

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

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**VOLUME 24**

**Containing cases in which opinions were filed and orders  
of dismissal entered, without opinion, between  
November 16, 1960 and August 20, 1964**

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**SPRINGFIELD, ILLINOIS**  
**1965**

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[Printed by authority of the State of Illinois.]



## PREFACE

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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

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### JUDGES

JOSEPH J. TOLSON, *Chief Justice*  
Kankakee, Illinois  
April 1, 1953 — January 31, 1963

MAURICE PERLIN, *Chief Justice*  
Chicago, Illinois  
February 1, 1963 —

JOSEPH J. TOLSON, *Judge*  
Kankakee, Illinois  
*February 1, 1963 — April 25, 1963*

MAURICE PERLIN, *Judge*  
Chicago, Illinois  
April 19, 1961 — January 31, 1963

GERALD W. FEARER, *Judge*  
Oregon, Illinois  
April 1, 1953 — March 19, 1963

ALFRED L. PEZMAN, *Judge*  
Quincy, Illinois  
March 20, 1963 —

JAMES B. WHAM, *Judge*  
Centralia, Illinois  
August 1, 1953 — April 18, 1961

ROBERT I. DOVE, *Judge*  
Shelbyville, Illinois  
May 22, 1963 —

**WILLIAM L. GUILD, *Attorney General***  
**June 17, 1960 — January 9, 1961**

**WILLIAM G. CLARK, *Attorney General***  
**January 9, 1961 —**

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**CHARLES F. CARPENTIER**  
***Secretary of State and Ex Officio Clerk of the Court***  
**January 12, 1953 — April 3, 1964**

**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**

**ALFRED H. GREENING, *Deputy Clerk***  
**Springfield, Illinois**  
**June 2, 1953 — April 9, 1964**

**MELVIN N. ROUTMAN, *Deputy Clerk***  
**Springfield, Illinois**  
**April 10, 1964 —**

## *In Memoriam*

# Charles F. Carpentier

"Mr. Republican of Illinois" is gone. Death has come to Charles F. Carpentier, ending a long record of outstanding public service to the people of his State.

Mr. Carpentier's career included service as an enlisted man in World War I, five terms as an alderman in East Moline, four terms as State Senator and three terms as Illinois' 29th Secretary of State, which office he filled from 1952 until his death. He had planned to run for governor of Illinois in 1964, but found it necessary to withdraw his candidacy after suffering a heart attack during a campaign tour.

He was without doubt the outstanding Republican in the State of Illinois, but he enjoyed the respect of members of both parties. This was evidenced in 1960 when, running for re-election to his third term as Secretary of State, he was the only GOP candidate to emerge victorious in an election which resulted in a Democratic landslide.

The greatest tribute to Mr. Carpentier, however, is not to be found in his political strength, in his political shrewdness or in the length of his career as a public official. The true measure of his worth is the high calibre of service, which he rendered. Under his direction and guidance, many improvements were made in the office of the Secretary of State to increase the efficiency of its operation.

He was mainly responsible for the updating of Illinois drivers' license law, which placed driver examinations and the authority for license revocation and suspension in the hands of the Secretary of State. This law, which had previously been nothing more than a program for the registration of motorists, became a potent force for greater highway safety and the curbing of motor vehicle accidents.

The citizens of Illinois, regardless of their political affiliations, will have good cause to long remember Charles F. Carpentier, a faithful public servant.

## **In Memoriam**

# **Joseph J. Tolson**

In the death of Joseph J. Tolson, the State of Illinois has lost a learned and able public servant.

His services to his community were outstanding. For the 10 years preceding his death he had served as Chief Justice of the Illinois Court of Claims.

During his lifetime, Joseph J. Tolson carried on the traditions of a pioneer family identified with the settlement of Kankakee. His ancestors had moved there only a few years after Kankakee was incorporated 110 years ago.

A graduate of the University of Illinois law school in 1930, throughout his career he was dedicated to maintaining the high standards of that profession. Besides years as a practicing attorney, he served as State's Attorney of Kankakee County for two terms. During the administration of Governor William Stratton he was appointed Assistant Attorney General.

A Republican committeeman for many years, Mr. Tolson served as secretary of the Kankakee County Republican Central Committee for 17 years. He was active in various church, lodge and civic organizations, was a lifetime member of the First Methodist Church, a past director of the Kankakee Area Chamber of Commerce, a former president of the Kankakee County Bar Association.

He devoted his life to his family and to his chosen profession. All who knew him personally or through his many good deeds mourn his passing. Joseph J. Tolson is deserving of the highest tribute: "He was a good and true man."

# **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 in 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 vs STATE OF ILLINOIS, (or the appropriate State Agency) Respondent No.

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, 1963 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.

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 proceedings 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

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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 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 claimant 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,

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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.

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 attorneys, 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 (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 at-

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torneys 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.

**FEES 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 20th day of December, 1963 to be in full force and effect from and after the 7th day of February, **A.D.**, 1964.

## **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. 437, 1963 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 \$6500 per annum payable in equal monthly installments.

SECTION 5. The Court shall have a seal with such 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, or the Teachers College Board; 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 or the Teachers College Board 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.

## APPENDIX

AN ACT *concerning claims for medical fees or charges for care of escapees from State controlled charitable, penal or reformatory institutions, who are injured while being recaptured.* (Chap. 37, Sec. 439, 1963 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 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.

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, 1963 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, or the Department of Public Safety or the Youth Commission for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has

escaped from a charitable, 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 or the Department of Public Safety or the Youth Commission, 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 said 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. 63, 1963 Ill. Rev. Stats.)*

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

SECTION 3. 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, 1963 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. 287, 1963 Ill. Rev. Stats.)

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

**SECTION 49.** 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*

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*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, 1963 Ill. Rev. Stats.)*

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

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.

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

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(No. 4238—Motion of Respondent to dismiss overruled.)

KENNETH L. MARTIN, ET AL, Claimants, vs. STATE OF ILLINOIS,  
Respondent.

Opinion filed December 18, 1950.

DAVID V. LANSDEN AND JULIAN JOHNSON, Attorneys  
for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H.  
SUMPTER AND C. ARTHUR NEBEL, Assistant Attorneys  
General, for Respondent.

CONSERVATION—*wild geese*. Ownership and title to wild geese is in the  
State of Illinois.

SAME—*establishing reservation for wild geese*. Establishing reservations  
for wild geese is a proprietary function, and not an exercise of the police  
power.

PLEADING AND PRACTICE—*complaint*. Claimant could have a cause of  
action for negligent operation of a game preserve.

SCHUMAN, C. J.

This case was heard on the amended motion to dis-  
miss filed by respondent.

The motion is predicated on Section 45 of the Civil  
Practice Act, and claims that the complaint on its face  
shows it is insufficient in law to justify an award.

The first point raised by the motion is that wild  
geese, as a matter of law, are not in possession or control  
of respondent. In support of this they cite the case  
of *Missouri v. Holland*, 252 U. S. 416. In that case the  
State of Missouri sought to enjoin Federal Officials from  
enforcing the regulations under the Migratory Bird  
Treaty Act, and claimed exclusive authority over migra-  
tory birds. The court in its opinion said:

“No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers.”

Indicating as between the State and its citizens, it may regulate the killing of birds.

Section 154 of the Game Code of Illinois, being Chapter 61, Smith Hurd Revised Statutes, provides as follows :

“The ownership of and title to all wild birds and wild animals within the jurisdiction of the State are hereby declared to be in the State, and no wild birds or wild animals shall be taken or killed, in any manner or at any time, unless the person or persons so taking or killing the same shall consent that the title thereto shall be and remain in the State for the purpose of regulating the taking, killing, possession, use, sale and transportation thereof, after such taking or killing, as hereinafter set forth. The taking or killing of wild birds or wild animals at any time, in any manner, and by any person, shall be deemed a consent on the part of such person that the title to such wild birds or wild animals shall remain in the State for the purpose of regulating the possession, use, sale and transportation thereof.”

For the purpose of passing on this motion, the Court concludes that as to claimants the ownership of and title to wild geese are in the State of Illinois.

Under point 2 it is contended that the maintaining of the Horseshoe Lake State Game Preserve was a valid exercise of the police power for which the State is not liable to respond in damages. In support of this respondent predicates its position on general regulation being under the police power. However, respondent states that the Department of Conservation is given authority to acquire land by Section 3-C of the Game Code, which provides :

“C. The Department may establish and maintain units upon any lands owned or leased by the State of Illinois, with the consent and approval of the State Department or agency having jurisdiction over such lands, for the purpose of breeding and propagating wild birds and wild animals.

“The Department shall have the power and authority to select and purchase, or lease, receive donation or acquire, in accordance with the laws relating to eminent domain:

(a) Suitable lands for the breeding, hatching, propagation and conservation of wild birds or wild animals, or

(b) Lands or lands and waters to be used as public shooting and fishing grounds.”

In order to establish the preserve the State had to do it by purchase, gift or by exercising eminent domain. Respondent cites numerous Illinois cases, which are cases stating that preservation of game is a police regulation. To this there can be no argument. Respondent then cites *Bailey v. Holland*, 126 Fed. 2d 317 as authority for this point. However the court on page 324 said:

“If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, e.g., erect improvements to lessen the dangers resulting from the drainage of marshy areas, it must acquire some *proprietary interest* in the areas suitable for such uses. It was to meet this that Congress enacted the Migratory Bird Conservation Act. Land purchased under this Act becomes an ‘inviolate sanctuary’ over which the Government acquires complete dominion, so that it can erect buildings, fences, ditches, dams; or do any other affirmative acts upon the property for the general welfare of the birds. And in order to make this refuge more effective, the Secretary may prohibit hunting in that immediate vicinity. Merely because the government purchases certain lands in order to do more than prohibit hunting, it does not follow that compensation must be paid for all land closed to hunting.

“The distinction between a ‘closed area’ which may well embrace privately owned lands, and a federally owned ‘inviolate sanctuary’ seems clear. Hence the regulation establishing the closed area in question did not extend the boundaries of the refuge proper; nor did this regulation involve any invasion or taking of appellee’s land.

“In this case owners of land stated only value of ground was in utilization for shooting migratory waterfowl, otherwise properties were practically valueless.”

This case holds that the government in order to maintain a refuge must obtain a proprietary interest in the ground, which it could only do by purchase, eminent domain, etc.

For this reason the State of Illinois in acquiring the game preserve acquired proprietary interest in the land, and, therefore, the establishment of the preserve was not under police regulations, nor is its maintenance.

The Court concludes that the State could be held responsible for negligence in the operation of the pre-

serve where damages occur to private property from said negligence.

Under point 3 respondent contends the complaint fails to allege facts sufficient to show that respondent was under any duty to protect claimants from the actions of wild geese, or that the State was negligent, or that the State was liable to claimants by any alleged action or non-action of its employees. Under this point they cite numerous cases, all of which, in arriving at the conclusion that the State can regulate game, state that the owner of private property may kill predatory game that is damaging his property. Respondent states that claimants had the right to protect their property. However, under Sec. 28, Chapter 61, of the Game Code, which provides :

“The owners and tenants of farm lands and their children actually residing on such lands shall have the right to hunt, take and kill game, wild animals, wild fowls and birds of the kind permitted to be hunted, taken or killed by the provisions hereof, upon such lands and waters thereon, of which they, or their parents, are the bona fide owners or tenants, during the seasons when it is lawful so to do, without procuring hunting licenses.

“The owners and tenants of lands may destroy any wild animal or wild bird, other than a game bird, when such wild animal or wild bird is destroying property upon his or her land, but no poison or poisonous substance shall be used as a means of destroying such wild animal or bird.”;

and Section 184, which provides:

“The owners and tenants of lands may destroy any wild bird or wild animal, other than a game bird or migratory game bird, when such wild bird or wild animal is destroying property upon his or her land, but no poison or poisonous substance shall be used, except chemicals may be used by owners or tenants of land on which levees and dams are located, by obtaining written permission from the Department.”;

and Section 155, which provides in part:

“MIGRATORY GAME BIRDS—Waterfowl, including brant, wild ducks, geese, and swans, Anatidae; Cranes, including little brown, sandhill, and whooping cranes, Gruidae; Rails, including coots, gallinules, and sora and other rails, Rallidae; Shore birds, including avocets, curlews, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock, and yellow legs, Limicolae; Pigeons, including doves and wild pigeons, Columbidae. GAME ANIMALS—Cot-

tontail rabbit, *Sylvilagus floridanus*; swamp rabbit, *Sylvilagus aquaticus*; Jack rabbit, *Lepus Townsendii*; Fox squirrel, **Sciurus niger**; Gray or cat squirrel, *Sciurus carolinensis*; Whitetail deer, *Odocoileus virginianus*. FUR-BEARING ANIMALS—Opossum, *Didelphis virginiana*; Raccoon, *Procyon lotor*; Mink, *Mustela visor*; Otter, *Lutra Canadensis*; Skunk, *Mephitis mephitis*; Muskrat, *Ondatra Zibethicus*; Beaver, *Castor canadensis*; Red fox, *Vulpes fulva*; Badger, *Taxidea Taxus*.

“It is unlawful to take any said wild birds and parts thereof (their nests and eggs), and wild animals and parts thereof, including their green hides, with such devices, during the protected seasons and in such manner, as defined by this Act.”,

claimants are absolutely prohibited from doing the very thing the State contends they can do.

In the case of *Platt v. Philbrick*, 47 P. (2d) 302, (Calif.) appeared the following :

“Respondent argued that provision for compensation controls only in case where interest is taken in the land by the State in which case the officers have the right to occupy the property to propagate, feed, and protect the fish and game.

“Appellant contended Section permitting ‘any lawful occupant of privately owned lands, etc.’ may take, hunt, or kill on such lands predatory or destructive birds or mammals, (this in closed area).

“Court held this question could not be raised by owners, but only against those discriminated against. (304).”

The court on page 304 said:

“The purpose of this exception to the general rule of a ‘closed season’ within these refuges is apparent. The legislature sought to meet the objection to which appellant makes to the legislation as a whole—that the effect of the ‘closed season’ would be that predatory game would be permitted to roam within the refuge at will and cause damage to the gardens and crops of private landowners. (Emphasis supplied). In giving permission to lawful occupant of lands within the refuge to protect his property against invasion, the Section is a reasonable exercise of the legislative authority to regulate the protection of game within the respective districts. The Section does not permit such persons to hunt and kill game at will throughout the refuge as argued by appellant. The privilege is limited to the ‘privately owned lands’ upon which each lawful occupant, or his employees, may take, hunt, or kill ‘predatory or destructive birds or mammals’.”

The Court concludes that the claimants being powerless under the Statute to protect their property from wild geese would have a cause of action for negligence causing damages to their property.

The very effect of these statutory provisions amounts to an extension of Horseshoe Lake Preserve, by preventing claimants from protecting their property, and without acquiring additional rights by the payment of just compensation.

As to point 4 of the motion, the Court feels sufficient facts are set forth in the motion to state a cause of action.

As to point 5, the Court can see no basis for such contentions. If a continuing trespass, the Court would have jurisdiction every time damages occur.

The Court has read both of the cases in the Federal court, and can see no basis that the cause of actions were in any way similar.

Under the original Migratory Bird Treaty Act the Federal Government could not acquire lands to establish refuges. The amendment to the Act in 1929 gave the Government power to do so. *Bailey v. Holland, supra*, the basis of the holding, held that regulations closing 5,000 acres surrounding the refuge made it more effective, but drew a clear distinction in the acquisition of the refuge, and regulations under the treaty.

The Court; therefore, concludes that sufficient facts are stated in the amended complaint to state a cause of action, and the motion to dismiss is overruled.

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Judge Lansden did not participate in the consideration and determination of this case.

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(Nos. 4238, 4392, 4399 and 4486—Consolidated—Claims denied.)

KENNETH L. MARTIN, ET AL, A. A. SEIBERT, ET AL, GERALD MILLER, ET AL, AND HENRY A. SHUMAKER, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1960.*

*Petition of Claimants for Rehearing denied November 16, 1960.*

LANSDEN AND LANSDEN, PEYTON BERBLING, and J. KELLY SMITH, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

**PRACTICE AND PROCEDURE—reopening matters decided by previous orders in same cause.** The Court is not bound by matters decided in previous orders, but may inquire into all questions raised for the purpose of making a final determination of the cause in the same manner as the orders would be subject to review by the Court upon a petition for rehearing of the final decree pursuant to Rule 25 of the Court of Claims.

**MIGRATORY BIRDS AND WILD LIFE—paramount authority in United States Government.** The United States has paramount authority over the respective states in protecting migratory birds.

**SAME—liability for damages caused by protection of.** States in their sovereign capacity may pass legislation protecting wild life, even though an individual may suffer losses, and, such losses are not compensable.

**SAME—liability for damages where protected by Presidential proclamation.** The State is not liable for damages caused by protection of wild life by Presidential proclamation, where they could not have successfully challenged the validity of the proclamation.

TOLSON, C. J.

The claims of certain landowners, tenants, or both, for the recovery of damages occasioned by the alleged neglect of the State of Illinois in its operation of a game preserve, known as Horseshoe Lake, in Alexander County, Illinois, are involved in these consolidated cases.

The complaints, as amended, charge the State in the following terms :

That the State of Illinois, through its Department of Conservation, owns and operates Horseshoe Lake Game Preserve.

That respondent, by virtue of Chap. 61, Sec. 154, Ill. Rev. Stats., has ownership and title to all wild birds.

That respondent, in the operation of the preserve, and in conjunction with agents of the United States of America, has encouraged the concentration of migratory water fowl in the surrounding area.

That claimants were free from contributory negligence, and exercised due care for the safety of their property and crops.

That claimants, naming them individually, were tenants, owners, or both, on lands surrounding the preserve, and during the years of 1947 and 1948 raised substantial amounts of corn, beans, and other crops.

That commencing on November 1, 1947, and continuing to the date of these suits, substantial quantities of corn, beans, and other crops were destroyed by wild geese.

That respondent, through its agents:

- (a) Was negligent in failing to protect plaintiff's crops.
- (b) Created a nuisance, which caused loss of crops.
- (c) Knew of the predatory nature of wild geese, and did nothing about it.
- (d) Is an insurer of plaintiffs' crops from the action of the geese.
- (e) By non-action cannot avoid liability.
- (f) In 1947 and 1948, by the use of bombs, stirred up the geese, and caused them to enter the fields of claimants.
- (g) By permitting geese to damage crops has interfered with the exclusive occupation and enjoyment of plaintiffs' lands.
- (h) Has title to the geese, and is responsible for any depredation.
- (i) By permitting geese to congregate in vast numbers, and knowing their dangerous propensities, has negligently caused damages.
- (j) By negligently concentrating the geese at Horseshoe Lake, and thereafter failing to feed them, has failed to perform the duty owed plaintiffs.
- (k) As an owner of wild geese, owed the duty of protecting innocent individuals from damages.
- (l) Trapped, and thereafter liberated geese, which came upon the lands of claimants after October 31, 1947, and damaged crops.

(m) On October 1, 1947, knew:

The habits of the geese to concentrate between September and April on Horseshoe Lake, with the heaviest concentration in October through December.

The population of the flock was approximately 30,000, which thereafter did not decrease.

Few fowl passed over Alexander County without settling on the preserve.

Horseshoe Lake was too small for feeding and resting that number of birds.

The fowl flew directly from Horseshoe Lake to the lands of the claimants.

The number of fowl on claimants' lands ranged from a few to 25,000.

That the migratory water fowl creating the damages, as alleged, came from Horseshoe Lake.

That one or all of the acts alleged occurred within two years prior to the filing of the complaints.

That respondent was negligent in failing to raise or provide sufficient food to feed the geese, and in its operation of the Horseshoe Lake Game Preserve.

That respondent's action or non-action was the proximate cause of injuries.

The complaints then conclude with a prayer for relief as to the several claimants for losses occurring in the seasons of 1947-1948 and 1948-1949.

These cases have been in Court for several years. The transcript of evidence is more than 800 pages in length, and considerable time was taken by the parties to make corrections therein. The facts involved are both novel and unusual, and the parties, by their pleadings, have presented difficult questions of law and construction of statutes.

As a background to the problem, it is to be noted that, as far back as history records, certain birds found on the Continent of North America have migrated each year from Caiiada to Central America. From a map introduced in evidence, it appears that there are four flight patterns across the United States, which are literally highways for migratory birds, and of equal intercut is the fact that, once a pattern is established, each succeeding generation of birds will follow his ancestral course to the exclusion of all others.

We are primarily conceried with the Mississippi Flyway, as Horseshoe Lake is a feeding and resting area directly in its path. In the early history of the United States, countless thousands of geese and ducks were to be found in this area, and it seemed as though the supply was inexhaustible. However, with an increase in the number of hunters and improved firearms, it was soon demonstrated that Canadian geese would become extinct unless regulations were established for their protection.

Since uniformity of regulations involved not only the United States, but also our neighbors, Canada and Mexico, the situation was resolved by way of treaty. On December 8, 1916, a treaty between the United States and Great Britain was proclaimed, which treaty was, on February 17, 1936, entered into by the United Mexican States. It recited that many species of birds (not limited to ducks and geese) in their annual migration were in danger of extermination for lack of adequate protection.

The act provided for closed seasons and other forms of protection, and directed each country to provide the necessary measures, by legislative action, to carry out the terms of the treaty. Congress thereafter enacted the Migratory Bird Treaty Act of June 3, 1918. This law prohibited the taking, killing or possession of migratory birds, except as permitted by regulation, and provided severe penalties for violation. The Secretary of Interior was directed to implement the act by regulations, which would become effective when approved by the President.

Since the treaty is of great significance in these cases, it is important to consider the rule established in the case of *Missouri vs. Holland*, 252 U.S. 416. The State of Missouri challenged the constitutionality of the Migratory Bird Treaty Act of 1918 by seeking an injunction against a federal game warden from enforcing the act. The State contended that under the Tenth Amendment "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to its people." The State of Missouri took the position that it had the exclusive right to legislate concerning water fowl within its territorial limits, and, therefore, federal legislation was unconstitutional.

Justice Holmes, in his opinion, pointed out that under Art. II, Sec. 2, of the Constitution, the power to make treaties is expressly delegated to the President, by and with the consent of the Senate; and, further, under Art. VI such treaties, together with the Constitution and laws of the United States made in pursuance thereof, are declared to be the supreme law of the land. He concluded by stating that, if the treaty of 1916 is valid, there can be no dispute about the validity of the Migra-

tory Bird Act of 1918, as a necessary means to execute the powers of government.

The opinion also stated that there is no doubt but what a State may regulate the killing of birds by its own inhabitants, but it does not follow that its authority is exclusive or paramount. Valid treaties are binding upon a State. The subject matter (birds) is only transitory within a State, and has no permanent habitat therein. But for the treaty, there soon might have been no birds for any power to deal with. (Decree affirmed.)

With this understanding of the national and international policy of protecting migratory birds, I will now consider the activity of the State of Illinois in this regard.

Alexander County is bounded on the west by the Mississippi River. To the east thereof prior to 1928 was an area of lowlands and sloughs, which overflowed in the spring due to its proximity to the river and island. It was a natural habitat for ducks and geese for many years.

In 1928, the State of Illinois purchased about 3,100 acres in this area, and built a dam to impound water and create an artificial lake, now known as Horseshoe Lake. An irregular area in the form of a horseshoe created an island containing approximately 1,100 acres, and the whole area was then designated as Horseshoe Lake Game Preserve.

The island was cultivated by the Department of Conservation for food for the geese, which assembled there, and over the years the preserve became a haven for the feeding and resting of game birds. As one witness testified, Horseshoe Lake Game Preserve had the largest concentration of wild Canadian geese in the world. As respondent has most strongly pointed out, this was an economic blessing to the farmers and property owners

in a surrounding area of five or more miles, as gun clubs and hunting rental zones were established to provide shooting facilities. Farmers and landowners thus had a second money crop, and were not limited to the usual hazards of farming in the area. It became such a success as a hunter's paradise that the Canadian geese were threatened with extinction.

On October 1, 1947, the President of the United States signed proclamation No. 2748, which prohibited the hunting of all wild geese in a designated area surrounding Horseshoe Lake Game Preserve, which included the lands of all claimants, as well as many others. At or about the same time the Governor of the State of Illinois joined in a supporting proclamation. As a matter of fact, this was a needless gesture, as the President's proclamation alone would have stopped all hunting. (*Missouri vs. Holland.*)

This was a tremendous economic blow to the landowners, as it shut off all revenue from the use of their hunting facilities; and, at the same time, it generated a new problem, which is the subject matter of these claims.

It took just a short time for the remaining geese to discover that they could forage for miles with complete immunity. The food supply, provided by the State Department of Conservation, was soon exhausted. As one witness testified, the State had food for about sixteen days. Thereafter the geese moved in on the lands of claimants, much like a swarm of locusts, and completely destroyed their crops.

One might assume at this point, that owners and tenant farmers would have an inherent right to use such force, i.e., guns, etc., to drive away or kill, if necessary, any geese damaging their crops. As a matter of fact, the proclamation of October 1, 1947 flatly prohibited the killing of geese under penalty of law. Agents from the

Department of Conservation and owners of the land made futile attempts to keep the geese moving by aerial bombs and other artificial devices, but the record is clear that all such attempts ended in failure, and the geese proceeded to strip the farms of their crops.

Some of the claimants, acting under the belief that their losses were occasioned by the Presidential proclamation, filed suits in the federal courts for relief. Two of the cases appear to express the attitude of the Federal Government in the matter, and are set forth briefly.

In *Lansden, Et Al vs. Hart*, 168 F. (2d) 409, plaintiffs, as landowners, owners of lease holds, and operators of hunting clubs, brought action to enjoin Federal and State officials from enforcing the proclamation of the President and Governor. The complaints stated that on October 1, 1947, the President of the United States, pursuant to the provisions of the Migratory Bird Treaty Act, signed a proclamation prohibiting the hunting of all wild geese in an area of 20,000 acres surrounding Horseshoe Lake. The Governor of Illinois signed a similar proclamation. Plaintiffs alleged irreparable damages. They urged that such actions were arbitrary and capricious, and that the Governor's proclamation violated the Federal and State Constitutions.

At the hearing before the district court for a preliminary injunction, the court found that numerous hearings had been held by the Department of Interior regarding the increase and decrease of the flocks, that certain plaintiffs had attended such hearings, and petitions had been filed by the attorneys for said plaintiffs. The district judge denied the motion for an injunction.

On appeal, the Circuit Court of Appeals pointed out that the Migratory Bird Treaty Act provided that, unless permitted by regulations, it was unlawful to hunt and kill migratory birds; that proclamation No. 2748 was

a proper exercise of the administrative discretion vested in the Secretary of Interior and the President; that in order to carry out the treaty, the Secretary was authorized to determine when and to what extent, if *at all*, hunting would be allowed, and to adopt suitable regulations; that both proclamations were neither unreasonable nor capricious, but were justified by the facts; that the Governor's proclamation does not violate the Federal or State Constitution, and was authorized by Sec. 3 of the Game Code of Illinois; and, that plaintiffs have no property rights in live migratory birds, as permission to hunt, given by Federal and State regulations, is not the grant of a property right, but is the grant of a privilege. A rehearing in this case was denied on June 24, 1948.

In the cases of *Sickman, Et Al vs. United States*, and *Ryal vs. United States*, 184 Fed. (2d) 616, plaintiffs in three suits, as owners or tenants on farms, brought action under the Federal Tort Claims Act seeking to recover damages in the amount of \$26,500.00 for damages to crops destroyed in 1946-1947 by migratory geese. The trial court sustained a motion to dismiss, and plaintiffs elected to stand on the pleadings.

The complaints alleged :

- (a) Defendant was negligent in failing to protect plaintiffs' crops.
- (b) Defendant created a nuisance by which plaintiffs' crops were destroyed.
- (c) Defendant, knowing the predatory nature of geese, failed to protect plaintiffs' crops.
- (d) Defendant is an insurer of plaintiffs' crops.
- (e) Defendant cannot avoid liability by non-action.
- (f) Defendant, by permitting the geese to destroy said crops, interfered with plaintiffs' exclusive enjoyment of their land.
- (g) Defendant, by stirring up the geese, caused damages that would not otherwise have happened.
- (h) Defendant, by having geese in its possession and control, is responsible for depredation.
- (i) By permitting geese to congregate in the preserve, and knowing their dangerous propensities, defendant negligently injured plaintiffs.

(j) By neglecting to concentrate the geese at Horseshoe Lake, or other areas, defendant failed to perform the duty owed plaintiffs.

(k) When geese are in the United States, the United States is the owner and has possession, or is the trustee for the parties to the treaty.

The court discussed the pertinent sections of the Federal Tort Claims Act, which waive immunity of the sovereign. It cited 28 U.S.C.A. Sees. 1346(b) and 2674, which read as follows :

Sec. 1346(b): "Subject to the provisions of Chap. 173 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, \* \* \* for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where **the United States**, if a **private person**, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sec. 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The court held that the United States, considered as a private person, did not have ownership, control or possession of these wild geese. Further, that a private person could not be held liable for the trespass of an animal, which is *ferae naturae*. On the merits, the court pointed out that it did not believe the complaints stated claims for which relief could be granted.

On the subject of jurisdiction, the court cited Sec. 2680(a) of the Federal Tort Claims Act, which is as follows :

"The provisions of this Chap. and Sec. 1346(b) of this title shall not apply to:

'(a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.'"

The court concluded its opinion stating that it believed the allegations in the complaint fell within the

provisions of the exceptions. It cited the case of *Lansden vs. Hart* as to the authority for a discretionary act by the Secretary of Interior. The decree was affirmed.

There are many other federal cases involving this subject matter, and, without exception, they hold that the United States claims paramount authority over the respective States in protecting migratory birds. Of equal importance, the decisions have denied compensation to all claimants, though injuries were quite apparent.

As to the complaints before this Court, on November 29, 1949 respondent filed a motion to strike these amended complaints, which motion was denied on December 15, 1950 by Judge Schuman, a member of this Court at the time. Counsel for claimants contend that all matters raised by said motion have been resolved, and may not further be inquired into by the Court in arriving at its decision.

The multiple complaints, amendments, answers and motions in these cases are voluminous. To add to the complexity, the testimony was heard in part by three Commissioners. This Court heard lengthy oral arguments covering facts and law. To render a decision, it believes it must consider all matters before it, and, therefore, concludes it is not bound by the order of December 15, 1950 in its entirety, but will consider the order, together with all other matters pertaining to the cases.

Attention is directed to Rule 25 of the Court of Claims, which provides for rehearings. Upon an adverse decision, respondent could, by motion, point out matters overlooked or misapprehended, and the original briefs, etc., would stand as the files in the case. The Court of necessity would be obliged to review all matters in order to rule on the motion.

The testimony in these cases clearly establishes that claimants suffered great monetary losses. Respondent

has not disputed seriously the amounts claimed by the various claimants, but contends that the losses were occasioned by proclamation No. 2748, which was signed by the President on October 1, 1947. It prohibited the hunting of wild geese in a designated area surrounding Horseshoe Lake Game Preserve, which included the lands of all claimants, as well as many others.

Respondent further contends that the supporting proclamation, which was signed by the Governor of the State of Illinois, was for all practical purposes an empty gesture, as the Presidential proclamation standing alone, by reason of paramount jurisdiction (*Missouri vs. Holland*), would have accomplished the same results.

Respondent finally contends that in any event, according to law, injuries received under these facts are not compensable.

Cases from Illinois and other jurisdictions seem to establish that a State in its sovereign capacity may pass legislation protecting wild life, even though an individual may suffer losses, and, further, that such losses are not compensable.

The leading case in the United States in support of the above rule, and cited in other jurisdictions, is *Barrett vs. State*, 220 N.Y. 423. In that case, Barrett, a landowner, had secured an award in the amount of \$1,900.00 for trees destroyed by beavers. The record disclosed that the State had purchased twenty-one beavers, and had released them in certain areas near claimant's land. Because of the threat of complete extermination, the State had undertaken to afford the beavers complete protection by having no open seasons.

On appeal, three propositions were submitted: (1) The State may not protect, under its police power, an animal, such as a beaver, which is known to be destruc-

tive; (2) The law of 1904 prohibits claimants from protecting their property, and is, therefore, an unreasonable exercise of police power; (3) The State, having actual possession of the beavers, and thereafter freeing them with knowledge of their natural propensities to destroy trees, is liable in damages.

In rendering a decision, the court held that the State is owner in its sovereign capacity, and that the protection and preservation of game is found in all civilized countries. The court stated that, whenever protection is accorded, harm may be done to an individual, and in certain cases the Legislature may be mistaken, and do more harm than good, but this is within its discretion, and not to be reviewed by it. Further, the court held that police power is not limited to guarding the physical or material interests of its citizens—their moral and intellectual interests must also be considered.

The court pointed out that claimants could have enclosed their lands with fences, or driven the beavers away, as the sole object of the State's action was the protection of the beavers.

As to the possession and liberation of the beavers, the court acknowledged that mistakes have been made. It pointed out that the rabbit in Australia and the mongoose in the West Indies have become pests, yet governments have made these experiments in the belief that the public good would be promoted. Whether a success or failure, such attempts are well within governmental powers.

With reference to liability, the court stated that it was true that one, who keeps a wild animal in captivity, is liable at his peril for damages. It, however, hastened to add that it is not true that, when an individual is liable for a certain act, the State is liable for the same act. In performing governmental functions, as involved in this

case, the court pointed out that the State was acting as a trustee for the people, and was not liable.

The rule in the Barrett case was also followed in *Corron vs. State*, 10 N.Y.S. (2d) 960 (destruction of orchards by rabbits); *Anthony vs. State*, 122 N.Y.S. (2d) 830 (protection of deer running at large on highways); and, *Geer vs. Connecticut*, 161 U.S. 619 (State Game laws alleged to violate Interstate Commerce Law).

Some of the cases, which have been passed upon by our courts in construing the provisions of the Fish and Game Code of the State of Illinois are *Magner vs. The People*, 97 Ill. 320 (conviction affirmed for selling quail out of season, though purchased in another State); *Parker vs. The People*, 111 Ill. 581 (conviction affirmed for maintaining a dam, which obstructed the passage of fish in the river); *Bridges vs. The People*, 142 Ill. 30 (conviction affirmed for seining fish on a private lake); *Diekman vs. The People*, 285 Ill. 97 (conviction affirmed for fishing except with hook and line); and, *Walton vs. The People*, 314 Ill. 45 (conviction affirmed regardless of defendant's plea that he was a commercial fisherman, and was deprived of his property without due process of law). While they are penal in nature, it is of interest to note the reason for the rule. The court in its opinion in *Bridges vs. The People*, 142 Ill. 30, quoted at page 44 the following excerpt from the opinion in *Magner vs. The People*, 97 Ill. 320:

"No one has a property in the animals and fowls denominated game, until they are reduced to possession. Whilst they are untamed and at large, the ownership is said to be in the sovereign authority—in Great Britain in the king—but with us in the people of the State. The policy of the common law was to regulate and control the hunting and killing of game, for its better preservation; and such regulation and control, according to Blackstone, belong to the police power of the government. \* \* \* The ownership being in the people of the State—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt or kill game, or qualify

or restrict it, as, in the opinion of its members, will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, not a right inhering in the individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence, by implication, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use, in the future, to the people of the State. But in any view, the question of individual enjoyment is one of public policy, and not of private right."

In arriving at a decision in this case, the Court wishes to acknowledge the outstanding briefs submitted by the parties hereto. There are many cases cited from other jurisdictions, which have been helpful, but have not been set out in this opinion, as they are merely cumulative.

From a review of the facts and the law herein, the Court finds that the damages suffered by the several claimants were occasioned by the Presidential proclamation No. **2748** of October **1, 1947**. The fact that the Governor of this State issued a supplemental proclamation is of little consequence, for, from the date of the proclamation, the federal government was in complete authority. It cannot be seriously argued that the State of Illinois should pay damages for the action of a paramount authority, when it is apparent that the State could not have successfully challenged that authority.

In addition thereto, it is established law that a sovereign State, under its police power, may pass regulations for the protection of wildlife, and, since an individual does not have property rights in wildlife, the sovereign is not liable for any consequential damages.

This Court recognizes that claimants have suffered substantial consequential damages, but, under existing law, it is powerless to provide a remedy, as this is a matter for the Legislature.

An award is, therefore, denied.

## OPINION ON REHEARING

PER CURIAM:

On July 22, 1960, claimants filed their petition, for a rehearing, and, as grounds for such, suggest the following :

1. The Court has entirely overlooked the theory of nuisance under which claimants were alternatively proceeding.

2. The Court, while disregarding Judge Schuman's prior opinion, has not, in any way, distinguished it, or demonstrated that such opinion was incorrect or wrong.

3. While it may be correct that the Federal government does not own migratory water fowl, the Game Code of Illinois has always categorically stated that the State of Illinois has title to and owns such birds. Therefore, such State property must be so managed and controlled as not to injure others.

4. Presidential proclamation No. 2748 and the Governor's proclamation are of significance only as to the issue of claimants' contributory negligence. Since such proclamations rendered claimants defenseless against geese depredations, claimants could not be charged with contributory negligence.

5. To now say that the Presidential proclamation No. 2748 was in effect while the Governor's proclamation was an idle gesture, is to overlook entirely the fact that the actions of the United States and the State of Illinois were coordinated to the day and almost the hour and were joint, and that the validity and efficacy of both proclamations were upheld in *Lansden, Et Al vs. Hart*, 168 F. (2d) 409.

6. The Court seems to think that an exercise of a valid police power absolves the State from all liability. However, negligent exercise of such power is the very basis and one of the chief reasons for the creation and existence of the Illinois Court of Claims.

7. The Court apparently feels that a governmental function is involved. Under the present Court of Claims Act and since 1945 this is immaterial.

8. The Court has entirely disregarded the trend in Illinois toward the complete abolition of governmental immunity for wrongs committed against its citizens.

As to the first point, the Court does not agree with claimants that the evidence in this case supports the theory of nuisance. To the contrary, the maintenance of Horseshoe Lake Game Preserve was of economic importance to claimants for a number of years.

As to the second point mentioned above, the Court did not disregard the opinion of Judge Schuman, but considered it with all other evidence introduced in said

case. It is to be noted that respondent filed a motion to dismiss the complaint. The only question before the Court at that time was the legal sufficiency of the complaint. The Court in its opinion used the language "for the purpose of passing on this motion, etc.," the motion is denied. In denying the motion to strike the complaint, the Court did nothing more than rule that the complaint stated a cause of action. Thereafter answers were filed by respondent, replies were filed by claimants, the cases were tried, a whole day was devoted to oral arguments, and elaborate briefs were filed by both parties.

As to the third point mentioned in the petition, the word "owner" has been construed by the Supreme Court of Illinois in the case of *Bridges vs. The People*, 142 Ill. 30, to mean that the sovereign authority holds wild life in trust for all the people, rather than physical ownership as such.

As to the fourth point, there is no finding of contributory negligence in this case by the Court so as to bar a recovery by claimants.

As to the fifth point regarding the legal effect of the Presidential proclamation and the Governor's proclamation being issued on the same day, it suffices to say that the ruling in *Missouri vs. Holland*, 252 U.S. 416, establishes the paramount authority of the United States to regulate under the Migratory Bird Treaty Act of 1918. Any proclamation of the Governor, issued before or after the date of the Presidential proclamation No. 2748, could not affect the finality of the President's act.

As to the remaining objections, claimants contend that the failure of the State to protect the claimants from the depredations of the geese was an act of negligence, and this Court should recognize the trend toward abolition of governmental immunity. As was pointed out in the opinion, the Court recognized that claimants suffered

losses. However, this Court may no longer make an award on the basis of equity and good conscience, but must hear and determine all claims on the basis of the law as determined by our Courts.

It seems to be well settled law that a State, acting in its sovereign capacity and as a trustee of wild life, may legislate to the detriment of an individual in the protection of wild life, and such detriment is not compensable (*Barrett vs. State*, 220 N.Y. 423).

The petition for rehearing is, therefore, denied.

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(No. 4729—Claim denied.)

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

*Opinion* filed *November 16, 1960.*

PIACENTI AND CIFELLI, Attorneys for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence.* Where claimant's evidence as to how accident happened was hazy and inconsistent, Court held he had not proven himself free of contributory negligence from other evidence.

FEARER, J.

On June 20, 1956, claimant, Frank Vesce, filed his claim in this Court against respondent alleging certain acts of negligence of respondent's agents, namely a flagman by the name of Joseph Mancini and the operator of a 1954 tractomobile.

The accident occurred on October 25, 1954 on 26th Street at or about 500 feet west of Salk Trail in Cook County, Illinois. The street in question was also State Aid Route No. 202 under the jurisdiction of the State of Illinois, Department of Public Works and Buildings.

The route in question was approximately four miles in length, and extended from Western Avenue on the

west to Cottage Grove Avenue on the east. It coincides with 26th Street in the Village of Park Forest and the cities of Chicago Heights and South Chicago Heights.

On the date of the accident at or about the hour of 1:30 P.M., respondent, through its agents, was engaged in shaping the earth shoulders on said State Route No. 202 at the point of the accident, and to the east and west thereof. There were a number of men located at the scene of the accident, who were operating heavy duty earth moving equipment, a power-driven blade grader, and a tractomobile, which was used in picking up and depositing excess dirt into a dump truck, which then hauled it from the work site.

At the time and place set forth herein, claimant owned and was operating a 1947 Dodge truck, which he used in conducting a hauling and delivery service business. Claimant was driving his truck in an easterly direction as he came upon the location where said work was being done, and he either slowed or stopped his truck upon instruction from the flagman. Upon a signal from the flagman, he proceeded to drive within the area where the equipment referred to herein was being operated, and where the accident occurred.

The evidence is in dispute as to: (1) whether or not the accident occurred on the north or south side of said road, which was a concrete pavement approximately 18 feet in width; (2) whether the operator of the tractomobile negligently picked up and swung the bucket over onto the traffic lane in which claimant was driving, striking the truck on the left hand side near the cab where claimant was sitting, and causing it to rock and nearly tip over; or, (3) whether claimant ran into and upon the bucket of the tractomobile with the resulting slight damage to the front end of the truck, which was stopped at the point of impact.

Respondent has not filed an answer to the complaint. Therefore, under the rules of this Court a general traverse or denial of the allegations set forth in the complaint will be considered as having been filed.

In addition to the complaint, the record consists of the following exhibits offered by respondent:

1. Departmental Report
2. Map of the area
3. Photographs of the scene of the accident
4. Photographs of the tractomobile

Claimant offered a stipulation as to medical reports, which respondent joined in, which also included bills of the doctors and hospital. No doctor was called to testify in person as to the nature and extent of claimant's injuries.

This case was heard by Judge Immenhausen, who spent a considerable length of time in trying to clarify the discrepancies in claimant's testimony as to the material facts surrounding the happening of the accident, nature and extent of his injuries, loss of earnings, and damage to his truck.

It is interesting to note that claimant did not offer a photograph showing where the truck was damaged, but respondent did offer a photograph of the piece of equipment involved in the accident. It does not show any damage whatsoever. We, however, appreciate the fact that the equipment is of heavy steel construction.

We feel justified in adopting the Commissioner's findings as to the proximate cause and question of contributory negligence. He had an opportunity of viewing the witnesses, and interrogating claimant's and respondent's witnesses. His comments on the fact that claimant was unable to give clear and concise testimony as to exactly how the accident happened, and that claimant's testimony, in many instances, was inconsistent, were

noted. In reading the record and the Commissioner's Report, we can't help but feel that claimant was guilty of contributory negligence.

It appears to us from reading this record and examining the exhibits that claimant had every opportunity to avoid the accident in question. It appears also to us that photographs substantiating his claim or the establishing of certain physical facts might have been helpful in corroborating his testimony. However, we have no corroborating testimony given in his behalf.

Also, there was a great deal of difficulty and inconsistency in the evidence as to his injuries, loss of earnings, and, in fact, all elements of his claim for damages. The foregoing, coupled with his inconsistent testimony and lack of evidence to substantiate his claim, are our reasons for denying his claim for personal injuries, property damage, loss of use of the truck, and salaries for additional help.

The record and transcript of evidence in this case are wanting in many respects in establishing a claim against respondent, especially where respondent had set up safeguards warning the traveling public in going through the area in question at the time of the accident.

Respondent is not an insurer of all persons traveling upon its highways. Where construction work is taking place, all that respondent has to do is to use reasonable safeguards in warning the traveling public of the location where such construction work is in progress. We believe from this record that respondent issued the required warnings, and claimant had ample notice of the construction work taking place through the area in which he was driving when the accident occurred. Further, we believe that it was his negligence and not the negligence of respondent's agents, which was the proximate cause of the accident resulting in his injuries.

It is, therefore, the order of this Court that the claim filed herein be denied.

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(No. 4792—Claim denied.)

EFFIE TRUAX, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion fled October 2, 1959.*

*Petition of Claimant for rehearing denied November 16, 1960.*

McMAHON AND PLUNKETT, Attorneys for Claimant.  
LATHAM CASTLE, Attorney General; LESTER SLOTT,  
Assistant Attorney General, for Respondent.

STATE INSTITUTIONS—*personal injuries—speculative evidence.* Evidence as to cause of personal injuries was speculative and unclear, and does not support an award.

SAME—*maintenance of sidewalks.* Evidence showed that object was a crack one-half inch wide, which did not constitute a dangerous defect.

WHAM, J.

Claimant, Effie Truax, 59 years of age, fell on the sidewalk approaching one of the entrances to the Manteno State Hospital on December 30, 1955, and sustained injuries to her person, for which she has claimed damages against the State of Illinois in the sum of \$7,500.00, because of respondent's alleged negligence in allowing a crack or raised defect in the sidewalk to exist at the point where she allegedly stumbled and fell.

The principles of law involved are clear, and it is not disputed that claimant, in order to recover in such a case, must prove that she was in the exercise of reasonable care for her own safety at the time of and immediately prior to her falling; that the State of Illinois negligently allowed a dangerous defect to exist in the sidewalk; and that the dangerous defect proximately caused the plaintiff to trip and fall with resulting injuries.

The main question in this case is whether or not the evidence offered satisfies the burden of proof, which is upon claimant. Like so many cases involving a fall,

the owner of the premises, in this instance the State of Illinois through its agents, was not present at the time of the incident, and the occurrence witnesses were those called by claimant.

We have carefully considered the evidence offered, and have found it to be unsatisfactory in several respects.

In the first place, the evidence offered does not contain a satisfactory explanation as to why claimant failed to see and avoid the defect she claims was present. At the time of her injury, approximately 11:45 and in daylight, she was accompanied by a John F. Keeley onto the hospital premises for the purpose of visiting her sister, a patient at the hospital.

After Mr. Keeley had parked his automobile upon the grounds, he and claimant walked to the sidewalk in question, which abutted the Administration Building on the east, and proceeded south thereon a short distance at which time claimant fell.

As an explanation for claimant not seeing the alleged defect upon which she claims to have fallen, claimant relies upon the testimony of both Mr. Keeley and herself. An examination of this testimony reflects a decided conflict between the two. Mr. Keeley testified at page 62 of the transcript on this point as follows:

*Q.* As you approached the sidewalk and as you got on the sidewalk and started to walk south, was her attention attracted to anything at that time.

*A.* Merely three or four people coming in the same direction converging on the east door of the Administration building. They were coming from the northwest. We were coming from the northeast. We arrived right there on the sidewalk, and, as I recall, we let them go first.

*Q.* Do you know for what reason her attention was attracted to these people?

*A.* Well, merely so we wouldn't bump into the people. That is about all."

He then testified that she fell when she was about fifteen feet from the door of the Administration Building.

At page 68 of the transcript he testified as follows:

“Q. Where were you in relation to Mrs. Truax when she fell?

A. I was on her immediate left.

Q. You were standing on the side of her?

A. Right on the side, yes, sir.

Q. On her left side?

A. Yes, sir.”

At page 88 of the transcript this witness testified as follows :

“Q. By the Commissioner: And you were on her left or right side?

A. I was on her left at this time. I had been on her right as we left the automobile.

The Commissioner: And you were to the left of the point where she fell, is that right?

