned.

A Departmental Report was filed in the matter as exhibit "A," and, pursuant to stipulation, was admitted into evidence. The Departmental Report consists of a letter from

Harold O. Swank, Director of the Department of Public Aid, stating in effect that claimant is justly entitled to the amount claimed.

Pursuant to the stipulation entered into on behalf of the Decatur and Macon County Hospital Association, by its attorneys, and the State of Illinois, by the Attorney General, the Departmental Report was admitted into evidence as the sole and only evidence in this cause. From this we find that the reasonable and equitable charges for services rendered by claimant to Margaret Taylor, Ruby Jane Van Norsdale, Margaret T. McDaniel, Fern Gertrude McDaniel, and Charles Mount amounted to \$2,356.97. We find that the appropriation for payment of the same had lapsed, and that claimant is justly entitled thereto.

Claimant is hereby awarded the sum of **\$2,356.97.**

(No. 5321—Claimant awarded \$90.00.)

ST. ANTHONY HOSPITAL, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed August 17, 1966.

ST. ANTHONY HOSPITAL, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant, St. Anthony Hospital of Terre Haute, Indiana, presented its statement to the State of Illinois, Department of Children and Family Services, for hospital serv-

ices rendered to one "Baby Girl Yoder" during the period from February 1, 1965 to February 10, 1965.

The hospital services for "Baby Girl Yoder" were contracted for through the Champaign District Office of the Division of Child Welfare, Department of Children and Family Services. The claim was denied by the Department in April of 1966 on the basis that the claim was for services rendered prior to July 1, 1965, and that the appropriation for that biennium had lapsed. On June 15, 1956, claimant filed its complaint in the Court of Claims seeking to recover the sum of \$90.00 for hospital services furnished to the said "Baby Girl Yoder," as set forth hereinabove.

A report of the Department of Children and Family Services was filed in the matter as exhibit "A," and, pursuant to stipulation, was admitted into evidence in its **full** context. Exhibit "A" states in part as follows: "Our investigation indicates that the charge appearing on the statement is legitimate, and, therefore, we cannot disagree with the claim."

We find that there were funds available in the appropriation of the Department of Children and Family Services for the purpose of administering the provisions of Sec. 5 of "An Act Creating the Department of Children and Family Services," and that the lapsed balance in that account was sufficient to cover the charge in question. Pursuant to the stipulation as to evidence, we further find that a contract had been properly entered into, services satisfactorily performed, materials furnished in accordance with such contract, proper charges made therefor, and that adequate funds were available to pay the same. The appropriation for the biennium from which such claim could have been paid had lapsed. We find that all qualifications for an award have been met in the instant case.

Claimant, St. Anthony Hospital, is hereby awarded the sum of \$90.00.

(No. 5333—Claimant awarded \$2,066.95.)

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

Opinion filed September 14, 1966.

JAMES R. BRYANT, JR., DOUGLAS G. BROWN AND THOMAS R. PHILLIPS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant, Illinois Bell Telephone Company, filed its claim on August 4, 1966 seeking to recover the sum of \$2,066.95, a balance due and owing to claimant for services rendered to the Department of Public Health for the billing period of September 11, 1964 to September 25, 1964.

Claimant alleges that services were actually furnished to respondent pursuant to tariffs, rules, and regulations of the Illinois Commerce Commission, which form a contract between the Telephone Company and its subscribers. Claimant further alleges that the services rendered consisted of a Centrex console equipment installation, fixed equipment rental, and terminals, and other items that are more specifically set forth in a bill of particulars, which was made a part of claimant's complaint. It is further alleged that the claim was presented to the Director of Public Health early in 1966, and that by reason of lapse of the appropriations for the biennium involved the claim was not paid.

Claimant and respondent, by their respective attorneys, on September 6, 1966, entered into the following stipulation:

"1. That claimant is a Public **Utility** Corporation, incorporated under **Illinois** Law, and at the special instance and request had supplied equipment and service at the Public Health **office** at **1601 W.** Taylor Street, Chicago, Illinois.

"2. That **the** charge for said installation and service, as provided for in the published tariffs, is as follows:

a. Specific terminals	\$ 139.51
b. Fixed rentals	855.07
c. Console charges	147.04
d. Installation charges	925.33

Total	<u>\$2,066.95</u>
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"3. ~~That~~, as a result of a new program of payment adopted by the Department of Public Health, and the delay in billing by claimant, payment was not made prior **to** the closing of the biennium appropriation.

"4. That no assignment or transfer of the claim has been made.