A. I was closer to the curb, yes.

The Commissioner: Did you have her by the arm then?

A. No, sir, I had her by the arm until we got to the sidewalk.

The Commissioner: How far away were you from her when she stumbled?

A. A matter of an inch. I was perhaps touching her garment, I was so close.”

On the other hand, Mrs. Truax’s testimony on this point at page 95 of the transcript reads as follows:

“Q. After you reached this sidewalk abutting the east side of the Administration Building, what did you do, if anything?

A. We turned south to walk to the stairway.

Q. Then what happened?

A. There were people passing with us, a couple of people, and then people coming directly towards me.

Q. And as you walked south—

A. As I walked south, these people directly in front of me weren’t paying any attention. I started to get out of the way to keep from bumping into them, and my toe caught on this raise or rise in the walk. It was broken, and it was a jagged edge and broken, and I stumbled and fell.

Q. Just prior to your fall where were you with reference to Mr. Keeley?

A. He was on my left side.”

At pages 99 and 100 of the transcript she testified as follows :

“Q. As you reached the sidewalk and started to walk south, you say your attention was attracted to these pedestrians is that correct?

A. Yes, that is true.

Q. And why was your attention attracted to them?

A. Well, because they were coming directly toward me, and they didn't —they weren't paying any attention to anybody except themselves and coming directly towards me, and I knew in order to keep from bumping them I had to step aside. In stepping aside, I didn't have any opportunity to **look** down. I just tripped."

And again at page 119 of the transcript she testified as follows:

"Q. Did you notice the sidewalk prior to your falling, Mrs. Truax?

A. No, I didn't. We had just barely stepped up on the sidewalk, and the people were coming toward us, and I had no opportunity of seeing the sidewalk any more than as I stepped up on it, it was clear, but after I turned to go south, I had no opportunity of noticing.

Q. How far had you proceeded on the sidewalk from the street or the curb to where you fell?

A. I would say just a few steps.

Q. Just a few steps?

A. Yes.

Q. How far were these people away who were approaching you?

A. Just about the same. As we stepped up, they were coming directly toward us.

Q. I say, about how far from you?

A. I would say perhaps three feet.

Q. Three feet?

A. Three or four feet.

Q. Three or four feet, approximately?

A. Approximately, yes.

Q. Were you facing them directly?

A. Yes, I was.

Q. And they were facing you directly?

A. That is right.

Q. How many people were there?

A. Three.

Q. And the sidewalk crack was in between you and them?

A. Right. They were just about, I would think now, they were possibly just about on that crack, but I noticed they were coming toward us, because they couldn't have gone very far.

Q. They were on the crack when you first noticed them?

A. Just about.

Q. What happened after that?

A. When I stepped out to go around them, because I didn't want to bump into them, my toe caught in the crack and away I fell.

Q. If they were on the crack, and you stepped around them, where were you in relation to the curb?

A. Well, let me see. I couldn't have taken more than three steps on that sidewalk, and as I looked up these people were coming directly toward me. I didn't look down at all. I watched them, because I felt I didn't want

to bump right into them, and they were concentrating on some kind of conversation, and I stepped to one side to keep from bumping into them. As I stepped around them, I fell, and I presume they must have been awfully close to the crack.

Q. You don't know if they were on the crack?

A. No, I don't really know."

It is significant from this testimony that claimant is not corroborated by her witness Keeley as to the reason she did not see the defect. It seems to us that, if three people had been bearing down on the claimant in the manner she stated they were, her companion, who was walking closely beside her and practically touching her, would have seen these persons. His testimony makes no reference whatsoever to any pedestrians on the sidewalk other than those walking south. His explanation that her attention was attracted to those pedestrians also proceeding south is not persuasive. At the most, this is a conclusion on his part, and is, in effect, negated by claimant herself, who makes no contention that the southbound pedestrians distracted her.

Moreover, the testimony of claimant that she had walked up on the sidewalk at a point not more than three steps from the alleged defect without seeing it indicates to us that she was not paying a great deal of attention to the place she intended to walk, since it is rather obvious she would have seen it, if she had looked down as she stepped up over the curb onto the sidewalk.

We can come to no other conclusion than that her excuse for failing to see the defect is more speculation than fact, and is not persuasive.

In the second place, the evidence offered regarding the location of the alleged defect with respect to claimant's position when she fell is likewise not satisfactory. The photographs offered in evidence by claimant, taken by her witness, Mr. Keeley, some six or seven months after claimant was injured, and the testimony regarding

same, establish the location of a raised place beginning at the curbing of the sidewalk and running west a foot or more in length. Claimant marked a point on the photographs, designated as claimant's exhibits Nos. 23 and 24, indicating where she fell. The marks placed by claimant on these photographs are very near the curb, and appear to be considerably less than one foot from the curb.

The witness Keeley marked on claimant's exhibit No. 25, a photograph of the alleged defect, the place where she stumbled. It likewise was close to the curb, and in the same relative position as claimant had indicated. He characterized the mark he made as being approximately two feet from the curb.

Both Mr. Keeley and claimant were walking on the sidewalk according to their testimony, with Mr. Keeley being next to the curb and claimant to his immediate right. Claimant testified that she "started to get out of the way to keep from bumping into" the persons directly approaching her from the south, when she caught her foot on the curb and fell.

It is obvious she could have gone only one way in attempting to avoid three people coming directly toward her, namely, to the west or away from the curb. It is obvious that Mr. Keeley was occupying the foot or two of sidewalk immediately adjacent to the curb. Such a position occupied by the witness Keeley would make it physically impossible for claimant to trip at the point indicated by both of these witnesses.

We also note on this question of the location of the place where claimant fell Mr. Keeley's testimony at page 49 of the transcript:

"Q. As you started to walk south on this sidewalk abutting the east side of the Administration Building, did anything unusual happen?"

A. Yes. As we were walking south Mrs. Truax hit the curb a sharp resound and fell to the ground."

We feel that the evidence regarding the place of claimant's fall, and the causal connection between the alleged defect and the fall is speculative and unclear.

In the third place, we are not satisfied with respect to the evidence regarding the size of the alleged defect. Claimant in describing it stated at page 98 of the transcript as follows :

"Q. Can you tell the Court about the dimensions of this rise; how high was it?

A. I would say about two inches.

Q. Approximately how wide was it?

A. I would say about twelve inches wide, twelve or fourteen inches."

She saw it on only two occasions—the day she fell, and six months later at the time Mr. Keeley took the photographs. On the first of these occasions she was in great pain from her injuries and almost delirious according to Mr. Keeley.

The witness Keeley testified at page 50 of the transcript with respect to the size of the defect as follows :

"Q. Tell the Court about the dimensions of this rise. For instance, how high was it?

A. It was approximately two inches tall.

Q. How many inches would you say it was in width or how many feet for that matter?

A. It was at least a foot in width, at least a foot."

At page 70 of the transcript he testified as follows:

"Q. How deep a crevice or obstruction would you say this crack created?

A. It was at least two inches above the ground for a length of a foot.

Q. It ran a foot, is that correct?

A. It ran a little further, but it diminished in height after that.

Q. It diminished in height after that?

A. Yes, sir."

He further testified that he had seen it for approximately two or three years prior to the accident, and that the photographs admitted into evidence on behalf of claimant were correct representations of the conditions.

Neither claimant nor the witness Keeley testified that they actually measured the height of the crack. We, therefore, presume their statements regarding the height of the defect represent their estimate of the height without measuring it.

We have examined these photographs, and they do not appear to us to reflect a crack two inches in height.

Respondent offered as exhibit No. **14** a Departmental Report, which was admitted into evidence, and which reads in part as follows:

“Claimant proceeded west from the parking area to the sidewalk abutting the east side of the Administration Building, and then proceeded south along that sidewalk to a point approximately  $37\frac{1}{2}$  feet south of the northeast corner of that sidewalk where she fell. This was a short distance north of the east entrance to the Administration Building. This sidewalk is the main sidewalk in front of the Administration Building, traversed by most visitors, many employees and many patients. The average number of persons using this walk in a given month would be approximately 400 per day. No accidents of the type referred to in the complaint herein have ever occurred on that sidewalk except the one referred to in the complaint. The sidewalk in front of the Administration Building is six feet in width at the place where claimant fell.

“It appears that claimant stumbled at the location of a normal expansion joint in the sidewalk between which asphalt tar had been poured, and at which there was a slight rise of one of the blocks at the joint over the other, not exceeding at any point the height of one-half inch.”

Photographs were attached to the Departmental Report and admitted into evidence. Several of these photographs show the crack to be less than the height of a quarter, which is shown in the photographs, and less than the thickness of a package of cigarettes.

The only evidence offered to refute this evidence is the witness Keeley, who stated that none of the photographs offered by respondent portrayed a true photographic representation of the rise at the time of the accident.

We have compared the photographs of claimant and respondent, and they appear to us to be of the same area and show the same crack, although respondent's are

taken from a different angle, and are considerably more clear cut in detail.

If the Departmental Report is correct, and the crack only one-half inch in height, then the defect complained of is not, in our judgment, a sufficiently dangerous condition upon which to base a recovery under the circumstances, conditions and locations involved in this case.

It is common knowledge that every city in the country has an untold number of defects and cracks in its sidewalks of such a nature, and that it would be an endless task to level all one-half inch rises at expansion joints. Although it is true that on city sidewalks pedestrians are entitled to a reasonably safe condition for travel, by the same token they are not entitled to perfection. The test of reasonableness is a two-fold test. The state in maintaining its sidewalks needs only to exercise reasonable care—no more and no less. In our judgment it would be unreasonable to require the state to repair every one-half inch crack in its sidewalks. Such a requirement would fasten upon the state the duty of an insurer, which is not now, nor should it ever be, the law.

In our judgment, in view of the conflict in the evidence noted above regarding the size of the alleged defect, **we** do not believe that claimant has borne the burden of establishing a dangerous defect.

After weighing all of this evidence in our capacity of judging the facts as well as the law, we do not feel that claimant has borne the burden of proving the essential elements of her case.

We, therefore, find that this claim should be denied.

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(No. 4839—Claimant awarded \$7,500.00.)

GROVER C. HENDERSON, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed November 16, 1960.*

A. DONALD FISHBEIN, Attorney for Claimant.

LATHAM CASTLE, Attorney General ; LESTER SLOTT, Assistant Attorney General, for Respondent.

**HIGHWAYS—personal injury.—negligence.** Evidence showed respondent was negligent in not erecting bamcades.

**SAME—evidence—burden of proof.** Claimant proved his case by a preponderance of evidence when respondent produced no witnesses, its only evidence being the Departmental Report.

**FEARER, J.**

The complaint filed in this case is for personal injuries sustained by claimant on September 14, 1956, while he was driving his automobile in a westerly direction along and upon the north half of that portion of State Route No. 9, which is approximately four-fifths of a mile east of Rankin, Illinois and State Route No. 49.

At the time and place aforesaid, respondent, namely the Department of Public Works and Buildings, had under its control and supervision the stretch of road where the accident occurred, which was being repaired by duly authorized agents and employees of respondent. In so doing, it is alleged by claimant that respondent, by and through its agents, left unprotected, with no barricade or any warning whatsoever, a portion or section of said highway, which had been removed. Furthermore, respondent, through its duly authorized agents, failed to erect, in addition to other signs, a detour sign warning the traveling public of the defect in the highway.

It is further alleged that, as a direct and proximate result of the defective condition of the highway created by the agents of respondent, claimant, while operating his automobile thereon on September 14, 1956, at or about the hour of 11:40 A.M., drove into said hole in the highway. The opening in question measured approximately eight feet by seven feet at a point where the pavement was approximately sixteen feet in width and seven inches

thick. The hole extended across the entire westbound traffic lane. The westerly opening cut into the highway was approximately one mile east of the intersection of Routes Nos. 9 and 49. Another opening was cut into the easterly lane of traffic at a point approximately one and one-fourth miles east of Route No. 49.

No answer having been filed by respondent, a general traverse of the allegations of the complaint will be considered under the rules of this Court.

The only evidence offered as to the condition of the highway was the testimony of claimant and his witnesses.

Respondent offered as its only exhibit and evidence a Departmental Report, which can only be considered as prima facie evidence. In our opinion, in order to sustain the position of respondent, evidence of agents, who were familiar with the facts existing at the time of the alleged occurrence, should have been presented.

We are familiar with the fact that the State of Illinois is not an insurer of all persons, who travel upon its highways. However, the State is bound to maintain its highways in such a condition that the public can travel upon them with a degree of safety. Respondent is required to protect and warn the traveling public when any major improvements are being made, such as removing portions of the surface of highways, and should erect warning signs, flares, and use any and all devices to warn the traveling public of the repair work going on, or provide a detour, which would be safe for the public to drive on.

Respondent, of course, is relying upon the defense of contributory negligence and the Departmental Report.

We cannot ignore the evidence, which has been produced and offered on behalf of claimant. After taking into consideration all of the evidence, the facts and circumstances, as well as the physical facts surrounding

them, we are of the opinion that claimant has maintained the burden of proof in first proving by a preponderance or greater weight of the evidence that he was free from contributory negligence; secondly, that it was the negligence of respondent in leaving the highway in the condition it was in at the time without erecting barricades or proper signs warning the traveling public of the condition of the highway, or providing a safe detour for the traveling public upon said highway; and, thirdly, damages.

At the time of the alleged accident, claimant, Grover C. Henderson, was 69 years of age, was in good physical condition, and had normal vision. He was employed by the Nickel Plate Railroad Company of Cleveland, Ohio as a freight car inspector, and received a salary of \$85.00 a week. He had been employed by said company for 38 years. His duties consisted of inspecting and classifying the freight cars of said company, which were located at various places along the railroad. He performed these duties by driving his automobile from place to place.

On the day of the accident, claimant was driving his 1951 Oldsmobile 4-door Sedan, which he had purchased for the sum of \$950.00. The only evidence, which we have, is that the car was in a good mechanical condition. Claimant testified that he had been driving an automobile for over 50 years, and that he had driven over this particular portion of the road at least twice a day, six days a week, for **24** years.

Along this line, claimant further testified that, on the day of the accident, he traversed this route at 4:30 A.M., driving east from Rankin to Hoopeton, Illinois, and at that time he did not notice any repairs of construction work being done to the road, nor any indication that there would be any. At 11:20 A.M. he left Hoopeton to return to Rankin, driving west on Route No. **9**,

traveling in the westbound traffic lane at a speed of between 55 to 60 m.p.h. It was a bright, clear day, and the pavement was dry. There was very little traffic, and he passed no other westbound vehicles. As he drove over Route No. 9 toward Rankin, he did not notice any repairs or construction work being done to the highway, or any indication that there would be any ahead of him, nor any signs, flags or barricades warning of the repairs and construction work then being done to the road ahead.

Corroborated testimony also appears in the records that, approximately one to one and one-fourth miles east of Rankin, Illinois on Route No. 9, there is a hill, and at its crest there is a gravel road, which joins Route No. 9 from the south, but does not continue north of Route No. 9. West of the gravel road there is a slight curve to the north on Route No. 9, but westbound traffic is unable to see the curve and the road, which continues on west until it passes the gravel road. It was at this point where a portion of the pavement had been removed.

Claimant testified that, "I was just a split second from the hole before I saw it." He also testified that there was a light pole on the shoulder of the road to the right and north of the hole. To avoid hitting the pole, he swerved his automobile to the left, drove it off of the road and into a cornfield on the south side of the road. His automobile was totally wrecked, and was later junked. He was taken to the Paxton Community Hospital, where he later regained consciousness, and remained for nineteen days.

The treating physician was Dr. Alfonso Baquero, who did not testify at the time of the hearing. However, by stipulation, claimant's exhibit No. 5, which is a medical report from the doctor, was admitted into evidence. The admission diagnosis was as follows: cerebral concussion ; shock, severe ; possible internal injuries ; and

multiple lacerations, abrasions and contusions. He was treated for shock, the open wounds were sutured, and he was given care consistent with preventing sepsis. On September 19, 1956, he developed a severe case of paralytic ileus, which remained a severe problem for two or three days. His course after September 22 was uneventful, and he was discharged on October 3, 1956. The final diagnosis of his injuries were : cerebral concussion; fractured skull, crack type, compound, left occipital area; fracture left os ilium, comminuted; contusion-sprain of the cervical spine and shoulders; multiple lacerations, abrasions and contusions; paralytic ileus, due to trauma.

According to the medical report, claimant was last seen by the doctor on January 6, 1959. He was still complaining of severe dizziness, which was more marked on change of position. The symptoms had remained since the accident with temporary improvement noted while taking medication.

At the time of the trial, claimant testified as to his present physical condition to the effect that his hand still appears to be half paralyzed, that he suffers from a **dizzy** condition for which he is still taking medication, and that he did not experience this condition prior to the accident on September 14, 1956. He further stated that he goes to the doctor all of the time, and that he is not able to drive his car as he did before the accident.

There is nothing in the doctor's statement relative to the paralysis, so that we are confined to the injuries appearing in the medical statement, which was admitted in evidence, and the prognosis given therein.

As to special damages, claimant testified that he paid \$950.00 for his automobile, which was a 1951 Oldsmobile Sedan, that it was a total loss, and was junked. However, neither claimant nor respondent attempted to show what

salvage was received, or raised the question of storage or towing.

Under the circumstances, we could not consider that the automobile was worth the same on the day of the accident as it was at the time it was purchased. We must, therefore, consider depreciation on this car from the date on which it was purchased to the date of the accident, and certainly there must have been some salvage received by claimant. From the record, claimant's special damages, in addition to the automobile, amounted to approximately \$1,288.39.

Claimant was employed by the Nickel Plate Railroad Company at a salary of \$85.00 a week prior to and on the date of the accident. The record indicates that he has not worked since that date

It is, therefore, the opinion of this Court that claimant is entitled to an award for personal injuries and property damage in the sum of \$7,500.00.

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(No. 4851—Claimants awarded \$695.66.)

CLINTON O. SIMS AND ALLSTATE INSURANCE COMPANY, Claimants,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 16, 1960.*

CLINTON O. SIMS, Claimant, pro se; AND FITZGERALD, PETRUCELLI AND SIMON, Attorneys for the Allstate Insurance Company.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

NATIONAL GUARD—*highways—negligent operation of vehicle.* Where National Guard vehicle struck parked car of claimant, the facts indicated that the driver was negligent entitling claimant to an award.

FEARER, J.

The original claim of Clinton O. Sims was filed in this Court on December 24, 1958.

On September 12, 1960, a motion to intervene was filed on behalf of the Allstate Insurance Company by Messrs. Fitzgerald, Petrucelli and Simon. Attached to the motion is a subrogation agreement, which was signed by Clinton O. Sims in the amount of \$403.25, representing the amount of money that the Allstate Insurance Company paid to Clinton O. Sims under the collision portion of his policy on a 1956 Ford.

The original claim filed was for damages to the 1956 Custom Ford of claimant, Clinton O. Sims, arising out of an automobile accident with a U. S. Army truck driven by Nolan A. Baity, a soldier with the rank of private, of the 178th Regimental Combat Team Headquarters Battery 184 F.A. It is alleged in the complaint that Private Baity drove and operated said truck in a negligent manner, causing it to collide with the automobile of claimant, Clinton O. Sims, on July 1, 1958, which said automobile was parked on 35th Street near the intersection of Indiana Avenue, in Chicago, Cook County, Illinois.

This case was heard by Herbert G. Immenhausen, one of the Commissioners of this Court, on April 15, 1959, who found the proximate cause of the damage to claimant's automobile was the negligence of Nolan A. Baity, and recommended assessing damages covering cost of repairs of \$623.66 and car rental of \$72.00, making a total of \$695.66.

Respondent offered a Departmental Report, which substantiated the claim.

Inasmuch as Allstate Insurance Company has been allowed to intervene under its subrogation agreement with claimant, Clinton O. Sims, and an order has been signed permitting such intervention, it is, therefore, the order of this Court that an award be made to Clinton O. Sims in the amount of **\$292.41** for the damages he sus-

tained. An award is also hereby made to Allstate Insurance Company for the amount of \$403.25, which it has paid to Clinton O. Sims.

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(No. 4855—Claimant awarded \$1,000.00.)

VIRGINIA SHULL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion* filed *November* 16, 1960.

LACHLAN CRISSEY, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

DAMAGES—*thumb*. Where liability was established in prior proceedings, claimant was given award for 50% limitation in use of thumb.

PROCEDURE—*stipulation as to liability*. mere liability was determined in prior consolidated cases covering the same accident, the liability was stipulated, and damages only tried.

FEARER, J .

Claimant, Virginia Shull, has filed a complaint asking \$5,000.00 for personal injuries, which she sustained on January 24, 1937.

This Court had occasion to render an opinion in the consolidated cases of Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Brothers, and Noi Coleman and Earl Coleman *vs.* State of Illinois, Nos. 4776 and 4781, in which awards were entered in favor of claimants as follows: Earl Coleman and Noi Coleman, claimants in case No. 4781, the sum of \$2,000.00 for personal injuries; Hardware Mutual Insurance Company, the insurance carrier for claimants in case No. 4776, Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., the sum of \$2,419.62; and Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Bros., claimants in case No. 4776, the amount of \$50.00.

Virginia Shull was the operator of the automobile, and brings this claim as an outgrowth of the same accident.

This Court previously passed upon the question of liability. This matter is now submitted on a joint motion for Submission of the case on the findings of the Court in consolidated cases Nos. 4776 and 4781, in which is incorporated an agreed statement of personal injuries of claimant, and motion for waiver of abstract and briefs. It reads as follows:

“Comes now claimant, Virginia Shull, by Lachlan Crissey, her attorney, and respondent, State of Illinois, by Grenville Beardsley, Attorney General of the State of Illinois, attorney for respondent, and moves this Honorable Court to accept and consider this cause upon the findings of occurrence facts by the Court as embodied in the opinion of the Court of Claims in the consolidated cases of *Clare D. Shull and Carter Shull, A Partnership, d/b/a Shull Brothers*, and *Noi Coleman and Earl Coleman vs. State of Illinois*. Nos. 4776 and 4781, filed October 22, 1958, and upon the medical certificate of injuries of claimant herein, and further moves the Court to waive filing of abstract and briefs by claimant and respondent, and as grounds for said motion state as follows:

1. That the liability of respondent and due care of claimant have been established by the findings and opinion of this Court in the above mentioned consolidated cases; that the opinion of the Court in such cases is final, and that there are no disputed questions of law or fact in this case to warrant the taking of evidence on the liability of respondent or due care of claimant. A copy of the opinion of the Court in Court of Claims cases Nos. 4776 and 4781 is attached hereto, marked exhibit A, and incorporated herein by reference.

2. That the compensable injuries of claimant in this case are small, have been established by competent medical examination, and are presented by a medical statement made by A. D. Markel, M.D., of 623 Pine Blvd., Poplar Bluffs, Missouri, dated February 5, 1960, which said injuries are not disputed by respondent. A certified copy of medical findings by Dr. Markel are attached hereto, marked exhibit B, and incorporated herein by reference.

3. That there are no disputed questions of law or fact on the extent or nature of compensable injuries sustained by claimant, the only question for determination being the amount of damages, which must be determined by the Court, and that the submission of an abstract and briefs will serve no useful purpose.

Wherefore, it is prayed that the Court will accept and consider the claim of claimant, Virginia Shull, and fix the damages incurred as a result of the collision between claimant's automobile and an Illinois National Guard vehicle as established by the finding of fact previously made by this Court in consolidated cases Nos. 4776 and 4781."

The only question remaining to be passed upon is the amount of the award based upon the medical reports, which were submitted with the complaint and record of proceedings. It appears from the medical report of Dr. Edwin F. Baker of Lewistown, Illinois, and Dr. A. D. Markel of the Kneibert Clinic, Popular Bluff, Missouri, that the principal injury of which claimant is complaining is that to her left thumb, along with cuts, abrasions and contusions. However, the medical reports are confined to her left thumb and knee.

Dr. Baker's subjective findings were that she does not have any pain in her left thumb, but does not use the thumb to hold any valuable or breakable article, or

anything dangerous, such as a hot dish, because of the weakness in the thumb. Without warning, the thumb may become weak, and the article will drop.

The objective findings were that the metacarpal phalangeal joint is enlarged, and there is limitation of flexion to 70 degrees. There is no limitation in adduction or abduction, and finger approximation is normal. There is moderate atrophy of the intrinsic muscles of the thumb. Subjectively, the left knee does not present any complaints, and objectively it is normal. It was the opinion of Dr. Baker that Mrs. Shull has a 50% disability in her left thumb.

A more recent medical for Mrs. Shull was done by Dr. A. D. Markel. His report, dated February 5, 1960, is as follows:

“I examined Mrs. Virginia Shull on February 4, 1960 in regards to an accident, which she states she had had on January 24, 1957. The patient says she does not have very much pain in her left thumb, but this is the thing that bothers her mostly, and she cannot use the thumb to hold anything of any weight. She seems to be unable to put a pressure down on any object that she is trying to hold. She states that, after she holds an object for some time, the thumb becomes weak, and the object easily drops from her hand.

“Upon examination the metacarpal phalangeal joint is enlarged, and there seems to be some degree of inability to move the finger in a flexion position to more than 70 degrees. There is no abduction limitation or adduction limitation. The finger approximation is within normal limits. There does seem to be a small amount of atrophy of the intrinsic muscles of the thumb with some degree of tremor and weakness of the thumb upon examination. Her left knee was hurt at the time of the

accident, but she states that there was no residual effect of the knee, and, therefore, no x-ray was made.

“We x-rayed the thumb at the time of this examination, and it does show some degree of arthritis with roughening of the joint edges, which probably is the cause of the muscular weakness and the joint weakness of the metacarpal phalangeal joint. This also accounts for the enlargement and the limitation of flexion. We feel that the arthritis of this joint is traumatic in origin, since she states that she had had no trouble with this before the accident. The left thumb continues to have a 50% disability, and I imagine that there will be a certain percentage of permanency of the disability in the thumb of the left hand.”

Whether or not claimant has lost any earnings does not appear in the record or joint motion. Therefore, we are confined solely to the question of the extent of the permanent injury to her left thumb. There is also an absence of findings in the medical reports as to whether or not the condition of the left thumb might improve with therapeutic treatments.

Based upon the medical findings submitted, the nature and extent of the injuries of claimant, an award is hereby made in the sum of \$1,000.00.

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(No. 4862—Claim denied.)

FRED BOELKOW, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion* filed November 16, 1960.

MELVIN A. GARRETSON, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

*HIGHWAYS — negligence — burden of proof.* Where there is a direct conflict in evidence, which is evenly balanced, claimant has not met his burden of proof.

**WHAM, J.**

Claimant, Fred Boelkow, brings this action to recover \$406.50 for damage to his automobile, which collided with a State of Illinois mowing machine on September 25, 1958 on Route No. 41 near its intersection with highway No. 163 in Lake County, Illinois.

Josephine Boelkow, wife of claimant, testified that she was driving south on the extreme left southbound lane of the six lane highway. The southbound lanes were separated from the northbound lanes by a grass parkway. She observed a southbound State vehicle in the same lane ahead of her. It turned off onto the parkway when she was approximately two car lengths behind it and proceeding at a speed of 20 miles per hour. She continued south until she heard or felt a jolt caused by an impact between the State vehicle and claimant's vehicle. She stopped within one car length, and did not move her automobile until the police arrived. The State mowing machine, however, was moved. She stated that the front of the State machine came in contact with the left rear side of claimant's vehicle. At the time of the impact the State vehicle was facing west at a right angle to her automobile.

Frank Brown, an employee of the Division of Highways, State of Illinois, testified that he was mowing the parkway with a Ferguson mower on the date of the accident. He had gone south along the east edge of the parkway, and had started to turn right to head back north and mow a strip along the west edge of the parkway. He then observed Mrs. Boelkow start to pass another automobile on a curve. He stated she partially left the pavement, went into a gulley on the parkway, and struck the mowing machine, which was stopped off the highway headed west at the time of the collision. The left rear door to the left rear bumper of claimant's automobile

was damaged when it hit the front end of the mowing machine as Mrs. Boelkom swerved to the right.

This is all of the testimony offered by both parties, and it is in absolute conflict. We see no more reason to give credence to Mrs. Boelkow than to Mr. Brown from the evidence appearing in this record. The evidence is no more than evenly balanced, and claimant has not borne the burden of proving that respondent was negligent and proximately caused the collision.

We must, therefore, deny this claim.

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(No. 4898—Claimant awarded \$25 3.80.)

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

*Opinion fled November 16, 1960.*

**RAY S. THOMPSON**, Claimant, pro se.

**WILLIAM L. GUILD**, Attorney General; **SAMUEL J. DOY**, Assistant Attorney General, for Respondent.

**TRAVEL EXPENSES**—~~lapsed~~ *appropriation*. Where evidence showed there were sufficient monies in appropriation to pay travel expenses at time they were incurred, an award will be made.

**WHAM, J.**

Claimant, Ray S. Thompson, the duly certified official court reporter of the 17th Judicial Circuit, brings this action to recover \$253.80 for travel expenses incurred in the performance of his duties from March to December of 1958, and January through June of 1959. At the time these expenses were incurred, there remained a sufficient unexpended balance in the appropriation from which payment could have been made. Proper vouchers were filed, but they were presented for payment after the appropriation for the 70th Biennium had lapsed.

There is no doubt as to the claim, and the following stipulation was entered into by and between claimant and respondent :

"It is hereby agreed and stipulated by and between Ray S. Thompson, claimant in the case herein, and the State of Illinois, respondent, through its attorney, William L. Guild, Attorney General of the State of Illinois:

1. That claimant, Ray S. Thompson, is the duly certified official court reporter of the Seventeenth Judicial Circuit of the State of Illinois with his principal place of performance of duties in the cities of Rockford and Belvidere, Illinois;

2. That during the period of March through December, 1958 travel expenses were then incurred by Ray S. Thompson, claimant, in the performance of the above mentioned official duties on the dates and in the amounts set forth in exhibit A of the complaint heretofore filed in the cause herein;

3. That during the period of January through June of 1959 travel expenses were incurred by Ray S. Thompson, claimant, in the performance of the above mentioned official duties on the dates and in the amounts set forth in lines one through seventeen of exhibit B of the complaint heretofore filed in the cause herein;

4. That vouchers for travel expenses were filed by Ray S. Thompson, claimant, in accordance with Section 12 of an Act entitled 'An Act in Relation to State Finance';

5. That a claim in the amount of \$253.80 was filed with the office of the Auditor of Public Accounts, State of Illinois, on December 7, 1959;

6. That the expenses incurred as set forth in exhibits A and B of the complaint hereinabove mentioned are reasonable, and were in fact incurred;

7. That Ray S. Thompson, claimant, is entitled to an award in the sum of \$253.80."

Claimant is obviously entitled to compensation for these incurred expenses, and the claim is hereby allowed in the sum of \$253.80.

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(No. 4899—Claimant awarded \$281.00).

TEXACO, INC., *formerly named the Texas Company, a Delaware Corporation*, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed *November 16, 1960.*

LOUIS G. GEANNOPOULOS, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, 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.

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.

FEARER, J.

A claim in the amount of \$281.00 for merchandise purchased by respondent was filed on January 29, 1960. Attached to the complaint is purchase order No. **345363** given to claimant by the Department of Public Works and Buildings, Division of Highways.

A joint motion has been filed submitting this matter on stipulation, which in substance is as follows :

(1) That the report of the Department of Public **Works** and **Buildings**, Division of Highways, shall constitute the record in this case;

(2) That claimant's claim totalling \$281.00 is justly due and owing to claimant by respondent;

(3) That the instrument is intended solely as a stipulation of the facts, or some of them, relating to the claim, and was executed for the purpose of avoiding the necessity of taking evidence with reference to such facts.

Based upon the stipulation and the Departmental Report filed herein, an award is hereby made to claimant in the amount of \$281.00.

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(No. 4915—Claimants awarded \$100.41.)

**THOMAS J. WINKING**, Claimant, vs. **STATE OF ILLINOIS**,  
Respondent.

*Opinion filed November 16, 1960.*

**R. W. DEFFENBAUGH**, Attorney for Claimants.

**WILLIAM L. GUILD**, Attorney General; **WILLIAM H. SOUTH**, Assistant Attorney General, for Respondent.

**PRACTICE AND PROCEDURE**—*stipulation of record*. Case heard on stipulation of parties that Departmental Report together with stipulation of damages constitute record of the case.

FEARER, J.

An amended complaint was filed in this Court on August 26, 1960, as an outgrowth of an accident, which occurred on January 10, 1960, at the Clark Service Station, 20th and Broadway Streets, Quincy, Adams County, Illinois.

In addition to the claimant herein, it appears from this record that the Allstate Insurance Company has a subrogation claim in the amount of \$51.41. Claimant, Thomas J. Winking, has a claim in the amount of \$50.00, being the deductible portion of his policy.

A joint motion between claimant and respondent, by their respective attorneys, was entered into to the effect that this cause be submitted on the amended complaint and Departmental Report; that there is no dispute of law or facts; that the Departmental Report of the Attorney General shows the matters alleged in the complaint and amended complaint to be true and correct; that claimant and respondent have entered into a stipulation of damages in the amount of \$100.41; that the filing of briefs and abstracts and the submission of the cause to a Commissioner under these conditions would serve no useful purpose.

It is, therefore, the order of this Court that an award be made to Thomas J. Winking in the sum of \$50.00, and, under the subrogation rights of the Allstate Insurance Company, an award is made to it in the sum of \$50.41.

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(No. 4619—Claim denied.)

LOUIS R. JEDLIKA AND MILDRED E. JEDLIKA, Claimants, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion* filed November 16, 1960.

*Petition of Claimants for rehearing denied on January 10, 1961.*

HOFFMAN AND DAVIS, Attorneys for Claimants.  
WILLIAM L. GUILD, Attorney General; MARION G.  
TIERNAN, Assistant Attorney General, for Respondent.

**HIGHWAYS—damages from delay in condemnation proceedings.** Respondent is not liable for damages due to long delay in dismissing condemnation suit, when claimant **took** no affirmative action to bring the matter to trial.

**SAME—same.** No evidence of bad faith on part of any employees of the State of Illinois.

WHAM, J.

Claimants, Louis R. Jedlicka and Mildred N. Jedlicka, bring this action to recover \$14,400.00 for loss of rental from their gasoline station property, 'located in the City of Chicago, by reason of condemnation proceedings instituted by the Department of Public Works and Buildings of the State of Illinois. They claim that these proceedings were pending from March of 1941 until August, 1953, when the case was dismissed by the State, and that by reason thereof claimants were precluded from leasing their property and sustained damages.

The record reflects that on one occasion in February of 1952, claimants obtained a continuance of the condemnation suit over the objection of respondent. On several occasions in 1942 and subsequent to 1948, respondent obtained a continuance of the trial setting. From the middle of 1942 through 1948, little was done by either party on the matter. Negotiations between the parties for the acquisition of the property continued intermittently between 1948 and 1953. At no time during the pendency of the condemnation case did claimant seek to have the case dismissed, nor did they take formal action in Court to press for a trial other than to appear and announce ready at several settings.

Respondent's exhibit No. 3, the Departmental Report, sets forth the reason for the delay and for the dismissal of the action on April 23, 1953, and reads as follows:

"That part of Mannheim Road in Cook County between 119th Street on the north and 143rd Street on the south was designated by the Department of Public Works and Buildings as a part of State Bond Issue Route No. 51 in conformity with the statutes establishing the One Hundred Million Dollar Bond Issue System.

"In the year 1921, the section above referred to was paved with 18 feet of concrete. August 2, 1941, a contract was awarded to widen and resurface the above section. The pavement was completed on August 20, 1942.

"The original construction was confined to the existing right-of-way, which in most instances was four rods or 66 feet in width. Because of the increased

width of pavement, width of shoulders, and improvement of lateral drainage under the 1941 contract, it was considered desirable to acquire additional right-of-way from a number of adjoining properties. Among those properties from which additional right-of-way was to be secured was that of Louis R. Jedlicka, et al. The Jedlicka property is situated at the southwest corner of the intersection of Mannheim Road (S.B.I. Route No. 51) and 131st Street in Palos Township, Cook County.

"An effort was made to acquire 0.538 acres, more or less, from the Jedlicka property through negotiation. That procedure having failed, the Department of Public Works and Buildings instituted eminent domain proceedings against Louis R. Jedlicka, et al, on March 11, 1941.

"The necessary precedent firm offer of settlement was made to the defendants on behalf of the Department of Public Works and Buildings, and was rejected.

"May 6, 1941, the Attorney General served the defendants with notice that the case, No. 418-3192 in the Superior Court of Cook County would be set for trial on a date soon thereafter. A continuance was granted to the February, 1942 term. The Attorney General sought a hearing on February 18, 1942, but counsel for defendants asked for and was given a continuance. At that time construction operations were being carried on near the Jedlicka property, and it was vitally important that the Department know whether or not the desired tract of land would be acquired in a relatively short time. In addition, the nation was in the throes of serious war effort, and, as a result, steel products were in short supply.

"Rather than risk the possibility of a contractor not being able to secure the necessary amount of reinforcing steel bars, as well as other steel products, the Department authorized the contractor to proceed with construction work along the Jedlicka property frontage. The work was completed and confined to the existing right-of-way. After construction of the section of highway adjacent to the Jedlicka property on Mannheim Road, it was found that the highway was generally adequate for traffic needs without additional right-of-way. In view of these conditions, the Attorney General's office was advised on April 23, 1953, through our district office at Chicago, that case No. 418-3192 in the Superior Court of Cook County should be dismissed. Accordingly, the case was dismissed on April 28, 1953."

Subsequent to the dismissal, claimant filed, and there is still pending before the Superior Court of Cook County, a petition for damages provided by Section 10, Chapter 47, 1957 Ill. Rev. Stats., which reads as follows :

"In case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of

such application shall be right and just, and also for the payment of the taxable costs.”

Respondent contends that the relief provided by the above statute is all that claimants are entitled to under the facts of this case.

Claimants on the other hand take the position that, because respondent prolonged the pendency of the proceedings for an unreasonable length of time after it **knew** the land would not be needed, respondent should respond in damages for the loss of rental incurred by claimants.

Both parties cite the case of *Roach vs. Village of Winnetka*, 366 Ill. 578, in support of their respective positions.

The court, in holding in favor of the condemner in that case, stated at page 586:

“All that is alleged, thereafter, to show a wrongful delay is the requests of appellants that the proceedings be completed and applications to the court to set down the disposed of matters for final determination. It is true it is alleged that counsel for the village stated that no one other than appellants wanted these matters finally determined, but the several continuances were granted by the court, and no abuse of discretion is alleged to have been induced by the appellee.”

The case of *Winkelman vs. City of Chicago*, 213 Ill. 360, relied on by claimants, is not in point, since the corporation counsel at that time had authority to determine when the case would be placed on call for trial. The court, in holding for the plaintiff, stated that, where it is ordinarily the duty of the property owner to take necessary steps to force a case to trial, because the corporation counsel had control of the trial calendar, the duty shifted.

Respondent cites the case of *Howard vs. Illinois Central Railroad Company*, 64 F. (2d) 267, involving a condemnation proceeding pending for ten years prior to dismissal. The court denied the property owner's claim for damage, since there was no showing of malicious

or wrongful conduct on the part of the condemner. The fact that many years were involved was insufficient to prove such conduct.

None of the cases called to our attention support claimants' contention. We believe it would be an improper application of the law to allow recovery in a case such as this wherein claimants took no formal action to obtain either a trial or dismissal. To merely announce ready when the case is called and to offer no protest to the granting of a continuance is not sufficient action on claimants' part in seeking an end to the proceedings, and thus free their property from the effects of a pending condemnation action. Moreover, in continuing to negotiate with respondent from 1948 to 1953 on a price for the land, claimants indicated no great desire to terminate the proceedings so that they could rent their premises.

Claimants originally included in their action a claim for loss of merchantability of title during the pendency of the condemnation proceedings. They, however, voluntarily dismissed this portion of their claim during the hearing of the case due to the fact that the property in 1953 was worth more than when the action was instituted in 1941, and, consequently, no loss was involved.

We will not discuss the evidence pertaining to the loss of rental, inasmuch as we are denying this claim; nor, is it necessary to pass on respondent's motion to strike the complaint, which motion was taken with the case.

The claim is hereby denied.

#### OPINION ON REHEARING

The following petition for rehearing has been filed by claimants :

"The claimants, Louis R. Jedlicka and Mildred E. Jedlicka, respectfully petition for a rehearing of this cause, and in support of such petition show the following:

"In 1942, the Department of Public Works and Buildings of the State of Illinois completed the improvement of a highway adjacent to claimants' property; restricting such improvement to the use of the existing right-of-way, and without availing itself of any of claimants' property described in the pending condemnation suit instituted by the Department for the taking of land for such highway.

"In a report (respondent's exhibit No. 3) made by the Division of Highways, it appears that, after construction of the section of the highway adjacent to the Jedlicka property, it was found that the highway was generally adequate for traffic without the additional right-of-way.' This conclusion was reached in 1942.

"The report of the Division of Highways then states that 'in view of these conditions (the adequacy of the existing right-of-way) the Attorney General's office was advised on *April 23, 1953* . . . that (this case) . . . should be dismissed. Accordingly, the case was dismissed on *April 28, 1953*.'

Claimants submit that the Court, in its opinion, has overlooked the following matters of vital consideration:

1. The Department knew, in 1942, that it would not require claimants' property; yet kept the condemnation suit pending for 11 years—until April, 1953—before instructing the Attorney General to apply for dismissal of the suit.

2. The Department, notwithstanding it, knew that it did not intend to take the claimants' property in condemnation, thereafter obtained a number of postponements of the trial of the case; and for a five year period between 1948 and 1953 carried on 'negotiations' for 'acquisition' of the property. These negotiations were carried on at a time when the Department well knew that it did not require, and would not take, the property.

3. Why did not the Department instruct the Attorney General, in 1942, to dismiss the condemnation suit? It is apparent that, when the Attorney General was finally instructed, on April 23, 1953, to dismiss the suit, he obtained dismissal in 5 days: on April 28, 1953.

4. Why did the Department 'negotiate' for acquisition of the property, from 1948 to 1953, when it never intended to take the property? The Department *never* informed claimants, *at my time*, of the conclusion it had reached in 1942, not to take claimants' land; yet continued to negotiate for 'acquisition' of the land, from 1948 to 1953!

5. Is it not grossly unfair, perhaps bordering on fraudulent conduct, for a public officer to 'negotiate' for the taking of land subjected to a pending condemnation suit, when there is NO intent ever to take such land, and a conclusion has already been reached, in the public office, *not to* take the land?

6. May the Department of Public Works and Buildings create the appearance of an intention to take land; lull the property owner into the belief that such land will be taken, and that the condemnation case will proceed to a determination, if negotiations are unsuccessful; all the while knowing that it never intends to take the land? Is this the virtue expected of an agency of the State Government?

7. This Court should protect claimants against the bad faith and wrongful action of a department of the State government. Claimants, ready for trial at all times (except on one occasion in 12 years, when a two week continuance was obtained by claimants, because of illness in the family of counsel for claimants), were sorely disadvantaged, in dealing with a State agency, which acted in bad faith."

In considering this petition, we find that claimants were not misled nor lulled into inaction by any act of respondent's agents.

Claimants' attorney was aware of the negotiations and position of respondent throughout the course of the proceedings, as appears from his testimony at pages 8 and 9 of the abstract of record:

"The Attorney General's office and Department of Public Works took no action in the period between 1942 and 1948 or 1949 to bring the case to trial. From the middle of 1942 until 1945 or 1946, I recollect no correspondence between our office and that of the Attorney General. There were negotiations between our office and the Attorney General. There were negotiations between our office and the Attorney General, some intermittent negotiations, between 1949 and 1953, with regard to possible settlement, but there was such a disparity in figures it appeared at no time we could have reached an agreement. One of the circumstances that seemed to prevent any negotiations was the lack of knowledge on the part of the Attorney General's office as to whether the Department did or did not wish to take the premises in condemnation. The Department at times had intended to take it, and at times had the thought of not taking it."

This does not establish a lulling of claimants into nonaction, but, on the contrary, would seem to prompt the taking of formal action if claimants wished to obtain an early disposal of the matter. No such action was taken by claimants, as we pointed out in our opinion.

Moreover, the statement of claimants in this petition to the effect that "the Department knew, in 1942, that it would not require claimants' property" is not well taken. The only evidence on the question is that of claimants' attorney, which we have already set forth above, and respondent's exhibit No. 3, which is the Departmental Report, dated May 25, 1954, a part of which reads as follows :

"Negotiations to acquire .538 acres, more or less, from Jedlicka failed. The Department instituted eminent domain proceedings on March 11, 1941.

"May 6, 1941, the Attorney General served defendants with notice that the case, 41 S 3192, Superior Court of Cook County, would be set for trial, on a date soon thereafter. A continuance was granted to the February, 1942 term. The Attorney General sought a hearing on February 18, 1942, but counsel for defendants asked for and was given a continuance. At that time construction operations were being carried on near the Jedlicka property, and it was vitally important that the Department know whether or not the desired tract of land would be acquired in a relatively short time. In addition, steel was in short supply.

"Rather than risk the possibility of a contractor not being able to secure the necessary amount of reinforcing steel bars, as well as other steel products, the Department authorized the contractor to proceed with the construction work along the Jedlicka property frontage. The work was completed and confined to the existing right-of-way. After construction of the section of highway adjacent to the Jedlicka property on Mannheim Road, it was found that the highway was generally adequate for traffic needs without an additional right-of-way. In view of these conditions, the Attorney General's office was advised on April 23, 1953, through our district office at Chicago, that case 41 S 3192 in the Superior Court of Cook County should be dismissed. Accordingly, the case was dismissed on April 28, 1953.

May 25, 1954

Earl McK. Guy  
Engineer of Claims"

Nothing here establishes the date the Division of Highways came to the conclusion that it no longer wished to acquire the land. We only know from this evidence that it was some time between the completion of the section of highway and April 23, 1953, five days before the dismissal of the action.

We do not feel that the evidence in this case establishes any bad faith or wrongful action on the part of anyone connected with the State of Illinois as contended by claimants. The petition for rehearing is denied.

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(No. 4845—Claimant awarded \$655.00.)

ARCOLINO EGIZII, d/b/a EGIZII ELECTRIC, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1961.*

G. WILLIAM HORSLEY, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; WILLIAM H. SOUTH, 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.

TOLSON, C. J.

On October 31, 1958, claimant, Arcolino Egizii d/b/a Egizii Electric, filed a complaint seeking an award of \$655.00 for certain work done in the office of the Court of Claims of the State of Illinois.

The file in the case consists of the complaint, transcript of evidence, order waiving the filing of briefs, and the Commissioner's Report.

The matter was heard by Commissioner Billy Jones, and, from an examination of his report, it appears that the claim is proper.

The Commissioner's Report, in the following words and figures, is, therefore, adopted by this Court:

"This case is a claim brought by a Springfield, Illinois electrical firm in the amount of \$674.00 for the installation of certain electrical fixtures in the Court of Claims offices in the Capitol Building in Springfield, Illinois.

"Claimant presented testimony that shows that he submitted a bid on May 21, 1957 in the amount of \$674.00 for the installation of four—eight foot long fixtures and all accessory parts, material, and labor for the installation thereof; that the bid was accepted by respondent, the work was completed on September 10, 1957, a bill in the amount of \$655.00 was submitted, which represented the original bid of \$674.00 less \$19.00 credit to claimant for the return of one switch, which was not used.

"Claimant presented testimony to show that the work was completed, was accepted by the respondent, was done in a workmanlike manner, and that the charges therefor were reasonable. Respondent offered nothing in the matter except to bring out on cross-examination that the work had been done by claimant in a satisfactory manner, and that the charges were reasonable and still due and owing to claimant.

#### OBSERVATION

"This is a case where there is no dispute of the facts. It is obvious that services have been rendered, that respondent owes for these services, and claimant should be paid.

#### CONCLUSION

"The Commissioner recommends that claimant be allowed the sum of \$655.00 as prayed in the complaint."

An award is, therefore, made to Arcolino Egizii d/b/a Egizii Electric in the amount of \$655.00.

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(No. 4872—Claimant awarded \$312.59.)

C. MITCHELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1961.*

KAVATHAS AND CASTANES, Attorneys for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

**HIGHWAYS—hole in pavement.** Where evidence showed State had either actual or constructive notice of defect in highway, and claimant was not contributorily negligent, an award will be made.

**SAME—negligence.** Evidence showed State was negligent in not notifying public of existence of hole in pavement.

FEARER, J.

Claimant, C. Mitchell, has filed his complaint in this Court for property damages.

Respondent has not filed an answer, therefore, a general denial or traverse of the allegations of the complaint will be considered as filed.

On February 15, 1959, claimant owned a 1953 Buick automobile, which was being driven by Theodore Blanas, with the consent of claimant.

Two witnesses testified on behalf of claimant, namely, the driver of the car, Theodore Blanas, and a friend, who lived in the neighborhood where the accident happened, by the name of Martha Skan.

The facts briefly stated are that on February 15, 1959, Theodore Blanas, was driving claimant's car in a southerly direction on Skokie Boulevard, about 500 yards north of its intersection with Grosse Point Road. At that location said highway is a four-lane highway with a painted line separating the northbound and southbound traffic. Skokie Boulevard is a public highway located in

the Village of Skokie, County of Cook, and State of Illinois.

The driver of the automobile testified that, at or about the hour of 10:00 A.M., he was driving claimant's automobile in a southerly direction on said highway aforesaid. This automobile was owned by his father-in-law, and he had been driving it for several months, and had driven over the highway in question before. He stated he was in the center lane going south, and that Skokie Highway that morning was covered with snow and ice, and was met. He further testified that there was one and three quarters lanes open for southbound traffic, and that there was not room for two cars to proceed on Skokie Highway. He further testified that, when he was approximately 60 feet away, he saw a hole in the road, which was approximately 3 inches deep and approximately 3 feet from the north to the south, and about the width of the car; that the hole was filled with ice, slush and snow; that he had been driving about 35 m.p.h., and, when he ran into the hole, he was going approximately 20 m.p.h.

He stated that his car skidded for a short distance, but that he did not leave the highway.

He stated that running into the hole damaged the following parts of the vehicle: tie rod was bent, stick was almost dragging to the ground, right front fender, right front bumper, hub cap, and the right side of the car was down, as though the spring was broken, and also damage to a tire.

From the record it is apparent that there were no warning signs, barricades, or any warning whatsoever advising the traveling public of the break in the highway. The hole in the highway was obscured by ice, snow and slush.

The highway had been in a defective condition and dangerous to the traveling public prior to Thanksgiving, which was a considerable length of time before the accident in question occurred.

Respondent did not offer any evidence to contradict the evidence offered by claimant. Claimant offered two exhibits, one of which was a paid repair bill covering the repairs to the automobile, which claimant contended was the result of the accident in question.

We are mindful of the fact that we have held several times that respondent is not an insurer of all people traveling upon its highways, but it does have an obligation to keep its highways in a reasonably safe condition for motorists traveling over them. If the highways are in a dangerously defective condition, which might be hazardous to the traveling public, then respondent is obligated to erect barriers or signs warning the people traveling over said highway of any dangerous or defective condition.

The only evidence in the record as to the driving of the vehicle owned by claimant was that of the driver himself, Theodore Blanas, who testified that he was driving at the time he ran into the hole not to exceed 20 miles per hour; that, because of the ice, snow and slush, he was unable to see the hole until he was within a few feet of it, and that he did not strike any other object.

Respondent, in maintaining said highway by its agents, employed by the Division of Highways, either had actual or constructive notice that this highway was defective, and should have either repaired the hole or placed warning signs so that the traveling public could have governed themselves accordingly.

From the record we find that neither claimant nor the operator of his automobile, Theodore Blanas, was guilty of contributory negligence, but that it was the

negligence of respondent's agents, which was the proximate cause of the accident in question resulting in damage to claimant.

It is, however, difficult to understand, and there is no explanation of it in the record, as to how certain parts on said automobile, such as damage to grill and bumper, which are more than twelve inches from the ground, were damaged by running into the hole, the size of which was testified to by claimant's witnesses. However, respondent did not go into these various matters, so that we would have anything other than claimant's testimony and exhibits in passing upon the amount of damage done to claimant's vehicle as the result of this accident.

Respondent could have, by cross-examination, brought out certain facts, which would eliminate any speculation on our part, but did not do so, and, therefore, we have no alternative but to pass upon the evidence, or lack of evidence, as we find it.

The Commissioner, who heard this case, had an opportunity of examining the witnesses, which he did, and examining the exhibits. He has made a recommendation that claimant be awarded damages in the full amount of **\$312.59**.

It will, therefore, be the order of this Court that claimant be awarded a claim for damages to his automobile in the amount of \$312.59.

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(No. 4908—Claimant awarded \$1,048.92.)

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

*opinion filed* January 10, 1961.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for  
Claimant.

WILLIAM L. GUILD, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

TAXES, FINES AND PENALTIES—*overpayment* Of *privilege tax*. Upon stipulation of evidence, it was found that privilege tax had been overpaid entitling claimant to an award.

FEARER, J.

Claimant, American Indemnity Company, A Texas Corporation, has filed a complaint in this Court for overpayment of its annual privilege tax for doing business in the State of Illinois in the amount of \$1,048.92. The overpayment was for the year of 1957.

On December 1, 1960, this Court entered an order on the joint motion of claimant and respondent for leave to submit this matter to the Court for consideration and opinion without the taking of evidence, or filing abstract and briefs, due to the fact that there were no disputed questions of law or fact in this case, and that no useful purpose would be served by the taking of evidence or the filing of abstracts and briefs.

The Director of the Department of Insurance has filed his report in this cause, which is as follows:

"1. That he is Director of the Department of Insurance of the State of Illinois, and that he caused a diligent search of the files and records pertinent to the above entitled matter to be made in his office, and hereby certifies that said files, books and records show the following facts:

A. That on June 18, 1958 a privilege tax statement for direct business for the calendar year of 1957 was filed by claimant with the Department of Insurance wherein that item No. 5 on page 2 of the statement under 'Amount (if any) paid to cities, villages, incorporated towns and fire prevention districts of Illinois during the calendar year of 1957 as a tax on premiums for the benefit of organized fire departments' claimant listed the amount of \$1,048.92.

B. That in calculating the retaliatory tax on the Texas basis, claimant listed on said statement the sum of \$46,151.68, and inadvertently failed to take credit against said sum for the sum of \$1,048.92 paid to the respective cities, villages, incorporated towns and fire prevention districts of Illinois during the calendar year of 1957 as a tax on premiums for the benefit of organized fire departments, as shown by the receipts therefor attached to claimant's complaint filed in this cause.

C. That claimant was, therefore, duly assessed by the Department of Insurance in the sum of \$46,151.68, which sum was paid by claimant to the Director of Insurance of the State of Illinois on June 18, 1958.

D. That it appears that under the provisions of Section 444 of the Illinois Insurance Code governing the assessment of retaliatory tax that said \$1,048.92 having been assessed and paid under the laws of the State of Illinois, a net amount properly owing for privilege tax for direct business during the calendar year of 1957 would be \$46,151.68 minus \$1,048.92, or a net amount of \$45,102.76, and that claimant has made an overpayment in the amount of taxes due in the sum of \$1,048.92."

A stipulation was entered into between claimant by its attorneys and respondent by the Attorney General as follows:

"It is hereby stipulated and agreed by and between claimant, American Indemnity Company, A Corporation, through its attorneys, Gillespie, Burke and Gillespie, and the State of Illinois, through William L. Guild, Attorney General of the State of Illinois, that the following documents are true and correct, and shall constitute the record in this cause:

1. Report of Department of Insurance dated August 4, 1960.
2. Complaint filed herein.

"It is further stipulated and agreed by and between the parties hereto that the Honorable Court of Claims of the State of Illinois may proceed to allow the claim of claimant in the sum of \$1,048.92 on the basis of the foregoing record."

Claimant is, therefore, awarded the sum of \$1,048.92 for overpayment of privilege tax to the State of Illinois for the year of 1957.

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(No. 4931—Claimant awarded \$2,119.82.)

AMERICAN MEXICAN PETROLEUM CORPORATION, A CORPORATION  
OF ILLINOIS, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion *filed* January 10, 1961.

HENRY L. BLIM, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General ; LESTER SLOTT,  
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.

FEARER, J.

The claim of American Mexican Petroleum Corporation, An Illinois Corporation, is being submitted to this Court on the complaint and exhibits attached thereto, a stipulation entered into by claimant and respondent, by claimant's attorney and William L. Guild, Attorney General, representing respondent.

An order was entered by this Court on a joint motion of claimant and respondent for the waiving of filing of briefs, and that the matter be taken under advisement on the complaint and stipulation.

The stipulation is as follows :

"This stipulation made by and between American Mexican Petroleum Corporation, An Illinois Corporation, claimant, by Henry L. Blim, its attorney, and the State of Illinois, respondent, by William L. Guild, Attorney General of the State of Illinois, representing said State of Illinois, as follows.

1. That the bid of said claimant to furnish two cars of asphalt filler to the Department of Public Works of the State of Illinois was accepted, and that thereafter said claimant furnished on Purchase Order No. 363709 one tank car of asphalt filler at the bid of \$43.60 per ton, making a total of \$1,062.21, which material was invoiced under date of May 25, 1959; that also the said claimant shipped to the State of Illinois, Division of Highways, a second car of said material at the same price per ton, at a total price of \$1,057.61, which material was invoiced by claimant under date of May 28, 1959.

2. That through misadventure said invoices were misfiled or mislaid in the Office of the Division of Highways at Dixon, Illinois, and were not forwarded for payment prior to the expiration of the 1959 appropriation.

3. That the claim of claimant is just and proper, and should be allowed by this Honorable Court as a claim against the State of Illinois for the total amount of \$2,119.82.

4. That claimant is still the owner of said claim, that no part thereof has been paid, that no assignment or transfer of said claim has been made by claimant, and that claimant is justly entitled to the amount hereinabove set out from the State of Illinois after allowing all just credits."

An award is, therefore, hereby made in favor of claimant, American Mexican Petroleum Corporation, An Illinois Corporation, in the amount of \$2,119.82.

The claim of American Mexican Petroleum Corporation, An Illinois Corporation, is being submitted to this Court on the complaint and exhibits attached thereto, a stipulation entered into by claimant and respondent, by claimant's attorney and William L. Guild, Attorney General, representing respondent.

An order was entered by this Court on a joint motion of claimant and respondent for the waiving of filing of briefs, and that the matter be taken under advisement on the complaint and stipulation.

The stipulation is as follows :

"This stipulation made by and between American Mexican Petroleum Corporation, An Illinois Corporation, claimant, by Henry L. Blim, its attorney, and the State of Illinois, respondent, by William L. Guild, Attorney General of the State of Illinois, representing said State of Illinois, as follows.

1. That the bid of said claimant to furnish two cars of asphalt filler to the Department of Public Works of the State of Illinois was accepted, and that thereafter said claimant furnished on Purchase Order No. 363709 one tank car of asphalt filler at the bid of \$43.60 per ton, making a total of \$1,062.21, which material was invoiced under date of May 25, 1959; that also the said claimant shipped to the State of Illinois, Division of Highways, a second car of said material at the same price per ton, at a total price of \$1,057.61, which material was invoiced by claimant under date of May 28, 1959.

2. That through misadventure said invoices were misfiled or mislaid in the Office of the Division of Highways at Dixon, Illinois, and were not forwarded for payment prior to the expiration of the 1959 appropriation.

3. That the claim of claimant is just and proper, and should be allowed by this Honorable Court as a claim against the State of Illinois for the total amount of \$2,119.82.

4. That claimant is still the owner of said claim, that no part thereof has been paid, that no assignment or transfer of said claim has been made by claimant, and that claimant is justly entitled to the amount hereinabove set out from the State of Illinois after allowing all just credits."

An award is, therefore, hereby made in favor of claimant, American Mexican Petroleum Corporation, An Illinois Corporation, in the amount of \$2,119.82.

(No. 4943—Claimant awarded \$1,788.68.)

**THE OHIO CASUALTY INSURANCE COMPANY, A CORPORATION,**  
Claimant, vs. **STATE OF ILLINOIS,** Respondent.

*Opinion filed January 10, 1961.*

**THE OHIO CASUALTY INSURANCE COMPANY,** Claimant,  
pro se.

**WILLIAM L. GUILD,** Attorney General; **WILLIAM H. SOUTH,** Assistant Attorney General, for Respondent.

*TAXES, FINES AND PENALTIES—overpayment of privilege tax.* Upon stipulation of facts, an award was entered for overpayment of privilege tax.

**TOLSON, C. J.**

On October 26, 1960, The Ohio Casualty Insurance Company, A Corporation, filed a complaint seeking an award in the amount of \$1,788.68 for overpayment of its annual privilege tax for the years of 1958 and 1959.

The file consists of the complaint, Departmental Report, stipulation, motion and order to submit the case to the Court without the necessity of taking evidence or filing briefs.

From an examination of the Departmental Report and stipulation, it appears without question that claimant did overpay the privilege tax for the years of 1958 and 1959, as stated in its complaint.

This Court has considered the following cases involving similar claims for refunds due to the overpayment of privilege taxes, and, in each instance, an award has been made :

1. *New Hampshire Fire Insurance Company, A Corporation, vs. State of Illinois*, No. 4804
2. *Culvert Fire Insurance Company, A Corporation, vs. State of Illinois*, No. 4805
3. *American Indemnity Company, A Corporation, vs. State of Illinois*, No. 4834
4. *Market Mens Mutual Insurance Company. A Corporation, vs. State of Illinois*, No. 4809

It is to be noted that the Court of Claims Act was amended in 1957 in the following manner:

“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 the effective date of this amendatory Act, may be prosecuted as if it arose on the effective date of this amendatory Act without regard to whether or not such claim has previously been presented or determined. (As amended by Act approved July 11, 1957.)”

An award is, therefore, made to The Ohio Casualty Insurance Company, A Corporation, in the amount of \$1,788.68.

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(No. 4719—Claim denied.)

JOHN HERBERT LINK, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 24, 1961.*

FRED P. SCHEUMAN, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

*HIGHWAYS—maintenance of shoulder—contributory negligence.* Evidence showed that claimant was contributorily negligent in failing to keep his vehicle under control on a road and under conditions that were familiar to him.

FEARER, J.

On May 6, 1954, at or about the hour of 1:50 A.M., claimant, John Herbert Link, was involved in an automobile accident, allegedly due to negligence on the part of the State of Illinois to properly maintain the shoulder of State Route No. 35A, and failure to properly post with appropriate signs an alleged dangerous curve on said highway. As a result of the automobile accident, claimant now seeks to recover for personal injuries and damages to his motor vehicle in the sum of \$7,500.00.

Some hours prior to the accident, on May 5, 1954, at or about the hour of 10:30 P.M., claimant, accompanied

by his wife, now deceased as a result of the accident, left their home, located in Granite City, Illinois, for the purpose of eating dinner at a restaurant known as "The Pines", located in Collinsville, Illinois. Claimant was driving his 1951 Chrysler New Yorker club coupe automobile.

In order to reach his destination, claimant proceeded across a portion of the highway, known as State Route No. 35A, which is now in question. The evidence shows that the weather conditions on May 5, 1954, and the early morning hours of May 6, 1954, were clear, and that State Route No. 35A was dry.

Upon reaching the Pines Restaurant, claimant and his wife had one or two drinks, in addition to their meal, which caused them to stay at this location a period of some three or four hours. At approximately the hour of 1:30 A.M., on the morning of May 6, 1954, claimant and his wife began their journey home by following the same route, which they had proceeded upon to get to the restaurant.

At the time and place in question, claimant contended he was traveling at approximately 25 miles per hour, proceeding in a general southeasterly direction. While traveling on State Route No. 35A, a short distance from State Route No. 162, the right front wheel of claimant's automobile left the highway. In an attempt to maneuver his vehicle back onto the paved portion of the highway, claimant lost control of his car, and, as a result, it turned over and rolled down a slight embankment on the left side of State Route No. 35A.

Claimant alleged there were weeds growing approximately three to four feet in height on both shoulders of State Route No. 35A. There was also considerable testimony by claimant that Route No. 35A, at the point of the accident, was inadequately marked, so as to notify

users of the alleged dangerous conditions of the highway.

The law in the State of Illinois is clear that, in order for a claimant in a tort action to recover against the State, he must prove that the State was negligent, that such negligence was the proximate cause of the injury, and that claimant was in the exercise of due care and caution for his own safety. *McNary vs. State of Illinois*, 22 C.C.R. 328, 334; *Bloom vs. State of Illinois*, 22 C.C.R. 582, 585. It is also a well known proposition of the law that the State is not an insurer of all persons using its highways. *McNary vs. State of Illinois*, supra; *Bloom vs. State of Illinois*, supra. However, a person is not entitled to recover where the facts show he has been guilty of contributory negligence.

The doctrine of contributory negligence has been applied by this Court in the cases of *Doolittle vs. State of Illinois*, 21 C.C.R. 113, and *Mounce vs. State of Illinois*, 20 C.C.R. 268, which are similar in nature to the instant case. In the cases cited, the Court held that to approach a place of known danger without care commensurate with such danger is contributory negligence. Similarly, the Court held that, where one has earlier the same evening driven over a certain stretch of highway, he is charged with a knowledge of its condition so long as the condition is unchanged on his return trip.

The facts in the instant case show that claimant did travel across a portion of the highway in question a few hours prior to the accident, and, therefore, had or should have had knowledge of the condition of the highway at the place in question. The fact that claimant had knowledge of the condition of the highway is substantiated by claimant's own testimony that he was traveling 25 miles per hour, which would appear to be a reasonable speed to negotiate a safe journey around the curve on State Route No. 35A. In view of the fact that claimant failed

to show any intervening force, which caused his vehicle to leave the paved portion of State Route No. 35A, it must be concluded from the evidence that claimant was negligent in the management and control of his vehicle, and, as a result, this Court must necessarily find that the proximate cause of the accident was claimant's negligence.

In view of the foregoing, the claim must be denied.

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(No. 4744—Claimants awarded \$3,345.16.)

**WILLIAM R. OTTO, DONALD W. HOUSTON AND EDMOND J. McSHANE, Claimants, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed January 10, 1961.

Petition of Claimants for Rehearing denied March 24, 1961.

**MICHAEL F. RYAN, Attorney for Claimants.**

**WILLIAM L. GUILD, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.**

CIVIL SERVICE ACT—*claim* for *salaries* from lapsed appropriation. Where Court ruled that claimants were illegally prevented from performing their duties, an award will be made.

SAME—*burden* of mitigation of damages. Burden is on claimants to mitigate damages during period of unlawful dismissal, and prove their efforts to obtain other employment to the Court's satisfaction.

SAME—*farm* income in mitigation of damages. Where farm was leased on crop shares, income will not be considered in mitigation of damages.

**FEARER, J.**

Claimants, William R. Otto and Donald W. Houston, prior to 1953 were employed under civil service as Weights and Measures Calibrators in the Department of Agriculture of the State of Illinois, and both worked in their respective positions until June 30, 1953.

On or about that date, claimants received a letter from Stillman J. Stanard, Director of Agriculture, as follows :

"The 68th General Assembly has discontinued the Division of Standards by legislative enactment, which will become law on June 30, 1953.

This letter is to call to your attention the fact that the Division of Standards, having been abolished by the Legislature, your connection with the State of Illinois will be severed as of that date. This letter is being sent to you at this time so that you may obtain your vacation period prior to June 1, 1953.

I, therefore, desire that you turn in to the Emerson Building, State Fair Grounds, Springfield, Illinois, all State-owned equipment in your possession on June 23, 1953; you will be receipted for this equipment.

Very truly yours,  
WILLIAM J. STANARD  
Director"

Claimants made demands for reinstatement on March 12, 1954, which were refused. Thereafter, claimants filed a complaint for mandamus in the Superior Court of Cook County, cause No. 5483854, against Stillman J. Stanard, Director of the Department of Agriculture, the members of the Illinois State Civil Service Commission, Auditor of Public Accounts, and Treasurer of the State of Illinois. The complaint for mandamus was received in evidence as claimants' exhibit No. 1. Claimants' exhibit No. 2 was the motion of the defendants named therein to strike and dismiss. Claimants' exhibit No. 3 was a judgment order in said cause entered in October, 1955, by Donald S. McKinlay, Judge of said court.

The Superior Court of Cook County found that claimants were removed from their respective civil service positions on June 30, 1953, and from said date were illegally prevented from performing the duties of said positions and receiving the salaries appropriated therefor until July 6, 1955, when House Bill No. 1130 of the 69th General Assembly became law, which abolished the positions formerly occupied by claimants, rendering further issues in this cause moot and academic.

The Court further found that claimants were entitled to the salaries appropriated for and attached to their respective positions in the Department of Agriculture for

the period from June 30, 1953 to July 6, 1955, less their earnings from other employment during said time, but that, because of the lapse of the biennial appropriation for said period on September 30, 1955, under the Constitution of the State of Illinois the court was without power to compel the payment of salaries by the writ of mandamus, which was prayed for in said cause.

Due to the findings hereinbefore set forth in said order, the cause was dismissed without prejudice to the claimants' back salary rights.

Respondent did not file an answer setting forth any affirmative defense to the complaint, so, therefore, under the Rules of this Court, a general traverse or denial of all of the allegations of the complaint would be considered as filed.

Claimants and respondent have both filed exhaustive briefs setting forth many citations in support of their respective theories. It would unduly lengthen this opinion if we were to review all of the theories set forth, either in support of the claim or in opposition thereto.

The only question we have to decide covers a period from June 30, 1953 to July 6, 1955, when House Bill No. 1130 of the 69th General Assembly became law, and claimants' positions were abolished.

If claimants were illegally prevented from performing their duties for the Department of Agriculture, which were civil service, then, in our opinion, claimants are entitled to recover their respective salaries, which were \$315.00 a month from June 30, 1953 to July 6, 1955.

This Court and the Supreme Court have had occasion to pass upon similar situations involving civil service employees, who were illegally prevented from performing their duties. *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Smith vs. State of Illinois*, 20 C.C.R. 202; *People vs.*

*Thompson*, 316 Ill. 11; *Schneider vs. State of Illinois*, 22 C.C.R. 453.

As against the claim for back salaries, this Court held in the case of *Schneider vs. State of Illinois*, 22 C.C.R. 453, that the burden is upon claimants to mitigate damages, and that all monies earned during the period of time from employment, but not investments, should be considered as a set-off against wages claimed because of unlawful dismissal from State employment. *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Kelley vs. Chicago Park District*, 409 Ill. 93; *Schneider vs. State of Illinois*, 22 C.C.R. 453.

In regard to monies received by claimants from other employment and other sources, respondent contends that income from a farm owned by claimant, Donald W. Houston, should also be taken into consideration.

Mr. Houston leased his farm to his sons, who were farming for him on a fifty-fifty basis, and he did on occasions go to the farm in an advisory capacity, and did, also, do a small amount of work around the farm.

This is not the type of employment or income that this Court had reference to in the *Schneider* case, nor could it be considered in mitigating damages any more than dividends from stocks or interest received on notes or mortgages. We make reference only to gainful employment and monies earned in other employment, whether for themselves or working for someone else, during the period of time referred to herein.

In arriving at claimants' earnings during the period of time from June 30, 1953 to July 6, 1955, we are not segregating the earnings by the month, whether more or less than their salaries of \$315.00 a month, but are taking the entire earnings for that period of time and deducting the entire earnings from the salaries that they would be entitled to for that period referred to herein. Also, we

are not going to enter an award for salaries unless claimants have proven that they attempted to find other employment, and, if there is no showing to that effect, there will be no award made for that period of time. We will only consider their salary and earnings from other employment from the date that they started to seek employment and were gainfully employed, as we do not believe that one can sit idly by and draw a salary without attempting to seek employment in mitigation of damages. If this were possible and legal, every employee under civil service so discharged would make no effort to find other employment. This was this Court's holding in the case of *Schneider vs. State of Illinois*, 22 C.C.R. 453.

In arriving at an award, first in the case of William R. Otto, he testified that he did not seek employment from July, 1953 until December, 1953, and that in December, 1953 he went into partnership with a friend of his in the electrical work, and that he remained in the partnership until August, 1954. He then worked for an electrician in Bloomington, Illinois, and after that employment went into business for himself as an electrical contractor.

The record is clear that claimant, William R. Otto, made no effort to mitigate damages or seek employment between the time of his discharge as a civil service employee to December, 1953. He is asking \$315.00 a month for that period of time.

In arriving at a just award, and not purely by speculation, the record should be clear as to the total amount of earnings during the period from January, 1954 to July, 1955. The record is silent as to this. However, there is evidence that Mr. Otto earned from \$150.00 to \$600.00 a month when he was working, but he does not specify total earnings. Therefore, in order to make an award, we would have to speculate, which this Court cannot do.

Claimant, William R. Otto, testified, as is found on page 21 of the transcript :“Q. But you did make sufficient money in other months, which would overcome this \$315.00? A. Yes, I would say that is right.”

As to claimant, Donald W. Houston, his salary at the time of his discharge as a civil service employee, as a Weights and Measures Calibrator, was \$315.00 a month. He worked until June 30, 1953, his position, too, being subject to House Bill No. 1130 of the 69th General Assembly.

Mr. Houston is making a claim at the rate of \$315.00 a month from July 1, 1953 until December 31, 1953, or a period of six months. He testified that during that period of time he did not seek employment, and had no other employment. Therefore, we are disallowing any claim for that period of time.

Mr. Houston operated a farm on a fifty-fifty basis with his sons. However, the actual farming was done by the sons, and claimant only acted in an advisory capacity doing only a small amount of work.

In arriving at the amount of the award for Mr. Houston, we are computing his loss of earnings from January 1, 1954 to December 31, 1954 at \$315.00 a month. This amounts to \$3,780.00, and, less his earnings of \$1,378.83 for that period, leaves \$2,401.17. From January 1, 1955 to July 6, 1955 is a period of six months, As computed at his salary rate of \$315.00 a month would total \$1,890.00, and, less his earnings of \$946.01 for that period, leaves \$943.99.

We, therefore, find that for the period of time for which we have computed his loss of earnings of \$315.00 a month from the State, less his earnings, claimant would have due him the sum of \$3,345.16.

As to claimant, Edmond J. McShane, who was one of the claimants at the time the complaint was filed in

this Court, no evidence was offered on his behalf, so said claim was dismissed and is not being considered.

It is, therefore, the order of this Court that no award be made to William R. Otto, and that his claim be denied.

It is, therefore, the order of this Court that the claim of Donald W. Houston is allowed, and an award is made in the sum of \$3,345.16.

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(No. 4785—Claimant awarded \$1,000.00.)

WILLIAM J. QUILTY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1961.

HERBERT F. FRIEDMAN, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence*. Where respondent was working on a bridge over railroad yards, claimant, who was a railroad man, was entitled to an award for injuries resulting from falling concrete.

FEARER, J.

An amended complaint was filed by William J. Quilty on June 11, 1958 alleging that on October 27, 1955 he was employed by the Chicago, Rock Island and Pacific Railroad Company at the Burr Oak Yards near Prairie Street, at or near the City of Blue Island in the County of Cook and State of Illinois. At or about the hour of 10:30 A.M., while claimant was standing in said yards near or underneath the viaduct overhanging said yards, a piece of concrete weighing about twenty-five pounds fell from the viaduct, a distance of approximately forty feet, and struck his right hand, injuring the little and ring fingers.

At said time respondent's agents of the State Highway Department, being about 20 to 25 in number, were working on said viaduct in the process of repairing it,

and were using air hammers. In the process of breaking the concrete on the viaduct, a piece was dislodged, and fell upon claimant, injuring the little and ring fingers on his right hand.

Attached to the amended complaint was an amended bill of particulars, wherein it was set forth the amount of damages claimed.

The record consists of the following :

1. Complaint
2. Amended bill of particulars
3. Amended complaint, together with attached amended bill of particulars
4. Transcript of evidence
5. Motion of claimant for leave to waive the filing of brief
6. Order of the Chief Justice granting the motion of claimant for leave to waive the filing of brief
7. Motion of respondent for leave to waive the filing of brief
8. Proof of service of a copy of the motion of respondent on counsel for claimant
9. Order of the Chief Justice granting the motion of respondent for leave to waive the filing of brief
10. Commissioner's Report

The Commissioner heard this case on June 10, 1958, and August 5, 1958, and the only evidence offered by claimant and respondent was that of claimant.

There seems to be no dispute as to the facts of the alleged occurrence, nor any question as to the contributory negligence of claimant. However, it does appear that claimant lost a considerable length of time for the nature and extent of injuries, which the Commissioner so found.

Claimant was taken to St. Francis Hospital. His little finger was limp. The ring finger was bleeding, and the nail was off. In accordance with the medical report introduced by claimant, being claimant's exhibit No. 2, it was found that there was a chipped fracture of the posterior articular margin of the distal phalanx of the right little finger, with a fragment displacement of about 3

mm. posteriorly. The ring finger was not broken. A splint was applied to the little finger, and gauze was applied to the ring finger. Claimant returned to work, and he was treated by Dr. Lally the following day.

Claimant testified that he visited Dr. Lally at least seven or eight times, and that he had a great deal of pain in the little and right ring fingers. From the medical report, no heat treatments were prescribed by the doctor, nor were any pills prescribed for pain.

The doctor and hospital bills were paid by the railroad company. Claimant also received \$200.00 from said company, and gave them a covenant not to sue.

At the time of the accident, claimant was earning approximately \$14.63 a day. From November 16 to November 30, 1955, he was unable to work, losing approximately twelve working days, amounting to \$175.56. He testified that he was off work from December 1, 1955 to December 8, 1955, inclusive; and from December 27, 1955 to January 10, 1956, inclusive; that his absence from work was the result of the accident and the injuries to the fingers on his right hand.

On December 1, 1955, his rate of pay was \$16.29 per day, for which he is claiming an additional \$517.65 for lost wages.

It appears to us that claimant lost an excessive amount of time as the result of the injuries of the nature sustained by him. However, all that we have to pass upon is the testimony of claimant. There is no cross-examination of him, nor any Departmental Report filed, nor does respondeat offer any testimony whatsoever.

The Commissioner found that no subrogation claim is being made by the railroad company for its expenditures on behalf of said claimant.

As previously stated, inasmuch as there is no question as to liability of respondent, or any cross-examination of claimant, or Departmental Report filed, the sole question to be passed upon by this Court is the question of damages to be awarded.

The oily evidence we have is that claimant lost \$693.21 in wages as the result of this accident.

It is, therefore, our order that the claim should be and is hereby allowed in the sum of \$1,000.00.

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(No. 4788—Claim denied.)

MICHAEL G. IVANCIC, Claimant, **vs.** STATE OF ILLINOIS,  
Respondent.

*Opinion filed November 16, 1960.*

*Petition of Claimant for Rehearing denied March 24, 1961.*

EUGENE M. SNARSKI AND LIDSCHIN AND PUCIN, Attorneys for Claimant.

WILLIAM L. GUILD, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

STATE OFFICERS AND AGENTS—*acts of State Police officer—malicious prosecution.* Evidence failed to prove any malice on the part of trooper in bringing disorderly conduct charge against claimant.

WHAM, J.

Claimant, Michael G. Ivaicic, seeks damages in an action based upon an alleged malicious prosecution by a State Trooper, Russell W. Ford, resulting from a jury finding claimant not guilty on a complaint charging him with disorderly conduct, which was signed by State Trooper Ford on April 29, 1957 before Justice of the Peace Emil Lindvahl in the City of Waukegan, Lake County, Illinois.

The facts appearing from the record are these:

On April 30, 1957, at about 12:20 A.M., State Police Officers Ford and Dagoes observed claimant in the drive

way of Bartell's Drive-In on Belvidere Road. His head was leaning partially out of the window. As the State Troopers pulled into the driveway, claimant proceeded to drive off. They followed claimant's car, and noted that it weaved across the center line on two or three occasions. On one occasion, he started to make a turn, and then turned back. The State Troopers then forced claimant's automobile to the curb. As claimant alighted from the car, Officer Ford noticed that claimant had vomited. Claimant informed Officer Ford that he was sick, and that he had had a couple of drinks before dinner, but that it was mainly the dinner that had made him ill. He was taken to the North Chicago Police Station, as the officers did not consider him capable of driving.

The North Chicago Police Station is approximately two miles southeasterly from the point of arrest and within a block or so of claimant's house. At the station claimant was advised to take the traffic ticket, which he was given, and go to his home. However, claimant refused to take the ticket, and wanted to be taken immediately before a judge. He was taken before Justice of the Peace Leroy Fritz of Wadsworth, Illinois. Wadsworth is approximately ten miles from the North Chicago Police Station.

Judge Fritz explained to claimant his rights. He then pleaded guilty, and paid a fine of \$15.00 plus \$5.00 costs.

The evidence as to what occurred before Judge Fritz and thereafter is in conflict. The evidence of respondent's witnesses, Judge Fritz and Trooper Ford, establish that claimant, in their presence and during the hearing before Judge Fritz, expressed himself repeatedly in vile and obscene language, including those classic four letter words of the gutter. He was informed by Judge Fritz on several occasions that the Judge's wife and

mother were in the adjoining room, and yet he persisted in a tone loud enough to be heard in the adjoining room until the Judge told him he would be held in contempt if he continued. After the hearing, at which time claimant pleaded guilty to the traffic violation, claimant and Officer Ford left the Fritz residence, and claimant re-embarked on his blasphemous course while in the State Trooper's automobile, at which time Trooper Ford informed him he was under arrest, took him to the Lake County Jail, and swore out a complaint charging claimant with disorderly conduct. Upon claimant's failing to **make** bond, he was placed in jail where he remained until 10 A.M. the next morning.

Claimant on the other hand testified that he at no time used such language. He stated that, when they arrived at the home of Judge Fritz, the Trooper and the Judge spoke together, and the Judge told him the fine was \$20.00. He paid the money, obtained a receipt, and he and Trooper Ford left with Trooper Ford shoving him on the shoulder and saying, "Out with you." He stated that Trooper Ford then gave him another shove, and told him to get back in the car. He denied using any vile or obscene language in front of Trooper Ford.

On May 2, 1957, claimant was tried on the disorderly conduct charge, and found not guilty by a jury.

Claimant contends that, as a result of this disorderly conduct charge, he was embarrassed and humiliated before his friends, and that his insulin balance was upset, which resulted in injury to his person and body, inasmuch as he is a diabetic.

Both claimant and respondent agree as to the necessary elements of a malicious prosecution suit. In *Brandt vs. Brandt*, 286 Ill. App. 151, at page 162, the court stated: "It was necessary to prove that a proceeding was

begun; that it was against plaintiff and caused by defendant; that it terminated in favor of plaintiff; that it was begun without probable cause and with malice, and that damage resulted therefrom.” Claimant has proven that a disorderly conduct proceeding was begun, that it was against him, and caused by an agent of respondent, namely, Trooper Ford. In the disorderly conduct proceeding, claimant was found not guilty.

These elements are established, but claimant’s case must fail for the reason that it has not been established that malice and a lack of probable cause for the institution of the disorderly conduct charge existed.

The burden of proof is upon claimant to establish that Trooper Ford was actuated by malice, and had no probable cause to institute the disorderly conduct proceeding. If respondent’s evidence is taken as true, there was probable cause for the arrest and prosecution of claimant for disorderly conduct, and the subsequent finding of not guilty is not significant on that question. Likewise, if claimant’s testimony is taken as true, there would be no probable cause for the arrest and prosecution.

We see nothing in the record to lend more credence to claimant’s version of the proceeding than to respondent’s. In fact, if Trooper Ford had been inclined toward malice against claimant, it would be more likely that such a charge would have been filed before Judge Fritz rather than before Judge Lindvahl.

We, therefore, find that claimant has failed to bear his burden of proving the elements of his case, and this claim is denied.

(No. 4801 — Claimant awarded \$4,000.)

EDWIN S. D. BUTTERFIELD, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed March 24, 1961.*

*Concurring opinion filed March 24, 1961.*

EDWIN S. D. BUTTERFIELD, Claimant, pro se.

WILLIAM G. CLARK, Attorney General, for Respondent.

**STATE OFFICERS AND AGENTS**—*when State elected officers may hire independent legal counsel.* If the Attorney General advises that he is unable to appear on behalf of a State officer because of a conflict of interest, then the State officer must necessarily resort to other counsel of his own choosing to properly defend his office.

**CONTRACTS**—*contracting beyond appropriation.* Where State officer had express authority to defend an action by counsel of his choice, he was not bound by the status of his appropriation.

WHAM, J.

Claimant, Edwin S. D. Butterfield, seeks to recover \$6,000.00 as the alleged unpaid balance of \$7,500.00 for legal services rendered to State Treasurer Warren E. Wright in defense of the cause of the People ex rel Latham Castle, Attorney General, Petitioner, vs. Warren E. Wright, State Treasurer, Respondent, No. 33925, being an original petition in mandamus filed in the Supreme Court of the State of Illinois, the decision of which is reported in 8 Ill. 2d 454.

Respondent, although filing no answer to the complaint, resists the payment of this claim on the following grounds:

1. That claimant was not retained by Warren E. Wright as his attorney.
2. That claimant has been paid for his services.
3. That, even if retained by Warren E. Wright, the obligation for his fees is the personal obligation of Warren E. Wright and not the State of Illinois.
4. The fee claimed is not reasonable under the circumstances.
5. That, even if Warren E. Wright had authority to retain attorneys to represent him in his official capacity in said suit, his authority as Treasurer to

contract for legal services was limited to the availability of unexpended funds in the State Treasurer's appropriations, and when said funds were expended, as they were, no additional funds can be paid for said services.

Claimant testified as follows: On January 2, 1956 he received a call from attorney Harold Halfpenny, representing Warren E. Wright, and was asked if he would be willing to represent Mr. Wright in a mandamus proceeding that the Attorney General intended to file against him. On the 3rd of January claimant met with Warren E. Wright, William J. Kiley and Harold Halfpenny in the office of Harold Halfpenny in Chicago. There, Mr. Kiley, assistant to Mr. Wright, asked Mr. Wright ("Do you want me to represent you, or do you want Mr. Halfpenny to represent you, or do you want all three of us to represent you?"), to which Mr. Wright replied, "I would rather have all three of you."

Claimant immediately began preparation for the defense of said suit, which, among other things, consisted of preparing a motion to dismiss the petition for an original writ of mandamus, argument and brief in support of answer, and petition for rehearing, upon each of which pleadings William J. Kiley and Halfpenny and Hahn are designated as attorneys for Warren E. Wright, and claimant is designated "of counsel."

Upon denial of the petition for rehearing on April 4, 1956, claimant testified that he submitted his statement for services rendered to Warren E. Wright in the sum of \$7,500.00, dated April 12, 1956, and offered a copy of it in evidence as claimant's exhibit No. 3 after service on respondent of a demand to produce the original statement. Exhibit No. 3 was admitted in evidence after counsel for respondent informed the Commissioner that the original statement could not be found. Exhibit No. 3 reads as follows :

“EDWIN S. D. BUTTERFIELD  
111 West Washington Street  
Chicago 2, Illinois

Hon. Warren E. Wright  
State Treasurer  
State of Illinois  
State Capitol Bldg.  
Springfield, Illinois

To services rendered as counsel for State Treasurer under letter of instruction from the Attorney General of the State of Illinois refusing to represent the State Treasurer in the preparation and presentation of defense to petition for original writ of mandamus brought by the Attorney General of the State of Illinois against the State Treasurer, including conferences with State Treasurer, his attorneys and aides, the Attorney General and his aides, and special counsel. Examination of pleadings and proceedings in State Toll Road litigation and conferences with counsel thereon, examination of authorities and precedents and petition for leave to file petition for original writ, preparation of legal memoranda, motion to strike, and brief and argument, conference with Clerk of the Supreme Court, serving notices, filing motion to strike and accepting service of summons, examination of response of relator to motion to strike, examination of petition of amicus curiae, objections thereof, and rulings of court thereon, preparation of answer to petition for writ and brief and argument in support thereof, supervising printing, serving notices and filing answer and brief, examination of motion of Attorney General to strike answer, preparation of response to motion to strike answer, preparation of response to motion to strike answer and brief and argument in support thereof, serving notices, telegraphing clerk of Supreme Court, and filing with Clerk of the Supreme Court response to motion to strike answer of the Attorney General, conferences with Clerk of Supreme Court in re: filing of pleadings and order of Supreme Court on issuance of writ and limitations, delivering letter to and conference with Attorney General in re: performance of duties of Treasurer under provisions of writ, conference with Attorney General and his aides in re: form of receipt, release and bond, drafting and sending telegrams of withdrawal of offer to New York Life Ins. Co. in re: purchase of \$30,000,000.00 in U. S. Treasury obligations, participation in the supervision of delivery of receipt, release and bond to Toll Highway Commission of \$411,541,666.67 in cash to the State Treasurer, and including services rendered during two trips to Springfield, Illinois . . . . \$7,500.00.”

He has received no payment on this statement, but did receive \$1,500.00 from Halfpenny and Hahn, who had received payment in full of their statement submitted to Warren E. Wright, dated November 9, 1956, which statement was admitted in evidence as respondent’s exhibit No. 5, and reads as follows:

“Warren E. Wright  
State Treasurer  
Capitol Building  
Springfield, Illinois

November 9, 1956

IN ACCOUNT WITH  
HALFPENNY AND HAHN  
Attorneys at Law  
111 West Washington Street  
Chicago 2, Illinois

IN RE: People of the State of Illinois ex rel, Latham Castle, as Attorney  
General of the State of Illinois,

vs.

Warren E. Wright, as Treasurer of the State of Illinois and ex  
officio custodian of the funds of the Illinois State Highway Com-  
mission, No. 55925, Illinois Supreme Court.

Legal services rendered in regard to motions, answers and briefs of Warren E. Wright in the above entitled mandamus suit in the Illinois Supreme Court, conferences, checking and approving various documents for the transfer of funds to the State Treasurer .....	\$ 3,500.00
Legal services as associate counsel of Edwin S. D. Butterfield in the above entitled matter pursuant to previous invoices .....	1,500.00
Monies advanced:	
Long distance telephone calls .....	\$ 17.10
Travel, meals, hotel expenses, trips to Springfield .....	118.25
Court costs .....	15.22
Photostats and reproductions .....	37.50
	\$188.07
	188.07
	\$5,188.07”

Claimant also acknowledged that the expenses he incurred in going to Springfield and all other items of expense were paid to him by the firm of Halfpenny and Hahn.

William J. Kiley, one of the attorneys representing Warren E. Wright and his administrative assistant, was called as a witness by claimant, and testified as follows: On December 28 or 29, 1955, Mr. Wright informed him of the contemplated action by the Attorney General. On January 3, 1956, Mr. Wright and he went to the office of Harold Halfpenny where they met with Mr. Halfpenny,

Mr. Butterfield, the claimant, and he believes Russell Morris, son-in-law of Mr. Wright.

The proceedings were discussed, and he, William J. Kiley, asked the question as to who was going to represent Warren E. Wright. The words he remembers using were "Do you want me to represent you? Do you want Mr. Butterfield? Do you want any combination, or do you want all of us? Mr. Wright's reply was that he felt we would make a good team, and he would like to have us all work on the case."

This witness worked with claimant and Mr. Halfpenny, and submitted no statement for services to Warren E. Wright. He accompanied claimant to a conference with Mr. Wright in Springfield regarding payment of fees sometime at the end of March or in April of 1956. During the discussion Mr. Wright said that, as far as he was concerned, he saw nothing within his budget to warrant the payment of attorneys' fees, that he wanted to see them paid, but he didn't know how he could do it.

Also pertaining to this witness' testimony, claimant's exhibit No. 2 was admitted without objection by respondent. It is a letter from Mr. Kiley to the Attorney General in response to a request for information. It reads as follows :

"Dear General Castle:

This will acknowledge receipt of your letter of November 20, 1958 relating to the above claim.

I was one of the attorneys of record in the above case, and was present on January 3, 1956 when Warren E. Wright, who was at that time Treasurer of the State of Illinois, employed myself, Mr. Harold Halfpenny, and Edwin S. D. Butterfield, the claimant herein, to represent said Warren E. Wright as State Treasurer in the mandamus procedure, which was in the process of being filed by the Attorney General against the State Treasurer in the Supreme Court of the State of Illinois.

I personally worked with Mr. Butterfield during the entire proceeding relating to this matter. We, as you know, were working under pressure, since this was an important and serious matter, and time was of the essence.

Mr. Butterfield and myself worked almost every day and evening, including Saturdays and Sundays, on this matter to the exclusion of our regular practice while this proceeding was pending before the Supreme Court of Illinois.

You undoubtedly are familiar with the motions, pleadings and briefs that we prepared and filed in this proceeding.

I have read the petition for attorneys' fees filed by Mr. Butterfield and the exhibits attached thereto filed with the Court of Claims, and have also reviewed my files in this matter.

It is my opinion, based on the above, that the matters contained in Mr. Butterfield's petition are substantially correct.

It is my further opinion, this being based on personal knowledge of this litigation, and the services performed by Mr. Butterfield therein, that the amount requested for attorneys' fees by Mr. Butterfield is a reasonable minimum for his services in this proceeding.

Should you desire any additional information from me pertaining to this matter, please advise, and I will be glad to forward same to you.

Sincerely yours,  
William T. Kiley"

Respondent called Harold T. Halfpenny as a witness. He testified that he was called by Warren E. Wright on New Year's Day, 1956, and discussed the pending suit with him, and made arrangements to confer the next day in Mr. Halfpenny's office.

The claimant, Butterfield, had space in Halfpenny and Hahn's office, and had worked with that firm on occasions.

He further testified that claimant was interested in the toll road situation, and that he called him at his home, and told him that Warren E. Wright had talked to him, Halfpenny, about representing him. Mr. Halfpenny then asked claimant if he would be interested in the case, and, if so, to come down and talk it over, which he did.

Mr. Halfpenny stated that he was present at the January 3 meeting, but did not recall hearing Mr. Wright state that he would like to have claimant work with Mr. Halfpenny and Mr. Kiley. He, Mr. Halfpenny, had always represented Mr. Wright, and agreed to represent him in the case. He further stated that he had discussed other counsel with Mr. Wright prior to the meeting of

January 3. Mr. Wright had asked whether he, Halfpenny, could work with Mr. Kiley, to which the witness replied that he would be very happy to work with Mr. Kiley, and that "we were going to have Mr. Butterfield work with us also."

He further stated that, after claimant had rendered his statement to Warren E. Wright, a discussion was had between Mr. Halfpenny and Mr. Butterfield concerning it. Mr. Halfpenny's testimony regarding this conversation is as follows: "I told him at the time that we were in charge of the litigation, and that we would try to work out something in the way of a fee, that I felt the figure he had sent was, under the circumstances, that he probably was entitled to the amount, but in the realities of Mr. Wright's position as Treasurer and his future, and the problem that was involved, that I felt that we had to do it kind of as a public service, and that we couldn't expect to get paid for what we were ordinarily entitled to, and that I would work something out with Mr. Wright over the period of the year that we would get paid, and whatever we received he would receive one-third of it, and that was done." Mr. Halfpenny further testified as follows: "Mr. Wright's position on this was that Mr. Butterfield was in this by our firm, and, at the time this discussion was going on, that he thought it was our obligation to pay his fee."

Also pertaining to this witness' testimony is respondent's exhibit No. 8 admitted without objection by claimant, which exhibit is a letter from the witness, Harold Halfpenny, to the Attorney General in response to a written inquiry from the Attorney General. It reads as follows :

"Dear Sir:

This **will** acknowledge receipt of **your** letter of November 20 in regard to the above entitled matter, enclosing copy of petition filed by Edwin

S. D. Butterfield in the Court of Claims, State of Illinois, for legal services rendered concerning the case of *People ex rel Latham Castle, Attorney General, vs. Warren E. Wright, State Treasurer*, in which you requested any information I may have pertaining to the validity of Mr. Butterfield's claim.

Please be advised that Mr. Warren Wright did not retain the services of Edwin S. D. Butterfield in this matter. However, we engaged Mr. Butterfield as associate counsel, and paid him the sum of \$1,500.00 for his services.