"5. That there is rightfully due to claimant the **sum of \$2,066.95.**

"6. That, upon the foregoing agreed case filed therein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue."

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the instant case.

Claimant, Illinois Bell Telephone Company, is hereby awarded the sum of \$2,066.95.

(No. 5314—Claimant awarded \$100.00.)

VIRGIL McCARTY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 17, 1966.

VIRGIL McCARTY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

DOVE, J.

Claimant seeks to recover the sum of **\$200.00** for services rendered by him to the Department of Public Aid.

A Departmental Report was filed admitting that one Simon Keppel was a recipient of assistance from the Department of Public Aid, and that services were rendered by claimant, Dr. Virgil McCarty, in connection with the amputation of the right leg of the recipient. The Departmental Report further disclosed that the statement for services was not paid on the grounds that funds appropriated for such payments had lapsed, and that there was now due Dr. McCarty the sum of \$100.00.

Subsequently a stipulation was entered into by and between claimant and respondent, which stipulation conformed to the findings and recommendations of the Departmental Report.

This Court has held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$100.00.

(No. 5340—Claimant awarded \$489.00.)

SOUTHWESTERN ASSEMBLIES OF GOD COLLEGE, WAXAHACHIE, TEXAS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion fled November 17, 1966.

WARWICK H. JENKINS, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PEZMAN, J.

Claimant, Southwestern Assemblies of God College of Waxahachie, Ellis County, Texas, seeks to recover the sum of \$489.00 for tuition, maintenance, **books**, and supplies furnished to one Donna Marie White for a course of study in claimant's educational institution for the period from February 1, 1965 to May 24, 1965.

A Departmental Report of the Division of Vocational Rehabilitation acknowledges the facts as alleged by claimant, and states clearly; "Claimant is entitled to the amount of the invoice voucher, and it was suggested by this office that they file for the claim through the Court of Claims." Claimant's billing was denied by the Department when presented, on the basis that the claim was for services completed prior to June 30, 1965, and that the appropriation for that period had lapsed.

On September 22, 1966, a written stipulation was entered into between claimant and respondent, by their respective attorneys, which supports the position of claimant in this matter.

This Court has heretofore held that, where a contract

has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Rockford Memorial Hospital Association, A Corporation, vs. State of Illinois*, Case No. 5165, opinion filed September 25, 1964; *American Oil Company, Inc., A Corporation, vs. State of Illinois*, Case No. 5109, opinion filed June 26, 1964. It appears that all qualifications for an award have been met in the case at hand.

Claimant, Southwestern Assemblies of God College, Waxahachie, Texas, is hereby awarded the sum of **\$489.00**.

(No. 5342—Claimant awarded \$142.42.)

CAMPUS BOOK STORE, INC., Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed November 17, 1965.

PAUL E. KARLSTROM, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; **LEE D. MARTIN**,
Assistant Attorney General, for Respondent.

CONTRACTS—lapsed appropriation. When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

DOVE, J.

Claimant seeks to recover the sum of **\$142.42** for certain books furnished by claimant to the Division of Vocational Rehabilitation. Subsequently a stipulation was entered into by and between claimant and respondent establishing that the invoices were not paid on the grounds that the funds appropriated for such payments had lapsed. The stipulation

further provides that the amount of **\$142.42** is owed by respondent to claimant.

This Court has held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order **for** the amount due claimant.

Claimant is hereby awarded the sum of **\$142.42**.

**CASES IN WHICH ORDERS OF DISMISSAL WERE
ENTERED WITHOUT OPINION**

- 5150 James T. Todd, Et *Al*
- 5155 Madison County Fair Association, A Not-For-Profit Corporation
- 5157 Richard E. Treiber
- 5171 Viola K. Dimond
- 5189 Anthony De Rosa, by his Father and Next Friend, Pasquale De Rosa
- 5210 Jean M. Souci
- 5033 Richard Taylor, A Minor, by Cecil Taylor, his Father, Natural Guardian and Best Friend
- 5063 Isaih Williams
- 5139 Richard Bobo
- 5140 Ora Metcalf
- 5149 Waverly Killings
- 5168 ~~Etta~~ Borton
- 5190 Albert Young
- 5216 Eleanor J. Mowbray
- 5232 C. H. Rosquist
- 5235 Bruce Motor Freight, Inc.
- 5248 Sidney Stein, A Minor, by Iren Stein, his Mother and Next Friend
- 5258 Joseph Johandes
- 5269 Arnold W. Henne
- 5315 Nora O'Sullivan Manley
- 5336 Adell Henderson
- 5346 Thomas Taylor

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