I have no desire to enter into a controversy as to whether his claim for \$7,500.00 is fair and reasonable for services rendered, as it was our feeling that we were entitled to a very substantial fee for the services rendered in this matter; but at the time the Attorney General indicated that he would not allow the payment of such fees.

If there is anything further that you desire in regard to this matter, feel free to communicate with me,

Very truly yours,  
/s/ Harold Halfpenny"

He further testified that their bill was paid on December 12, 1956, and that there had been discussion throughout the year in regard to fees, that the problem was whether anyone could be paid. In the fall of 1956 the Attorney General rendered an opinion to the Treasurer, which was admitted in evidence as respondent's exhibit No. 5-E, and which reads as follows:

"Dear Sir:

I reply to your inquiry as to whether the fees that you incurred in defending in your official capacity the case of *People vs. Warren Wright*, 8 Ill. (2d) 454, may be paid from appropriations to the State Treasurer's office.

As appears from the Supreme Court's opinion above cited, that case was an action against you in your official, not in your private, capacity as State Treasurer to compel you to take action in that capacity to effect the sale of toll road highway bonds.

That the questions raised by you and your counsel were substantial appears from the fact that arguments in your behalf elicited two dissents from the Supreme Court.

Ordinarily, State officials must be defended only by the Attorney General and his assistants. *Fergus vs. Russel*, 270 Ill. 304; *People vs. Toll Highway Commission*, 3 Ill. (2d) 218, and authorities collected and discussed in that case, at page 236. But, in the above mentioned litigation, the Attorney General conceived it to be his duty to appear for the relator, a conception that was approved by the Supreme Court's decision in that case. He could, therefore, not appear as your counsel.

If the State Treasurer, under these circumstances, had been powerless to employ counsel, the State itself would have been deprived of the important right of obtaining a binding decision of the highest court.

The action of the State Treasurer in this case was not a willful one nor a violation of the duties. He was entitled to receive the guidance of the court of last resort, and the welfare of the State itself depended on his obtaining such a decision.

Under these facts, it appears inevitable that the State Treasurer was compelled to employ counsel. It is my opinion that the Supreme Court would hold that under these conditions the State Treasurer would be authorized to employ an attorney, and necessarily it follows that he is authorized to pay him out of any available appropriation to the State Treasurer's office.

It is, therefore, my opinion that the State Treasurer, out of the funds appropriated for the conduct of his office, may pay the counsel, who represented him in the case of **People vs. Wright**, 8 Ill. (2d) 454. To hold otherwise would be to disable the State in the performance of its necessary governmental functions, and would deprive public officials in cases such as this of the right to resort to the courts for a binding determination of vitally important matters. It cannot be believed that the law of our State could be so construed as to make submission to the courts impossible in circumstances such as this.

Yours truly,  
/s/ Latham Castle  
Attorney General"

At the time the Attorney General's opinion was given, the maximum amount available in the Treasurer's appropriation for payment of legal fees and expenses was the amount of the statement rendered by Halfpenny and Hahn, namely, \$5,188.07, which statement was prepared, submitted and paid.

It is apparent from the above that the evidence is in conflict on the point of whether or not claimant was to **look** to Warren E. Wright and the State, or to Harold Halfpenny and his firm for his fees.

As claimant points out, his testimony regarding the conversation of January 3, 1956 with Warren Wright is not directly contradicted by Mr. Halfpenny. Mr. Halfpenny, who was present, stated that he did not recall hearing that portion of the conversation. Mr. Halfpenny was under the impression that he was in charge of the litigation, and that it was his responsibility to bill the client and pay claimant.

Warren E. Wright was not called as a witness by either claimant or respondent. He was out of town on

the date of the hearing, and neither party moved for a continuance.

From the evidence before us, we find that claimant was hired by Warren E. Wright as Treasurer of the State of Illinois. Although Mr. Halfpenny was under the impression that claimant was brought into the case by him, the significant fact is that claimant was requested by Mr. Wright to perform legal services on his behalf in conducting the defense of the case.

Apparently claimant had good reason for understanding such to be the case, inasmuch as Mr. Kiley, the administrative assistant of Mr. Wright, also had the same understanding. Claimant rendered the services, and forwarded his statement to Mr. Wright while under this impression.

The conversation with Mr. Wright from which this understanding was gained was such as to lead a reasonable person to believe that his services were requested by Mr. Wright, and that a fair fee would be paid for those services. This establishes a direct hiring, regardless of what Mr. Halfpenny understood Mr. Wright to have intended. Respondent contends that claimant's designation as "of counsel" on the briefs is inconsistent with and precludes him. We do not agree. This designation has nothing to do with who is to pay an attorney's fee. In many instances it is applied to the particular lawyer, who prepares the briefs and presents the matter to the court.

It is all a matter of agreement as to who is to pay an attorney's fee whether the lawyer be designated "of counsel" or something else.

Respondent contends that Mr. Wright had no right to contract for these services at the State's expense. The Attorney General could not represent him as State Treasurer, inasmuch as the Attorney General had commenced

the action against him. Mr. Wright was informed of this prior to hiring claimant, and claimant's exhibit No. 4, a letter dated January 9, 1956, from the Attorney General to Mr. Wright, confirmed the fact that the Attorney General could not represent him.

Ordinarily, the State Treasurer would be required to look only to the Attorney General for representation in any matter involving the State Treasurer in his official capacity. *Fergus vs. Russel*, 270 Ill. 304.

It was the Attorney General's opinion, however, as expressed in his letter dated September 11, 1956, being respondent's exhibit No. 5-E, that, because of the situation presented, the State Treasurer would be authorized to employ an attorney to represent him in the matter, and pay the attorney's fee from any available appropriation to the Treasurer's office.

We agree with the Attorney General's opinion. A State officer, charged with the responsibility of administering his office as a public trust for the people of Illinois, is under an obligation to defend such an action as this in which he is involved in his official capacity, and which concerns matters affecting the welfare of the State of Illinois.

If the Attorney General advises that he is unable to appear on behalf of such State officer because of a conflict of interest, then the State officer must necessarily resort to other counsel of his own choosing in order to properly defend such an action.

The reasonable attorney's fees in such an instance should be at the State's expense rather than the expense of the State officer, since ordinarily the Attorney General would perform these services at no expense to the State officer in the absence of such conflict.

We have examined the briefs and opinions of *People ex rel Latham Castle, Attorney General vs. Warren E.*

Wright, and have concluded from such examinations that Warren E. Wright, as State Treasurer, was obligated to appear by counsel in his official capacity, and under the circumstances was entitled to engage counsel of his own choosing at the expense of the State of Illinois.

With respect to the amount of the fee, claimant testified that he expended approximately **240** hours in performing the required legal services involved, for which services he rendered his statement in the amount of \$7,500.00. Three attorneys, namely, William J. Kiley, Harold Halfpenny, and John J. Yowell, a past president of the Chicago Bar Association, in addition to claimant, testified that his fees were reasonable for the matters and time involved.

Evidence to the effect that the amount of the fee was excessive was the testimony of respondent's witness, George W. McGurn, Assistant Attorney General, who participated in the litigation of *People ex rel vs. Wright*. His opinion was that the fee should be "somewhere in the neighborhood of \$3,700.00."

We have examined and considered all of the evidence on the question, the opinion of the Supreme Court, and the briefs filed therein on behalf of Warren E. Wright, and have arrived at what we feel is a fair and reasonable amount. We are not bound by the opinion evidence offered by either party, although we have considered it in arriving at our decision. In our judgment a fair and reasonable fee for the legal services rendered by claimant is \$5,500.00. He has already received \$1,500.00 on account. He is, therefore, entitled to an additional \$4,000.00.

Respondent next contends that claimant's acceptance of the \$1,500.00 check from Halfpenny and Hahn constituted payment in full for his services. The evidence on this point is that Halfpenny and Hahn delivered the

check to a creditor of claimant, and that claimant is willing to consider it a part payment of the fee due him from the State. He did not know that Halfpenny and Hahn had submitted their statement to the Treasurer, or the amount of the statement, until after it was done and the money paid.

At no time did claimant give any indication of withdrawing his statement for attorney's fees submitted in April, 1956. We find no sufficient evidence in the record to establish this as an acceptance by claimant as payment in full of his fee.

Lastly, respondent contends that the authority of Mr. Wright as State Treasurer to contract for legal services was limited to the availability of unexpended funds in the State Treasurer's appropriation, and that the payment of the Halfpenny and Hahn bill exhausted the amount, which could be paid, and, therefore, no further amount is available for payment to claimant, even if he is entitled to it.

Respondent relies on the Statutes and Constitutional provisions, which prohibit State officials from contracting indebtedness against the State in excess of the amount appropriated by the Legislature. This case, however, is not in violation of these. Here we have a situation where neither Mr. Wright nor the Legislature could anticipate the necessity of his defending an action brought against him in his official capacity by the Attorney General, who ordinarily would represent him. The Attorney General himself recognized the necessity for Mr. Wright to employ counsel at public expense, although in his opinion, respondent's exhibit No. 5-E, went only so far as to state that Mr. Wright could pay the fees out of available appropriations. Although Mr. Wright could pay no more funds than were in his unexpended appropriations, we do not believe that the power to incur legal fees should

be limited to the available and unexpended appropriations. Since Mr. Wright was entitled to defend this action in his capacity as State Treasurer by counsel of his own choice, he had the authority to retain attorneys to represent him until the action was concluded, irrespective of the status of his appropriations.

Under the law, as we see it, Warren E. Wright, as State Treasurer, had express authority to defend this action by counsel of his choice, even though it meant incurring an indebtedness against the State of Illinois for reasonable attorneys' fees that exceeded his appropriations.

Therefore, the amount yet due claimant in the sum of \$4,000.00 is a valid claim, and should be paid. The claim is hereby allowed in the amount of \$4,000.00.

#### COXCURRING OPINION

TOLSON, C. J.

Respondent has urged that any award made in this case would violate the Constitution, which prohibits State officials from contracting an indebtedness in excess of the amount appropriated by the Legislature. This rule of law was announced in *Fergus vs. Brady*, 277 Ill. 272, and, of course, would be a complete bar to the claim, if, in fact, there was no appropriation made by the Legislature to pay such a claim.

The Court will take judicial notice of the fact that in 1955 the Legislature made an appropriation for the office of the Treasurer of the State of Illinois for the biennium. We have found from the evidence that on January 3, 1956 the State Treasurer engaged the services of claimant, and, on that date, there remained in his appropriation the following sums:

1. Contingent Fund .....\$ 20,000.00
2. Contractual Fund ..... 103,235.74

We have previously held in the case of *Schutte and Koerting, Et Al*, (Consolidated Cases) vs. *State of Illinois*, 22 C.C.R. 591, that a claim would be allowed if at the time of the contract there were sufficient funds remaining unexpended in the proper appropriation to pay for the same.

In the light of this evidence, it is apparent that the State Treasurer was obliged to secure separate counsel, as the Attorney General was unable to represent him. There were sufficient funds in the contractual account, and, if need be, funds could have been transferred from the contingent fund to pay this claim. An award should be made in this case.

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(No. 4838—Claimant awarded \$710.00.)

DONALD W. HUTCHINSON, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion* filed March 24, 1961.

CHARLES M. LOVERDE, Attorney for Claimant.

WILLIAM L. GUILD, Attorney General; LESTER SLOTT,  
Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*negligent* operation of vehicle. Evidence showed that driver of National Guard vehicle was negligent in not keeping his vehicle under control.

NEGLIGENCE—*sudden* emergency. A driver acting in a sudden emergency need not use the same degree of self possession and coolness as when there is no imminent peril, but he is required to act as an ordinarily prudent person would act under similar circumstances.

FEARER, J.

Claimant, Donald W. Hutchinson, has filed an amended statement of claim for property damage to his vehicle in the amount of \$710.00.

It appears that, on August 28, 1957, at or about the hour of 10:00 A.M., at the intersection of U. S. Route No. 66 and Towando Avenue, which is located about five

miles north of Bloomington, McLean County, Illinois, claimant was proceeding in a northerly direction in the right-hand lane on Route No. 66. Route No. 66 at that point is a four-lane highway, which is divided by a gravel strip of approximately five feet in width. Milton Wasserman, a member of the Illinois National Guard, was proceeding in a southerly direction on U. S. Route No. 66, driving a 2½ ton army vehicle. It was drizzling at the time of the accident, and, as a result of the same, the highway was wet and presumably in somewhat of a slippery condition.

It appears that the truck driven by Wasserman skidded across the gravel divider and struck claimant's vehicle on the left side immediately behind the driver's seat. There seems to be no dispute that both drivers, immediately prior to the accident, were traveling at a lawful rate of speed.

Claimant, being a resident of California at the time this matter was heard, supplemented his personal appearance with an evidentiary deposition, which was properly admitted into evidence. In the deposition claimant swore to the fact that, as he was proceeding along his side of the highway, he observed the army vehicle when it was a considerable distance ahead. Claimant also stated that he saw the army vehicle go into a skid, and, as he was crossing a point in the highway, identified as the intersection of U. S. Route No. 66 and Towando Avenue, the army truck suddenly veered over to his side of the highway and struck his vehicle behind the driver's seat. At the point of impact claimant's car was just past the intersection and proceeding in a northerly direction. Claimant stated that he may have applied his brakes instinctively when he saw the truck skidding, although he didn't have any particular recollection of it, because he did not consider himself to be in any danger.

Wasserman's version of the accident is that, as he approached the intersection of Towando Avenue and Route No. 66, a vehicle, identified as a Chevrolet with an unidentified driver, was proceeding in a southerly direction in front of him. The truck driver also stated that the Chevrolet vehicle, prior to the point of the accident, signaled for a right-hand turn. Wasserman, seeing that the road was clear, moved to the left lane in order to pass the Chevrolet. As he was about to pass, the Chevrolet moved toward the left and partially blocked the left-hand, southbound passing lane, forcing the army driver to apply his brakes in an attempt to avoid colliding with the Chevrolet. As a result of this emergency situation, causing Wasserman to suddenly apply his brakes, the 2½ ton truck went into a skid causing the truck to leave the highway, veer across the gravel divider, and strike the left side of claimant's 1956 Chrysler 8-door sedan.

The law is clear in Illinois that a driver acting in a sudden emergency need not use the same degree of self possession and coolness as when there is no imminent peril, but he is required to act as an ordinarily prudent person would act under similar circumstances. On the other hand, the fact that a driver is confronted with a sudden emergency does not lessen his duty to use ordinary and reasonable care, but the emergency is one of the circumstances to be considered in determining whether he did exercise such care. The fact that a driver is guilty of error of judgment, or might have taken some other course of action, does not indicate a lack of due care when an ordinarily prudent person would have acted similarly under the circumstances. However, a driver, whose failure to use due care causes him to swerve suddenly to avoid one car, cannot escape liability for striking another, which was traveling in its proper place on the highway.

The facts in the instant case show that claimant was proceeding in his proper lane of traffic at a lawful rate of speed, and was exercising due care as an ordinarily prudent person would have done under similar circumstances.

The facts also show that the driver of the army vehicle was a contributing factor to the emergency situation, which was created by the unidentified driver of the Chevrolet proceeding immediately in front of him, in that he had knowledge that the highway was wet and possibly slippery, and that a sudden application of the brakes would very likely cause his vehicle to skid and possibly go out of control.

Therefore, taking all the facts and circumstances into consideration, the necessary conclusion in this case is that claimant did not contribute to the accident in any way, but that Milton Wasserman, driver of the army vehicle, 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 negligently caused the damage to claimant's car.

Commissioner George W. Presbrey heard this case, and recommended that an award of \$710.00 be paid to claimant, Donald W. Hutchinson, for damages to his motor vehicle, which under the facts and circumstances of this case is a proper recommendation.

It is, therefore, the order of this Court that the sum of \$710.00 be awarded to Donald W. Hutchinson.

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(No. 4843—Claimant awarded \$17,403.30.)

**ALBERTA HANSEN**, Administrator of the Estate of Edward A. Boegen, deceased, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion fled March 24, 1961.*

**DIXON, DEVINE AND RAY**, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General, for Respondent.

STATE PARKS AND MEMORIALS—*nature trails*. Respondent has duty to warn of a danger that exists along a trail, which could not be discovered by public.

NEGLIGENCE—*injury on nature trail*. Evidence sustained finding that gorge along nature trail was obscured by foliage, and should have been marked by respondent.

NEGLIGENCE—*assumed risk of hiker*. Hiker does not assume a risk, which cannot be known to him.

WHAM, J.

This is an action commenced and maintained by claimant, Edward Boegen, until his death, which resulted after the evidence was heard by the Commissioner from causes other than those upon which this action is predicated. It was continued thereafter by the administrator of his estate against respondent, State of Illinois, to recover \$25,000.00 in damages for personal injuries, which Edward Boegen sustained on May 24, 1958, when he fell from a nature path or trail into a canyon on White Pines Forest State Park near Dixon, Illinois, while supervising several boy scouts in his troop on a hike through the park.

The complaint charged that claimant stepped on a portion of the path or trail adjoining a gorge, and a crumbling of dirt on the outer edge of the path, or a slippery condition, or both, caused him to slip and fall into the gorge, a distance of 100 feet. The complaint further charged that the State of Illinois had allowed a hazardous and dangerous condition to exist, and was guilty of negligence in one or more of the following respects :

(a) Failed to provide notice or warning of the hazardous condition of the trail.

(b) Failed to provide notice or warning of the proximity of the dangerous gorge to the portion of the trail in question.

(c) Failed to keep the trees, foliage and underbrush surrounding the trail in question cleared sufficiently, so that travelers thereon might observe the **proximity** of the dangerous gorge to said trail.

(d) Failed to provide guard rails, platforms, widened trail, or any other means for hand-grips or protection for travelers on the trail at the said point of proximity to said dangerous gorge.

(e) Kept and maintained said trail in a dangerous, hazardous and unsafe condition, although it knew, or, in the exercise of reasonable care, would have known thereof for a long time prior to said injury to claimant.

(f) Maintained said trail in a slippery and otherwise dangerous and defective condition at the point in proximity to said gorge, although it knew, or, in the exercise of reasonable care, would have known thereof for a long time prior to said injury to claimant.

(g) Otherwise failed to exercise reasonable care in establishing and maintaining the path or trail over which claimant was traveling at the time aforesaid.

The facts concerning the happening of the accident, as shown by the evidence, are as follows:

On May **23**, 1958, Edward Boegen, Scout Master, 29 years of age, and his troop of six boy scouts attended a camp-out with three other troops at White Pines State Park, near Oregon, Illinois, paying a fee to enter the park. Boegen had been there ten years before, but was not familiar with its trails.

The next morning Boegen took his troop on a nature study hike. They used a map on which the buildings, creek, shelters and trails were shown. The map was

used in selecting their route, including the trail on which Boegen was injured.

They started from the lodge on a wide main trail, turned off on a foot path, which was shown in claimant's exhibit No. 1, then onto a secondary trail on which Boegen was injured. Main trails differ from secondary trails only in that they are at least partially man made, wider, and maintained to keep weeds low. Secondary trails are formed by constant usage of hikers. There were no designations on the map furnished claimant, or signs in the park to distinguish the trail as main or secondary.

There were no signs showing directions to follow, or indicating one trail from another, or warning of any dangers. A sign with the legend "Danger—Loose Rock" was 25 yards away from the place where Boegen and his troop entered the trail upon which he was injured. They did not pass it, and did not see it. This was the only sign in the vicinity pertaining to the trail.

The trail's dirt surface was one and a half to two feet wide, and was well worn, so that the underbrush did not close in on it. On both sides, however, was a heavy foilage, which did not grow on the path itself. It was wet or damp in places in the area where Boegen fell, but there was no standing water. To the left of the trail the ground sloped steeply up. Pine Creek paralleled the trail on the right. They walked in single file with Mark Omoto, one of the scouts leading, and David Madsen, the last of the scouts. Boegen was 20 feet behind Madsen and about 40 feet from Omoto. Claimant's exhibits Nos. 2 and 4, photographs of the trail showing where Boegen fell, were offered and admitted into evidence. At the point where he fell, the land had been washed back by natural drainage causing the cliff edge to cut back sharply from Pine Creek into the edge of the trail and out into

a narrow deep gorge, which is shown in claimant's exhibit No. 3. There were no guard rails or protective devices in that area, nor were there any warning signs.

The Park Custodian, Earl Kappenman, testified that this gorge could not be seen from the trail until a person was within six feet of it, and then only if a person was looking for it.

As the scouts entered this area, they did not see this gorge, nor did they see any indication of danger, as they approached it. Omoto led the scouts around a tree to the left of the trail, and then back onto the trail, because the path was wet at that point. After returning to the trail, he bent over to tie his shoe lace, and for the first time saw the gorge. He then told Reh, the second scout, to **look**, and the rest clustered around him for a few seconds and went on. Madsen testified that, as he reached the tree, he turned, and saw for the first time the gorge where prior thereto he had thought there was only a little shelf of land. He gave as his reason for going around the tree the fact that he was afraid he might slip and fall off onto what he thought was a shelf of land a few feet from the trail. It was only after passing around the tree that he saw what the other scouts had seen, namely, the deep gorge immediately adjacent to the edge of the trail.

Claimant did not hear any of the scouts discussing this gorge, nor did he see them clustered on the trail. He saw Omoto lead the troop around the tree, and considered at the time that this was poor hiking practice, because they might slip on the incline and fall. He looked around to the left and right and ahead without stopping, and saw no apparent reason why they should go around the tree. He surmised that they were playing follow the leader, and, as he walked on, was thinking of what to tell the boys, because he did not want them to do the same

thing on their return trip. He testified that he saw no gorge or change in the lay of the land or foliage, and the first thing he knew he was flat on his back. He states that he did not slip on the damp path, but thought that solid ground gave way and collapsed beneath him. He slid along on his back until he hit something and passed out. He landed at a point **46** feet below the trail.

Madsen testified that he heard a sound, turned, and saw claimant going off into space past the cliff. The scouts went down into the bottom of the gorge after him, as did a troop of girl scouts, who had been hiking in an opposite direction on the same trail. He received very serious injuries to his person, and was removed to the Dixon Hospital, and then to the Illinois Research Hospital at Chicago where he remained up to and including the date of the hearing. He thereafter died in the Oak Forest Institution on October 15, 1959.

Respondent contends that the cases of *Kamin vs. State of Illinois*, 21 C.C.R. **467**, and *Stedman vs. State of Illinois*, 22 C.C.R. **446**, control, and there can be no recovery, since there was no duty to maintain a guard rail at that point, and that the evidence fails to establish a knowledge or constructive notice of an unsafe condition. Further, that the failing to place guard rails at the edge of the canyon was not the proximate cause of claimant's injury, but a mere condition, which rendered possible the happening of the accident.

We have carefully considered the record in this case and the authorities cited by respondent. With respect to the Kamin case, we believe it is not completely in point. In the Kamin case the canyon into which claimant fell was apparent to her and clearly visible. In the instant case the evidence establishes that it was not visible to claimant. Not only does the evidence of claimant establish the fact that it was not visible, but also he is supported by

the scouts, Omoto and Madsen, and claimant's witness, Kappenman himself. Moreover, the photographs, which are before the Court, fail to reveal a canyon due to the dense foliage adjoining the trail.

In our view of the case, it is immaterial whether claimant slipped while he was walking on the path, or a portion of the path crumbled from under him. Claimant's allegation in the complaint, which we consider material under the proof, is the charge that the State negligently failed to provide notice or warning of the proximity of the dangerous gorge to the portion of the trail in question.

We do not consider that the trail itself was in a hazardous condition, nor do we consider that the State was under any duty to keep the trees, foliage, etc., surrounding the trail in question cleared to provide a view, nor do we feel that the State was required to provide guard rails at this particular place. Claimant's case must stand or fall on the allegations set forth above, and, therefore, the Kamin case does not pertain to this situation.

We have also considered the Stedman case on which respondent relies, but it likewise fails to control this situation. In the Stedman case claimant intentionally walked off of the pathway in the night time when he knew that he was in the proximity of a precipice. In this case, however, claimant was walking where he had a right to walk, and did not step off the path. Rather, he fell, and then went off the path down into the canyon.

The question before this Court is whether or not respondent owed a duty at this particular place in the park to warn of the proximity of the canyon.

Obviously, the State, in maintaining a nature park, is not obligated to warn of every dangerous place within it. It is, however, obligated to warn of a danger that

exists along a trail, which it knows is being used by the public, who would have no knowledge of the existing danger.

The evidence clearly shows that respondent knew that this particular trail was used by boy scouts, girl scouts and other members of the public. Although it did not create the path in the first instance, it did assume some control over it after it had been created through years of usage by the public with its consent. The testimony establishes that it had even erected a sign at one point warning of loose rock along this same path, and the testimony of Mr. Earl Kappenman, Park Custodian, indicates that it was inspected from time to time.

It, therefore, evolves upon us to determine whether or not the evidence has established such a dangerous situation, as would call for a warning by the State.

Here was an unusual condition. **All** along the trail, up to the particular point involved, the path was a safe distance from the edge of the canyon. **It** was estimated by the witnesses to be as much as a block from the trail. Users on this path were, therefore, lulled into a sense of complacency by the distance separating the edge of the path from the place of danger up to the point where suddenly a cavern immediately adjoined the one and a half to two foot pathway bordered on the opposite side by an upward slope. This created a condition where the slightest misstep would result in a certain fall to the bottom of the canyon and resulting serious injury.

This was not one of the inherent risks to hiking assumed by the hiker, since it constituted a risk unknown to him. Only those risks that are known and realized by the person coming upon the land in the exercise of due care can be classified as those which such a person would be held to assume under the **law**.

We believe from the evidence that respondent was negligent in failing to provide notice or warning of the proximity of the dangerous gorge to the portion of the trail in question. This is not to say, however, that respondent must warn of every dangerous condition in a park. In many instances it would place an unreasonable burden on the State to require it to warn or protect against injury. In other instances, even though a dangerous condition exists, the State should not be placed under a duty to either warn or guard against an injury, where such danger is as obvious to the person using that portion of the park as to respondent. Then, too, cases may arise wherein paths have been created by hikers, and have not been recognized as such by respondent.

The next question to resolve is whether or not claimant 'was in the exercise of reasonable care for his own safety. We have carefully reviewed the testimony on this point, and find that there is no evidence indicating that he was doing anything other than what an ordinary person would do under the same or similar circumstances. It cannot be said that he was guilty of contributory negligence in not seeing the gorge at the point where he fell, since all of the testimony in the case establishes that the others ahead of him did not see it until they were right on it, and particularly in view of the fact that respondent's own witness testified that it could only be seen when within six feet of it. Moreover, as hereinabove stated, the pictures introduced into evidence disclose a situation that would not be apparent to a person in the exercise of ordinary care until the last moment. Nor can it be said that the mere falling on the trail, whether by slipping, or by a portion of the trail giving way, could be chargeable as contributory negligence.

We believe that claimant has borne the burden of proof, and that an award should be made in this case.

With respect to the amount of damages, the rule is well settled that a cause of action for personal injuries survives to the personal representative of a deceased, where the death of the injured was not caused by the injuries received by the decedent.

In such action recovery is limited to the loss of earnings, medical expense, disability, and pain and suffering incurred and sustained from the date of the accident to the time of death.

Alberta Hansen, Administrator of the Estate of the original claimant, Edward Boegen, deceased, was substituted as party claimant after the suggestion of death had been filed.

In her affidavit filed in support of her petition, claimant administrator stated that:

“The said claimant, Edward A. Boegen, died on or about October 15, 1959 from causes other than the injuries, which were the basis of the complaint filed in this cause; and that attached hereto as exhibits A and B are copies of letters, which were received by the affiant and her attorneys, which show the result of an autopsy of the said Edward A. Boegen, claimant.”

The pertinent portions of exhibits A and B, attached to said petition, read as follows:

#### EXHIBIT A

“The microscopic study of the organs have been finished, and the findings are summarized as follows:

1. Mr. Edward Boegen suffered of idiopathic epilepsy, i.e., no lesion could be found to explain the epilepsy. The microscopic changes found in the brain were just secondary to the repeated convulsions, but they were not the cause of the epilepsy. These findings are, therefore, in accordance with our present knowledge about the so-called idiopathic epilepsy.

2. The paralysis of the lower extremities found its explanation in the extensive damage of the spinal cord (demyelination), which in turn was secondary to the injury suffered by the patient.

The patient had a severe liver disease, so-called post-nectotic cirrhosis, which has developed secondary to hepatitis of viral etiology.

(Signed) Respectfully yours,  
Paul B. Szanto, M.D.  
B. Martinez, M.D.  
Pathologists"

#### EXHIBIT B

#### "OAK FOREST INSTITUTIONS

Oak Forest, Illinois

February 3, 1960

Mr. George K. Ray  
Attorney at Law  
121 East First Street  
Dixon, Illinois

My dear Mr. Ray:

I am attaching herewith a copy of the autopsy report in the case of Edward Boegen, who died in this hospital on October 15, 1959. The **cause** of his death was bronchopneumonia with a background of idiopathic epilepsy. Although this patient gave a history of severe injuries to the spine and to the thoracic cage following an accident during May, 1958, with resulting **para**plegia, it is our opinion that this did not directly contribute to the cause of the death of the patient.

Our confirmed and substantiated diagnosis during the period of **his** hospitalization were: Spinal cord lesion due to accident, 1958, paraplegia due to cord injury and associated with incontinence of urine and bowel, multiple decubiti, idiopathic epilepsy, bronchopneumonia.

I am also attaching herewith a copy of a letter **written** to Mrs. A. Hansen, 3023 N. Oakley Avenue, Chicago 18, Illinois, sent to her at the request of Dr. F. H. Ketola of 1791 W. Howard Street, Chicago, Illinois, by our pathologist, which gives additional microscopic findings resulting from the post mortem examination.

It is recommended that should you desire additional information, **our** entire chart on this case is available to you.

Respectfully yours,  
Eugene J. Chescrow, M.D.  
Medical Superintendent"

No further testimony was adduced by either party, and respondent has filed no motion nor objections to the **claimant** administrator proceeding with this cause as a survival of the personal injury action commenced by Edward Boegen, deceased.

The date of death appearing from the petition of the claimant administrator is October **15**, 1959. The injury occurred on May **24**, 1958.

The evidence established that Boegen had been in good health, was permanently employed at an average of \$78.00 per week, and living with his widowed mother. His medical expenses to the date of the hearing held on March 10, **1959** totaled \$1,787.30. The evidence established that he would require extensive medical attention and care the rest of his life, although at the time of the hearing Dr. Eric Oldberg, Director of the Division of Neurology and Neurological Surgery at the Illinois Research Hospital, testified that Boegen was at the time of the hearing receiving all hospital, professional and medical services without charge, except those noted above.

Dr. Eric Oldberg further testified that, "this patient had a transverse complete lesion of the spinal cord at the fifth dorsal segment, which means that he had no voluntary muscle power below a portion of his body just below the line adjoining the nipples; that he had no sensation below that level, and that he had no bowel or bladder control. In addition to this, the patient had some fractured ribs on the left side, and he had a head injury, which was operated upon in order to rule out the possibility of there being a blood clot, which could be drained. In addition to this, he had an operation on his bladder, so that urinary infection could be better controlled. He also had plastic surgery for extensive bed sores. He had pain when he came into the hospital, but, because of his type of injury, such pain would not recur."

We find from the evidence that his lost wages from the date of the accident to the date of his death at \$78.00 per week total \$5,616.00. His medical expense, as established by the evidence, was **\$1,787.30**.

It is difficult to arrive at a sum of money for the physical disability, pain and suffering, etc., of deceased for the 72 weeks he lived after the injury. There can be no consideration of the fact that he would be permanently disabled, since death terminated all future damages.

We believe that the sum of \$10,000.00, in addition to the lost wages and medical expense, is warranted by the evidence. Therefore, we recommend that the claim of Alberta Hansen, Administrator of the Estate of Edward A. Boegen, deceased, the original claimant, be allowed in the amount of **\$17,403.30.**

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(No. 4871—Claimant awarded \$9,444.42.)

WILLIAM H. EGAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 24, 1961.*

RUDOLPH J. WESTPHAL, Attorney for Claimant.

GRENVILLE BEARDSLEP, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*damages by falling aircraft.* Where evidence showed that National Guard Aircraft, due to pilot error, fell on claimant's building and destroyed it, an award will be made.

DAMAGES—*determination of unliquidated damages.* Where the right of recovery exists, the best evidence, which the subject will admit, is receivable, notwithstanding the rule of law that a witness may not speculate as to possible damages.

TOLSON, C. J.

On June 4, 1959, William H. Egan filed his complaint in two counts against the State of Illinois seeking an award for damages to his property, which were caused by a falling aircraft belonging to the State of Illinois.

It appears from the evidence that Lieutenant Hugh B. Lott, Jr. was a member of the Illinois Air National Guard, and, on the 14th day of March, 1959, was flying on a routine training mission. He was returning to the

Greater Peoria Airport in Peoria, Illinois on the date in question, when his plane was allowed to “stall out”, and fell upon a certain building belonging to claimant. The fall of the plane completely demolished the building and all of the contents.

The following is a Departmental Report from the office of the Adjutant General, the tenor of which admits liability because of pilot failure :

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”

The case was heard on February 18, 1959 by Commissioner George W. Presbrey. A copy of his report is as follows:

## COMMISSIONERS REPORT

"The evidence in the above entitled cause was heard and taken on September 18, 1959, in the City of Peoria. Rudolph J. Westphal represented claimant, William H. Egan, and William South, Assistant Attorney General, represented respondent, the State of Illinois.

"Claimant, William H. Egan, is the owner of a small farm located approximately one and one-half miles from the Greater Peoria Airport, Peoria, Illinois. On March 14, Lieutenant Lott was flying an F-84F jet aircraft as a member of the Illinois National Guard. According to the Departmental Report, and this appears to be the only proof on this point, Lieutenant Lott allowed his aircraft to 'stall out' while turning on the final approach for landing at the Greater Peoria Airport. According to the Departmental Report, the Lieutenant did not maintain sufficient air speed and proper altitude to effect a safe landing at the airport. As a result, the jet aircraft crashed on the property owned by claimant, causing extensive damage. The items damaged or destroyed, and repairs required are set forth in claimant's exhibit A, which is attached to his complaint. A real estate agent testified that the property in question was worthless, due to the loss of the aluminum building, approximately 20 by 50 feet in dimension. In general, the amounts claimed were substantiated by the testimony. There might have been a few minor discrepancies. The inconvenience the claimant has sustained, as well as the expense he will incur in collecting his damages, will more than offset any minor discrepancies in the amount of damages.

"Lieutenant Lott, the deceased pilot, as a member of the Illinois National Guard, was an agent of the State. He was negligent in the operation of said aircraft. It cannot be seriously contended that claimant was guilty of contributory negligence. The sole question is one of damages. It is, therefore, recommended that claimant be awarded the sum of \$9,444.42."

Respondent has not denied liability in this case, but has limited itself to the question of damages, and contends that claimant has failed to establish the true measure of loss for each of the items described in the bill of particulars.

The Commissioner, in his report, found that the amounts claimed were substantiated for the most part by the testimony, and that any discrepancies were minor.

From the transcript of the testimony, it appears as though there was direct testimony as to the value of each of the items mentioned in the complaint, and it would appear as though the claimant has furnished adequate proof as to the measure of damages.

“Where the right of recovery exists, the defendant cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry in the instant case is such that it is difficult, if not impossible, to ascertain with mathematical certainty the amount of the defendant in error’s damages, but this difficulty affords no answer to a cause of action, which results from a breach of duty imposed by law. The unliquidated damages growing out of the commission of a tort are seldom susceptible of exact measurement. The rule is, that, while the law will not permit witnesses to speculate or conjecture as to the possible or probable damages, still the best evidence, which the subject will admit, is receivable, and this evidence is often nothing better than the opinions of persons well informed upon the subject under investigation.”

Johnston vs. *City of Galva*, 316 Ill. 598.

The report of the Commissioner is hereby adopted by this Court, and, an award is, therefore, made to claimant, William H. Egan, in the amount of \$9,444.42.

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(No. 4885—Claimant awarded \$377.95.)

**BADGER PETROLEUM COMPANY, a Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed March 24, 1961.*

BROWN, CONNOLLY AND PADDOCK, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General, for Respondent.

HIGHWAYS—*negligent operation of snowplow.* Driver of snowplow colliding with parked vehicle was guilty of negligence.

NEGLIGENCE—*unavoidable accident.* Where snowplow was traveling fifteen miles per hour around parked vehicle, driver was guilty of negligence, and damage was not due to unavoidable accident.

DAMAGES—*evidence.* Estimates of cost of repairs are not admissible to prove damages.

TOLSON, C. J.

Claimant, Badger Petroleum Company, A Corporation, filed its amended complaint on November 2, 1959 against the State of Illinois seeking to recover the sum of \$411.45 for the alleged negligence of the driver of a snowplow, who was an employee of the State.

The matter was heard by Commissioner George W. Presbrey, and his report is set forth in length herewith:

#### COMMISSIONERS REPORT

"The above entitled cause was heard on February 4, 1960 at Rockford, Illinois. Robert J. Oliver represented claimant, the Badger Petroleum Company, and Samuel Doy, Assistant Attorney General, represented respondent.

"On March 17, 1959, at approximately 12:15 A.M., a gas transport truck, belonging to the Badger Petroleum Company, and being driven by Walter Trueheart, was traveling south on highway No. 26, approximately one mile south of Forreston, Illinois. Route No. 26 is a two-lane highway. The road was icy, and while it had stopped snowing, the snow was blowing at the time.

"It appears that the truck driver noticed a snowplow being operated by an agent of respondent approaching from the south approximately 700 or 800 feet away. As the driver could not tell whether the road was open, he pulled his truck off the road onto the shoulder to wait for the snowplow to pass. It was plowing the east side of the road.

"As it reached the spot where the gas truck was stopped, the plow skidded across the road into the southbound lane, and struck the motor vehicle of claimant then on the shoulder of the road. The truck driver noticed the plow skidding toward him. He attempted to pull ahead and into the ditch. However, he was unable to avoid the plow.

"The driver of the snowplow, Joel A. Toomsen, stated his truck skidded into the southbound lane because the snow had drifted at this point, and was packed and deeper than in most spots. Toomsen stated that he was aware of the drifting condition at this particular spot, as he had just previously plowed the southbound lane of this highway, and knew of the drift. When his plow hit the packed snow, the blade grabbed, and the truck skidded out of control into the truck driven by Mr. Trueheart.

"The defense of respondent appears to be based upon the fact that there was nothing about this particular snowdrift or portion of highway that would warrant, or in any way indicate to the snowplow operator that the blade would grab and throw the truck out of control. The testimony of the truck driver on this particular point starts at page 50 of the transcript, and continues through page 52.

"It appears that the truck driver had insurance to cover him as a driver of a State truck.

"It would appear that the agent of claimant was free of contributory negligence. His truck was not on the highway at the time of the accident, but was parked on the shoulder to allow the snowplow in question to proceed without interruption.

"In the opinion of this Commissioner, the agent of respondent was guilty of negligence. In passing a motor vehicle on the highway, the snowplow operator was under a duty to operate his vehicle in such a manner as to avoid colliding with other vehicular traffic on the highway. The driver of the

snowplow, in passing the parked vehicle of claimant, should have reduced the speed of the snowplow, so that he could safely pass vehicular traffic in the opposite lane.

“Claimant offered petitioner’s exhibit No. 1 for identification into evidence. This exhibit is an estimate, and is not a paid repair bill. The attorney for respondent objected to the introduction of said exhibit. His objection was sustained, but the exhibit was allowed to stand as a rejected exhibit, so that the parties to said cause could argue this point in their briefs. A repair bill marked ‘paid’ can be introduced for the purpose of showing the reasonableness of the cost of the repairs. However, an estimate is not proper for this purpose. Respondent’s attorney points out the distinctions in his brief and argument.

“Claimant did introduce certain paid bills as exhibits. The exhibit showing the value of the tires, which were damaged in the accident, is questionable as to the probative value. However, if \$80.00 is allowed for this amount, together with the paid repair bills, which are in evidence, the total amount of claimant’s damages would be in the sum of \$377.95. It is recommended by the Commissioner that claimant be allowed the sum of \$377.95 as the measure of its damages.”

It is apparent from the report of the Commissioner that Walter Trueheart, the driver of claimant’s truck, was entirely free from any fault.

Respondent contends that its driver, Joel A. Toomsen, was plowing the road at a reasonable speed of 15 miles per hour, and, when the blade grabbed the packed snow and skidded out of control, it was in effect an unavoidable accident, and that, therefore, the State was not guilty of negligence.

The driving of a snowplow at a speed of 15 miles per hour may be entirely proper on an open road. However, when the driver saw the truck parked on the shoulder of the road, he was duty bound to slow his vehicle down to the point where he could control it in the event of an emergency. The Court, therefore, finds that the driver of the snowplow did not use reasonable care under the facts of this case.

As to the proof of damages, the Court agrees with respondent that an estimate is not proper, nor is it the best evidence of proof of damages.

The Commissioner, however, has considered these matters, and has concluded that the claimant is entitled to an award in the amount of **\$377.95**.

An award is, therefore, made to claimant in the sum of **\$377.95**.

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(No. 4903—Motion of Respondent to dismiss denied.)

**JOHN ROBERTS, a minor, by MARGARET ROBERTS, his Mother and next friend, Claimant, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed March 24, 1961.*

**FRED LAMBRUSCHI, Attorney for Claimant.**

**GRENVILLE BEARDSLEY, Attorney General; LESTER SLOTT AND HAROLD A. COWEN, Assistant Attorneys General, for Respondent.**

**NEGLIGENCE, PRACTICE AND PROCEDURE—*failure to give notice of intent to sue by minor.* Requirement that six month notice be given State in case of personal injury claim does not apply to minor.**

**WHAM, J.**

The complaint in this case was filed by John Roberts, A Minor, by Mary Roberts his mother and next friend, to recover damages by reason of personal injuries sustained by said minor when the automobile in which he was riding as a guest passenger was struck by a motor vehicle operated by an employee of the State of Illinois.

Respondent filed a motion to dismiss the complaint on the ground that no notice was served upon the Attorney General and the Clerk of the Court of Claims within six months from the date of the alleged injury, as required by Chap. 37, Sec. 439, Subsec. 22-1, 1959 Ill. Rev. Stats.

Although this Court in the case of **Jacob G. Gossar vs. State of Illinois**, No. 4828, passed upon a similar motion, wherein claimant was an adult, we have not had

occasion to pass on a case, such as this, wherein claimant is a minor.

This statute is, for all practical purposes, identical with the notice statute applying to municipalities set forth in Chap. 24, Sec. 1-11, Ill. Rev. Stats., which has been construed in several cases involving minor plaintiffs.

In the case of *Doerr vs. City of Freeport*, 239 Ill. App. 560, the Court held that a minor 12 years of age was not within the purview of the statute, and stated at pages 563-565 as follows:

“This statute was construed in *Langguth vs. Village of Glencoe*, 253 Ill. 505, and it was there held that the filing of this notice was an essential element of the plaintiff’s cause of action, which must be averred and proved before a recovery could be had, but in the case of *McDonald vs. City of Spring Valley*, 285 Ill. 52, in holding that this statute did not apply to an infant seven years of age, the court said:

‘At common law an infant within seven years of age could not be convicted on a criminal charge, as he was conclusively presumed not to be capable of committing a crime, and between the ages of seven and fourteen he was still presumed to be incapable, but between those ages this presumption might be overcome by proof. These rules of law are based upon the well-known fact of the incapacity of children of tender years, and they are not held to the same accountability as are adults. The recognition, by the law, of the status of infants, and of their exemption up to a certain age from liability under the law, is so well known that it must be presumed that the legislature, in enacting such a statute as the one under consideration, did not intend by the general language used to include within its provisions a class of persons, which the law has universally recognized to be utterly devoid of responsibility.

\* \* \* \* \* The act is meant to apply only to those who are mentally and physically capable of comprehending and complying with its terms . . . . . It cannot be controverted that a minor is incapable of appointing an agent, or an attorney, and it cannot be successfully contended that the statute can be complied with by the filing of the required notice by the father, mother or some friend of the child as next friend. While the parent of a minor is its natural guardian, he cannot be said to be the agent or attorney for the child. A child with a meritorious cause of action, but incapable of initiating any proceeding for its enforcement, will not be left to the whim or mercy of some self-constituted next friend to enforce its rights.’

“The declaration in the instant case was filed on January 11, 1923, and it fully described plaintiffs injuries, and alleged that he was a minor, twelve years of age. Under the reasoning of the McDonald case, supra, we are of the opinion that appellee was relieved from alleging in his declaration or

proving upon the trial a compliance with the statutory provisions with reference to notice.”

This reasoning is sound, and should also apply to the statute involved herein.

Moreover, in construing the legislative intent in the enactment of this statute, we have read it in conjunction with Par. 439.22 of Chap. 37, 1959 Ill. Rev. Stats., which in part is as follows:

“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 sub-section 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.”

It appears to us that, inasmuch as the Legislature exempted infants from the two year limitation requirement governing the filing of complaints until they had reached their majority, surely the Legislature intended to exempt infants from the requirement of giving a six months notice of an action's accrual. A construction to the contrary would lead to the anomalous result of saving to the infant only the right to file, after two years, a complaint based on a cause of action already barred by non-action of the infant, who had no legal capacity to act or refrain from acting in connection with his claim for damages.

We do not believe the Legislature intended such a result, and, we, therefore, hold that the notice statute involved herein does not apply to a minor.

The motion of respondent is, therefore, denied.

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(No. 4929—Claimant awarded \$6,119.70.)

J. P. MILLER ARTESIAN WELL CO., A Corporation, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed March 24, 1961.*

BERGSTROM, EVANS AND NELSON, Attorneys for Claimant.

WILLIAM G. CLARK, 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.

TOLSON, C. J.

On August 8, 1960, claimant, J. P. Miller Artesian Well Company, A Corporation, filed its complaint seeking an award in the amount of \$6,119.70 for services performed at the Honor Farm of the Illinois State Penitentiary, Joliet, Illinois.

From the Commissioner's Report, it appears that there are no controverted facts in this case, and they may be summarized as follows :

Claimant was called upon to make repairs to a pump on the Honor Farm. Upon examination, it was discovered that the bearings and shafting whip were out at the bottom of the well, and also that the bowl assembly was destroyed.

Claimant completed the **work**, and submitted a statement in the amount of \$6,119.70, which was composed of two items, labor \$1,803.00 and materials \$4,316.70.

The Departmental Report filed herein indicates that the Division of Architecture and Engineering found the bill to be fair and equitable, but that the Department of Public Works and Buildings disagreed with the amount of the statement.

At a later date, the differences were resolved, and the Department of Safety was directed to pay the bill. At this later date, it was then discovered that the appropriation had lapsed, and it was impossible to honor the claim.

This Court has repeatedly held that, where the evidence shows that the only reason a claim was not paid

was because the appropriation had lapsed prior to its presentment for payment, an award will be made. (*Material Service Corporation, vs. State of Illinois*, 22 C.C.R. 735; *University of Chicago vs. State of Illinois*, 22 C.C.R. 683.)

Commissioner Herbert G. Immenhausen heard the evidence in the case. He found that claimant had proved its claim for time and material, and recommended an award.

An award is, therefore, made to claimant, J. P. Miller Artesian Well Co., A Corporation, in the amount of **\$6,119.70.**

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(No. 4752—Claim denied.)

**TED E. WARREN**, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed April 14, 1961.*

**RALPH W. HARRIS**, Attorney for Claimant.

**WILLIAM L. GUILD**, Attorney General; **C. ARTHUR NEBEL**, Assistant Attorney General, for Respondent.

**NEGLIGENCE**—*acts* of police officers *in performing governmental functions*. Evidence failed to show that police officers used more force than was necessary to effect claimant's arrest.

**SAME**—*contributory negligence of prisoner*. Evidence showed that claimant's injuries were caused by his contributory negligence in placing thumb on jam of cell door, as it was being closed.

**FEARER, J.**

This is an action brought by claimant, Ted E. Warren, against respondent, State of Illinois, to recover \$5,000.00 in damages for personal injuries, which he sustained at or about the hour of 11:00 P.M. on October 29, 1955.

The record consists of the following:

1. Complaint
2. Departmental Report
3. Transcript of evidence

4. Motion of claimant for leave to waive the filing of brief and argument, together with attached proof of service of a copy on the office of the Attorney General

5. Order of the Chief Justice denying the motion of claimant for leave to waive the filing of brief and argument

6. Brief and argument of claimant

7. Statement, brief and argument of respondent

8. Original transcript of evidence taken on September 10, 1959

9. Abstract of evidence

10. Supplementary brief and argument

11. Commissioner's Report

Claimant charges that on said date State police officers, Sgts. Herbert Bramlet, L. E. Lezynski and Guthrie Alexander, were patrolling State Bond Issue No. 13, during which time they apprehended him near the Gallatin County Line in Saline County, Illinois. He was placed under arrest, and charged with driving while under the influence of intoxicating liquor, reckless driving, and with having a bottle with a broken seal in his possession and in his automobile.

He was taken to the Saline County jail in the City of Harrisburg, Illinois, at which time he was assaulted by officers Lezynski and Bramlet, while being placed in the jail, i.e., by officer Lezynski shoving and throwing claimant through the jail door, causing him to be over-balanced, and while grabbing for the door to keep from falling, and simultaneously therewith officer Bramlet slammed the cell door catching claimant's left thumb in the door, and severing it at the first phalanx.

This is an action sounding in tort.

Respondent proceeded to trial under a general denial of the facts set forth in the complaint pursuant to Rule 11 of this Court.

In its brief and argument, respondent contends that, first, there is no evidence of any negligence by the officers, agents or employees of respondent; second, that the injury to claimant was the result of his own carelessness

and unlawful acts; third, that under the statutory jurisdiction of this Court no liability exists for the acts of State highway policemen; fourth, that the acts upon which this claim is based were performed for the sheriff of Saline County, and not as agents or in behalf of the State of Illinois.

The three police officers testified that on the evening in question they saw claimant's automobile, and noticed that his car was weaving back and forth across the center line, and on one occasion off onto the shoulder of the road. Upon stopping him and asking him to get out of his car, they noticed that he was unsteady, and it was necessary for him to lean up against his automobile to support himself. He was driven to the sheriff's office in Saline County by two of the officers, the other officer driving his automobile to Harrisburg, Illinois.

The officers further testified they observed claimant walking from the automobile into the sheriff's office, that he staggered and was unsteady, that there was a strong odor of alcohol, and that there was a bottle of gin in his car, which was half gone. He was observed not only by the police officers in the sheriff's office, but by the deputy sheriff, referred to as the turnkey, being Jeff Stricklin, who testified that claimant was staggering, unsteady on his feet, and talking incoherently with a thick tongue, **All** four of these witnesses expressed an opinion that claimant was intoxicated.

Claimant offered the testimony of the doctor, who cared for him at the Harrisburg Hospital, and who was unable to testify as to the intoxication of claimant at the hospital. Also, a patient in the hospital testified that, in his opinion, when he saw claimant in the hospital in the ward in which he was taken after midnight, he was not intoxicated.

There is testimony to the effect that, when the personal effects were being taken from claimant in the jail, claimant objected to his billfold being taken, and refused to voluntarily give it up. It was necessary that officer Lezynski count the money, and note the contents of personal property of claimant on the envelope in which his personal effects were to be kept.

Claimant refused to go into the jail, so that it was necessary for officer Lezynski to pick him up bodily, by getting behind him, putting his arms around his body, and pinning his arms to his side, while the deputy sheriff opened the door, so that officer Lezynski could put him inside. All during this time, claimant was resisting, and attempting to brace his feet to keep from being put into the jail. Before the cell door could be closed, claimant started to come out, and was pushed or held inside of the door, and, with the aid of the deputy sheriff, the door was closed. Evidently at that time claimant placed his hand in the door, and his thumb was caught.

In regard to the incident, the officers claimed that they knew nothing about any injury to the thumb of claimant until one of the inmates said that his thumb was injured, and, due to the fact that there was heavy meshing on the door, it was hard to see through the cell block door. They viewed claimant's thumb through an opening in the door used for the purpose of passing food through to the inmates, and it appeared that his thumb nail was torn and bleeding very slightly.

Claimant is further making an issue of the fact that, at the time of the subsequent hearing before the Commissioner, the State's Attorney of Saline County dismissed all of the charges with the exception of the reckless driving charge, and, upon the plea of guilty, assessed a fine, which was suspended.

Counsel for claimant is also relying upon the fact that the other officers should have assisted officer Lezynski in placing claimant in the cell or cell block; and, the fact that he was injured is automatic as to the State's responsibility and liability that damages should be awarded to claimant under the Court of Claims Act, namely, Sec. 8 (C), Ill. Rev. Stats., 1957, Chap. 37, 439.8 (C).

Two cases are also cited under the points and authorities, namely, *Erickson vs. Fitzgerald*, 342 Ill. App. 223, *Both vs. Collins*, 339 Ill. App. 437, and 29 I.L.P. 100 (Sec. 61). The cases referred to relate to the responsibility of police officers in performing their governmental functions.

We could dispose of one of the contentions of respondent, and the contentions of claimant, that, **if** the police officers used more force than was necessary in apprehending and placing claimant behind bars, and were negligent in the handling of claimant, then, in our opinion, the State would be liable, and claimant would be entitled to damages.

As to respondent's contention that the State of Illinois is not liable for the acts of officers, agents or employees of political subdivisions or municipal corporations, that is a correct statement of the law, and we have so held. However, this case is not predicated upon the negligence of any county law enforcing officer, but of the police officers of the State of Illinois, who are its agents.

The State of Illinois, in employing police officers to patrol its highways, does so for the sake of the traveling public, both residents and non-residents of the State, in an attempt to keep its highways free from motorists traveling while under the influence of intoxicating liquor, violating the motor vehicle code, and the operation of an

automobile in a manner, which endangers the life or lives of people traveling thereon.

The police officers in this regard do not have an enviable job, and are only trying to do their duty. They only make arrests where they believe that arrests should be made, and those punished, who have violated laws, which have been passed by our legislature.

It is a grave offense to operate a motor vehicle upon a public highway in an intoxicating condition, because of the hazards which are created thereby.

The officers, in discovering the condition of claimant, had no alternative but to take him into the county jail, remove his personal effects, and place him behind bars until he was in a condition to be released, after furnishing satisfactory bond prior to being tried for the offenses for which he was charged.

His refusing to go into the jail voluntarily was of his own doing. It was necessary for the officer to bodily carry him into the jail, and it was necessary for the officer to keep him from coming out of the jail before the door could be closed.

We appreciate the fact that claimant contends that he was pushed and spun around, and that he grabbed onto the door to keep from falling. However, from the testimony of the witnesses, it appears that he was not shoved hard enough to fall, but that he was attempting to come out of the door, and the deputy sheriff and officer Lezynski were trying to hold him off, and at the last minute claimant stuck his thumb in the door jam, and it was injured in the closing of the door.

Based upon the evidence in this case, we find that the officers did not use any more force than was necessary to place him in the jail, but it was necessary to close the door, and to hold him off while closing the door. Had he

not stuck his hand in the door, he would not have been injured.

We feel inclined to follow the same reasoning that we have in any case sounding in tort, which is that the burden would be upon claimant to prove that he did not contribute to his own injury, and that it was the negligence or unlawful assault upon him, which resulted in damages.

It is, therefore, the order of this Court that the claim filed herein be denied.

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(No. 4860—Claimant awarded \$20,000.00.)

**WILLIAM H. DAUM**, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed* April 21, 1961.

**DRACH AND TERRELL**, Attorneys for Claimant.

**WILLIAM L. GUILD**, Attorney General; **WILLIAM H. SOUTH**, Assistant Attorney General, for Respondent.

**PRISONERS AND INMATES**—*personal injuries*. Evidence disclosed that respondent's agent cut cable holding pole on which inmate was working, causing claimant and pole to fall.

**NEGLIGENCE**—evidence. Evidence failed to show claimant was guilty of any negligence, had assumed any **risk**, or assumed any unnecessary exposure to danger.

**TOLSON, C. J.**

On February 26, 1959, William H. Daum, an inmate of the Illinois State Penitentiary at Menard, Illinois, filed his claim against the State of Illinois seeking damages in the amount of \$25,000.00 for injuries received by him due to the alleged negligence of the State.

The State did not file an answer, but has defended the claim on the theory that claimant was either guilty of contributory negligence, or had assumed the risk of the work at hand.

Respondent's brief acknowledges that the statement in claimant's brief sets forth the facts of this case in a

proper manner. Subject to certain cleftioiis, they are as follows :

#### STATEMENT OF FACTS

“On June 3, 1959, claimant was an inmate of the Illinois State Penitentiary at Menard, Illinois, and was assigned, along with two other inmates, James Blair and Edward Shrake, to the job of removing certain poles and attached electrical wires and cables on the penitentiary grounds in connection with a project, which was then being undertaken by the penitentiary in converting the electrical system at Menard from DC current to underground AC current. A private contractor was employed to install the new system, and the penitentiary undertook to remove the existing poles and wires. At the time in question, one Oscar Marquadt was the Chief Engineer at the institution, and, as such, was in charge of the work to be performed by the penitentiary. One George McVicker was Marquadt’s assistant. Charles Brown was employed by the State as an electrical foreman at the penitentiary, and was responsible to Marquadt and McVicker. He was given the responsibility of the immediate supervision of the removal of the poles and wires in question.

“Approximately two weeks before June 3, Oscar Marquadt had a conversation with inmate James Blair, who had been working for many years on what was called the electrical crew, in which he ordered Blair and his crew to perform the job of removing the poles and wires then existing on the premises of the penitentiary. Although claimant had been for many months prior to that date closely associated with Blair and inmate Edward Shrake in the performance of electrical work in and about the penitentiary, both as a welder and as an electrician, Daum was on said date not officially assigned to the work of electrical maintenance as were Blair and Shrake. He was at that time officially assigned to the welding shop, a division of the machine shop, over which Marquadt, as Chief Engineer, had supervision. At or about the time Marquadt directed Blair to undertake the removal of the wires and poles, claimant and Blair requested Charles Brown to arrange for Daum’s assignment from the welding shop to the electrical crew, in order that he, Daum, might officially be a part of that group of persons, wha were concerned with and assigned to the job of performing electrical work on the penitentiary grounds.

“Although Charles Brown, as electrical foreman, was the immediate supervisor of Blair, Shrake and Daum in connection with this project, the work of removing the poles and lines was not considered as being part of the routine or normal work of the electrical crew, but, rather, was regarded as a wrecking job, to which claimant Daum, as a welder, might properly be assigned.

“All of the officers and other persons testifying at this hearing agree that at some date within the two weeks prior to June 3, 1959, claimant Daum was officially assigned to work with Shrake and Blair under the supervision of the electrical foreman, Charles Brown. Brown at all relevant times herein had the authority to use inmates assigned to various departments in the

machine shop, whether assigned specifically to his department or not, without formal reassignment, when such inmate was not engaged in performing work in the department to which he was then assigned. Brown testified that, during the period in question, his electrical crew was shorthanded, and that Daum had little welding work to do at that time.

"On or about May 20, 1959, when inmate Blair was told to perform this job, he was instructed by Marquadt to remove the wires from the poles before taking the poles down. When Blair suggested pulling the poles down before removing the wiring, Marquadt stated that it would not be necessary to do this, because all of the poles involved were reinforced with railroad iron. Marquadt had been in the penitentiary for a number of years, and was regarded by all those persons under his supervision as an engineer, who knew or should have known the proper manner of removing the existing system of wiring. During the period between May 20 and June 3, electrician Charles Brown recommended to Marquadt that, in the interest of safety, a derrick be used to support the poles while the wiring was being taken from them; but Marquadt insisted that all of the poles were reinforced with railroad iron, and that his prescribed method of removal was entirely safe.

"Although Blair, Shrake and Daum were under the immediate supervision of Charles Brown, it appears that Brown was not continuously on the job site, and that he only visited the job site on and off. The testimony ranges from two times throughout the two week period prior to June 3 to 50 times a day. The latter is Brown's estimate. Brown instructed Daum in the use of a safety belt in connection with ascending the poles.

"On June 3, 1959, between the hours of 11:00 A.M. and noon, Dauni ascended a 25 foot iron pole situated approximately 150 feet from the wall of the penitentiary for the purpose of cutting the messenger cable, which was secured by a bracket on that pole. The messenger cable consisted of a round lead cable of a diameter of some one to two inches within which ran a large number of smaller wires, and on top of which was a metal loop through which an additional steel cable ran. When Daum reached the level of the messenger cable, which was approximately 20 feet above the ground, he fastened his safety belt around the pole, looping the belt around one arm of the cross arm in the manner that he had been instructed or directed to do by the electrical foreman, Charles Brown. Daum flattened out the messenger cable, and was reaching back to get his cutters when the whole cable began to slide through the bracket attached to the pole, by reason of the cable having been severed near the prison wall, or at some other point between Daum's pole and the wall. Daum's pole then began to jerk, and, upon being warned by Chief Guard Lence that the pole was beginning to fall, Daum attempted to unhook his safety belt. Being unable to unhook it in time, Daum attempted to get around on top of the pole, so that he would not be pinned by it upon falling. Before this was done, the pole and Daum hit the ground, the pole falling on Daum's right elbow, right thigh and left leg between the knee and the ankle. He was pinned in that position for three or four minutes, until Blair and Lence removed him from underneath the pole after unhooking his safety belt.

“Daum had never done any electrical work prior to his incarceration at Menard; and, except for the experience obtained by him through working with Blair and Shrake at the penitentiary in connection with several wiring jobs, he was inexperienced in electricity. He had no prior experience in removing pole and wiring systems. With the exception that he had been instructed as to the proper use of the safety belt when ascending and working on the poles, he received no special instructions as to the manner in which the poles and wiring were to be removed from any officer or employee of the penitentiary. Although Blair, by virtue of his having been on the electrical crew for many years, was expected to take the lead in supervising the activities of Daum and Shrake, he was clothed with no official supervisory capacity.

“At the time of the accident, the messenger cable was strung on several poles running from the south wall of the penitentiary at a point to the east of the main cellblock to a pole immediately inside the wall at that point; thence in a northwesterly direction to a pole located near the machine shop, which pole is located immediately inside the wall, and is identified as pole number 2; thence generally west to the pole, which broke with claimant, which pole is designated as pole number 3; and, thence west to several other poles, running parallel to Front Street.

“Immediately prior to the accident, Charles Brown, the electrical foreman, was in the vicinity of pole number 1, and at that time, after having requested that Blair obtain some wire cutters for him, severed the messenger cable at the wall. Although Brown testified that he severed this line that morning, but some time before the accident occurred, the great preponderance of evidence is that the line was cut by Brown immediately before the pole fell. It was the strain caused upon the system by reason of the unsecuring of this line, which had acted as a guying support for all poles in the system, which caused the pole upon which Daum was working to be subjected to a force and strain, which the pole, in its weakened and aged condition, was unable to withstand. Shrake, who was in the vicinity of the pole upon which Daum was working, and who had a clear view of the place where Charles Brown and another inmate were working at the wall, testified that he saw Brown cut the cable immediately before the poles fell. Blair testified that he had a conversation with Brown immediately before the poles fell, in which Brown had requested wire cutters, and had informed Blair that he was going to cut the messenger cable at the wall. Immediately after the accident, he observed that the cable was cut at the wall. There is no other accounting for the sudden falling of the pole, since there was no evidence introduced showing that any other undue strain had been placed upon the system. Several days before, Blair had ascended the same pole, and had removed a transformer of a weight of approximately one thousand pounds.

“At or about the time that the project of removing the poles and lines began, Charles Brown recommended to the Chief Engineer, Oscar Marquadt, that a derrick be used to support the poles, since the poles were old and in a weakened condition, pointing out that the use of a derrick as a support would lessen the danger to the inmates working on the poles. Brown was at that time assured that no danger existed, because all of the poles on the grounds

were reinforced with railroad iron. Acting upon the assumption that the poles were in fact so reinforced, Brown did not use any means of giving support to the poles, although he admitted that measures could have been taken to support them by guying the poles, by using an A-Frame and by using a derrick. Furthermore, Brown testified that neither he nor any other officer took any steps to determine whether any of the poles were, in fact, reinforced with railroad iron or any other metal.

"As a matter of fact, neither the pole upon which Daum was working, nor any of the poles, which fell with it at the time of the occurrence in question, were reinforced with railroad iron or any metal.

"Although Brown was the immediate supervisor of the crew engaged in taking the poles down, and had himself arranged the assignment of Daum to this crew, and, although he was on the job site many times a day, he testified that he had never seen Daum working on a pole. However, this is disputed by the testimony of Captain Lewis C. Lence, Assistant Chief Engineer George McVicker and Chief Guard Max P. Frye, all of whom had seen Daum working on poles on many occasions throughout the two week period preceding the date of the accident, and the testimony of inmates Edward Shrake and James Blair, both of whom stated that Daum worked on poles every day during this period, and during times when Brown was present. The testimony of claimant, who was given a safety belt by Brown, refutes this assertion, as does much of the testimony of Brown himself.

"None of the poles were ever examined or tested for strength, even though the poles were rusted at the bases, and were known by officers of the institution to be 35 or 40 years old.

"Not only were the poles not inspected or examined with reference to determining the extent of internal reinforcement by any responsible guard, officer or employee of the penitentiary, but all attempts made by inmates Blair, Shrake or Daum to have the poles tested for strength were refused by Brown, who on each occasion stated that no need existed for testing the poles, since they were all reinforced with railroad iron.

"Officer Brown testified that no safeguards were taken to prevent poles from falling while inmates were working on them. He further testified that, although it would have been good practice to guy the poles to provide additional support, he took no such measures. He testified, based upon his years of experience, that it would have been good practice to have provided three guy wires for each pole.

"As the result of Daum's fall and his being pinned under the fallen pole, Daum sustained a displaced fracture of the olecranon of the right elbow with considerable fragmentizing or splitting of the bone, a simple fracture with displacement of the tibia of the left leg, and a fracture of the left pubic ramus. The elbow fracture was treated initially by surgery, consisting of an open reduction of the fracture with the insertion of a 4½ inch screw.

"The arm was immobilized, and some weeks later an operation was performed, wherein the screw was removed. The testimony of the physicians testifying in this case is that Daum had sustained a permanent injury to his

right arm, in that he now has and will continue to have only 40 to 50 per cent use of that arm.

“The fracture of the tibia in the left leg was treated by open reduction of the fracture and the insertion of a Rush Nail. The leg was thereafter immobilized, and some weeks later surgery was performed in which the nail was removed. Although the fracture of the bone has completely healed, the fracture of the left leg has resulted in a shortening of that leg by 1% inches, so that a two inch built-up heel must be worn by claimant at the present time in order to permit even walking and to reduce strain upon the hip. The disability is not correctible by further surgery, and the medical testimony is that traumatic arthritis will be expected to set in. That this has already happened is borne out by the testimony of Daum that he experiences pain in his leg during damp weather.

“Daum was hospitalized for seven months at Menard, and is still unable to perform any work requiring the full use of his right arm or standing for any length of time. Daum’s testimony with reference to the acute pain experienced by him for the first weeks following the injury is borne out by the testimony of Dr. James Weatherly, who testified that acute pain would be experienced the first ten or fourteen days after the accident, and that soreness would be experienced for four or five weeks thereafter.”

This case was argued orally before the Court.

As to the charge of negligence, the Court finds that Oscar Marquadt, Chief Engineer, was entirely mistaken when he advised his subordinates that the poles were reinforced with steel. As to the time when the messenger cable was cut, we believe that the preponderance of the evidence indicates that the cable was cut while claimant was working on the pole, rather than Brown’s testimony that it was cut earlier in the morning. The best evidence in this regard is the fact that all three poles fell at the same time.

The Court, therefore, finds from the evidence that respondent was negligent in failing to provide safe working conditions for claimant.

Respondent’s contention that claimant was guilty of contributory negligence, and assumed the risk of the job at hand, is not supported by the evidence. We do not believe that claimant should be penalized for his willingness to work. Since he was using a safety belt, in accordance with instructions, we do not find any evidence of

foolhardiness, or unnecessary exposure to danger on his part. *Moore vs. State of Illinois*, 21 C.C.R. 282.

It is unnecessary to restate the injuries received by claimant. They were severe and of a permanent nature. The medical testimony supports the claim that he will be impaired in obtaining gainful employment when he is discharged from the prison.

The Court, therefore, finds that claimant has suffered damages in the amount of \$20,000.00.

An award is, therefore, made to claimant, William H. Daum, in the amount of \$20,000.00.

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(No. 4924—Claimant awarded \$119.51.)

**OKLAHOMA OIL COMPANY, AN ILLINOIS CORPORATION, Claimant,  
vs. STATE OF ILLINOIS, Respondent.**

*Opinion* filed May 9, 1961.

PANTER, NELSON, ROTHSTEIN AND ALBERT; GIFFIN, WINNING, LINDNER AND NEWKIRK, Attorneys for Claimant.

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

**FEARER, J.**

The record in this case consists of:

1. Complaint
2. Departmental Report
3. Stipulation
4. Joint motion of claimant and respondent for leave to waive the filing of briefs
5. Order of the Chief Justice granting the joint motion of claimant and respondent for leave to waive the filing of briefs

In accordance with the motion for the waiver of briefs, signed by all parties, and the complaint filed herein, with exhibits attached thereto, it appears that

this claim in the amount of \$119.51 is for materials and services and petroleum products purchased from claimant's agent and dealer by respondent, and the invoices herein were not paid due to the fact that the appropriation had lapsed at the time that the claim was submitted.

It was stipulated and agreed that the Departmental Report, signed by Earl McK. Guy, Engineer of Claims, Division of Highways, dated August 5, 1960, and filed under Rule 16 of this Court, is to constitute the record in this case.

It is further stipulated that by said report it is acknowledged that the claim is correct, that there was a balance remaining in the appropriation at the time the petroleum products were purchased, and that the invoices would have been paid had they been presented before the lapse of the appropriation.

There seemingly appears to be no dispute as to questions of fact or law in this matter. In previous holdings of this Court, we have allowed claims, which have not been paid because of the lapse of an appropriation, if services rendered and merchandise furnished were satisfactory, and the charges reasonable, and have stated that such claims would be allowed, even though the appropriation had lapsed, if the funds were available at the time that services were rendered, or items were purchased for the State of Illinois.

An award is, therefore, made to claimant in the sum of \$119.51.

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(No. 4926—Claim denied.)

ISABELLE THOMAS, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 9, 1961.*

BESSE AND BESSE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; HAROLD A. COWEN, Assistant Attorney General, for Respondent.

PRACTICE AND PROCEDURE—*failure to give notice of intent to sue.* Burden is on claimant to give notice provided in statute, and mere reporting of the accident to a State employee will not constitute compliance.

TOLSON, C. J.

This cause comes on to be heard upon the motion of 'respondent to strike and dismiss the amended complaint filed by claimant on March 17, 1961.

The question raised by the pleadings is whether or not claimant has complied with Sees. 22-1 and 2 of the Court of Claims law, which read as follows :

"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.

"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. (Added by Act approved July 10, 1957)."

Claimant has filed objections to the motion to strike, and, as grounds for same, alleges that within six months of the injury due notice was given to the State of Illinois by Louis G. Gramp, Park Supervisor of the Northern District One, and Ray Barto, Superintendent of Parks of the White Pines State Park, both of the State of Illinois, Department of Conservation.

Claimant further alleges that such employees of the State were her agents for the purpose of giving notice, and, finally, that the State is estopped from raising any questions as to the sufficiency or form of said notice.

It is apparent from the pleadings that due notice was not served upon the Attorney General and the Clerk of the Court of Claims by anyone as required by statute. Claimant argues, however, that, if any employec of any department of State government is notified of the injury, the latter notice is a sufficient compliance with the act.

It is obvious that claimant's position is untenable. The State of Illiinois operates through many departments, aind employs thousands of employees. It may well be that a report of the accident was filed with the Department of Conservation, but such a report could not be regarded as a notice to the Attorney General and the Clerk of this Court.

The statute places the burden upon claimant, her agciit, or attorney to give the proper notice. An agency relationship cannot be established by reporting an accident to a Statc employec, and thereafter gratuitously claiming that the employec is now the agent of claimant.

For tie above reason, the motion of the respondent to strike and dismiss tie amended complaint is allowed.

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(No. 4938—Claimant awarded \$93.00.)

TED N. SMALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 9, 1961.*

JEFFERSON LEWIS, Attorriey for Claimant.

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

STATE OFFICERS AND AGENTS—*award for travel expenses.* Where evidence showed that employec was entitled to travel expenses, an award will be made.

FEARER, J.

The record in this case consists of the following:

1. Complaint
2. Departmental Report
3. Stipulation
4. Joint motion of claimant and respondent for leave to waive the filing of briefs
5. Order of the Chief Justice granting the joint motion of claimant and respondent for leave to waive the filing of briefs

The complaint filed herein is for certain expenses incurred by claimant between the period from June 1, 1959, to and including August 7, 1959, when he was employed by the Department of Public Works and Buildings of the State of Illinois in the capacity of an inspector with a survey team working upon a project at Lewistown and Canton. Claimant was a married man and living away from home. Attached to the complaint is a listing of the various items of expense.

A letter was written to the Attorney General by Earl McK. Guy, Engineer of Claims, reviewing the claim, and advising the Attorney General that claimant lived in Petersburg, Illinois, and was assigned to the project mentioned above; that, as an employee on field assignment, he was entitled to certain expenses as defined in Division of Highways Administrative Memorandum No. 32, (Revised), dated April 1, 1958, and bearing the subject: Expense Accounts—Rates for Lodging, Meals and Automobile Mileage.

It appears from the report of the Division of Highways that a figure has been agreed upon as being correct for expenses allowed to a married man, who is away from home and working on State projects of this nature, and that respondent has agreed that the sum of \$93.00 is a correct figure. The attorney for claimant has entered into a stipulation with the Attorney General's office, and, also, there is filed in this case a motion for waiver of briefs by both parties, wherein it is agreed that the letter

of the Division of Highways, written by Earl McK. Guy, dated April 14, 1961, and sent to the Attorney General in lieu of the customary report of the Division of Highways, which has been filed in this cause under Rule 16 of the Court of Claims, shall constitute the record in this case.

There being no disputed questions of law or fact, and, in view of the stipulation and motions entered into by the parties hereto, by and through their respective counsel, an award is hereby made to claimant in the sum of \$93.00.

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(No. 4959— Claimant awarded \$6,852.00.)

**THE COUNTY OF RANDOLPH, Claimant, vs. STATE OF ILLINOIS,**  
Respondent.

Opinion *filed* May 9, 1961.

WILLIAM A. SCHUWERK, Attorney for Claimant.

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

COUNTIES—*reimbursement* for writs of habeas corpus *in forma pauperis*. Upon stipulation of facts and expenses, an award was entered pursuant to Ill. Rev. Stats., 1957, Chap. 65, Secs. 37-39; and Chap. 37, Sec. 439.8.

TOLSON, C. J.

The County of Randolph has filed a claim seeking an award in accordance with the statutory provisions of Chap. 65, Pars. 37, 38, and 39, Ill. Rev. Stats., 1957.

The claim was heard by Commissioner Billy Jones, and his report, in the following words and figures, is hereby adopted by the Court:

#### COMMISSIONER'S REPORT

"This is the latest in the long series of claims that are filed regularly biennially by the County of Randolph for payment of filing fees, sheriff's fees, and State's Attorney's fees owed to the respective county officers by reason of habeas corpus writs filed by inmates of the Illinois State Penitentiary at Menard. The complaints set out the statutory authority, and list the names of the inmates, who availed themselves of the above services. The Commissioner, together with the State's Attorney of Randolph County and the

Assistant Attorney General of the State of Illinois, appeared at the Circuit Clerk's office in Randolph County, and examined the entries in the court docket as compared with claimant's exhibit A. A typographical error was discovered, which prompted the following stipulation by and between the parties.

'It is stipulated by and between the parties that the State's Attorney's fee listed in claimant's exhibit A in cases Nos. 4251 to and including case No. 4277 be changed from Ten (10) Dollars to Twenty (20) Dollars; that the total amount in filing fees shown in exhibit A be changed from Two Thousand Five Hundred and Forty Dollars (\$2,540.00) to Two Thousand Five Hundred and Thirty Dollars (\$2,530.00); and that the total amount prayed for in paragraph seven (7) of exhibit A be changed from Six Thousand Eight Hundred and Fifty-two Dollars (\$6,852.00) to Six Thousand Eight Hundred and Forty-two Dollars (\$6,842.00).

#### OBSERVATION

"The Commissioner found all of the cases listed in claimant's complaint docketed and in order in the regular Circuit Clerk's docket book, and the only difference found was that claimant failed to list one ten dollar filing fee in his complaint, which was entered in the docket book, and was claimed in the total amount prayed for. The respondent objected to the allowance of this ten dollar (\$10.00) fee, and the objection was sustained.

#### CONCLUSION

"The Commissioner wishes to state that all of the fees claimed were for bonafide cases, which were filed by inmates of the penitentiary, and for which the State of Illinois is liable.

#### RECOMMENDATIONS

"The Commissioner recommends the claims be allowed in the amount of \$6,852.00."

An award is, therefore, made to the County of Randolph in the amount of \$6,852.00.

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(No. 4836—Claim denied.)

SIRI WARD, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion fled May 26, 1961.*

THEODORE L. FORSBERG, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

STATE PARKS, FAIR GROUNDS, MEMORIALS AND INSTITUTIONS—*negligence*. Claimant, an invitee, who fell on waxed floor of institution, was bound to assume all normal, obvious or ordinary risks attendant on the use of the premises.

**SAME — burden of *proof*.** Claimant failed to prove by a preponderance of the evidence that respondent negligently waxed institution hallway.

**TOLSON, C. J.**

Claimant, Siri Ward, filed her complaint on August 19, 1958, seeking an award for injuries received by her due to the alleged negligence of the State of Illinois.

The complaint alleges that she visited her husband, who was a patient in the Elgin State Hospital, on February 9, 1958, and that she walked down a corridor, slipped on a floor, which was improperly waxed, and, as a result, suffered a fracture of the right hip.

According to her testimony, she noticed that the floor was unusually waxed and soft when she walked on it. She further stated “my right foot went up like that, and I went down.”

It is to be noted that this was the third time that she walked the corridor that day, although it is not clear that she walked over the exact area on the two previous occasions.

Claire Westerdahl, claimant’s sister-in-law, testified that she visited the hospital the next day, and walked the corridor where claimant fell. She testified “suddenly I realized the floor was exceedingly slippery — I felt that I was going two ways, up-down and forward.” She stated that the floor was very highly polished, and the wax on the floor felt soft, “as though I was walking on soft soap.”

Olaf Riggs, a supervisor of the section, testified as to the procedure of washing and waxing the floors. He stated it was done about a week prior to the accident, that he did not notice anything unusual about the floor, and that the gloss was no more than usual.

Greene Finley, a supervisor, testified that he inspected the wards daily, that the floors were waxed in the usual manner, and there was no softness in the wax.

This Court is presented with a record wherein the witnesses are in total conflict. There is no way to reconcile the testimony, and we must search elsewhere to see if claimant has satisfied the burden of proof.

The Court attaches significance to the fact that the corridor had been waxed for a week prior to the accident, and had been in daily use since that time.

The Departmental Report indicates that there had been a number of visitors and others using the corridor that afternoon, none of whom slipped, which would tend to negate the charge that the floor was either highly polished or was soft like soap, as testified to by claimant and her sister-in-law.

It is common knowledge that asphalt floors are cleaned and waxed at regular intervals to preserve the surface. The fact that the work was performed by patients in the hospital is of no significance, as this work does not require any particular skill.

Claimant was an invitee, and, as such, must assume all normal, obvious or ordinary risks attendant on the use of the premises. *Lindberg vs. State of Illinois*, 22 C.C.R. 29 (citing *Dargie vs. East End Bolders Club*, 346 Ill. App. 480).

Claimant has failed to establish by a preponderance of the evidence that the wax was applied excessively or unevenly, and, since respondent is not an insurer of all who enter the hospital as an invitee, the claim must be denied.

An award is, therefore, denied.

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(No. 4936—Claimant awarded \$267.65.)

LAWRENCE B. HARRISON, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed May 26, 1961.*

ERIC E. GRAHAM, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; HAROLD A. COWEN, 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.

PERLIN, J

The complaint herein requests payment for certain travel expenses incurred by claimant in his capacity as a psychologist in the employ of the Chicago State Hospital, a Division of the Department of Public Welfare, State of Illinois.

Claimant had been granted specific authority by the Director of the Department of Public Welfare and the Director of Finance to attend the Thirty-Sixth Annual Meeting of the American Orthopsychiatric Association in San Francisco from March 29, 1959 through April 2, 1959. Upon his return, claimant submitted all required receipts and expense itemization for his trip, and executed the necessary vouchers. He submitted also a report of the Association's proceedings.

Claimant's travel expense reimbursement request was not processed in due course because of the apparent oversight of the secretary in the Psychology Department office. The appropriation lapsed prior to the correction of this error.

Respondent has stipulated to the amount of the claim herein and to the facts accounting for its non-payment. These facts were confirmed in the report of the Superintendent of the Chicago State Hospital.

There being no questions of law or fact in controversy, as reflected by the stipulation of the parties hereto, by and through their respective counsel, an award is hereby made to claimant in the sum of \$267.65.

(No. 4962—Claimant awarded \$4,296.00.)

WILLIAM H. KERR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 26, 1961.*

LEON D. SHAPIRO, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; BERNARD GENIS, Assistant Attorney General, for Respondent.

*CIVIL SERVICE ACT—payment for period of unlawful discharge.* Where evidence showed that claimant was illegally discharged, he was entitled to an award.

FEARER, J.

Claimant, William H. Kerr, filed his complaint against the State of Illinois on January 24, 1961 alleging that lie was an employee of the Department of Vocational Education, Division of Vocational Rehabilitation, and was wrongly discharged from his employment on August 25, 1958.

On March 21, 1960, a complaint was filed in the Superior Court of Cook County, being case No. 59-S-9520, being a suit for a writ of mandamus. The title of this case being W. H. Kerr *vs.* Vera M. Binks, Et Al.

The record in this case consists of the following :

1. Complaint
2. Transcript of evidence
3. Claimant's exhibits Nos. 1, 2 and 3
4. Respondent's exhibits Nos. 1 and 2
5. Motion of claimant for leave to waive the filing of abstract and brief, together with attached proof of service of a copy on the Attorney General
6. Commissioner's Report
7. Order of the Chief Justice granting the motion of claimant for leave to waive the filing of abstract and brief
8. Motion of respondent for leave to waive the filing of brief, together with attached proof of service of a copy on counsel for claimant
9. Order of the Chief Justice granting the motion of respondent for leave to waive the filing of brief

A copy of the order of the Superior Court was attached to the complaint, marked exhibit No. 1, and made a part thereof, and at the hearing a certified copy of the

order was admitted in evidence as claimant's exhibit No. 1.

This matter was heard before Commissioner Immenhausen. No answer was filed by respondent, so, therefore, a general traverse or denial of the facts set forth in the complaint shall be considered as filed under Rule 11 of this Court.

The only evidence offered by either claimant or respondent was that of claimant, and the exhibits, being a certified copy of the order of the Superior Court of reinstatement and respondent's exhibits relative to mitigation.

The Commissioner found that, on August 1, 1960, claimant was reinstated pursuant to the order of the Superior Court, and presented his claim for back pay for the period of August 26, 1958 to July 31, 1960. On or about September of 1960, claimant received from respondent \$6,200.00 for the period from July 1, 1959 to July 1, 1960.

The reason advanced as to why he did not receive his pay for the period between August 26, 1958 to June 30, 1959 was that funds were not available because of the expiration of the 1957-1959 biennial appropriation.

A supplemental hearing was held in the Superior Court of Cook County, being case No. 59-S-9520. In that case the court held that there was due claimant the sum of \$4,806.00 covering the period from August 26, 1958 through June 30, 1959. This supplemental order was attached to the complaint, and marked exhibit No. 2. A bill of particulars regarding the period of August 26, 1958 through June 30, 1959 was also attached to the complaint, and marked exhibit No. 3.

claimant testified he had charge of employment of all handicapped persons in Chicago and downstate Illi-

nois. His specialty was working with the deaf, and teaching them sign language. This particular division was created by the Legislature, as found in Chap. 123, Sec. 695. The Federal Government provided grants for states for vocational rehabilitation work, as set forth in Act 29 U.S., Chap. 4, 1954. In order for the states to receive grants from the Federal Government, each was required to submit a plan, and qualify under certain requirements. The State of Illinois qualified under the Federal Act.

There is no question but what claimant was wrongfully discharged, and there are no questions presented as to mitigation of damages. As it was developed, claimant was unable to find any employment other than the fact that he was employed as a salesman for the Walton Rug Company for one month in July, 1959, and earned \$510.00. His income tax return was introduced into evidence, and marked respondent's exhibit No. 1. It revealed that claimant received \$510.00 gross pay from the Walton Rug Company; that there was \$47.80 tax withheld, and \$12.75 social security. He testified further that he had no other earnings.

In previous cases this Court has 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. *Schneider vs. State of Illinois*, 22 C.C.R. 453.

In the same case we also held that claimant should mitigate damages by seeking other gainful employment, and any earnings should be offset against an award for back pay by reason of being unlawfully discharged.

Since the Commissioner had an opportunity of hearing the evidence, we adopt as our findings his conclusion, which is as follows:

"After careful consideration of all the evidence, and having had an opportunity to observe the witnesses during examination and the exhibits, it is my opinion that claimant has proved his case by a preponderance of the evidence. Claimant, William H. Kerr, was employed by the State of Illinois in January, 1955, by the Division of Vocational Rehabilitation, and was unlawfully discharged in January, 1958. Claimant filed writs of mandamus in the Superior Court of Cook County in case No. 593-9520 against Vera Binks, Director of the Department of Registration and Education. A certified copy of order for mandamus and judgment order were received in evidence as claimant's exhibit No. 1. The Superior Court found that claimant was wrongfully discharged from the position of Vocational Counselor in the Division of Vocational Rehabilitation; that he was ready, willing and able to render the service; and that he was entitled to back pay from the date of his discharge to the date of his reinstatement. In accordance with said judgment order, claimant was reinstated to his position on August 1, 1960, and received \$6,200.00 back pay for the period of January 31 to August 1, 1960. There remains unpaid his salary from August 25, 1958 to June 30, 1959, which was not paid because the biennium appropriation for 1957-1959 had expired.

"Claimant asks for the sum of \$4,806.00 for the period of August 6, 1958 to June 30, 1959. From this amount respondent, the State of Illinois, is entitled to a credit of \$510.00, which amount claimant earned as a salesman for the Walton Rug Company during this period."

Claimant is, therefore, entitled to an award in the amount of \$4,296.00.

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(No. 4960—Claimant awarded \$976.70.)

JOSEPH D. CAREY, JR., Claimant, vs. STATE OF ILLINOIS,  
Respondent.

Opinion filed June 5, 1961.

JOSEPH D. CAREY, JR., Claimant, pro se.

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 because appropriation lapsed prior to its presentment for payment, an award will be made.

TOLSON, C. J.

Joseph D. Carey, Jr., filed his claim against the State of Illinois on December 21, 1960 alleging that he was an employee of the Department of Labor of the

State of Illinois on special assignment. Claimant further alleges that he filed travel vouchers for the months of April, May and June of 1959 with the Department, and through error the vouchers were mislaid, and were not presented for payment before the appropriation lapsed.

The Departmental Report filed in this case acknowledges the existence and propriety of the claim, and admits that through error the vouchers were not presented for payment during the time in which the money was still available from the biennium.

Claimant and respondent have entered into a stipulation that the Departmental Report shall constitute the record, and, on May 25, 1961, filed a joint motion to waive briefs in which it is alleged that there are no disputed questions of law or fact in this case.

The exhibits filed in this case indicate that claimant incurred travel expenses in the amount of \$306.72 for the month of April, 1959; \$288.01 for the month of May, 1959; and, \$381.97 for the month of June, 1959, making a total of \$976.70.

This Court has held that, when there is no dispute over a claim, which would have been paid in due course if the appropriation had not lapsed, it will make an award. *University of Chicago vs. State of Illinois*, 22 C.C.R. 682.

An award is, therefore, made to Joseph D. Carey, Jr., in the amount of \$976.70.

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(No. 4977—Claimant awarded \$1,286.14.)

EARL RICHARD BLESSING, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion* filed June 5, 1961.

FRANK E. SHAW, Attorney for Claimant.

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

CIVIL SERVICE ACT—*award for salary during period of unlawful discharge.* Where Civil Service Commission order discharging employee was held void by Circuit Court on certiorari, claimant is entitled to an award for salary covering time of lapsed appropriation.

TOLSON, C. J.

Earl Richard Blessing, by Frank E. Shaw, his attorney, filed his complaint on May 1, 1961 seeking an award in the amount of \$1,286.14.

On May 24, 1961, a joint stipulation that the Departmental Report herein shall constitute the record was filed by claimant and respondent. A joint motion to waive the filing of briefs was presented on the same date, which alleges that there are no disputed questions of law or fact.

Claimant was employed as a guard at the Menard Branch of the Illinois State Penitentiary. On January 16, 1959, charges were made against him, and he was suspended pending a hearing.

On May 7, 1959, claimant was found not guilty of the charges by the hearing officer, and a finding was made to that effect. It was recommended that he be restored to his former position, and paid all wages lost by virtue of the filing of the charge. On May 15, 1959, the Illinois Civil Service Commission, without further hearing, rejected the finding of the hearing officer, and ordered claimant discharged.

On July 13, 1959, claimant filed a certiorari proceeding in Sangamon County, and, on October 6, 1960, the Circuit Court entered an order finding that the order of the Illinois Civil Service Commission was void, and further ordered that claimant be restored to his position, and paid all salary lost by virtue of this illegal discharge.

Joseph E. Ragen, Director of the Department of

Public Safety, filed a Departmental Report on May 15, 1961, which recites that he made an investigation of the claim, and found that claimant was entitled to his salary from January 16, 1959 to June 30, 1959 in the amount of \$1,886.50. He further found that the State was entitled to an offset in the amount of \$600.36 resulting from earnings of claimant during this period, leaving a balance due in the amount of \$1,286.14. It further appears from the complaint that the appropriation of the Department of Public Safety lapsed on September 30, 1959, so that there were no funds available to pay the claim.

Since there is no dispute as to facts, it is apparent that claimant is entitled to an award. This Court has held that, if a valid claim is not paid by reason of the lapse of an appropriation, an award will be made. *University of Chicago vs. State of Illinois*, 22 C.C.R. 682.

An award is, therefore, made to Earl Richard Blessing in the amount of \$1,286.14.

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(No. 3025—Claimant awarded \$4,726.39.)

ELVA JENNINGS PENWELL, Claimant, **vs.** STATE OF ILLINOIS,  
Respondent.

*Opinion filed July 28, 1961.*

GOSNELL AND BENECKI, AND JOHN W. PREIHS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, 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 April 30, 1960 to and including May 1, 1961.

TOLSON, C. J.

Claimant was injured on February 2, 1936 in an accident, which arose out of and in the course of her em-

ployment 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 award of \$5,500.00 was made to claimant for total permanent disability, \$8,215.95 for necessary medical, surgical and hospital services, expended or incurred to and including October 22, 1940, and an annual life pension of \$660.00.

Successive awards have been made by the Court from 1942 to and including April 30, 1960, and the matter is now before the Court for an award to and including May 1, 1961.

The record consists of a verified petition, supported by original receipts, and joint motion of claimant and respondent for leave to waive the filing of briefs and arguments, which has been allowed.

The petition alleges that claimant is still bedfast, and requires daily medical and nursing care. It further discloses that claimant has incurred expenses in the following amounts :

1. Nursing expenses .....	\$1,966.40
2. Room and board for practical nurses .....	638.75
3. Drugs and supplies .....	590.77
4. Physicians' services .....	1,186.28
5. Hospital .....	224.19
6. Transportation .....	120.00
7. Miscellaneous expenses .....	35.90

The last award made in this case was in the amount of \$2,288.57, and claimant now requests an award in the amount of \$4,762.29.

The item of miscellaneous expenses in the amount of \$35.90 is for the fitting of eye glasses. Since this item is in no way connected with the injury complained of, it will be disallowed.

Item No. 1 for nursing and practical help for claimant is not completely satisfactory. As noted, for example, in the payments made on May 31, 1960, seven checks were drawn for nursing care ranging from \$5.00 to \$65.00, for a total of \$222.50. The report does not indicate the period of time served by the seven persons mentioned during this period, and proof of this nature will not be accepted by the Court when a request is made for an award in 1962.

From the previous record of this case, it appears that the Court has reserved jurisdiction of same from year to year to determine the future needs of claimant for additional care, and it further appears that the amounts involved were necessarily expended for the medical care of claimant with the exception of the miscellaneous expenses.

An award is, therefore, made to claimant for medical and nursing services, and other expenses, from April 30, 1960 to and including May 1, 1961 in the amount of \$4,726.39.

The Court reserves jurisdiction for further determination of Claimant's need for additional medical care.

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(No. 4633—Claim denied.)

**LEROY SHANNON**, Claimant, **vs.** **STATE OF ILLINOIS**, Respondent.

*Opinion filed May 9, 1961.*

*Petition of Claimant for rehearing denied July 28, 1961.*

**JOHN R. SNIVELY**, Attorney for Claimant.

**GRENVILLE BEARDSLEY**, Attorney General; **SAMUEL J. DOY**, Assistant Attorney General, for Respondent.

*PRISONERS AND INMATES—contributory negligence.* Evidence produced by claimant that he didn't know how accident happened is not sufficient to prove claimant free from contributory negligence.

*SAME—status of inmate.* An inmate is not an employee so as to come within the Health and Safety Act.

NEGLIGENCE—*burden of proof.* Inmate must prove himself free from contributory negligence even though facts disclose State was inexcusably negligent.

TOLSON, C. J.

On July 15, 1954, LeRoy Shannon filed his complaint seeking an award for injuries sustained while working in the woodworking shop at the Illinois State Penitentiary, Joliet, Illinois. The complaint consists of two counts, i.e., negligence and violation of statutory duty.

The case was argued orally on April 21, 1961, and the Court, after examining the pleadings, briefs and arguments, and Commissioner's Report, finds that the latter fairly states the facts, and arrives at the proper conclusion.

The Court, therefore, adopts the Report of Commissioner Presbrey, which is set forth as follows :

"The evidence was taken in this cause on October 23, 1958 in the City of Joliet. John R. Snively represented claimant, LeRoy Shannon, and Samuel Doy, Assistant Attorney General, represented respondent.

"This is a claim by LeRoy Shannon to recover alleged damages for personal injuries sustained by him while an inmate in the Illinois State Penitentiary. After claimant's confinement to the penitentiary, he was processed in the usual manner.

"After holding several jobs in the institution, he was assigned to the furniture factory on March 6, 1953. Adrian Hartfield was the superintendent of said factory. According to the testimony of respondent's witness, Adrian Hartfield, claimant was assigned to the furniture factory at his own request. His first assignment was as a janitor or porter. From there he was transferred to the sanding line, and thereafter he was put on a drill machine. According to the superintendent, he requested to be assigned to a power saw. The power circular saw in question is like a large table with the saw blade projecting through the surface of said table. Various fixtures can be used on said saw. This request was denied at first because of lack of work. Subsequently he was allowed to work on the saw part time.

'Claimant testified that, before he was assigned to the saw, he would go over and watch the men operate it. Claimant contends that he was ordered to work on said saw. It appears from the testimony of claimant that in November of 1953 he worked on the power saw on several occasions. He stated that on the first occasion he worked for approximately a 35 or 40 minute period. He was taken to the machine by an assistant to Mr. Hartfield. Claimant had never operated a saw on a regular basis.

“On January 11, 1954, claimant testified that Mr. Hartfield’s assistant, an inmate, called him over to the saw, and asked him to cut out some chair seats. It appears that the chair seats in question were made of birch wood. They were approximately 18 to 24 inches wide. The wood in question was placed on the saw table to the right side of the blade. It appears that there were pencil lines drawn on the wood to indicate the line to be cut by the saw. Claimant was wearing gloves on his hands at the time that he guided the boards through the blade. Respondent’s witness, Mr. Hartfield, testified that claimant had been repeatedly warned not to use gloves while operating the saw. Claimant contends that he was issued the gloves from the office in the furniture factory, and that he used them on many occasions while operating machines in areas where he could be seen by the supervisory personnel, and that he had never been told not to use the gloves. There is no testimony in the record as to why it was an improper procedure to use gloves while operating a power saw.

“Plaintiff was asked what occurred to him as he was pushing the lumber through the power saw. He stated as follows on page 13 of the transcript:

‘A. I was—I remember putting the seat into the saw, and was pushing it up, and—

Q. You say pushing it up—

A. I was guiding it through.

Q. Were you pushing it away from you?

A. That’s right, That’s correct, and I looked up, and I noticed I didn’t have no finger, and my thumb was cut.’

“On cross examination it was brought out that the chair seat, which was being cut, was placed in a form or jig, and that said jig would **keep** the piece steady as the cut was made on the chair seat. The form would be pushed with the left hand, and held steady with the right hand. On page 42 of the transcript, claimant testified as follows:

‘Q. What would cause the form to slide along with the wood?

A. Your hand would be holding it between the form—to keep—

Q. Your left hand would be holding part of the form too?

A. That’s right.

Q. As well as the chair—would?

A. And it would slide right along with it.

Q. And as you were sliding it along on this particular day, your right hand got caught in the saw blade, is that right?

A. Yes, that’s right. The pressure from the glove or something pulled it in, I don’t know how, exactly.

Q. You noticed something pulling it in?

A. I don’t know just exactly how it happened, all I know is I looked up, and my finger was off, and my thumb was cut.’

“On page 90 of the transcript Mr. Shannon was asked by the Commissioner whether he was using the jig at the time he lost his index finger. He stated that he was not using the jig, that lines were drawn on the chair seats, and that he was following these lines free hand while making the saw cuts.

“There was no guard present on the saw. Mr. Hartfield testified that there had never been a guard on the saw during the period that he had been superintendent of the factory, which would cover a period of approximately thirteen years.

“Respondent’s exhibits Nos. 1 through 4 illustrate the saw in question. There is some dispute as to whether the claimant was using the saw with the permission of the superintendent.

“However, claimant testified that he used the saw with the permission of the assistant to the superintendent, another inmate. There was also some question as to whether claimant was using the proper gloves, and if claimant should have been using any gloves at all in the operation of the saw.

“Respondent’s exhibit No. 5 shows the condition of claimant’s hand.

“In the opinion of this Commissioner, claimant has failed to sustain the burden of proof in establishing negligence on the part of respondent, and in proving himself free of contributory negligence. The observance of proper safety rules would indicate that respondent should have provided a guard on the saw in question. However, there is no proof in the record that the failure to provide such a guard was instrumental in causing claimant to lose his finger. In the opinion of this Commissioner, it is not sufficient for claimant to merely testify that he does not **know** how the accident occurred, but that he looked up and that his fingers were gone. It is, therefore, respectfully suggested that claimant’s claim be denied.”

In denying an award, this Court would be remiss if it did not comment upon the palpable violation of statutory duty by respondent. In *Moore vs. State of Illinois*, 21 C.C.R. 282, this Court held that, while a prisoner cannot sue for a violation of the Health and Safety Act, as he is not considered to be an employee as such, yet “we will not create an anomaly by holding that a food grinder without a hopper used by a private person 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.”

**We**, therefore, hold that the failure of respondent to equip the circular saw with a protective guard was inexcusable negligence.

We further find that claimant has failed to establish that he was free from contributory negligence, and, for that reason alone, the claim must be denied.

## OPINION ON REHEARING

On July 5, 1961, claimant, LeRoy Shannon, by John R. Snively, his attorney, filed a petition for rehearing in this case. The matters alleged in the petition have been discussed for rehearing in the case of *Craven vs. State of Illinois*, No. 4866.

Upon further review and consideration, the Court does not find grounds for reversing the decision heretofore handed down.

The petition for rehearing is, therefore, denied.

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(No. 4866—Claim denied.)

JIMMY CRAVEN, Claimant, **vs.** STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1961.

Petition of Claimant for rehearing denied July 28, 1961.

JOHN R. SNIVELY, Attorney for Claimant.

GRENVILLE BEARDSLEY, Attorney General; SAMUEL J. DOY, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES—*personal* injuries, contributory negligence. Evidence disclosed that claimant was contributorily negligent in his operation of a jointer, while an inmate.

SAME—negligence. State is held to same standards that apply to others under the Health and Safety Act, although the Act does not apply to the State.

SAME—defense of contributory negligence. The defense of contributory negligence is available against an inmate.

TOLSON, C. J.

Jimmy Craven, a former inmate of the Illinois State Penitentiary at Joliet, Illinois, filed his complaint seeking an award for injuries received while working on a jointer, which was located in the woodworking shop.

The case was argued orally on April 21, 1961, and the Court, after examining the pleading briefs and Commissioner's Report, finds that the latter fairly states the facts, and arrives at the proper conclusion.

The Court, therefore, adopts the Report of Commissioner Presbrey, which is set forth as follows :

"The evidence in the above entitled cause was heard and taken on December 4, 1959, in the City of Joliet, Illinois. John R. Snively represented claimant, Jimmy Craven, and Samuel J. Doy, Assistant Attorney General, represented respondent, State of Illinois.

"Claimant, Jimmy Craven, a former inmate of the Illinois State Penitentiary, has brought this action to recover alleged damages for personal injuries sustained by him while an inmate in the penitentiary. It appears that on February 15, 1957 claimant was assigned to the machine and maintenance shop in the penitentiary. Respondent contended that he was assigned to said duties after expressing an interest in such work, while claimant contends he was ordered to do work in the machine shop.

"On April 7, 1957, claimant was helping to make screens for the mess hall in the penitentiary. He was working in conjunction with two or three other inmates. While making said screens, claimant was using a jointer.

"A jointer is a woodworking machine. It is used primarily to smooth wood surfaces. The cutting operation is performed by knives set in a cylindrical shaped head, which in turn is powered by a motor. On each side of the knife is a steel table. These tables can be lowered or raised independently. Usually, when the machine is operated, the table nearest the operator is lowered as the board being surfaced is pushed through the cylindrical head the planed surface slides on the opposite table, which is in a raised position. A metal guard is positioned over the revolving cutting head and knives. It is held in place by a spring. Its normal position is over the cutter head. As the wood surface to be planed is pushed through the cutter head, it pushes back the guard in question. The spring maintains a tension on the guard so the knives are not exposed.

"As the board being planed by claimant was pushed over the cutter head, the guard swung away from its position over the cutter head due to the fact that the spring, which held the guard in place, was broken. The accident occurred on April 7, 1957. It appears that the spring in question was broken on the previous day while the machine was being operated by another inmate. The accident occurred on a Monday.

"It appears that, as claimant pushed the board to be surfaced over the cutter head, the end of the board being planed suddenly went down, thereby causing the other end to fly up. In one portion of his testimony claimant stated that, in attempting to grab said board, the little finger of his left hand came in contact with the cutter heads. In another portion of his testimony, he stated that as the end of the board went down, and he attempted to hold it in place, the little finger of his left hand and the middle finger of his left hand were injured.

"There is testimony that, in addition to the broken guard, the one table was in a lowered position rather than its normal raised position. Claimant stated that he did not know the machine was not properly adjusted until after the accident when he was told of this by one of the guards.

“As a result of the accident, claimant lost the distal joint of his little finger, and his middle finger was swollen. At the time of the accident claimant was 34 years of age. Prior to his imprisonment he had been a mason and cement finisher. He earned approximately \$3.17 an hour. At the time of his hearing he was employed as a laborer, because he testified that he was unable to do cement work. He earned \$2.88 an hour as a laborer. In the opinion of this Commissioner, this claim for damages should be denied. It appears that both claimant and respondent were guilty of negligence. Claimant was guilty of negligence in not seeing that the guard in question was in proper working order. It would also appear that, before an inmate is allowed to operate a machine, it should be inspected to see that it is adjusted properly. However, claimant was guilty of negligence in continuing to operate said machine when he discovered that the guard in question was not properly engaged. It is obvious that, when the board first struck the guard and pushed it aside, the machine should have been stopped until the guard was properly in place. It would also appear that claimant should have inspected the machine before attempting to operate it to determine if it was properly adjusted.

“It is rather curious that claimant did not discover that the far table was in a lowered position rather than in a raised position when he operated the gauges to determine the depth of his cut on the board in question. It would appear that claimant was guilty of contributory negligence, and that his claim should be denied.”

An award is, therefore, denied.

#### OPINION ON REHEARING

TOLSON, C. J.

On June 23, 1961, claimant filed a petition for a rehearing of this case, and, as grounds for same, suggests the following :

1. The common standards of safety by which the duty of the employer to the employee and the master to the servant is measured in private business or industry are applicable to the State.
2. Where the State is guilty of wilful and wanton misconduct, the defense of contributory negligence is not available to it.
3. The claimant was not guilty of contributory negligence.

As to point one, there is no dispute as to the rule of law that the State is held to the same standards in principle that apply under the Health and Safety Act (1959 Ill. Rev. Stats., Pars. 137.1 to 137.21).

In *Moore vs. State of Illinois*, 21 C.C.R. 282, this Court held that a convict was not an employee of the State, and, hence, is thereby prevented from maintaining

an action under the Health and Safety Act. Yet this Court would not create an anomaly by ruling that a food grinder, without a hopper, used by a private citizen is dangerous, while a similar grinder used by the State was not dangerous.

Claimant further argues that the defense of contributory negligence is not available, and cites the Moore Case, *supra*, as authority. As indicated in the opinion on page 290, respondent urged that claimant assumed the risk, and was guilty of contributory negligence. The Court held that neither defense was available in this case, but further stated "We do not, however, hold that such doctrines can never be asserted against a convict, but merely conclude that they do not apply in this case."

As to point two, there is no evidence of wilful and wanton misconduct by the State.

As to point three, claimant has the burden of proof of establishing that he was free from contributory negligence. Not only has he failed in this regard, but the evidence discloses that he was, in fact, guilty of contributory negligence.

The petition for rehearing is, therefore, denied.

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(No. 4762— Claimants awarded \$21,000.00.)

**CHRISTINE KOSKI, A MINOR, STEVEN KOSKI, A MINOR, AND DEBORAH KOSKI, A MINOR, BY CLARENCE L. KOSKI, THEIR FATHER AND NEXT FRIEND, AND CLARENCE L. KOSKI, ADMINISTRATOR OF THE ESTATE OF CATHERINE MAY KOSKI, DECEASED, Claimants, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed September 22, 1961.*

**JEROME J. NUDELMAN, Attorney for Claimants.**

**WILLIAM L. GUILD, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.**

HIGHWAYS—*negligence—constructive notice of hole in pavement.* Testimony that hole had been in existence a month was sufficient evidence of constructive notice of dangerous condition entitling claimants to an award.

TOLSON, C. J.

On February 25, 1957, claimants by Jerome J. Nudelman, their attorney, filed a complaint seeking an award for the death and the several injuries sustained by claimants due to the alleged negligence of the State of Illinois.

The case was heard by Commissioner George Presbrey on February 9, 1959, and was thereafter reassigned to him for the taking of further testimony, which was completed on April 6, 1960.

It was stipulated at the first hearing that the accident occurred on 87th Street near the intersection of Laurel Avenue, and that 87th Street was under the jurisdiction, control and maintenance of the State of Illinois.

The facts of the case are not in dispute, and are set forth in claimants' brief as follows :

#### STATEMENT OF FACTS

"This occurrence took place on May 8, 1955, between one and two o'clock in the afternoon, on 87th Street, a public highway running east and west, at or near its intersection with Laurel Avenue in Cook County, Illinois.

"Claimants lived at 10725 South Calumet Avenue. May 8, 1955 was Mother's Day, and the family was on its way to see a new home that they had hopes of buying. They had left their house at 10725 South Calumet Avenue, and were, just prior to the accident, proceeding west on 87th Street near its intersection with Laurel Avenue.

"The accident happened suddenly and without any warning. The Koskis were driving behind a 1951 Plymouth driven by Catherine McNamara. Miss McNamara had a friend with her, Felicia Wierzbicki, and were returning home after a Sunday of horseback riding.

"Robert F. Michniak was driving his one and one-half ton dump truck east on 87th Street. He had his partner Joseph L. Jakubec, 11, with him, and Jakubec's son, Joseph L., III.

"At the intersection of Laurel Avenue, in the eastbound lane of traffic, there was a large rectangular hole and broken portion of pavement, approximately eight feet by four feet, and was approximately four inches in depth. The road itself is a narrow two lane highway suitable for one lane of traffic to proceed easterly and one lane in a westerly direction.

"As Mr. Michniak proceeded easterly, his truck suddenly bumped into the shattered section of the highway, causing the heavy truck to veer to the

left and into the westerly lane of traffic. The truck sideswiped the oncoming 1951 Plymouth of Miss McNamara, and the Plymouth went into the ditch on the south side of the road. The truck now completely out of control collided head on with the 1955 Ford driven by Mr. Koski.

"Two days later Mr. Koski regained consciousness. He was in the Little Company of Mary Hospital in Evergreen Park, Illinois. Mrs. Koski had died immediately after the accident, and, because Mr. Koski was on the critical list, they would not tell him of his wife's death. His three children were injured, and were in a room by themselves. Mr. Koski woke up with a terrible pain in his head, and his entire right leg was in a cast. He had a broken rib, a cracked kneecap, and a broken bone in his right ankle. The upper and lower portion of his lip had stitches taken in them.

"Dr. Eugene F. Dolenheide of 12757 South Western Avenue, Blue Island, Illinois, was the attending physician. Mr. Koski remained in the hospital from May 8, 1955 to May 22, 1955. Two of Mr. Koski's children, Steven and Deborah, were able to come home with him on May 22. Christine remained in the hospital 'till May 28, 1955. Christine's injuries consisted of a broken right leg, head injuries and a concussion. Christine was treated by Dr. Dolenheide and Drs. Spaeth and Sacks while in the hospital. Although she was released from the hospital on May 28, 1955, there was repeated care necessary due to later complications, and this care is still going on. A re-operation was needed and performed by Dr. Gibson at Blang Children's Memorial Hospital in Des Moines, Iowa. This second operation kept her in the hospital longer than a week. She is still quite emotionally upset and nervous.

"Steven, who was seven years old at the time of the accident, suffered a concussion, a fracture to his right wrist and a ruptured spleen. His spleen was removed in an emergency operation after the accident at the Little Company of Mary Hospital. Dr. Dolenheide was in charge with Drs. Spaeth and Sacks in consultation. Steven still evidences signs of the accident in that he repeatedly gets headaches, and finds that he must watch his diet due to the removal of his spleen.

"Deborah, who was three at the time of the accident, was left with scars on her cheek and forehead. The scar on the forehead has turned white, and is approximately two inches by two inches. It is a solid mass. The scar on the right cheek is a linear one, curved and about three inches long. It cannot be determined at this time whether plastic surgery will permanently remove the scars.

"Mr. Koski, as a result of this accident, was not able to work until September of 1955. For a period of thirty months he took a reduction in pay from \$500.00 to \$420.00 a month. He is now back in management with the Kresge Company. But, it was not until June of 1958 that he was able to regain the position he previously held.

"At the second hearing the testimony for the most part was limited to the medical aspects of the case, and Drs. Robert Meany and Eugene Dolenheide related the nature of the injuries sustained by the several claimants, which will be summarized at the close of this opinion."

Respondent did not offer any evidence in the case other than a Departmental Report, which admitted that an area of pavement had deteriorated in the intersection of Laurel and 87th Street, which measured five feet in width, and extended from the centerline of the pavement to the south edge, a distance of ten feet.

Claimant did not attempt to prove, nor did respondent acknowledge actual notice of the dangerous condition of the highway. If claimants are to recover an award, constructive notice must be established by the evidence in this case.

Mr. Edward Schuda, a deputy sheriff of Cook County, was called to the scene of the accident. He testified to the size and location of the hole in the pavement. He further stated that he traveled this area in the performance of his duties, and that the hole had been in this condition for at least a month.

This Court has held that there cannot be any hard or fast rule in determining when it can be said that the State had "constructive notice" of a dangerous condition, and each case must be decided on its own particular facts. *Visco vs. State of Illinois*, 21 C.C.R. 480.

From the evidence, it is apparent that the State did not post warning signs, nor make repairs for the period of a month. This leads to the only conclusion that the State did not use reasonable care to maintain its highway, and must be charged with constructive notice of a dangerous condition.

Claimants were entirely free from contributory negligence, and, as a family, suffered a catastrophic loss, because of the negligence of the State.

Commissioner Presbrey made the following recommendation in his report:

"The funeral expenses of Catherine May Koski, deceased, amounted to the sum of \$904.55. In the opinion of this Commissioner, for the wrongful

death of Catherine May **Koski**, the damages should be assessed at the sum of \$7,500.00, the maximum provided by statute at this time.

“Clarence **Koski**’s hospital bills amounted to the sum of \$1,278.45. In the opinion of this Commissioner, he should be awarded the sum of \$6,000.00 for his expenses, loss of earnings, pain and suffering, and injuries.

“Deborah **Koski**’s medical expenses amounted to the sum of \$231.90. For her medical expenses, scarring, pain, and other injuries, she should be awarded the sum of \$3,000.00.

“Steven **Koski**’s, age seven at the time of the accident, medical expenses amounted to the sum of \$618.25. He should be awarded the sum of \$7,500.00 for the fracture of the right wrist, loss of the spleen, pain and suffering caused by said accident.

“Christine **Koski**’s, age four at the time of the accident, medical expenses amounted to the sum of \$545.17 as of June 27, 1955, for the fracture of the right femur, pain, suffering, and future medical attention. She should be awarded the sum of \$7,500.00.”

The Court finds that the Commissioner’s conclusions as to liability is in accordance with the evidence, but that his recommendations for awards should be modified in certain instances, as hereinafter set forth.

An award is, therefore, made to Clarence L. Koski, as next friend of Christine Koski, a minor, in the amount of \$7,500.00.

An award is, therefore, made to Clarence L. Koski, as next friend of Steven Koski, a minor, in the amount of \$3,000.00.

An award is, therefore, made to Clarence L. Koski, as next friend of Deborah Koski, a minor, in the amount of \$1,000.00.

An award is, therefore, made to Clarence L. Koski, Administrator of the Estate of Catherine May Koski, deceased, in the amount of \$3,500.00.

An award is, therefore, made to Clarence L. Koski, in the amount of \$6,000.00.

(No. 4775—Claim denied.)

KRALIS POULTRY COMPANY, INC., A CORPORATION, AND GREAT AMERICAN INSURANCE COMPANY, SUBROGEE, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1961.

Petition of *Claimants* for *Rehearing* denied October 27, 1961.

JOHN J. YELVINGTON, Attorney for Claimants.

GRENVILLE BEARDSLEY, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—contributory negligence. Where evidence showed that claimant had sufficient warning by signs and a flagman to reduce his speed, the resulting accident was due to claimant's traveling too fast for conditions.

FEARER, J.

Kralis Poultry Company, Inc., A Corporation, and Great American Insurance Company, Subrogee, have filed their complaint against respondent growing out of an accident, which occurred on June 14, 1956, on U. S. Route No. 50, approximately three-fourths of a mile east of the City of Olney, Richland County, Illinois.

The record consists of:

1. Complaint
2. Departmental Report
3. Transcript of evidence taken on April 10, 1958
4. Transcript of evidence taken on January 26, 1959
5. Motion of claimants for leave to waive the filing of abstract and brief
6. Proof of service of a copy of the motion of claimants for leave to waive the filing of abstract and brief on the Attorney General
7. Order of the Chief Justice granting the motion of claimants for leave to waive the filing of abstract, brief and argument
8. Statement of fact in lieu of abstract, brief and argument, together with attached certificate of service of a copy on the Attorney General
9. Statement, brief and argument of respondent
10. Commissioner's Report

On the above mentioned date, respondent, through the Division of Highways, was engaged in widening ditches and leveling shoulders along U. S. Route No. 50. In the course of this work, several men were employed,

who were using dump trucks, endgate loaders and other necessary quipment.

The employees of the Highway Department had erected warning signs, yellow and black in color, 24" x 24", indicating "Repair Zone", "Barricade Ahead", "Slow", and "One Way Traffic." A flagman was also stationed within the area.

The 1956 Chevrolet, 2 ton truck of claimant, Kralis Poultry Company, Inc., was being operated by one of its employees, Dwight Holman, whose duties consisted of buying poultry and eggs, and transporting them in Indiana and Illinois. At the time of the accident in question, the truck was loaded with eggs and poultry.

Mr. Holman was driving the truck within the repair zone area at or about the hour of 2:00 P.M. on said date, and at said time the road was dry and visibility was good, even though it was cloudy at said time. At said time and place, Mr. Holman was driving said truck in a westerly direction on the concrete slab, which was estimated to be approximately 18 feet in width.

Just prior to the accident, the Highway Department had a dump truck, which was under the control and operation of Mr. C. R. Stine, dumping dirt on the north shoulder of said highway.

Also just prior to said time, there was another vehicle, which has not been identified in the record, which was traveling in an easterly direction, but was not involved in said accident.

There seems to be no question but what claimant's, Kralis Poultry Company, Inc., agent was aware of the repair work being done on said highway for a distance of several hundred feet, and that he was sufficiently warned by signs and the flagman to reduce his speed and to travel with caution through this particular area.

There is very little dispute as to what happened just prior to the impact. As Mr. Holman approached the area where the dirt in the dump truck was being unloaded, he testified he noticed the operation, that the truck was facing in a northwesterly direction, mostly west, and that the dump box was being lowered. He then stated that when he was within 50 feet of the truck, it pulled out onto a portion of the concrete slab, traveling not faster than three or four miles per hour, and that his truck came in contact with it, causing damage to his truck and breakage of eggs and loss of poultry, being the cargo transported by him for Kralis Poultry Company, Inc., one of the claimants.

The impact threw the operator of the dump truck out of his truck, and pushed it for a considerable distance. Claimant's truck traveled some **75** feet or more after coming in contact with the slow moving truck, and extensive damage was done to the truck, for which the subrogation claim is being made. In fact, there was damage to the truck in the sum of \$657.24.

Mr. Stine, the State's agent, testified that he did not see claimant's truck approach. Claimant's agent, Mr. Holman, testified that he was aware of the work being carried on, and that his truck was only moving at the rate of 15 miles per hour at the time of the impact, and that, just prior to the impact, he blew his horn, applied his brakes, and swung to the left. Mr. Holman further stated that the flagman slowed him down, and that he was driving at a rate of about **25** miles per hour.

The only witnesses testifying as to the occurrence were the driver of claimant's truck, Mr. Holman, and the driver of respondent's truck, Mr. Stine. Two other State employees were called as witnesses, who testified as to certain physical facts and the location of the vehicles after

the impact, but the)- did not see the actual impact between the two trucks.

The trial was held by the Commissioner on two separate dates, and on the first date the Attorney General's office was not represented, so that there was no cross-examination of claimant's witness, Mr. Holman. We believe that a lot could have been developed by cross-examination of this witness.

The State did not file an answer, so, therefore, under our rule, a general traverse or denial of the allegations will be considered.

There is testimony to the effect that Mr. Holman pleaded guilty to a traffic violation, but the section of the statute or the violation that he was charged with does not appear in the record. We could only assume that he was driving too fast for conditions. However, it is an admission, and is not denied, even though it was not proven in the proper manner. Therefore, we cannot overlook the charge and disposition of same.

We have held many times that the State of Illinois is not an insurer of all persons, who travel upon its highways. Furthermore, that, with the heavy traffic today, constant repair work is being done by the Highway Division for the convenience, comfort and safety of all those traveling thereon, and that, in view of this, the public using the highways have a certain responsibility in the operation of their vehicles to protect employees and to guard and protect their own property.

The burden of proof at all times is upon claimant to prove freedom from contributory negligence, the negligence of respondent being the proximate cause of the accident, and, thirdly, the injuries.

There is no question in our mind but what Mr. Stine was guilty of negligence in failing to see the approaching Kralis Poultry Company's truck. However, we cannot

overlook the physical facts as to the extensive damage done to the vehicles, the distance the vehicles traveled after the impact, and the warnings that were given to Mr. Holman.

In approaching and driving through the repair zone, Mr. Holman is chargeable with using reasonable care to guard against the possibility of what actually occurred in this particular situation, and, therefore, we cannot help but feel that he was driving too fast for the conditions, and that he was sufficiently warned of this. It is, therefore, our opinion that he was guilty of negligence in contributing to this accident, which resulted in the damages of claimants.

It is, therefore, the order of this Court that the claim of Kralis Poultry Company, Inc., and Great American Insurance Company, Subrogee, be denied.

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(No. 4893—Claimant awarded \$3,078.00.)

ARMOUR AND COMPANY, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed July 28, 1961.*

*Petition of Respondent for Rehearing denied October 27, 1961.*

THOMAS G. CRONIN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; LESTER SLOTT  
AND HAROLD A. COWEN, Assistant Attorneys General, for  
Respondent.

HIGHWAYS—*negligent operation of bridge.* Evidence disclosed that bridge tender was negligent in opening bridge without sufficient warning to claimant.

TOLSON, C. J.

On December 4, 1959, Armour and Company, A Corporation, filed its complaint against the State of Illinois for an award in the amount of \$3,078.00.

The facts of this case are not in dispute, and may be stated as follows:

On December 9, 1957, Michael Killaney, an employee of Armour and Company, was driving a company truck in a westerly direction along and upon McDonough Street Bridge in Will County, Illinois. As he drove up to the incline, he noticed lights flashing ahead of him, and stopped about twenty feet behind the moving part of the bridge that had started to rise. By this time, the gates behind him had closed, so that he could not move in either direction. Directly over the truck a heavy counterweight descended, and crushed the truck so that it became a total loss.

Claimant alleges that the bridge tender was negligent in failing to give proper signals, and to lower the gate on the east side before he opened the bridge.

Respondent did not offer any evidence in the case other than a Departmental Report. The latter does not indicate that the bridge tender looked both ways before he started to open the bridge, and it would appear that he directed his attention to the west end of the bridge before he lowered the near side (east side) gates. By this time claimant's truck was in such a position that it could not be moved forward or backward.

The Court, therefore, finds that respondent was guilty of negligence as charged in the complaint.

The evidence discloses that the truck and equipment cost \$6,216.63 in 1954, and had been depreciated to \$2,448.00. The evidence further discloses that claimant was obliged to rent a comparable truck for a period of twenty-one days at a cost of \$30.00 per day.

An award is, therefore, made to claimant, Armour and Company, in the amount of \$3,078.00.

(Nos. 4816 and 4822—Consolidated—Claimants awarded \$1,531.00.)

DOLORES LABODA AND SAM ANZALONE, Administrator of the Estate of Sam Anzalone, Jr., deceased, Claimants, vs STATE OF ILLINOIS, Respondent.

*Opinion filed September 22, 1961.*

*Petitions of Claimants for Rehearing denied December 15, 1961.*

SAMUEL BASS AND D. ROSSI, Attorneys for Claimants.  
GRENVILLE BEARDSLEY, Attorney General; LESTER SLOTT, Assistant Attorney General, for Respondent.

**HIGHWAYS—constructive notice of defect.** Evidence supported finding that respondent had constructive notice of hole in pavement where holes developed over an eighteen day period.

**DAMAGES—credit for amount received under a covenant not to sue.** Claimant is entitled to but one satisfaction, and Court must deduct from statutory limit amount received under a covenant not to sue.

TOLSON, C. J.

The above cases were consolidated by this Court, as they both arose out of the same transaction. Both causes of action arose out of an automobile accident, which occurred on April 6, 1957. Dolores Laboda was injured as a result of a collision with an automobile driven by Sam Barranco, in which Sam Anzalone, Jr., was a passenger. Mrs. Laboda was very seriously injured, and Sam Anzalone, Jr., was so seriously injured that he expired within ten days after the accident. The facts are undisputed, and respondent introduced no witnesses.

On April 6, 1957, at about 5:00 P.M., claimant, Dolores Laboda, was driving north on Mannheim Road. This is also known as U. S. Route No. 45, and is maintained by the Highway Department of the State of Illinois. The highway consists of four lanes separated by a concrete divider.

At about the same time, Sam Barranco was driving south on Mannheim Road in the inner lane. Just prior to the accident, a car being driven in the west lane pulled

in front of the Barranco car. Mr. Barranco thereupon drove his car to the west lane, and hit a large hole in the road, which caused the car to go out of control, cross the concrete divider, and hit the Laboda car.

From a reading of the transcript, it may be assumed that the unknown driver of the car in the west lane saw the holes in the pavement, and pulled sharply in front of the Barranco car. Mr. Barranco, thereafter driving into the west lane, did not have an opportunity to see the holes in time, for almost simultaneously his car hit the holes, and went out of control when he entered the west lane.

As a result of this head-on collision, Mrs. Laboda suffered serious and permanent injuries, and Sam Anzalone, Jr., who was riding in the front seat of the Barranco car, was killed.

The State did not introduce any evidence in these cases, but from the witnesses, who testified for claimants, it is apparent that Mannheim Road is a heavily traveled highway. Donald Kagebein, a disinterested witness, stated that he traveled this road twice a day; that on March 18 a large hole developed in the west lane of travel, which grew progressively larger day by day, and by April 6 there were several holes, two to three feet wide and eight inches deep, in the traveled portion of the highway.

Claimants' exhibit No. 1, a photograph of the highway taken on the day of the accident, indicates that nearly all of the west lane of travel is chopped up with one or more holes, so that it is virtually impossible to drive in the west lane without hitting one or more of them.

The gist of the complaints is to the effect that respondent had actual or constructive notice of the dangerous condition of the road, and did not either repair

or post warning signs for the protection of the traveling public.

Respondent in its brief relies on the proposition of law that it is not an insurer of all those traveling on highways or being on property owned by the State, but is only required to keep its roads reasonably safe for ordinary travel.

At the outset, it is clear that claimants have not introduced any evidence to show that respondent had actual knowledge of the condition of the highway. For claimants to recover, it must be established from the evidence that respondent had constructive notice under the facts of these particular cases.

In the case of *Visco vs. State of Illinois*, 21 C.C.R. 480, this Court at page 487 stated:

“There cannot be any hard or fast rule in determining when it can be said that the State had ‘constructive notice’ of a dangerous condition, and each case must be decided on its own particular facts.”

In the instant cases, the undisputed evidence is to the effect that ‘a hole was discovered on or about March 18, 1957, and that said hole became larger day by day, so that on April 6, 1957, the date of the accident, a series of holes covered the entire west lane of travel.

Mannheim Road is a heavily traveled street. Yet, for a period of eighteen days the agents of the State charged with the inspection, repairing and posting of warning signs did nothing about the situation.

As to the charge of contributory negligence, the facts disclose that Mrs. Laboda was injured, through no fault of her own, by a car that crashed over a concrete divider, and struck her car head-on.

Claimant’s intestate, Sam Anzalone, Jr., was likewise free from contributory negligence for, at the time of the accident, he was unable to warn Sam Barranco in

time that the west lane of travel was in a dangerous condition.

From a review of the evidence, this Court finds that respondent had constructive notice of the dangerous condition of the road, and was negligent in failing to either repair or post warning signs.

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.)

This Court has considered the rule announced in the Court of Claims of the State of New York in consolidated cases, *Sagan Buss vs. State*, 128 N.Y. Sup. 2nd 924:

“There is only one tort or injury established by the record in the Buss claim, and he can have but *one* satisfaction, but, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and in good conscience 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 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.

An award to Dolores Laboda is, therefore, denied, as the amount of \$20,000.00, paid to her under a covenant not to sue, exceeds the jurisdictional limits of \$7,500.00 in force in 1957.

An award is made to Sam Anzalone, Administrator of Estate of Sam Anzalone, Jr., in the amount of \$1,531.00, the said amount being the difference between the sum of \$5,969.00 paid under a covenant not to sue and the statutory limit of \$7,500.00 in force in 1957.

#### OPINION ON REHEARING

PER CURIAM:

Claimants in the above entitled cause filed their petitions for rehearing, and allege that the Court misapprehended their contentions with reference to the effect of a covenant not to sue.

The Court found in its opinion that it was governed by the statutory limits in cases sounding in tort, and that, according to the decisions of our courts, we were obliged to set off against such limits any sums paid under a covenant not to sue.

The Court recognized that claimants were faultless on their parts, and that their damages exceeded the

amounts received under their respective covenants. However, this Court is unable to make an award in excess of the amount authorized by the statute.

The petitions of claimants for rehearing is, therefore, denied.

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(No. 4761—Claim denied.)

**LILLIE FINN, Claimant, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed April 21, 1961.

Petition of claimant for rehearing denied January 9, 1962.

**JOSEPH COHN, Attorney for Claimant.**

**WILLIAM L. GUILD, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.**

STATE PARKS, INSTITUTIONS AND MEMORIALS—recovery for personal injuries from fall in hole in playground—notice. Evidence disclosed that State did not have notice, actual or constructive, of grass filled hole in sod of playground.

SAME—duty to public using parks. Respondent is under duty to exercise reasonable care in maintaining its parks. However, it is not an insurer against accidents occurring to patrons while using the parks.

SAME—hole in playground area. Respondent is not obligated to warn of every dangerous place in a park, and cannot be held responsible for every depressed area or hole in which some might step and injure themselves.

**FEARER, J.**

This is an action commenced and maintained by claimant, Lillie Finn, to recover damages for personal injuries, which she sustained on July 22, 1956, when she stepped into a hole in the playground area where there were swings, teeter-totters and slides, which area was located approximately 500 feet from the Lodge in the Pere Marquette State Park near Grafton, Illinois. At said time she was watching her small granddaughter play on the swings.

The complaint charged that respondent, through its agents and servants, negligently, carelessly and unlaw-

fully maintained said park in one or more of the following respects :

a. Failed to inspect the grounds in said park so as to ascertain the existence of any holes in the grounds, which may have endangered the public and this claimant in particular.

b. Created, or allowed to be created, a large and dangerous hole in the playground area of said park, which hole became and was covered with grass and foliage, so as to render it difficult to discern by the public and this claimant.

c. Neglected and failed to post notices of warning of the existence of said hole, thus endangering the safety of the public and this claimant.

d. Allowed said hole to remain in such a condition as to be concealed from the public and this claimant, and thus created a dangerous trap.

The complaint states that said hole was located in an area comprised by or immediately adjacent to the area commonly known as the children's playground; further, that respondent knew, or, by the use of reasonable care and diligence, could have known, and was under a duty to learn of the existence of such hole.

As a proximate result of the negligence of respondent, by and through its agents and servants, claimant fell, or was caused to fall to the ground; that she sustained serious permanent and painful injuries to her body and limbs. She sustained a fracture of the ankle, which is permanent in nature, for which she has become liable to spend sums of money for the services of doctors and other medical treatment. Said injuries have permanently disabled claimant, and have prevented her from transacting her usual business.

On July 22, 1956, claimant, Lillie Finn, together with other members of her family, drove to Pere Marquette

State Park near Grafton, Illinois, in two cars. Upon arrival, each person, including claimant, paid the admission charge of ten cents, and, after using the Lodge facilities for luncheon, the children in the group, accompanied by claimant, went to the playground area, which was located about 500 feet from the Lodge.

The playground area is approximately fifty feet square, does not contain sidewalks, and the swings, teeter-totters and slides were located on the grass. After claimant had been in the playground for about a half an hour she stepped in a hole, which she did not see prior to her fall. The position of the hole in reference to the playground equipment was estimated to be about ten feet from the swings.

The hole has been described as being 12 to 13 inches in width, 4 to 5 inches deep, with a sloping gradual indentation with grass growing in the hole, which was not noticed by agents of respondent in mowing the area, or by claimant. In fact, no one testified that they had ever noticed this hole previously. There was grass growing in the hole, which also covered the top of the hole. There was no loose sod or grass in the hole or fresh earth.

It appears from the testimony of the custodian of the park, Mr. Studebaker, that "It was just about like the way they said."

Immediately after the fall the custodian was called to render first aid, and a rock was placed in the hole. Later on dirt was used in filling the hole to correct the condition, which existed at the time claimant fell.

Claimant's ankle became painful and swollen to such an extent that she could not walk on her right foot. She consulted Dr. Carl Vohs, a physician of St. Louis, Missouri, who, after x-raying her ankle, applied a plaster

cast covering the right foot extending to the knee joint, and had her remain in bed for a month. After a period of six or seven weeks the cast was shortened. Claimant was required to move from an upstairs apartment to one downstairs, and to use a wheelchair and then crutches. She continued under the care of Dr. Vohs until July 30, 1957, and she was required to hire domestic help for a period of four months at \$20.00 a week.

Exhibits were admitted in evidence reflecting the following expenses incurred as the result of the accident in question:

Rental of bed and crutches	\$13.00
Rental of wheel chair	11.00
Dselivery of bed and wheel chair	5.00
X-ray examination:	42.50
Dr. Carl Vohs, medical <b>bill</b>	75.00
<b>X-ray</b> examination	10.00
Domestic help	320.00
	<hr/>
Total	\$476.50

It was stipulated that the medical report of Dr. Carl F. Vohs be admitted in evidence, which set forth the nature and extent of the injuries sustained.

Claimant contends that:

1. Inasmuch as she paid admission to the State Park, she became a business invitee.
2. Respondent owed towards claimant a duty to keep the premises in a reasonably safe condition.
3. The operator of a place of public amusement impliedly warrants the safe condition of the premises.
4. The land owner is under a constant duty to inspect the premises to discover defects.

We have previously held that the State of Illinois is not an insurer of all persons, who use and enjoy State parks. *Stedman vs. State of Illinois*, 22 C.C.R. 446, 448.

“While it is true that respondent is under a duty to exercise reasonable care in maintaining its **parks**, it is

likewise the law that respondent is not an insurer against accidents occurring to patrons while using the park facilities.” *Kamin vs. State of Illinois*, 21 C.C.R. 467; *Penwell vs. State of Illinois*, 22 C.C.R. 477.

It has been the law of this State that, before the State can be held liable for an injury on property maintained by it, it must have actual or constructive notice of the dangerous or hazardous condition. *Penwell vs. State of Illinois*, 22 C.C.R. 477, 485. *Weygandt vs. State of Illinois*, 22 C.C.R. 478. In these opinions the following cases were cited : *Delaney vs. State of Illinois*, 21 C.C.R. 191; *DiOrio vs. State of Illinois*, 20 C.C.R. 53; and, *Arnett vs. City of Roodhouse*, 330 Ill. App. 524.

We have previously held that the State of Illinois, in maintaining a nature park, is not obligated to warn of every dangerous place within it. It is, however, obligated to warn of a danger that exists along a trail, which it knows is being used by the public, who would have no knowledge of the existing danger. *Alberta Hansen, Administrator of the Estate of Edward Boegen, deceased, vs. State of Illinois*, No. 4843.

It is our opinion that the State cannot be held responsible for every depressed area or hole into which someone might step and turn their ankle, or otherwise injure themselves throughout the State parks. To require constant inspection in a park of some size, where the State maintains several thousand acres for the benefit of the public, would place an undue hardship and extraordinary burden on the State, by and through its agents and servants.

Furthermore, before the State can be held liable for an accident, it must have, and we have so previously held, actual or constructive notice of the dangerous condition.

Previously we have denied recovery in the following cases: *Stedman vs. State of Illinois*, 22 C.C.R. 446; *Kamin vs. State of Illinois*, 21 C.C.R. 467.

We further denied recovery in the case of *Weygandt vs. State of Illinois*, 22 C.C.R. 478, based upon the fact that the State did not have either actual or constructive notice of the defect, which allegedly caused the injury to claimant.

No answer having been filed by respondent, a general traverse or denial of the facts set forth in the complaint shall be considered as filed under Rule 11 of this Court.

Claimant admits that no actual notice was given to respondent, and we believe that it can be conceded that it did not have constructive notice of the depressed area referred to. However, in the reply brief claimant is distinguishing this case from the Kamin case on the fact that claimant in the present case was not in a remote area of the park, but was within an area comparatively close to the Lodge where the swings and play area were located, and that the State should inspect such an area for any hazards, which could cause injuries to those enjoying said park.

From the testimony, the depressed area was covered with grass, which was not apparent to claimant, and did not appear to be apparent to the agents or servants of respondent in mowing the area about once a week. Because of the grass growing in and on top of the depressed area, it was not visible to the employees working within the area. There was no evidence that anyone ever noticed this depression, as described, before, or ever called it to the attention of the caretaker or anyone else, so that it could be repaired.

If we are going to adhere strictly to the rule that the State is not liable unless it has actual or constructive

notice of a dangerous or hazardous condition, this claim must be denied.

Claimant has the burden of proving, first, that she was free from contributory negligence, and from the record we cannot find that she was guilty of any negligence, which contributed to her own injury; second, that the State had actual or constructive notice of the condition, which amounted to negligence and the proximate cause; and, third, damages.

In practically all of the State parks there are certain areas for picnicking, play areas for baseball, swings, and areas of recreation where the ground might be depressed, and where someone might turn their ankle, which would result in injuries, such as were sustained by claimant. If a recovery were had in all these cases, the State could be considered an insurer of everyone using the park facilities and playground areas, which would place an undue burden on the State to make careful inspection of every playground area as to any depression, which might be covered by grass, such as the one in question.

It is, therefore, very important that claimants, in cases of this kind, prove first the hazardous and dangerous condition, and, second, that the State had actual or constructive notice before the State can be held liable.

The claim of Lillie Finn is hereby denied.

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(No. 4828—Claim denied.)

JACOB G. GOSSAR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March 24, 1961, Judge Wham dissenting.*

*Petition of claimant for rehearing denied January 9, 1962.*

PYLE AND McCALLISTER, and RICE, CHEATHAM AND VANSTONE, Attorneys for Claimant.

WILLIAM G. CLARE, Attorney General, for Respondent.

**PRACTICE AND PROCEDURE—*jurisdiction of Court.*** The Court of Claims is a quasi-judicial body created by the legislature, and does not have jurisdiction to consider the constitutionality of the Court of Claims Act.

**SAME—*notice of personal injury.*** Sec. 22-1 of the Court of Claims Act. Where notice was not filed in apt time, an action will be dismissed.

TOLSON, C. J.

Claimant, Jacob G. Gossar, sustained injuries in a wreck of a motorcycle, which he was riding on September 11, 1957. A complaint was filed in June, 1958 on his behalf in this Court seeking recovery for these injuries from respondent, State of Illinois,

On the 3rd day of March, 1959, respondent, State of Illinois, through its Attorney General, filed a motion to dismiss the complaint on the grounds that claimant had not filed a notice of his claim with the Attorney General, as set out in Section 22-1 of the Court of Claims Act.

Sections 22-1 and 22-2 were enacted by House Bill No. 552 of the 70th General Assembly of the State of Illinois. It was passed by the General Assembly on June 28, 1957, and approved by the Governor of Illinois on July 10, 1957.

Subsequently, claimant filed with this Court objections to the motion to dismiss and amended objections to the motion to dismiss raising several questions as to the motion, but primarily challenging the constitutionality of said House Bill No. 552 for the reason that it violates Section 13 of Article IV of the Illinois Constitution of 1870.

The pleadings in this case have presented the following issues :

1. Is House Bill No. 552 of the 70th General Assembly an amendatory act?

2. If House Bill No. 552 is an amendatory act, does it comply with Section 13 of Article IV of the Illinois Constitution of 1870, which provides, "No law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act"?

3. Is House Bill No. 552 of the 70th General Assembly an act complete within itself?

4. If House Bill No. 552 is a complete act within itself, does it comply with Section 13 of Article IV of the Illinois Constitution of 1870, which provides, "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title"?

The Statutes and Article IV, Section 13 of the Constitution, involved in this case, are hereinafter set forth:

"Section 22 of the Court of Claims Act provides:

"Except as provided in subsection 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 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."

"House Bill No. 552:

"AN ACT to add Sections 22-1 and 22-2 to an Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named, filed July 17, 1945, as amended.

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

"SECTION 1. Sections 22-1 and 22-2 are added to an Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named, filed July 17, 1945, as amended, to read as follows:

"22-1. Within six months from the date that such 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.

"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.

2. This amendatory Act shall apply only to causes of action accruing after the effective date of this amendatory act.

Passed in General Assembly June 28, 1957.

Approved July 10, 1957."

The Illinois Constitution of 1870, Article IV, Section 13, provides as follows:

"Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill, having passed both houses, shall be signed by the speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act. And no act of the General Assembly shall take effect until the first day of July next after its passage, unless, in case of emergency, (which emergency shall be expressed in the preamble or body of the act), the General Assembly shall, by a vote of two-thirds of all members elected to each house, otherwise direct."

It is apparent from the reading of House Bill No. 552 that, if it is to be considered as an amendment to Section 22 of the Court of Claims Act, it would violate Section 13 of Article IV of the Illinois Constitution of 1870, as it was not inserted at length in the new act. *Giebelhausen vs. Daley*, 407 Ill. 25.

While respondent does not concede this point, it is apparent from its brief that it takes the position that House Bill No. 552 is an act complete within itself, and that it does not violate Section 13 of Article IV of the Constitution with reference to the requirement "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

That Section 22 of the Court of Claims Act is anything other than a limitation statute cannot be argued. It

provides a time limit for the filing of a claim, and thereafter provides for additional time for persons under disability.

Section 22-1 of the Court of Claims Act presents an entirely different subject matter, i.e., the requirement of *notice* of injury to the person within six months as a condition precedent to the right to file a complaint. This is a new requirement involving *notice*, and in no way is related to the *time when* a complaint must be filed.

The fact that the Legislature made no provision in House Bill No. 552 for persons under disability is evidence that it was enacting a new and different statute without any reference or consideration to the limitation statute (Section 22).

Sections 22-1 and 22-2 of House Bill No. 552 set forth with particularity the necessity of notice, where to file it, when to file it, what it should contain, and the effect of failure to file a notice. This Bill is clearly an amendment to the Court of Claims Act, which is complete in itself, and requires no reference to any other section of the Court of Claims Act.

Claimant and respondent have submitted excellent briefs, and, from the many cases submitted and reviewed, one case, *People vs. City of Peoria*, 374 Ill. 313, sets forth with clarity the rule of law to determine whether an amendment to an act of the Legislature violates the Constitution.

The court in its opinion laid down the following test:

“Whether the amendatory act amends prior acts is to be determined not alone by the title, or whether the act purports to be an amendment of existing laws, but by its effect upon prior laws and an examination ana comparison of its provisions with the prior law left in force. *People vs. Knopf*, 183 Ill. 410, 56 N.E. 155; *Badenoch vs. City Of Chicago*, 222 Ill. 71, 78, N.E. 31; *Michaels vs. Hill*, 328 Ill. 11, 159 N.E. 278. This same principle is applicable whether the amendatory act purports to be an independent act or to be an act to amend another act by the adding of

a new section, *Lyons vs. Police Pension Board*, 255 Ill. 139, 99 N.E. 337. If the amendatory act is complete in itself, constituting an entire act of legislation on the subject with which it purports to deal, it is to be deemed good and is not subject to the constitutional provision notwithstanding it may repeal by implication or modify the provisions of the prior law. If the amendatory act merely amends the old law by intermingling new and different provisions or by adding new provisions so as to create out of the old act and the new, when taken together, a complete act, and leaves it in such condition that the old act must be read with the new to determine its provisions and meaning, then the act is amendatory of the old law, and the constitutional provision requires that the law so amended be inserted at length in the new act. *Bishop vs. Chicago Railways Co.*, 303 Ill. 273, 135 N.E. 439; *Board of Education vs. Haworth*, 274 Ill. 538, 113 N.E. 939."

In applying the rule to the present case several distinctions are quite apparent. Section 22 is purely a *limitation statute*. Sections 22-1 and 22-2 relate solely to *notice* as a condition precedent to the right to maintain a suit.

It is not necessary to examine and compare Sections 22-1 and 22-2 with Section 22 to give meaning to them as amendatory acts. If there was no Section 22 in the Court of Claims Act, with reference to limitations, Sections 22-1 and 22-2, standing alone, would require a claimant in a personal injury case to give notice, as therein stated, as a condition precedent to the right to maintain a suit.

This Court, therefore, concludes that Sections 22-1 and 22-2 of the Court of Claims Act are amendatory acts, complete in themselves, and not subject to the constitutional objection urged by claimant.

House Bill No. 552 was signed by the Governor on July 10, 1957, and became effective on that date. *People vs. Kramer*, 328 Ill. 512. The accident complained of occurred on September 11, 1957, and it is admitted that no notice was served as required by law. Claimant filed its complaint on June 20, 1958, and thereafter respondent filed its motion to strike for failure to give the notice as required by statute.

The Court, therefore, finds that the motion by respondent to strike the complaint should be allowed.

*DISSENTING OPINION*

**WHAM, J.**

I do not agree with the result of the majority, and, therefore, respectfully dissent.

In my judgment, House Bill No. 552 is an amendatory act, and does not comply with Section 13 of Article IV of the Illinois Constitution of 1870.

From a reading of the House Bill and the Court of Claims law, it is apparent that it is intended to amend Section 22 of the Court of Claims law, and the above Constitutional provision, therefore, requires that said section be inserted at length in the new act, which was not done.

Section 22 is more than a Statute of Limitations. It is jurisdictional in scope, and provides, as a condition precedent to the bringing of an action, that a complaint must be filed within a certain length of time in order to prevent the barring of the claim. We have interpreted this section as being a jurisdictional provision and a condition of liability. *Brown vs. State of Illinois*, 17 C.C.R. 79; *Rexdall vs. State of Illinois*, 19 C.C.R. 171. In fact, we have applied this section even in the absence of respondent raising it. *Atkinson vs. State of Illinois*, 21 C.C.R. 429.

Prior to the enactment of House Bill No. 552, it was the only section of the Court of Claims law setting forth a condition precedent of a jurisdictional nature for the institution of an action in the Court of Claims. House Bill No. 552 imposed an additional condition precedent to the bringing of an action in certain cases.

In order to determine what conditions must be complied with in order to prevent an automatic barring of a

claim, a party must refer to both Section 22 and House Bill No. 552. Therefore, this Bill is not complete in itself, and does not constitute an entire act of legislation on the subject with which it purports to deal, namely, the law prescribing the conditions precedent, which must be complied with in order to prevent the automatic barring of a claim.

*People vs. City of Peoria*, 374 Ill. 313, cited in the majority opinion, referred to *Nelson vs. Hoffman*, 314 Ill. 616, which involved a similar question to that presented in the instant case. In the Nelson case, the act under consideration purported to amend the Mortgage Act by adding a section. The prior law provided that a chattel mortgage acknowledged and recorded in accordance with the provisions of the Act would, if bona fide, become good and valid against everyone from the time of filing for record. The amendatory section provided that such mortgage was good and valid from the time of filing for record against everyone, subject, however, that it was not good against the creditors of the mortgagor unless filed for record within ten days after its execution. The court declared the section added to be amendatory to the previous law and unconstitutional. The court stated at pages 618-619:

“This amendatory act is exactly the kind of legislation against which Section 13 of Article IV of the Constitution is aimed. It amends Section 4 by reference, only. The subject with which both sections deal is the filing for record of chattel mortgages. No one can tell what is required in that regard except by reading together the two sections, whose intermingled provisions declare the law. The whole subject was covered by Section 4, and the only purpose of Section 4a was to add to Section 4 the requirement that such mortgage should not be valid as against creditors of the mortgagor unless filed for record within ten days of its execution. The constitutional provision in question provides that such amendment shall not be made by reference to the title, only, but the section amended shall be inserted at length in the new act.”

I believe that the scope of the word “*subject*”, referred to in *Nelson vs. Hoffman* and in *People vs. City of*

*Peoria*, must be given a broader meaning than applied in the majority opinion. To me, the requirement that a notice of intention to file a claim must be filed within six months after an injury in order to prevent a barring of the claim pertains to the same subject of the prior provision, namely, Section 22, requiring the filing of the claim within a certain length of time after its accrual in order to prevent a barring of the claim: True, one provision provides for filing a notice and the other for filing a complaint. They both, however, are jurisdictional requirements dealing with the subject matter of instituting actions in the Court of Claims in such a manner as to prevent those actions from being automatically barred.

It is also significant to note that, when House Bill No. 552 was enacted, the Court of Claims Law consisted of sections numbered 1 to 24, inclusive. Rather than designating the new matter set forth in House Bill No. 552 as Section 25 of the Court of Claims Law, it was designated in said Bill as Sections 22-1 and 22-2. This would seem to indicate that the bill was intended as an amendment to Section 22 rather than as a separate independent provision of the law.

Then, too, the wording of the Bill itself also indicates that it is an amendatory act. Section 2 of the act reads as follows :

“The amendatory act shall apply only to causes of action accruing after the effective date of this amendatory act.”

Taking all of the above matters together, I believe that House Bill No. 552 does not comply with the constitutional provisions above quoted, and that respondent's motion to strike the complaint for failure to give the notice, as required by the statute, should be overruled.

## OPINION ON REHEARING

On May 31, 1961, claimant filed his petition for rehearing and reversal of an opinion handed down by this Court on March 24, 1961.

The petition alleges that on March 3, 1959 respondent filed a motion to dismiss the complaint on the grounds that claimant had not filed a notice of his claim as required by Section 22-1 of the Court of Claims Law, which Section was enacted by House Bill No. 522 of the 70th General Assembly of the State of Illinois. Claimant thereafter filed objections to the motion, and alleged that House Bill No. 522 violates Section 13 of Article IV of the Illinois Constitution of 1870.

The opinion of March 24, 1961 sustained the motion of respondent to strike the complaint, and found that House Bill No. 522 did not violate Section 13 of Article IV of the Constitution. However, a minority opinion, filed in this case, found that the objections to the motion were well taken, and that House Bill No. 522 was unconstitutional.

It is apparent that this Court, consisting of three members, was gravely concerned by the issues raised by the pleadings, in that House Bill No. 522 was sustained by a bare majority.

What is not apparent by the reading of either the majority or the minority opinion is a fundamental question, which may be stated as follows:

“Does the Court of Claims, under our Constitution, have the jurisdiction, **power** or authority to inquire into the constitutionality of any of the provisions of the Court of Claims Law as enacted by the Legislature?”

The members of the Court were in disagreement as to the answer to this question. However, the Court saw fit to take jurisdiction, and thereafter filed a majority and a minority opinion in this case.

The petition for rehearing has reopened this case for the consideration by the Court, and, although the petition limits the inquiry to the matters therein contained, the Court, on its own motion and before, turning to the petition, believes that it must resolve the question of its jurisdiction to approve or strike down an act of the Legislature.

At the outset, three sections of the Constitution of 1870 should be considered :

**ARTICLE IV, Section 26**

“The State of Illinois shall never be made defendant in any court of law or equity.”

**JUDICIAL DEPARTMENT**

**ARTICLE VI, SECTION 1**

“Judicial Power, where vested.

“The judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, Justices of the Peace, Police Magistrates and such courts as may be created by law in and for cities and incorporated towns.”

**ARTICLE 111—Distribution of Powers.**

“The powers of the government of this State are divided into three distinct departments — the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”

At the beginning of its statehood, Illinois took a surprisingly liberal and progressive attitude regarding claims against the sovereign. Its Constitution of 1818 made no provision for the adjustment of claims against the State, but the following year the General Assembly passed an act, which provided that the Auditor of Public Accounts might sue and be sued on behalf of the State. When a judgment of a court of general jurisdiction was rendered against the Auditor, he was authorized to draw

a warrant on the State Treasurer for the amount of the judgment, and the warrant was payable out of moneys not otherwise appropriated.

This act was repealed in 1829 by an act, which provided that the Auditor might be sued, but that the judgment would not be conclusive upon the State until examined by the General Assembly, and an appropriation made to satisfy the judgment, or so much of it as the General Assembly might deem just. The suit could be brought only in the county where the Capital was located; express provision was made for appeal to the Supreme Court. The act was replaced in 1845 by another act, which was, however, substantially the same.

The Constitution adopted in 1848 provided that the General Assembly should direct by law the manner in which suits might be brought against the State. Apparently, the General Assembly failed to act, and between 1848 and 1870 the only applicable law was a special act covering unliquidated claims arising from canal construction.

A proposed Constitution in 1862 provided that suits against the State might be brought in the Circuit Court of the county where the seat of government was situated, but permitted a change of venue in proper cases.

The Constitution adopted in 1870, however, and still in force in Illinois, reverted to the earlier and narrower conception of sovereign immunity from suit. Only in the Legislature itself could any relief be had for claims against the State until 1877 when an act was passed creating a Commission of Claims.

From 1877 to the present time legislative changes were enacted altering the form for the presentment of claims, but, in general, the concept of a commission to hear and pass upon claims has been maintained.

The present Court of Claims Law is set forth in Chap. 37, Section 439 of the Illinois Revised Statutes. A few of the pertinent sections are noted in brief.

Section 439.1. The Court of Claims, hereinafter called the Court, is created.

Section 439.8. The Court shall have jurisdiction to hear and determine the following matters :

(a) All claims against the State founded upon any law. . .

(b) All claims against the State founded upon any contract . . .

(c) All claims against the State for time unjustly served in prison . . .

(d) All claims against the State for damages sounding in tort . . .

(e) All claims for recoupment made by the State . . .

(f) All claims for recovery of overpayment of premium taxes by insurance companies . . .

Section 439.20. 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 person in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based . . .

In addition to the provisions of the Constitution and the Court of Claims Law, it may be well at this time to define the word jurisdiction. Jurisdiction includes not only the power to hear and determine the cause, but to enter and enforce a judgment. (*Williams vs. Hawkins*, 75 Colo. 136. Words and Phrases, Vol. 23, P. 366.)

Turning now to the basic question of jurisdiction, we note that, in the absence of the Court of Claims Law, it would be impossible to recover any claim against the State due to the prohibition of Section 26 of Article IV of the Constitution. Section 1 of Article VI enumerates the courts created by the Constitution, and it is readily apparent that, although the Legislature describes the Court of Claims as a Court, it is not a constitutional court.

The text "Preparing and Trying Cases in the Court of Claims" (Nebel and Eckert) defines the Court of Claims as follows :

"The Illinois Court of Claims is a statutory body as distinguished from a constitutional body, and, as such, in reality, is not a court but is a legislative commission. The power to pay claims against the State is in the Legislature, **and** the Court of Claims can neither extend nor limit this power. (*Fergus vs. Brady*, 270 Ill. 201.)

If then it be admitted that the Court of Claims is in fact a commission or fact finding body for the convenience of the Legislature in sifting out and reporting back to the Legislature meritorious claims, so that, in turn, the Legislature may make the necessary appropriations, then it is crystal clear that any opinion of this Court purporting to find House Bill No. 522 either constitutional or unconstitutional would be in complete Violation of Article III and Article VI, Section 1, of the Constitution.

Many statutory bodies, in the performance of their duties, exercise quasi-judicial functions, and at times it is difficult to define the precise line where quasi-judicial functions and judicial functions overlap. *Owners of Land vs. Stookey*, 113Ill. 296.

Board of Appeals under Section 46 of the Drainage Act was attacked as an illegal tribunal exercising judicial powers. The court held that the Board action was purely

ministerial, and did not violate the Constitution. *People, ex;rel Kern, vs. Chase*, 165 Ill. 527.

Section 38 of the Torrens Act purported to clothe the Recorder of Deeds with authority to hear and determine adverse claims over land, and thereafter issue a certificate of title to one of the parties. This was challenged as being unconstitutional.

The court held that the power conferred upon the Recorder was a judicial function. His decision affected the rights of the parties claiming ownership, and, therefore, contravenes Article VI, Section 1, as this power is limited to the courts.

When the Court of Claims hears and determines the merits of a claim, and thereafter files its report with the Legislature, it is clearly exercising a quasi-judicial function.

When it is called upon to pass on the constitutionality of an act of the Legislature, it is manifestly clear that it is attempting to perform a judicial function of the highest order, and, being a commission of the Legislature, rather than a component part of the judicial department, it would violate Article VI, Section 1, of the Constitution.

In addition to the foregoing, there is another reason why this Court should not attempt to invalidate an act of the Legislature as expressed in the Court of Claims Law. No claimant has a constitutional right to reimbursement from the State for a claim, regardless of its merits. The Legislature can create or abolish the Court of Claims at its pleasure. Having created the Court, it may also establish rules, regulations and procedures for the consideration of such claims, and such rules, regulations and procedures may not be questioned by anyone, including

the Court, which has the responsibility of administering the law.

For the foregoing reasons, this Court finds that it does not have the jurisdiction, power or authority to rule on the constitutionality of the Court of Claims Law.

It is, therefore, ordered that the majority and minority opinions, heretofore filed on March 24, 1961, be expunged from the records.

It is further ordered that the motion of respondent to strike the complaint for failure of claimant to comply with Section 22-1 of the Court of Claims be allowed.

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(No. 4930—Claimant awarded \$712.00.)

CONSOLIDATED FOODS CORPORATION, A CORPORATION, SPRAGUE-WARNER DIVISION, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 9, 1962.*

ALLEN, DARLINGTON AND ELLIOTT, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD MARSALEK, 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.

TOLSON, C. J.

On August 10, 1961, claimant filed its petition seeking an award in the amount of \$712.00, the same being the balance due it for the sale of food and supplies to the Mississippi Palisades State Camp at Savanna, Illinois.

An order was entered granting the joint motion of claimant and respondent to waive the filing of briefs, and the matter was referred to Commissioner Immenhausen for the taking of evidence.

The case was heard on September 6, 1961, and thereafter the Commissioner filed his report, which is hereinafter set forth:

“Claimant, Consolidated Foods Corporation, A Corporation, Sprague-Warner Division, by its attorneys, Allen, Darlington and Elliott, filed a complaint in the Court of Claims for a \$712.00 balance due on amount stated for goods, wares and merchandise sold and delivered to respondent, State of Illinois, at the Mississippi Palisades State Camp, Savanna, Illinois, in accordance with purchase order No. 323248, attached to complaint as claimant’s exhibit A.

“It was stated that the total price of said goods was \$1,342.29; that respondent paid \$630.29 in November, 1958, leaving a balance of \$712.00 unpaid. Respondent did not file an answer to the complaint. Therefore, a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

“The case was set for hearing on September 6, 1961, in Court Building, 160 N. LaSalle Street, Chicago, Illinois.

“Claimant introduced photostatic copies of purchase order No. 323248, proof of delivery, and acknowledgment from office of the State that goods were delivered in good order.

“Claimant called Mr. Schmidt, who said he was familiar with the book-keeping procedure used by Consolidated Foods. The order was admitted as exhibit No. 1. It bore the signature of M. M. Hollingsworth. There was no objection by respondent. Claimant then introduced exhibits Nos. 2 and 3. Exhibit No. 2, dated July 15, 1958, shows shipment made to the Mississippi Palisades Camp, Savanna, Illinois, by truck, and the driver’s receipt. Claimant then offered claimant’s exhibit No. 4, a statement of shipments and payments received from the State of Illinois. The total amount of the purchase order was \$1,342.29, and received \$630.29, leaving a balance of \$712.00 unpaid. The balance was not paid because the appropriation had expired. Exhibits Nos. 1, 2, 3, 4 and 5 were admitted into evidence. Exhibit No. 5 was a letter from Mr. Munday testifying that all were true and correct copies.

“The next witness was Mr. Brales, Franklin Park, a truck driver employed by claimant. He identified receipt of delivery to the Mississippi Palisades Park; and stated that he obtained signature and signed delivery receipt for merchandise actually delivered by him to the Camp kitchen. All deliveries were checked in off the bill of lading—the agent, who checked goods, was employed by the State of Illinois. He was the superintendent.

“On September 11, 1961, the attorneys for claimant and respondent stipulated that the requirement for briefs and arguments be waived.

“After careful consideration of the testimony offered, claimant has proven its case by a preponderance of the evidence; that the goods were ordered, delivered in good order, and that \$712.00 was not paid, because the appropriation had expired.

“It is my recommendation that claimant, Consolidated Foods Corporation, a corporation, Sprague-Wamer Division, be awarded \$712.00.”

This Court has held on previous occasions that, where the evidence shows claimant has fully complied with the terms of a contract, and payment was not made on the contract due to the fact that the appropriation had lapsed, an award will be made. (*Ross vs. State of Illinois*, 22 C.C.R. 51; *Walsh Oil Co. vs. State of Illinois*, 22 C.C.R. 154.)

It is, therefore, ordered that the report of the Commissioner be adopted by the Court.

An award is made to claimant in the amount of **\$712.00.**

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(No. 3025—Claimant awarded \$2,212.81.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed February 23, 1962.*

GOSNELL AND BENECKI, and JOHN W. PREIHS, Attorneys for Claimant.

WILLIAM G. CLARK, 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 May 1, 1961 to October 31, 1961.

TOLSON, C. J.

Claimant was injured on February 2, 1936, in an accident, which arose 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 award of \$5,500.00 was made to claimant for total permanent disability, **\$8,215.95** for necessary medical, surgical and hospital services, expended or incurred to and including October **22,1940**, and an annual life pension of **\$660.00**.

Successive awards have been made by the Court from **1942** to and including **May 1, 1961**, and the matter is now before the Court for an award to and including **October 31,1961**.

The record consists of a verified petition, supported by original receipts, and joint motion of claimant and respondent for leave to waive the filing of briefs and arguments, **which** has been allowed.

The petition alleges that claimant is still bedfast, and requires daily medical and nursing care. **It** further discloses that claimant has incurred expenses in the following amounts :

1. Nursing and practical help.....	\$877.05
2. Room and board for nurse.....	320.25
3. Drugs and supplies.....	275.51
4. Physician and professional services.....	711.00
5. Miscellaneous expenses .....	29.00
<b>Total .....</b>	<b>\$2,212.81</b>

From an examination of the exhibits and supporting vouchers, it appears that such sums of money were necessary for the care of claimant.

An award is, therefore, made to claimant for medical, nursing and other expenses from **May 1, 1961** to **October 31, 1961** in the amount of **\$2,212.81**.

The Course reserves jurisdiction for further determination of claimant's needs for additional care.

(No. 4918—Claimant awarded \$7,250.00.)

R. E. CRIM, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 23, 1962.*

JAMES E. BALES, Attorney for Claimant.

WILLIAM G. CLARE, Attorney General; WILLIAM H. SOUTH, Assistant Attorney General, for Respondent.

**STATE INSTITUTIONS—*escaped inmates.*** Where evidence showed that inmate had known propensity for incendiarism, and had previously escaped, respondent was liable for burning of barn by escaped inmate.

PERLIN, J.

Claimant; R. E. Crim, brings this action to recover damages caused when three inmates escaped from the Dixon State School, entered upon claimant's real estate, and set fire to his barn, totally destroying the barn and most of its contents. Neither the facts nor the amount of damages are in dispute.

The parties have stipulated to the following:

1. On April 21, 1960, the State of Illinois owned and operated the Dixon State School at Dixon, Illinois, an institution for the mentally deficient.

2. On that date, John Fleury, Robert Mays and Charles Clark left the Dixon State School grounds on an unauthorized absence, and made their way to the farm of one R. E. Crim, which was located approximately one and one-half miles from the school grounds.

3. They acquired some matches from the Crim automobile parked in the barn lot of the farm, and, after making their way to the hay loft of the Crim barn, they started several small fires, one of which they could not put out, and which destroyed the barn and much of its contents.

4. The records of the Dixon State School show that John Fleury was committed to the school as a mentally

deficient person on June 8, 1955; Robert Mays was committed to the school as a mentally deficient person on December 4, 1959; Charles Clark was committed to the school as a mentally deficient person on February 16, 1960; and, all were residents of the school on April 21, 1960.

5. The records of the school further show that John Fleury had a history of delinquency prior to his commitment to the Dixon State School, and that he had been known to set small fires prior to his commitment. During his residency at the Dixon State School, he had left it without authority on at least one occasion prior to April 21, 1960, and, on or about December 8, 1959, a small fire was discovered beneath one of the institution buildings at the school, in which incident Fleury "was strongly implicated."

6. The records also show that both Robert Mays and Charles Clark had a history of delinquency prior to their commitment to the Dixon State School, and that each of them was committed after having been in custody of the St. Charles School for Boys as delinquent children.

7. The Dixon State School is operated as an institution for the mentally deficient in accordance with accepted standards and practices of institutions of similar type located in the United States. The residents of the school are housed in cottages containing from fifty to one hundred and fifty persons. The school is operated on the "open cottage" principle, that is, the doors of the cottages are not locked during the daylight hours, and the inmates of the cottages are permitted to go to and from their assigned school, therapy or recreation areas without adult supervision.

8. The institution grounds are not fenced or regularly patrolled, and the inmate checks are made by per-

sons in charge of the cottages, school, therapy and recreation areas at the times the inmates are performing functions under the supervision of such persons.

Respondent contends that the State was not negligent in permitting the inmates to leave without permission. This contention is based on the fact that the Dixon State School was conducted in accordance with accepted standards for the operation of institutions for the mentally deficient, and that it is not fenced in accordance with such operating principles. Therefore, respondent claims that there can be no inference from the evidence that any act or omission on the part of respondent caused or materially contributed to the absention of the inmates from the school.

The case of *Dixon Fruit Company, Et Al, vs. State of Illinois*, 22 C.C.R. 271, presented facts almost identical to those in the instant case. The Court held that a finding of negligence is preliminary to an award in a case involving damage by an escaped inmate, since the State is not an insurer. In that case, an inmate of the Dixon State School was allowed to wander at will, although he had a record disclosing that he was a mental defective, and possessed a history of previous escapes and of incendiarism. He was kept in a cottage, which was not a maximum security cottage, escaped from the school grounds, and burned a truck. In holding that the State was negligent, the Court declared:

“It appears to us that respondent should have exercised more restrictive control over the movements of this particular patient. It does not seem reasonable to us that a known mental defective, with an exhibited tendency toward incendiarism, should have been allowed to wander at will without supervision in an institution wherein there were no restraining walls or other means of controlling his movements. This is especially so in view of the institution’s location with respect to the City of Dixon, wherein the property of many persons would be jeopardized by the activities of such a patient.

“It is, therefore, our finding that respondent was negligent in failing to take further measures in controlling the activities of this particular patient,

and should, therefore, respond in damages. *Malloy vs. State*, 18 C. C. R. 137."

The negligence of the State of Illinois in allowing John Fleury to roam the grounds without supervision is even more evident than in the *Dixon Fruit* case in view of the fact that Fleury had not only previously escaped, but had manifested a propensity for incendiarism, and that respondent strongly suspected that Fleury had attempted to set fire to the buildings of the institution itself.

Because the State was clearly negligent as to lack of proper supervision over John Fleury, it appears not necessary to determine whether it should have similarly restricted Robert Mays and Charles Clark, although both had histories of delinquency prior to their commitment to the Dixon State School, and both had been committed to St. Charles School for Boys as delinquent children.

It was stipulated that the damage to the contents of the barn amounted to \$500.00. An expert witness testified that the fair, reasonable market value of the barn as of April 21, 1960 was \$6,750.00, which amount was not disputed by respondent. We must assume, therefore, that respondent was in agreement with this valuation.

It is, therefore, the judgment of this Court that claimant be awarded the sum of \$7,250.00.

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(No. 4942—Claimant awarded \$229.60.)

CENTRAL Y. M. C. A. HIGH SCHOOLS, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 23, 1962.*

AUGUST A. GRUNDEI, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; BERNARD GENIS, 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.

**PERLIN, J.**

Claimant, Shirley Briggs, through her assignee, the Central Y.M.C.A. High Schools, submitted a claim for tuition and school materials. Claimant is a blind girl, and is entitled to vocational rehabilitation as a disabled person under Chap. 23, Sees. 3431 to 3439 of the Ill. Rev. Stats.

The Central Y.M.C.A. High Schools provided tuition and school materials for claimant, and now claims the amount of \$229.60 therefor. This amount was substantiated by invoice vouchers attached to the complaint, which showed that \$217.00 for tuition and \$12.60 for school materials were due and owing for the period of January 23, 1959 through June 20, 1959. The only reason for non-payment of this claim by respondent was lapse of the appropriation. At the time the appropriation lapsed there were sufficient unexpended funds available to cover the amount of the claim in the Vocational Rehabilitation Fund.

Claimant is hereby awarded the sum of \$229.60.

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(No. 4961—Claimant Awarded \$110.00.)

MONTGOMERY ELEVATOR COMPANY, A CORPORATION, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 23, 1962.*

MONTGOMERY ELEVATOR COMPANY, A Corporation,  
Claimant, pro se.

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.

PERLIN, J.

Claimant has, for many years, furnished elevator service to the East Moline State Hospital at East Moline, Illinois at the agreed rate of \$110.00 per month.

Through inadvertence, mistake, and oversight in the billing department, claimant failed to submit a regulation invoice voucher form for services rendered by it during the month of March, 1959. This error was discovered on or about March 15, 1960, by which date the biennial appropriation had lapsed. Claimant subsequently filed this claim.

Respondent has adopted the Departmental Report, and has stipulated to the amount of the claim herein and to the facts accounting for its non-payment.

There being no question of law or fact in controversy, an award is hereby made to claimant in the sum of \$110.00.

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(No. 4979—Claimant awarded \$93.60.)

DANIEL F. RING, SHERIFF OF THE COUNTY OF ST. CLAIR, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 13, 1962.*

JOHN M. KARNs, JR., Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, 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.

PERLIN, J.

Claimant, Daniel F. Ring, Sheriff of the County of St. Clair, asks the sum of **\$93.60** as mileage fees for conveying persons to the Illinois State Prison, Menard Branch. The claim was submitted to the Department of

Public Safety, but was not paid for the reason that the charges were payable from the appropriation for the 70th Biennium, which lapsed September 30, 1959.

It has been stipulated that the Departmental Report, dated May 18, 1961, which was filed in this cause under Rule 16, shall constitute the record in this case.

Chap. 53, Sec. 37, 1961 III. Rev. Stats., provides for payment of the sum of twenty cents per mile out of the State Treasury to Sheriffs for conveying persons in going only to the penitentiary.

When a claim would have been paid in due course, if the appropriation had not lapsed, this Court will make an award. It is agreed that the claim herein would have been so paid, if the appropriation had not lapsed.

An award is, therefore, made to Daniel F. Ring, Sheriff of the County of St. Clair, in the amount of **\$93.60.**

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(No. 4782—Claim denied.)

**GUSTAV ENGELKE AND LEOLA ENGELKE, Claimants, vs. STATE OF ILLINOIS, Respondent.**

Opinion *filed* May 8, 1962.

**ELDON M. DURR AND RALPH T. SMITH, Attorneys for Claimants.**

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

**HIGHWAYS—consequential** damages *after* dedication. Evidence showed that claimants had released all rights to consequential damages in dedication of highway right of way.

**SAME—Dedication by Deed.** A Deed of Dedication is as conclusive in cutting off subsequent claims as is a condemnation proceeding.

**PERLIN, J.**

Claimants seek to recover for damages allegedly resulting from the failure of the State to keep unobstructed

an underpass or culvert, which runs under Highway No. 66 and bisects claimant's property. Claimants allege that it was the duty of the State of Illinois to keep the culvert clear of silt and water, and that respondent's neglect of this duty gave rise to damages, because claimants' seventy head of cattle could not cross the highway to use the pasture land on the other side, and that partial closure of the underpass caused water to stand on such pasturage.

Claimants are owners of a dairy farm, which consists of 180.2 acres west of U. S. Route No. 66, and **34** acres east of Route No. 66. Most of the **34** acres east of the roadway were devoted to pasturing cattle, and access to this area required use of the culvert in question.

In about **1953** negotiations were undertaken between claimants and respondent to acquire access rights and some **12.17** acres of this farm. On April **2**, 1955, documents were executed with the State, whereby claimants dedicated the land and access rights to the State for a consideration of approximately \$28,000.00.

During the negotiations, claimants allege the State agreed to construct a culvert, which would enable claimants' cattle to pass under the road. A letter from the Department of Public Works and Buildings, Division of Highways, dated April 6, 1955, signed by the District Engineer, refers to the proposed use of the culvert as a cattle pass, and states an intention to maintain the waterway channel in such a manner that erosion or ponding at the ends of the culvert will not be excessive. The State constructed the new cattle pass or culvert sometime in 1955, and evidence shows that this underpass was cleaned out by respondent once after the construction of the highway.

Claimants allege that, after the completion of the construction, the cows could not pass through to the pasture for the reason that silt and water accumulated to such a depth that the cattle could not wade through. Also, the culvert did not provide a proper drainage, and, as a result, the water from the west side of the highway ran off onto the claimants' farm, and stood in an area of one-half to one acre. Claimants contend that their entire pasture land on the east side of the highway was rendered useless, because the cows could not get from the west side through the underpass to the pasture, and that there was no alternative method of crossing the road. Because of this, they had to buy tons of hay to feed the cattle, and were required to hire extra help. Claimants also claim that three trees were removed by respondent to provide entrance to the highway from the farm, but that such entrance way was never built. Respondent alleges said tree removal was done with claimants' permission, so that better access to the property would result.

The principal issue herein presented is whether or not respondent's payment of \$27,930.00 to claimants for the land in question relieves respondent of any liability for subsequent damages.

Respondent contends that it did not assume responsibility of guaranteeing the continuous passage of claimants' cattle. Respondent further claims that the 12.17 acres of claimant's land, which was dedicated for the free-way, including access rights, was valued at \$810.00 per acre or \$9,857.70, and that the balance of the \$27,930.00 was for consequential damages to the remainder.

It is noted that the Deed of Dedication herein makes no reference to providing or maintaining an underpass by respondent for the benefit of claimants. The Deed provides in part as follows:

“ . . . And the Grantors further, as a part of this dedication, on behalf of himself, his heirs, executors, administrators, and assigns, does hereby release, quit-claim and extinguish any and all rights or easements of access and crossing under which the tract of land herein conveyed and dedicated might otherwise be servient to abutting lands of the grantors. . . ”

The letters of the Department of Public Works and Buildings, introduced by claimants, are dated subsequent to the date of the Deed of Dedication, and cannot be deemed a part thereof.

A deed, which is unambiguous, and which has a settled meaning in law, cannot be changed or added to by parol evidence. *Morton vs. Babb*, 251 Ill. 488.

In *Cole, Et Al, vs. State of Illinois*, 23 C.C.R. 74, this Court, in denying the claim therein, stated that “a decree in condemnation includes damages both to lands taken and lands not taken, and includes all damages, past, present and future.” The Court, citing the case of *C., R.I. & P. Ry. Co. vs. Smith*, 111 Ill. 363, states that “. . . it would appear that a deed of dedication is all inclusive, and of the same effect as a condemnation proceeding.” It must be concluded, therefore, that the payment for the deed herein includes past, present and future damages.

Claimants’ complaint for damages resulting from the removal by respoident of three trees was neither clear nor proved, a fact conceded by claimants’ counsel.

An award is, therefore, denied.

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(No. 4875— Claimant awarded \$1,300.00.)

VIRGIL KIDD, Claimant, vs. STATE OF ILLINOIS, liespondent.

*Opinion filed May 8, 1962.*

BESSE AND BESSE, Attorneys for Claimant.

GRENVILLE BEARDSLEP, Attorney General; SAMUEL J DOY, Assistant Attorney General, for Respondent.

**HIGHWAYS—condemnation—damage to leasehold.** Evidence showed that claimant's leasehold was damaged to the extent of \$50.00 per month over the remainder of the lease.

**SAME—same.** Where State took dedication from fee owner, lessee was entitled to damages for reduction in value of his leasehold over remaining period of the lease.

**PERLIN, J.**

Claimant seeks to recover damages incurred to his leasehold when the State of Illinois appropriated land for a highway improvement.

Claimant, Virgil Kidd, was the lessee of a bowling alley and parking lot from Mr. and Mrs. E. O. Holbrook, who owned the property. Claimant entered into a lease on February 1, 1954 for a term of five years and five months at a rental of \$500.00 per month with a five-year option to renew, which was not exercised. The leasehold consisted of two adjoining lots, one of which was improved by a building used by claimant as a bowling alley, and the other which was used by him as a parking area. The parking area had a capacity of about 45 to 50 cars. Each lot had a 125 foot frontage along U. S. Alternate Route No. 30.

The State of Illinois, Department of Public Works and Buildings, made an improvement on U. S. Alternate Route No. 30 in May, 1957. In making this improvement, the State appropriated a strip of land from both lots, 27 feet wide and 250 feet long. As a result, twelve to fifteen parking places were lost to claimant from May, 1957 to July 1, 1959, the end of the lease term — a period of twenty-six months.

It appears that there was no condemnation proceeding between the State of Illinois and the Holbrooks, as owners, or the claimant, as lessee. The record shows that the owners received from the State compensation for the land taken in an amount not set forth in this proceeding.

The lessee continued to pay the \$500.00 per month rental for the twenty-six months remaining on the term of his lease at the time the land in question was taken.

Respondent does not question that the leasehold interest of claimant was damaged by respondent without just compensation. That a lessee may recover from the State for damages resulting from any taking of his leasehold has been recognized by the courts of Illinois. *Department of Public Works and Buildings vs. Bohme*, 415 Ill. 253, 113 N.E. (2d) 319. *Illinois Power Co. vs. Miller*, 11 Ill. App. (2d) 296, 137 N.E. (2d) 78. The only issue presented is one of determination of the amount of damages.

An expert witness testified for claimant that the parking lot in question had a fair and reasonable rental value of \$150.00 per month. Such value was determined by him in ratio to the total rental of \$500.00 per month paid by claimant for the bowling alley and parking lot. Claimant testified that the loss of the appropriated 'parking area resulted in a reduction in the amount of his weekly gross business, especially during the open bowling season. Another bowling alley operator testified that a parking lot is a valuable asset to any bowling alley, a fact which is not controverted.

Claimant contends that, inasmuch as approximately one-third of the parking lot was taken by the land acquisition, he was damaged to the extent of \$50.00 per month for twenty-six months.

Respondent agrees that the measure of damages in a partial taking of a leasehold should be the value of the leasehold interest at the time of the taking, less the value of the premises not taken. The lessee is, according to respondent, entitled to compensation only, not to a profit, and that to award the lessee compensation measured by

his obligation to pay rent rather than by the property value would render him a profit. Respondent further claims that claimant's damages were speculative and not proven, since the testimony relating to the valuation of the leasehold was predicated on its value at the time of the hearing, and not as of the time of the taking three years prior.

Respondent submitted no evidence as to the value of the property in question. Respondent made no effort to show that the value of the leasehold interest is less than the \$500.00 per month rental upon which claimant's request for damages is based, nor does respondent claim that the rental price, as contracted for in the lease, is unreasonable. In view of the fact that the land value had probably risen from **1954**, when the lease was drawn, to 1957, when the land was taken, it would seem the valuation, as advocated by claimant, is not excessive.

In the recent case of *County Board of School Trustees vs. Elliott*, 14 Ill. (2d) 440, 152 N.E. (2d) 873, the Court held that the law of eminent domain contemplates that, where private property is taken for a public use, the owner is entitled to the amount of money necessary to put him in as good financial condition as he was with the ownership of his property at the time the petition is filed.

The Court finds that, since all of the parking space was valued fairly at \$150.00 per month, and, since the parking space was reduced by one-third, the loss of value to the leasehold estate was \$50.00 per month from the time of the improvement to the expiration of the lease.

Claimant, Virgil Kidd, is hereby awarded damages at the rate of \$50.00 per month for a period of twenty-six months, during which he suffered loss, for a total amount of \$1,300.00.

(No. 4945—Claimant awarded \$441.84.)

CARL PAULUS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1962.

ROBERT J. WOODS, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; BARRY JAY FREEMAN AND LAWRENCE W. REISCH, JR., Assistant Attorneys General, for Respondent.

**STATE PARKS, FAIR GROUNDS, MEMORIALS AND INSTITUTIONS—*negligence—escaped inmates.*** Where evidence showed that patient, who had a history of escape, was insufficiently supervised, an award will be made for damage caused by the inmate to claimant's property while an escapee.

TOLSON, C. J.

On November 2, 1960, Carl Paulus filed a complaint seeking an award for damages to his property, caused by Francis Wasson, a patient at the Lincoln State School, Lincoln, Illinois.

Apparently claimant and the Department of Public Welfare were of the opinion that the case should be tried on the basis of the provisions of Chapter 23, Sec. 4041, 1959 Ill. Rev. Stats.

**“Claims for damages caused by escaped inmates of charitable, penal, reformatory, or other institutions.** Whenever a claim is filed with the Department of Public Welfare, or the Department of Public Safety, or the Youth Commission for damages resulting from property being stolen, heretofore or hereafter caused by an inmate, who has escaped from a charitable, penal, reformatory, or other institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Public Welfare, or the Department of Public Safety, or the Youth Commission, 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 said Departments 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. 1935, June 21, Laws 1935, p. 255, Sec. 1; 1951, Aug. 2, Laws 1951, p. 1892, Sec. 1; 1953, June 30, Laws 1953, p. 631, Sec. 1.”

The testimony in the case does not indicate that any property was stolen. To the contrary, the evidence discloses that many acts of vandalism were committed by

the escaped patient in and upon the property of claimant.

A review of the cases decided by this Court, involving escaped inmates point out that mere proof of an escape, followed by subsequent damages, will not sustain an award.

*Dixon Fruit Company, A Corporation, Et Al, vs. State of Illinois, 22 C.C.R. 271.*

*Charles Finch vs. State of Illinois, 22 C.C.R. 376.*

*American States Insurance Company, Et Al, vs. State of Illinois, 23 C.C.R. 47.*

*United States Fidelity and Guaranty Company, A Corporation, vs. State of Illinois, 23 C.C.R. 188.*

If claimant makes a prima facie case, and respondent offers no evidence as to the circumstance surrounding the escape, we will conclude that claimant has sustained the burden of proof. *United States Fidelity and Guaranty Company, A Corporation, vs. State of Illinois, 23 C.C.R. 188.* In the instant case, respondent offered the testimony of Robert Endres, Chief of Safety and Protection, and William Chambers, a psychologist employed by the Lincoln State School. The gist of their testimony was to the effect that the Lincoln State School is not a penal institution with walls and fences, and that the institution is so understaffed that it is impossible to afford adequate security.

The Departmental Report discloses that Francis Wasson had absented himself five times without leave during the past seven years, and that he became disturbed several times a year, during which he was prone to inflict damages on himself, as well as on property.

While this is not what might be termed a bad record, yet it does disclose a tendency on the part of the inmate to leave the grounds and cause damage at irregular intervals. We believe that, under the circumstances, the State

was negligent in not providing better security for a potential risk.

This case was heard by Commissioner George W. Presbrey, and his report in the following words and figures is hereby adopted by the Court:

#### COMMISSIONER'S REPORT

"The above entitled cause was heard on March 13, 1961, in the City of Lincoln, Illinois. Robert J. Woods represented claimant, Carl Paulus, and Barry J. Freeman represented respondent, the State of Illinois.

"It was stipulated that on July 12, 1959 the State of Illinois, through the Department of Public Welfare, operated the Lincoln State School at Lincoln, Illinois, as a State institution for the mentally deficient.

"It was further stipulated that Francis Wasson entered upon the premises owned by claimant, Carl Paulus, on July 12, 1959, and caused certain damage to said premises. The facts surrounding this matter are substantially agreed to by the parties. It appears that Francis Wasson, 34 years of age, was a patient at the Lincoln State School on July 12, 1959. He had been an inmate since his admission on February 3, 1928, having the intelligence of an imbecile or an idiot. He could be trained but not educated. Wasson was quartered in the farm portion of the Lincoln State School, an area which is not fenced in any manner.

"On July 12, 1959, Wasson escaped from the Lincoln State School, and, while absent, caused damage to the electrical system, walls, windows, window glass, woodwork, water system, and the screens of a house owned by claimant, Carl Paulus, and situated in West Lincoln Township, Logan County, Illinois. The patient was apprehended at 6:30 P.M. on July 12, 1959 by the Lincoln police, and was returned to the institution.

"Claimant reported the damage to the officials of the Lincoln State School. He subsequently repaired the damage at a cost of \$441.84. Officials of the Lincoln State School inspected the premises. On December 22, 1959, claimant presented his claim to respondent.

"Claimant contends that the State of Illinois was negligent in allowing the aforesaid patient to escape from the Lincoln State School, and that, therefore, claimant is entitled to a judgment in the amount of \$441.84.

"It appears from the report of the Department of Public Welfare that Wasson showed a tendency to become disturbed once or twice in a year, at which times he damaged property. He had a record of five brief unauthorized absences in a seven year period, all without property damage. The Lincoln State School has a population of about 5,261 patients. It is not a security institution, and is not fenced. The patient Wasson had been determined medically eligible for privileges, and on July 12, 1959 was under supervision, but was not under detention. It appears that the patient was absent from his cottage at the time of the check at 5:50 A.M. on July 12, 1959. A search was made for him on the grounds of the institution by the personnel of the institution. When he could not be found on the

grounds, the institution notified the local police in Lincoln, and the State Police, who apprehended Wasson on Route No. 121, and returned him to the institution at 6:30 P.M. on the same date.

"Mr. Robert Endres, Chief of Safety and Protection at the Lincoln State School, testified that the patient in question had a known record of being absent from the Lincoln State School twice in 1954 and three times in 1959. It was further testified that there was one attendant for each 125 to 150 patients, and that there were no guards at the gates of the approaches to the farm property. It appears that 11 men were responsible for the safety and security of all the patients of the Lincoln State School at both the town and farm units, and that the institution was understaffed. Endres testified on page 27 of the transcript that in his opinion there was insufficient supervision over the patient in question.

"In the opinion of this Commissioner, claimant should be awarded the sum of \$441.84 for the damages to his property. Claimant has established that respondent was guilty of negligence in permitting the patient in question to escape. Therefore, respondent should reply in damages."

An award is, therefore, made to Carl Paulus in the amount of \$441.84.

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(No. 5012—Claimant awarded \$408.33.)

**HARRY L. McCABE**, Claimant, **vs. STATE OF ILLINOIS**, Respondent.

*Opinion filed June 22, 1962.*

**HARRY L. McCABE**, Claimant, pro se.

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

**PERSONAL SERVICES—lapsed appropriation.** Evidence showed that claimant was entitled to an award for services performed.

**TOLSON, C. J.**

On December 6, 1961, Harry L. McCabe, Judge of the City Court of Harrisburg, Illinois, filed a complaint seeking an award for the balance due him for services rendered the State of Illinois as a sitting Judge in the Superior Court of Cook County.

A stipulation filed discloses that Judge McCabe served in the Superior Court of Cook County from June 19, 1961 through June 23, 1961, and a second period from June 25, 1961 through June 30, 1961.

Exhibit A, attached to the complaint, is a statement from the office of the Auditor of Public Accounts, which discloses that there is a balance due Judge McCabe in the amount of **\$408.33**.

The complaint alleges that, through inadvertence or mistake, only a portion of his statement was paid, which left a balance of \$408.33 due him, after allowing all just credits.

The Court, after examining the pleadings and exhibits, finds that Judge McCabe performed the services in the Superior Court of Cook County, as set forth in the complaint, and that there is due him for such services the sum of \$408.33.

An award is, therefore, made to complainant in the sum of \$408.33.

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(Nos. 4779 and 4780—Consolidated—Claims denied.)

VERNON THOMPSON AND DORIS GREEN, ADMINISTRATRIX OF THE ESTATE OF ERNEST R. GREEN, DECEASED, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed July 27, 1962.*

GEORGE J. MORAN AND GORDON BURROUGHS, Attorneys for Claimants.

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

HIGHWAYS—*negligence—marking speed limit on curve.* Evidence disclosed that State used generally accepted method in arriving at speed designation for curve.

SAME—*negligence—burden of proof.* Claimant must prove by a preponderance of the evidence that some negligent act of respondent was the proximate cause of claimants' damages.

PERLIN, J.

This case is a consolidation of two separate claims arising from an automobile accident, which occurred on June 10, 1955, on Illinois State Route No. 3, at a point

about three miles west of Red Bud, Illinois. In said accident the driver of the car, Ernest Green, was killed, and a passenger, Vernon Thompson, was injured. Doris Green seeks \$7,500.00 recovery as Administratrix of the Estate of Ernest R. Green. Vernon Thompson seeks \$7,500.00 for the injuries he allegedly received in the accident.

The evidence indicates that at the time of the accident Ernest Green, the driver of the car, was proceeding in a southerly direction on said Route No. 3, and heading into a long curve bending in an easterly direction to his left. As the driver rounded the curve, the car failed to continue in the arc, and veered or swerved to the right, leaving the highway, smashing into a tree, killing the driver, Ernest R. Green, and injuring the passenger, Vernon Thompson.

For either claimant to recover damages from the State, he must prove that the State of Illinois was negligent as charged in the complaint, and that such negligence was the proximate cause of the accident. It must further be established that claimants were in the exercise of due care and caution for their own safety. (*McNary vs. State of Illinois*, 22 C.C.R. 323, 334; *Bloom vs. State of Illinois*, 22 C.C.R. 582, 585; *Link vs. State of Illinois*, Case No. 4719.)

Claimants' amended petitions charged several specific acts of negligence to respondent including the following :

(a) It failed to erect proper warning signs to warn people of the proximity of the curve.

(b) It suffered and permitted said highway to be and remain in an unsafe condition in that the curve on said highway where the accident occurred was not constructed in accordance with good engineering practice ;

it did not comply with the original specifications for the construction of said road; and, that the highway was not constructed in accordance with the engineering rules, regulations, specifications and standards promulgated by the State of Illinois through its Division of Highways.

(c) It suffered and permitted the curve on said highway to have two sets of super-elevations, both of which were insufficient for the posted speed set for said curve.

To substantiate their allegations, claimants offered the testimony of Clarence J. Trankle, a member of the Illinois State Police, who was one of the investigating officers. He testified that this curve had been part of his patrol for several years; that he had told a member of the State Engineering Department prior to the accident that the curve needed more markings; and, that there had been a number of accidents on the curve.

Claimants also presented Willard Flagg, a civil structural engineer, who testified that he had previously worked for the Illinois Division of Highways, and that there were formulae established for determining the pitch and degree of curves for highways at particular speeds. He further testified that the southbound lane of the road in question did not have an appropriate super-elevation for a curve on which the State had posted a speed limit of 50 miles per hour. In his opinion, the super-elevation in the southbound lane at the time of the accident justified only a speed of from 35 to 38 miles per hour.

Respondent presented the testimony of Jack Day, a highway engineer for the State of Illinois and a maintenance field engineer for the area of highway in question, who stated that the curve was properly marked by signs measuring 2 feet by 2 feet, and that their subsequent replacement by signs measuring 3 feet by 3 feet

resulted in the curve being substantially overmarked. He further testified that the designated speed of 50 miles per hour was properly determined, and was correct for the curve in question.

The only witness to the accident, Vernon Thompson, testified that he did not remember anything about the incident, since his last recollection was at a point 3 or 4 miles before the occurrence. Officer Trankle stated that the automobile traveled approximately 80 yards after leaving the highway. Mrs. Green testified that her husband was a careful driver, and had had no previous automobile accident experience.

It is the function of the Court of Claims to pass upon questions of fact as well as questions of law, and the Court must determine the weight that should be given to the testimony of witnesses. (*Joyner vs. State of Illinois*, 22 C.C.R. 213; *Flint vs. State of Illinois*, 21 C.C.R. 80.) Despite the divergence of opinion of the witnesses as to the critical speed of the road segment in question, the evidence reflects that the State computed such critical speed pursuant to a generally accepted method of using a ball bank indicator, while actually negotiating the curve with a motor vehicle. This Court concludes that the State was not negligent in the designation and marking of the road area in question.

It is also the opinion of this Court that claimants have failed to prove by a preponderance of the evidence that any act of respondent was the proximate cause of this occurrence. In fact, no evidence as to proximate cause was established, because the sole witness remembers nothing about the accident, nor does the evidence tend to show what actually caused the accident. Claimants were unable to prove that Ernest Green was in the exercise of due care and caution for his own safety. Indeed, the fact that there were skid marks on the highway,

and the fact that the automobile traveled about 80 yards after leaving the highway, tend to show that Ernest Green was probably driving at a high speed.

It is an established rule that the State is not an insurer of all those traveling upon the highway, the extent of its duty being to use reasonable care to keep the highways in a reasonably safe condition for persons exercising due care for their own safety. (*Bloom vs. State of Illinois*, 22 C.C.R. 582.)

In the opinion of this Court, claimants have not proved by a preponderance of the evidence the elements necessary to a recovery.

An award to claimants, Vernon Thompson and Doris Green, Administratrix of the Estate of Ernest R. Green, deceased, is, therefore, denied.

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(Nos. 4967 and 4968—Consolidated—Claimants awarded \$24,984.07.)

DOUGLAS DRUGS, DIVISION OF DEL-KAR DRUGS, INC., DAVID KARGER, Claimants, vs STATE OF ILLINOIS, Respondent.

*Opinion filed July 27, 1962.*

ROSE, BURT and PIERCE, and VICTOR H. GOULDING, Attorneys for Claimants.

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

**CONTRACTS—lapsed appropriation.** Evidence showed that claimants were entitled to an award for professional services and drugs upon stipulation to an amount in lieu of prior disallowed claim with the Department of Public Aid.

TOLSON, C. J.

On February 14, 1961, David Karger, M.D., and Douglas Drugs, Division of Del-Kar Drugs, Inc., filed their complaints, and, upon order of this Court, the cases were consolidated.

The complaint of David Karger, M.D., alleged that he had furnished professional services to the Illinois Public

Aid Commission from June 5, 1959 to July 8, 1960, and that there was due him for such services the sum of **\$33,850.77**. It was dismissed on motion of respondent, and, thereafter, on April 5, 1961, claimant filed an amended complaint seeking an award in the amount of \$14,015.80.

It appears from the testimony in this case that claimant made application to the Cook County Department of Welfare for authority to participate in the medical program. On July 8, 1959, Raymond M. Hilliard, Director, advised Dr. Karger that he had been accepted, and that he was authorized to treat A.D.C. patients in conformity with the rules and price schedule of the department.

On July 8, 1960, Dr. Karger was notified by Peter W. Cahill, Executive Director of the Public Aid Commission, that he was suspended. The reason for the suspension does not appear in the proceedings, but it would appear that a dispute existed as to the nature and the amount of the charges.

Prior to the hearing of this case, the bills submitted by Dr. Karger were re-examined by the Illinois Public Aid Commission, and from this examination it was determined the Commission was indebted to claimant in the amount of \$11,212.64, rather than the sum of \$14,015.80 set forth in the amended complaint. A stipulation of facts was thereafter entered into by complainant and respondent as to the correctness of the amount due.

The matter was heard by Commissioner Herbert G. Immenhausen on March 7, 1962. At that time Dr. Karger testified that exhibit No. 2 was a true and correct copy of statements sent to the Illinois Public Aid Commission, and that the amounts stated therein were due and owing to him, after allowing all just credits.

The complaint of Douglas Drugs, Division of Del-Kar Drugs, Inc., alleged that it had furnished pharmaceutical supplies to recipients of Illinois Public Aid for a number of years, and that, until they were suspended on July 8, 1960, there was due them from previous billings the sum of \$25,194.44. It was dismissed upon motion of respondent, and, thereafter, claimant filed an amended complaint seeking an award of \$17,214.26.

Claimant's statements for supplies were re-examined by the Illinois Public Aid Commission, and from this examination it was determined that claimant was only entitled to \$13,771.43 for the reason that it had not complied with the rules of the department. A stipulation of facts was thereafter entered into by claimant and respondent as to the correctness of the amount.

The matter was heard by Commissioner Herbert G. Immenhausen on March 7, 1962. At that time Harry Simon, a druggist, who was the secretary of Douglas Drugs, Inc., identified claimant's exhibit No. 1, and testified that it was a true and correct copy of statements sent to the Illinois Public Aid Commission, and that the amounts stated therein were due and owing to claimant, after allowing all just credits.

The Court, after examining the transcripts, exhibits, and Report of the Commissioner, finds that claimant, David Karger, is entitled to an award in the amount of \$11,212.64.

The Court further finds that claimant, Douglas Drugs, Division of Del-Kar Drugs, Inc., is entitled to an award of \$13,771.43.

An award is, therefore, made to David Karger in the amount of \$11,212.64.

An award is, therefore, made to Douglas Drugs, Division of Del-Kar Drugs, Inc., in the amount of **\$13,771.43.**

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(No. 3025—Claimant awarded \$2,782.46.)

**ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,  
Respondent.**

*Opinion filed October 4, 1962.*

GOSNELL AND BENECKI, and JOHN W. PREIBIS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, 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 October 31, 1961 to June 1, 1962.

TOLSON, C. J.

On July 30, 1962, claimant filed her petition for reimbursement for monies expended for nursing care and help, medical services and expenses from October 31, 1961 to June 1, 1962.

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 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 her physical condition, as she is bed-ridden, and requires constant care by physicians and nurses.

Attached to the complaint is a bill of particulars, supported by receipts, which discloses the following amounts expended by the petitioner to May 31, 1962:

1. Nursing and practical help _____	\$1,078.90
2. Board and room .....	367.50
3. Drugs and supplies _____	427.56
4. Physicians and professional services .....	908.50
	\$2,782.46

From an examination of the petition and supporting exhibits, it appears 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 \$2,782.46 for the period of October 31, 1961 to June 1, 1962.

The Court reserves jurisdiction for further determination of claimant's needs for additional care.

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(No. 4895—Claimant awarded \$12,000.00.)

**ROSEMARY P. JONES**, for herself, and as next friend of **MARGARET MARY JONES**, a Minor; and **TIMOTHY DANIEL JONES**, a Minor, Claimants, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed November 13, 1962.*

**EARL R. BICE**, Attorney for Claimants.

**WILLIAM G. CLARK**, Attorney General; **MADALYN MAXWELL**, Assistant Attorney General, for Respondent.

**ILLINOIS NATIONAL GUARD—death claim.** In personal injury or death 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 Workmen's Compensation Act in effect in the State of Illinois at the time the action arose.

**PERLIN, J.**

On September 1, 1958, Howard D. Jones, who was a First Lieutenant in the Illinois National Guard, was killed while on a flight from Luke Air Force Base, Arizona via El Toro Marine Base, California to his home-

base in Springfield, Illinois. The parties have stipulated that he was "killed in the line of duty", and while performing his duty as an officer of the 170th Fighter Interceptor Squadron of the Illinois National Guard under orders of his commanding officer.

Claimants in this proceeding are Rosemary P. Jones, the widow of Howard Jones; Mary Margaret Jones, 17 months old at the time of the accident; and, Timothy Daniel Jones, 3 months old at the time of the accident, both minor children and dependents of Howard D. Jones.

Said claimants seek recovery under Chap. 129, Sec. 220.53, 1957 Ill. Rev. Stats., which provides as follows :

"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."

The parties have stipulated that from January 1, 1957 through August 9, 1957, Howard Jones, while on active duty with the United States Air Force, received a total monthly rate of pay of \$627.48. During the period of August 9, 1957 to January 8, 1958, he was a student in Parks College, and was unemployed during that period. From January 8, 1958 to September 1, 1958 he earned \$1,280.59 for 54 days active duty as a member of the Illinois National Guard.

The parties have further stipulated that Rosemary P. Jones was paid \$3,000.00, representing gratuity pay for six months from the United States Air Force. She receives monthly from the United States Veteran's Administration, as Dependency and Indemnity Compensation, the sum of \$158.00 for herself and her two minor children, and a payment of Old Age and Survivor's Insurance of \$100.00 monthly for herself and her two minor children.

Under the policy of the Court of Claims enunciated in *Ward vs. State of Illinois*, No. 4897, this Court Will allow, in addition to benefits being received from the Federal Government and other sources, a recovery equivalent to the maximum amount prescribed by the Illinois Workmen's Compensation Act in effect at the time the accident occurred. According to the provisions of the Workmen's Compensation Act, Ill. Rev. Stats., Chap. 48, Sec. 138.7 (1957), the maximum death benefits allowable to a widow and two minor children on September 1, 1958 mere \$12,000.00.

It is the opinion of this Court, therefore, that claimants shall be awarded the sum of \$12,000.00.

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(No. 4897—Claimant awarded \$12,000.00.)

**RICHARD L. WARD, II** and **ANN WARD**, by **JOAN S. WARD**, their mother and next friend, and **JOAN S. WARD**, individually, Minor children and Surviving Spouse of **RICHARD L. WARD**, Deceased, Claimants, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed November 13, 1962.*

**JOHN E. CASSIDY, JR.**, Attorney for Claimants.

**WILLIAM G. CLARK**, Attorney General; **MADALYN MAXWELL**, Assistant Attorney General, for Respondent.

**ILLINOIS NATIONAL GUARD—death claim.** In personal injury or death 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 Workmen's Compensation Act in effect in the State of Illinois at the time the action arose.

**SAME—no set-off of other payments.** In cases where awards are made under the Military and Naval Code, amounts received from other sources will be disregarded.

**PERLIN, J.**

On June 6, 1959, Richard L. Ward, age 30, who was a full-time member of the Illinois National Guard and a Commissioned Officer in the United States Air Force, was

killed in an aircraft accident, while in the line of duty and acting pursuant to orders from his Commander-in-Chief and superior officers. The accident occurred near the Greater Peoria Airport, Peoria County, Illinois, when a jet fighter plane, which Ward was flying, failed to gain altitude on take-off, crashed and burned.

Surviving the deceased were his wife, Joan S. Ward, age 31; his daughter, Ann J. Ward, age 3, who was born August 3, 1956; and his son, Richard L. Ward, II, age 4 months, who was born on March 11, 1959. Said survivors are the claimants in this proceeding.

Although this case was commenced under Ill. Rev. Stats., Chap. 129, Sec. 143, that section was changed in 1957 to Ill. Rev. Stats., Chap. 129, Sec. 220.53 (1957), which provides as follows :

“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.”

The provisions of former Sec. 143 and current Sec. 220.53 are substantially similar, and the arguments of the parties in this case are applicable to the new as well as the old statutory sections.

The only question presented in this proceeding is the amount of compensation, which should be awarded.

At the time of his death, the deceased was a full-time, salaried member of the Illinois National Guard. He held the rank of Captain, and received a salary of approximately \$800.00 per month. His earnings for the year 1958 were \$9,071.86, and, for 1959, until his death in June, his earnings were \$5,147.01. He was the sole means of support of his wife and children.

The deceased held several life insurance policies, including two which secured a Real Estate Mortgage,

having an unpaid balance of \$16,400.00. Most of these policies denied all or part recovery in the event death occurred while operating an aircraft. Claimants allege that the full amount of all policies totalled \$36,000.00, and that, since Mrs. Ward received only \$7,240.00 of this amount, a base figure in computing her award should be the \$29,359.10, which she did not receive because of the ‘‘Aircraft Exclusion’’ clauses.

Claimants further urge that, on the basis of estimated minimum expenses of Mrs. Ward and the two children, Mrs. Ward should be awarded \$55,000.00, with Ann and Richard receiving respectively \$9,000.00 and \$12,600.00, for a sum total of \$76,600.00.

The widow is currently receiving from Federal Funds monthly payments of \$165.00 from the Veteran’s Administration and \$81.80 from Social Security benefits, while the children are receiving \$136.40 per month from Social Security benefits, and will continue to do so until they reach 18 years of age, for a total monthly income of \$383.20.

Claimants contend that their request for \$76,600.00 is allowable under the Statute because of the holdings in Military and Naval Code cases, such as *Dudley vs. State of Illinois*, 21 C.C.R. 225, **258**, that this Court has ‘‘not considered the Workmen’s Compensation Act to be either a ceiling or floor under our awards.’’ They further cite the following language in the *Dudley* case as justification for the amounts claimed:

‘‘One of the primary purposes of both Public Law 108 and the applicable section of the Military and Naval Code is to render more attractive to potential members service in the National Guard, and to afford protection to members thereof in activities, which concededly are often extremely dangerous. In other words, both statutes serve as stimulants to voluntary military service, which service is of the utmost importance to the safety, welfare and protection of the Nation and the State.’’

It should be noted, in enunciating this principle of public policy, the Court was merely setting forth reasons as to why Federal benefits should not preclude State payments.

Respondent argues that, as a matter of public policy, benefits payable to a National Guardsman, or his dependents, should not greatly exceed benefits paid to dependents of others, who serve their government equally faithfully in different capacities, since it is as important to the State to encourage the employment and retention in service of competent dedicated persons in the civil aspects of government as it is in the military, and discrimination in the awarding of benefits to the two such classes of persons would have an inevitable ill effect.

Respondent further urges that the maximum amount of recovery should be not more than that expressed in the Illinois Court of Claims Act section on tort liability or of Sec. 138.7 of the Workmen's Compensation Act.

In arriving at the amount of awards arising out of the death or injury of Illinois National Guardsmen, the Court of Claims has often used the Workmen's Compensation Act as a guide. Cases in which the Act was so used include the following :

*Williams vs. State of Illinois*, 4 C.C.R. 209 ; *Tranchita, Et Al, vs. State of Illinois*, 10 C.C.R. 535; *Hall vs. State of Illinois*, 12 C.C.R. 464; *Quigley vs. State of Illinois*, 17 C.C.R. 27; *Falls vs. State of Illinois*, 21 C.C.R. 229; **Brown vs. State of Illinois**, 21 C.C.R. 409; and *Sypniewski vs. State of Illinois*, 21 C.C.R. 586.

In *Tranchita, Et Al, vs. State of Illinois*, 10 C.C.R. 535, where a member of the Illinois National Guard, while in the line of duty, received personal injuries resulting in his death, the Court held:

"No hard and fast rule exists for determining what amount should be allowed. In certain of these cases the Court has seen fit to take as a guide,

but not as a fixed rule, the provisions of the Illinois Workmen's Compensation Act in determining what payment would be reasonable and customary for the loss sustained."

The Court then allowed recovery by calculating how much would be allowed had the deceased been an ordinary State employee, limited to recovery under the Workmen's Compensation Act.

It is the opinion of this Court that, while the section of the statute under which recovery is here sought appears to impose no maximum amount on its face, the Legislature adopted this provision as remedial legislation, and did not intend that it be applied without equal standards or reasonable limitation of amount.

Section 220.53, under which this action is pursued, provides that financial help or assistance will be allowed to personnel, or their heirs or dependents, if death or injury occurs while performing duty in pursuance of orders from the Commander-in-Chief. This requirement is nearly identical in practice to the Workmen's Compensation standard, which allows compensation for injury or death if "suffered in the course of employment within this State" (Ill. Rev. Stats., Chap. 48, Sec. 138). In neither instance is it required that the employee, or his successors in interest, prove that he was free from wrongdoing, and that the employer or the State is a tortfeasor or wrongdoer. The comprehensive liability imposed by the Workmen's Compensation Act is discussed by the Illinois Supreme Court in *Decatur Ry. Co. vs. Industrial Bd.*, 276 Ill. 472, 474, where the Court states:

"The liability imposed by the Workmen's Compensation Act has no connection with the negligence of either the employer or the employee. An injury arising out of and in the course of employment creates the liability without any question of fault on the part of either the employer or the employee."

The intent of Workmen's Compensation legislation is to provide practically automatic and certain relief to

an injured employee upon mere proof that the injury arose in the course of covered employment within the State. This precludes the doubtful contest for recovery, which the employee would face under common law, wherein such recovery would require proof of the employer's negligence, plus a negation of the defense of contributory negligence, assumed risk, and the fellow servant doctrine. Similarly, Sec. 220.53 of the Military and Naval Code makes recovery for injuries or death suffered in the line of duty almost certain.

However, it has long been recognized that a fundamental purpose of the Workmen's Compensation statutes is "to provide not only for employees a remedy, which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." (*Bradford Electric Light Co. vs. Clapper*, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696.)

In the landmark case of *New York Central Railroad Co. vs. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, the United States Supreme Court upheld the constitutionality of the New York Workmen's Compensation statute, and declared :

"If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences in excess of the scheduled compensation of risks, ordinary and extraordinary.

"On the other hand, *if the employer is left without defense respecting the question of fault, he at the same time is assured the recovery is limited, and that it goes directly to the relief of the designated beneficiary.*" (Emphasis supplied.)

For the foregoing reasons, liability without fault must be necessarily limited to protect the State of Illinois from the astronomical claims, which might be urged by claimants under the Military and Naval Code, just as the

State is protected from injury claims by ordinary State employees under the Workmen's Compensation Act.

Because of the absence of requirements showing either freedom from contributory negligence on the part of claimant or negligence on the part of the State, there is no basis for treating injury cases arising under the Military and Naval Code as ordinary tort actions subject to the ad damnum provisions of the Court of Claims Act, Ill. Rev. Stats., Chap. 37, Sec. 439.8 (D).

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 applicable provisions under the Workmen's Compensation act in effect, when the accident in question occurred on June 6, 1959, were as follows:

"(Ill. Rev. Stats., Chap. 48, Sec. 138.7)

"Sec. 7. The amount of compensation which shall be paid for an accidental injury to the employee resulting in death shall be:

(a) If the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his accident, a sum equal to 9.25 times the average earnings of the employee, but not less in any event than \$7,500 and not more in any event than \$10,750.

.....

3. Whenever in paragraph (a) of this Section a maximum of \$10,750 is provided, such maximum shall be increased in the following amounts:

.....

\$12,000 in the case of 2 such children ('such children' refers to unemancipated children of the deceased under the age of 18 years)."

It is the opinion of this Court, therefore, that claimants shall be awarded the sum of **\$12,000.00**.

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(No. 4911—Claimants awarded \$28,000.00.)

**GARY MALLORY and SUSAN MALLORY, minors, by RUTH M. MALLORY, their Mother and next friend, and RUTH M. MALLORY, and MERTON MALLORY, Claimants, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed November 13, 1962.*

EBERT AND SEIB, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; HAROLD A. COWEN, Assistant Attorney General, for Respondent.

**HIGHWAYS—sudden narrowing of highway.** Evidence showed State was negligent in not placing adequate warning signs indicating a narrowing of the pavement.

SAME—constructive notice of dangerous condition. Evidence that condition of black top highway narrowing twenty-seven inches had existed for some time was constructive notice to State, because such a condition is ipso facto a dangerous one.

NEGLIGENCE—*sudden emergency*. Evidence disclosed that claimant acted as an ordinarily prudent person under a sudden emergency.

**FEARER, J.**

This is an action brought by claimants, Gary Mallory and Susan Mallory, minors, by Ruth M. Mallory, their Mother and next friend, Ruth M. Mallory, individually, and Merton Mallory, against respondent, State of Illinois, to recover damages for personal injuries and loss of consortium brought on behalf of Merton Mallory, for injuries sustained on the 12th day of October, 1959, on State Highway No. 19 at or near the DuPage-Cook County line in the State of Illinois.

There has been filed in this cause a complaint, an amended complaint, and a second amended complaint.

The complaints allege that one of the plaintiffs, Ruth M. Mallory, was driving a motor vehicle in an easterly direction on State Highway No. 19, at or about 7:00 P.M., at approximately  $\frac{3}{4}$  of a mile west of Roselle Road in the Township of Hanover, County of Cook, State of Illinois, and at said time and place was in the exercise of ordinary care and caution for her own safety.

It was also alleged that Gary Mallory and Susan Mallory, her minor children, were riding as guest passengers, and that they were at all times exercising due care and caution for their own safety. Due to the age of the children, there is no question of contributory negligence on their behalf.

In the second amended complaint, an action is brought on behalf of Merton Mallory, husband of Ruth M. Mallory, for loss of consortium with the necessary allegations in regard thereto.

Respondent proceeded to trial under a general denial of the facts set forth in the complaints pursuant to Rule 11 of this Court.

On the evening of the accident, Ruth M. Mallory, along with her two children, Susan and Gary, and Leola Underwood and her daughter, Jennifer, were driving from a girl scout camp, which was about four miles east of Elgin, Illinois, and were returning to their home in Chicago. Mrs. Underwood was sitting in the front seat on the righthand side, the two small girls were in the back, and the small boy was riding to the right of Mrs. Underwood.

Respondent was charged with the following acts of negligence : constructed said highway at the place of the accident to permit a sudden narrowing of the road; failure to post warning signs of the narrowing of the road; allowing the shoulder of the road on the south side to erode and wash away, leaving a drop off of about six inches.

Briefly, Ruth M. Mallory was driving her husband's 1953 Dodge automobile in an easterly direction at or about the hour of 7:00 P.M., driving approximately 40 m.p.h., when suddenly the right wheels of the automobile dropped onto the shoulder causing her car to go out of control over into the westbound traffic lane and strike another vehicle.

There were offered in evidence photographs showing the extensive damage to the vehicles, namely claimants' exhibits Nos. 6 through 10, inclusive. The photographs clearly indicate that both vehicles were total wrecks. One man, Albert T. Miter, was killed in the westbound vehicle.

There were also claimants' exhibits introduced in evidence showing the highway and the shoulder, and one exhibit, which has been marked as petitioners' exhibit No. 3, which we assume is claimants' exhibit No. 3, of

measurements showing the width of the highway in question.

The injuries of Ruth M. Mallory were severe. Medical statements, with certain stipulations that they may be admitted into evidence, and that the doctors would testify in accordance thereto, were admitted in evidence, along with medical bills and testimony as to damages claimed as a result of this accident.

As we find in some of the cases, there is a lot to be desired as far as a record is concerned. It is especially difficult when you consider that this Court is not only passing on the legal aspect of each and every case, but also sitting as a jury and as a trier of the facts.

We are mindful of the fact that passengers, particularly the Mallory children, could not be guilty of anything, taking into consideration their tender years, age, experience and dependence. Their claims will then rise or fall on whether or not it was the sole negligence of their mother, which was the proximate cause of the accident, or the negligence of respondent, as charged.

As to Ruth M. Mallory and the claim of her husband, Merton Mallory, their claims will rise or fall on the question of whether or not it was the negligence of the State of Illinois, Division of Highways, and its failure to erect warning signs as to the narrowing of the pavement and the maintenance of the shoulders, and also the question of contributory negligence and the negligence of the operator of the automobile, Ruth M. Mallory, which was the proximate cause of the accident resulting in injuries.

The Commissioner, who heard this case, has made reference to certain testimony. We believe, because of the seriousness of the accident and the questions of fact involved, that it is going to be necessary to take

each witness separately, and to make a resume of the evidence.

Two abstracts of evidence have been filed in this case.

The first witness called for claimants was Russell Mallory, a brother-in-law of Ruth M. Mallory, who testified that he went to the scene of the accident the following day. That he also went back to the scene of the accident on October 14, 1959, and took some pictures, claimants' exhibits Nos. 1 through 5, inclusive, measured the road, and that he found that it narrowed 25 inches on each side. He did not measure the actual drop-off, but did have his wife stand apparently on the south side of the road next to the paved portion of the highway, being the traffic lane that Ruth M. Mallory would have been driving in on the night of the accident. This is shown in claimants' exhibit No. 4, which also indicated where the roadway narrows. He estimates that there is a drop-off of approximately 8 inches, and that it runs for approximately 76 yards along the south side of the highway in an easterly direction.

Some place in the record in this case, we have found that counsel for claimants has referred to ruts. The exhibits and testimony in support thereof does not indicate that the shoulders of the road were in disrepair, nor were there any ruts along the south side of the paved portion of the highway.

On cross-examination, Russell Mallory testified that he drives over this road about two or three times a week, and has for the past year, and that he knew the condition of the highway. He marked the measurements on claimants' exhibit No. 3, signing his name.

The record is not clear as to the figures of 22 feet, 2 inches, but we assume, although he did not so testify, that the paved portion of the road was 22 feet, 2 inches wide.

The next witness called on behalf of claimants was Joseph Ganziano, who lived on Route No. 1, his address being Box 9, Roselle, Illinois, being about a block and one-half from the scene of the accident. He testified that he had occasion to travel this road many times, and that he lived in Cook County where the road is blacktop, and that, when it comes to DuPage County, it is a concrete highway that narrows down approximately 2 feet. That there had been a drop-off on the south side of the road, but he did not know the extent of the drop-off, but that it did extend for some 75 yards. That he traveled back and forth at least twice a day over the road. That the condition existed for at least one year prior to the accident. That he never notified anyone about it.

At this point in the trial of the case, there appears to have been a stipulation by claimants' counsel and counsel for respondent that other witnesses would testify to the same condition.

Joseph Ganziano also testified that he did not notice any signs along the highway warning the traveling public of the narrowing of the paved portion of the road.

Claimants' next witness was Leola Underwood, who was a passenger in the car at the time of the accident. Her testimony was that they were coming from a girl scout camp, and were on their way back to their home in Chicago. The camp was located at Bartlett Woods, and she was riding in the car with Mrs. Mallory, who was driving. That with them was Susan and Gary Mallory, and daughter, Jennifer. That at the time of the accident it was dark. That Mrs. Mallory had the lights of the car on, and that the weather was nice. That they were traveling east on Route No. 19 towards Chicago. That all of a sudden the **car** swerved, and felt like a bump. That she does not drive a car herself, but has been a

passenger in automobiles for 25 years, and that, in her opinion, the Mallory car was traveling about 40 m.p.h. That she recalled nothing after the accident, as she was taken to the hospital in an ambulance.

On cross-examination, Leola Underwood testified that she did not notice anything wrong with the road, and does not recall any traffic on the road at the time.

Claimants' next witness was Kenneth Rackow, the State Trooper, living in Bellwood, Illinois. He testified that, on the night in question, he received a call at about 7:20 P.M., and, when he got to the scene of the accident, there was a great deal of congestion. He stopped automobiles, that the injured had already been removed from the scene, and that he proceeded to take the information that he could get at the scene of the accident, namely, the names and types of automobiles involved, and proceeded to the Sherman Hospital at Elgin, Illinois.

He testified that the day following the accident he completed his examination. That he picked up official police photographs, and stopped back at the scene (the photographs were never introduced in evidence). That he measured the highway at the point of the accident with the aid and assistance of someone in a highway department truck. He found that the roadway narrowed exactly 27 inches on each side. He also identified claimants' exhibits Nos. 2 and 4, and testified that they clearly portrayed the highway where the accident occurred. That the drop-off varied in depth from 2½ inches to 5 inches, but he did not measure the length. That he did judge that the automobile came back onto the highway about 50 feet from the point where the car dropped off. That he saw no warning signs of any kind. That the speed limit at the scene of the accident was 65 m.p.h.

On cross-examination, there seemed to be some mix-up as to whether or not the accident occurred in Cook County or DuPage County, and the officer, believing it occurred in Cook County, handled the investigation.

The photographs referred to were photographs of the automobiles, which the Court asked to have admitted in evidence as the Court's exhibits. Counsel for claimants at this point stated for the record that exhibits Nos. 6 through 10, inclusive, were offered only to show damage to the vehicles at the time of the accident and for no other purpose.

At this stage of the interrogation, the Commissioner interrogated the officer in respect to his questioning any of the occupants of the car, and he stated that the only people he was able to talk to were the two young girls, who knew nothing about the accident, and that all of the information that he had was what he gathered from the scene and the hospital records. He then went on to describe the age of Ruth M. Mallory as **42**, and the injuries that he found to exist from the hospital records in regard to the claimants and passengers.

The officer further stated that he did not have an opportunity to talk to the driver of the car, which was struck by Ruth M. Mallory. This man's name was Albert T. Miter, and he was killed in the accident.

Ruth M. Mallory testified that she lived at 4837 Grace Street, Chicago, Illinois, with her husband, Merton Mallory, and two children, Susan, 12, and Gary, 7. That she was a housewife, and was involved in an automobile accident while returning to Chicago from a girl scout camp, and driving her husband's 1953 Dodge automobile. That she left the girl scout camp, which was about 4 miles east of Elgin, Illinois, at around 7:00 P.M. That it was dark, and she had her lights on, and was driving about

40 m.p.h. That traffic was light, and she did not have the radio on. That all of a sudden the right wheels went off the road, and, in trying to get back on the road, she heard a crash. That is all that she remembers. That she saw no signs along the highway. That she woke up in the hospital a few days later. That her left leg had been amputated, and her arm was in a cast. She then described her other injuries, and testified as to bills.

On cross-examination, Ruth M. Mallory testified that she had been over this same road about a year ago. That she was driving on the righthand side of the road, between the white line and the edge of the road, but does not recall exactly how far she was from the right edge of the road. That apparently the wheel of her car went off the road, and she refers to a rise, which appears to be a lip or drop-off from the paved portion of the shoulder, and lost control. That when her car left the road, she was traveling about 40 m.p.h. She made a mark on claimants' exhibit No. 2 where her car went off the road. That she put her foot on the brakes, and tried to stop by pushing the brakes, that there was a crash, and that she did not remember a thing after that.

At this point claimants' attorney asked that the matter be continued. That he would like to amend his pleadings to make the husband of Ruth M. Mallory a party, and bring an action for loss of consortium, as well as to amend the pleadings to the extent that the road narrowed 25 inches to conform to the proof. This was allowed, and a subsequent hearing and cross-examination of Ruth M. Mallory was had.

Ruth M. Mallory then stated that she did not remember seeing the car that she struck. All that she remembers is the right wheel going off the side of the road, and she tried to stop and applied her brakes, and turned back

onto the road, but that she could not get the car onto the road, and she lost control. She doesn't know how far she was driving her car from the white center line. That she went off of the road where it narrowed. That she does not remember how far from the point that she marked on exhibit No. 2 that she tried to get back on the road.

On being interrogated by the Commissioner, Ruth M. Mallory testified that she had been over the road once or twice before, but that her husband was driving. This was 9 months before the accident. That she had occasion to look at the road, and she knew it was not in good condition. That she slowed down to 20 m.p.h. at the time that she went back on the road. She does not remember stepping on the accelerator, but one wheel was off the pavement and one was on.

Respondent called William R. Stahl, Civil Engineer of the Division of Highways, who testified that, at the time of the accident, he knew nothing of the general condition of the road in the area. After the accident he found no warning signs in the area, and he ordered gravel placed along the edge of the pavement.

Under cross-examination, William R. Stahl testified that he went to the scene of the accident about 3 days afterwards, and saw no warning signs indicating that the pavement narrowed.

At this point of the trial, there was a stipulation as to the medical reports and bills, which were offered and received in evidence.

Ruth M. Mallory was called on redirect examination by her counsel. She testified that she felt the car go off the road, applied brakes, and tried to get back on the road, slowing the car down little by little in trying to get back on the road, and does not recall anything after that. That besides pumping the brakes to try to slow down, after slowing down, she attempted to get back on the

m.p.h., and got back on the road.

Leola Underwood was recalled, and testified that, when the car went off the road, she hollered to Ruth to stop, and she said, "I am trying", and she noticed that the car swerved and bounced and bumped along.

On cross-examination, Leola Underwood testified that she did not see what Mrs. Mallory did, but that she estimated the speed of the car to be **35 to 40 m.p.h.** She does not know how far the car traveled along the shoulder of the road before she tried to get back. That the car did slow down a bit after she applied the brakes.

Merton Mallory, husband of Ruth M. Mallory, testified as to the marital relationship after the accident, and also about the various injuries and expenses that he had incurred.

From the testimony of claimants' witnesses, there was no question but what the State failed to place an appropriate sign warning the traveling public that the pavement narrowed at the point where Ruth M. Mallory drove her car off of the highway onto the shoulder. Also, the State had not only constructive notice of this condition, but also actual notice, and it should have been apparent to respondent's agents that they should have posted signs warning the traveling public that this roadway narrowed, so that an operator of a vehicle would be placed on notice before coming to the point where the roadway was narrowed some 27 inches on each side.

This was a newly constructed blacktop road, and there were no white lines painted on the outside edges, which would make it apparent that the roadway narrowed; and a person driving near the outside edge of the paved portion on a black asphalt road would have difficulty observing the narrowing unless there were signs or painted lines on the outside edge of the highway.

Inasmuch as Ruth M. Mallory's car struck another vehicle traveling in the opposite direction, she was also confronted with oncoming lights, which would reduce her vision, wherein she might not be able to see the narrowing of the roadway, even though she was driving with proper lights on, which we find from the evidence in this case.

We are mindful of the fact that we have held many times that the State is not an insurer of everyone traveling upon its highways, and, further, that the State does not have to maintain the shoulders in the same condition as the paved portion of the highway.

As to Ruth M. Mallory's conduct in the operation of her vehicle in trying to get back onto the paved portion after the right wheel ran off onto the shoulder, to decide what she should have done in those circumstances would merely be speculating. She was faced with a sudden emergency, and, under the conditions, we find that she acted as an ordinarily prudent person would have acted under the same or similar circumstances.

As to the other claimants, there is no question of contributory negligence on their behalf, and from our findings it is believed that the proximate cause of the accident resulting in damages to claimants was due to the State's failure to give proper warning of the narrowing of the roadway at the point where the car left the highway.

There is no necessity of prolonging the opinion by reciting the nature and extent of Ruth M. Mallory's injuries, and itemizing her bills. She has lost a leg, and suffered other serious injuries.

It is, therefore, the opinion of this court that a claim should be allowed on behalf of Ruth M. Mallory in the sum of \$25,000.00.

As to Gary Mallory, after reviewing the nature and extent of his injuries, it is our opinion that a claim should be allowed to Ruth M. Mallory, as mother and next friend for Gary Mallory, in the sum of \$1,500.00.

As to Susan Mallory, after reviewing the nature and extent of her injuries, it is our opinion that a claim should be allowed to Ruth M. Mallory, as mother and next friend for Susan Mallory, in the sum of \$500.00.

As to Merton Mallory, it is our opinion that an award should be made to him in the sum of \$1,000.00, or, making a total award for all claimants of \$28,000.00.

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(No. 4966—Claim denied.)

CHARLES L. KELLAMS and DOROTHY KELLAMS, Claimants, vs.  
STATE OF ILLINOIS, Respondent.

*opinion* filed November 13, 1962.

FRANK H. BYERS, Attorney for Claimants.

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

**DAMAGES**—*burden of proof.* Claimants failed to show by a preponderance of the evidence that their damages were the result of any negligence on the part of respondent in rebuilding and widening street.

FEARER, J.

This is a claim for damages sustained subsequent to the year 1955 by claimants, Charles L. Kellams and Dorothy Kellams, the owners of a home located on the following described real estate, in the City of Decatur, Illinois :

Lot Twenty (20) in Block One (1) of Urban Place as per plat recorded in Book 149, page 107, of the records in the Recorder's Office of Macon County, Illinois, except the North Seventy-six feet (76').

The charges of negligence in the complaint consist generally of faulty construction in the reconstruction of North 22nd Street, at the intersection of East Prairie Street, in the City of Decatur, Illinois.

The home in question is located on the northwest corner of the intersection of East Prairie Street and North 22nd Street. In the reconstruction of the intersection respondent rebuilt a sidewalk and driveway to claimants' home.

Claimants charge that the concrete driveway approach and the concrete highway slab were one solid piece of concrete abutting the northeast corner of claimants' residence, thereby transmitting vibrations caused by heavy traffic in the intersection where a slight rise appears. It is also alleged that respondent neglected to allow sufficient spacing between the concrete highway slab and the concrete driveway so as to prevent vibrations caused by heavy traffic, which claimants contend caused cracks in the foundation, plaster to fall in various parts of the house, and cracks to appear in the walls.

The Department of Public Works and Buildings, Division of Highways, of the State of Illinois, did undertake the reconstruction of the intersection in question. However, the highway in question is under the jurisdiction of the City of Decatur for maintenance, as it lies within the corporate limits.

A Departmental Report was admitted in evidence, which had attached thereto a drawing of the section of highway in question and location of claimants' home. The only objection raised by claimants' counsel was that the drawing was not to scale. He also objected to that portion showing conveyance of former owners, and that portion showing payment to claimants for other property, and what was received from a third party. These matters objected to, we will not consider.

Part of the hearing was held in claimants' home, and the Commissioner hearing this case inspected not only that portion of the highway objected to, the driveway

and the sidewalk, but the damaged portions of the home, which were testified to by Mr. and Mrs. Eellams.

Both Mr. and Mrs. Kellams testified that, when heavy vehicular traffic passed through the intersection, it caused certain vibrations, which resulted in the damages they are now claiming.

It is contended by claimants that the city is the agent of respondent. Without further comment, the City of Decatur is not the agent of respondent, nor can the City of Decatur bind, in any way, the State of Illinois.

This cause must rest solely upon the question of whether or not the State of Illinois, through its agent, the Department of Public Works and Buildings, Division of Highways, negligently reconstructed the slab of concrete in question at the location referred to, and the sidewalk and concrete drive abutting claimants' home.

The record is silent as to the distance from the bump or rise in the highway to claimants' property. Claimants did not offer any expert testimony that improper engineering practices were employed in the construction and laying of the concrete at the intersection, or in the laying of the sidewalk and driveway on claimants' property.

From the Departmental Report it appears that a bituminous felt expansion joint was used, allowing a complete separation of the paved driveway approach from the adjacent sidewalk; and, that a one-inch expansion joint exists between the concrete of the sidewalk and driveway and claimants' home, except where an earth berm intervenes.

Mr. J. T. Doyle, an architect with five and one-half years experience with an engineering service in Decatur, Illinois, testified that he noticed cracks in the plaster and foundation; that he examined the house on the average of every six months; that the vibrations were caused by

trucks; and that the vibrations originated from the bump in the street. However, his first observance of the street and home was in 1959,. He had visited in the home of claimants since 1954, but his visits were not for the purpose of examining defects of the street and damages to the home until 1959, which was some three years after the street and concrete slab in question were constructed.

He did testify, however, that the construction of pavement leading to the garage could not have caused any damage to the home; and that the sole cause of such damage was vibrations, which were caused by the bump in 22nd Street. Furthermore, he did not testify that the State was negligent in any manner in the construction of the street, the laying of the concrete slab, or failure to construct and lay the concrete without sufficient and proper expansion joints.

There is an entire absence of testimony offered by claimants that respondent, by and through its agents, negligently used unsound engineering practices in the building and construction of the street in question.

Respondent called a resident engineer, who testified that the street was widened; old pavement in claimants' driveway was removed, due to the change in the grade of the driveway as a result of the reconstructed street, and that, without objection from claimants, a new sidewalk was built from the driveway to the house. He further testified that standard, approved, expansion joints were placed in the new pavement in keeping with accepted methods of construction, and that after the construction there was no bump in 22nd Street; that any bump that might have resulted was caused by a blow-up at the junction of Prairie Avenue, and that such a blow-up cannot be prevented. However, it was his opinion that any damages claimed by claimants to their home were not caused

by the bump in Prairie Avenue, as it was too far away from the home to cause such damage. He further testified that the new street project was commenced on April 14, 1955, and finished on October 1, 1956, which included the laying and completion of the driveway and sidewalk for claimants.

On cross-examination he testified that the cracks could have been caused by moisture; also, there was evidence that cracks in the foundation, walls and ceiling could be caused by the settling of the house.

Respondent also called Robert W. Johnson, who worked as an engineer on the project. He testified also that the work was done by respondent's agents according to good engineering practices; that the expansion joints were large enough to prevent vibrations from reaching the house; that special contraction joints were placed along the center line of the street in accordance with good engineering practices; that it was his opinion that the bump did not cause the damage to claimants' house, and that such damage, as claimants were contending, to the plaster could result from settling of the foundation, the condition of the soil, and/or contraction of plastering. As to the damage to the sidewalls, such could occur from moisture coming in from the foundation.

One other witness was called by claimants, Walter J. Ware, a general contractor, who estimated that the cost of repairs to claimants' home would be around \$1,200.00 to \$1,500.00.

From the record and the testimony of the respective witnesses, we do not believe it material to consider the exhibits offered and received in evidence, nor do the citations submitted by claimants throw any light upon the legal aspect of this case for the reason that claimants have failed to maintain the burden of proof, and to

prove by a greater weight of evidence that respondent, through the Department of Public Works and Buildings, Division of Highways, did not adopt good engineering practices in the construction of the highway and the building of the sidewalk and driveway.

Claimants' contention that eminent domain proceedings should have been commenced by respondent is without merit, and will not be considered in this opinion.

It is, therefore, the order of this Court that claimants' claim be denied.

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(No. 5048—Claim denied.)

**GEORGE E. BEARDSLEY, AUDREY ANDERSON, JOHN W. HUNT, RAND McNALLY AND COMPANY, and ILLINOIS BELL TELEPHONE COMPANY, Claimants, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed November 13, 1962.*

**JOHN W. HUNT**, Attorney for Claimants.

**WILLIAM G. CLARK**, Attorney General, for Respondent.

*CONTRACTS—services rendered pursuant to unconstitutional act.* Where act under which services were contracted is held to be unconstitutional, no payment may be made, as the agreement or contract is without any express authority of law.

**TOLSON, C. J.**

On July 2, 1962, the several claimants in the above entitled cause joined in a complaint seeking an award for services and materials furnished the Illinois Industrial Development Authority.

The case was submitted to this Court by a stipulation of fact joined in by all claimants and respondent, and is set forth as follows:

"Claimants, George E. Beardsley, Audrey Anderson, John W. Hunt, Rand McNally and Company, and Illinois Bell Telephone Company, by John W. Hunt, their attorney, and respondent, State of Illinois, by William G. Clark, Attorney General of the State of Illinois, its attorney, hereby stipulate and agree as follows:

(1) The 1961 General Assembly of the State of Illinois passed, and the Governor of the State of Illinois approved a statute entitled 'An Act to create the Illinois Industrial Development Authority for the purpose of creating and increasing job opportunities in labor surplus areas of the State of Illinois, to define its powers and duties, to provide for the transfer of funds in the State treasury, and to make an appropriation in connection therewith.' (Ill. Rev. Stats., 1961, Chap. 48, Pars. 831-847.) The bill for that Act was H.B. 'No. 1618 of the 1961 General Assembly.

(2) Section 19 of said Act (not printed in Ill. Rev. Stats., 1961) provided as follows:

'The sum of \$100,000, or so much thereof as may be necessary, is appropriated to the Illinois Industrial Development Authority created by this Act for the ordinary and contingent expenses of such Authority.'

(3) The Illinois Industrial Development Authority created by said Act was duly organized for the transaction of business at a meeting called for such purpose held at Room 3900, Prudential Plaza, Chicago, Illinois on October 11, 1961.

(4) By Resolution No. 4, duly adopted at said organizational meeting and never thereafter altered or rescinded, said Authority employed claimant George E. Beardsley as its General Manager commencing as of October 12, 1961 to serve for the term provided in the by-laws (i.e., during the pleasure of the Authority), with compensation at the rate of \$12,000 per year. By said Resolution No. 4 said Authority, in addition, authorized the General Manager to employ, for and on behalf of the Authority, a secretary-clerk, with compensation not to exceed a rate of \$450 per month.

(5) Claimant George E. Beardsley duly qualified for employment as General Manager of said Authority. His employment in such capacity commenced as of October 12, 1961 and continued through March 22, 1962, during all of which time he faithfully and diligently performed his duties as said General Manager.

(6) Pursuant to said Resolution No. 4, claimant George E. Beardsley, on or about February 28, 1962, employed, for and on behalf of said Authority, claimant Audrey Anderson as secretary-clerk with compensation at the rate of \$425 per month. Claimant Audrey Anderson's employment commenced as of February 28, 1962 and continued through March 22, 1962, during all of which time she faithfully and diligently performed her duties as said secretary-clerk.

(7) By Resolution No. 5 duly adopted at the aforesaid organizational meeting of said Authority, which resolution was never thereafter altered or rescinded, said Authority employed claimant John W. Hunt as general attorney to said Authority commencing as of October 12, 1961, to serve in such capacity until further action of the Authority, with compensation on the following basis:

(a) For general services, the sum of \$25 per hour for time actually expended;

(b) For services in any litigation, the sum of \$25 per hour for time actually expended;

all conditioned upon said claimant providing his own office space, secretarial help, supplies, and the like at his own expense, with the Authority to be obligated only for such expenses, e. g., long-distance telephone charges and travel expenses, as are customarily borne by the client of an attorney.

(8) Claimant John W. Hunt commenced serving in the capacity of general attorney to said Authority as of October 12, 1961 and continued to serve in such capacity through March 22, 1962, during all of which time he faithfully and diligently performed his duties as general attorney to said Authority.

(9) By voucher No. 66 of said Authority, dated March 19, 1962, claimant George E. Beardsley, for and on behalf of said Authority, submitted, to Michael J. Howlett, as State Auditor of Public Accounts of the State of Illinois, a request for payment from the State treasury of his compensation and that of claimant Audrey Anderson for the period March 16, 1962 through March 31, 1962. Pro-rating the compensation shown on said voucher No. 66 for the period March 16, 1962 through March 22 (rather than March 31), 1962, the amount of compensation for which payment was requested for said period (namely, March 16 through March 22, 1962) was as follows:

George E. Beardsley.....	\$241.99
Audrey Anderson.....	\$102.83

(10) By voucher No. 69 of said Authority, dated March 19, 1962, George E. Beardsley, for and on behalf of said Authority, submitted to said Michael J. Howlett, as State Auditor of Public Accounts for the State of Illinois, a request for payment from the State treasury of compensation for John W. Hunt for legal services rendered as general attorney to said Authority for the period March 1, 1962 through March 15, 1962 in the amount of \$712.50.

(11) By voucher No. 68 of said Authority, dated March 19, 1962, George E. Beardsley, for and on behalf of said Authority, submitted to said Michael J. Howlett, as State Auditor of Public Accounts for the State of Illinois, a request for payment from the State treasury of the sum of \$57.20 to claimant Rand McNally and Company representing the purchase price of a commercial atlas purchased by said Authority from said claimant and delivered to said Authority on or about March 14, 1962.

(12) By voucher No. 70 of said Authority, dated March 19, 1962, George E. Beardsley, for and on behalf of said Authority, submitted to said Michael J. Howlett, as State Auditor of Public Accounts for the State of Illinois, a request for payment from the State treasury of the sum of \$53.53 to claimant Illinois Bell Telephone Company representing payment for telephone services furnished to said Authority by said claimant during the period December 19, 1961 through January 19, 1962.

(13) On March 23, 1962, the Illinois Supreme Court filed its opinion in a certain cause known as *Franklin B. Bowes, Et Al, vs. Michael J. Nowlett, Auditor of Public Accounts of the State of Illinois, Et Al*, docket No. 37014. The effect of this opinion was to declare unconstitutional the

statute described in paragraph (1) hereinabove. Petitions for rehearing were denied on May 23, 1962.

(14) As a result of said opinion of the Illinois Supreme Court, the State of Illinois, acting by and through the said Michael J. Howlett, as State Auditor of Public Accounts for the State of Illinois, has refused and persists in refusing to issue warrants for the payment of the vouchers of said Authority described in paragraphs (9) through (12) hereinabove, notwithstanding the fact that all goods and services for which said vouchers were drawn and submitted to said Michael J. Howlett were furnished and performed prior to the date of said opinion of the Illinois Supreme Court.

(15) Of the sum of \$100,000 appropriated in 1961 to the Illinois Industrial Development Authority, as set forth in paragraph (2) hereinabove, a sufficient amount remains unexpended to pay all claims joined in the complaint herein in full.

(16) No assignment or transfer of any of the claims joined in the complaint herein, or any part thereof, or any interest therein, has been made. Each claimant is justly entitled to the amount in the complaint herein claimed from the State of Illinois, after allowing all just credits."

An examination of the case referred to in the stipulation discloses that a taxpayer's suit was filed in the Circuit Court of Cook County attacking the constitutionality of the Authority. The plaintiffs sought to enjoin the Auditor and the Treasurer from disbursing public funds, and the chairman and members of the Authority from receiving or disbursing funds under the provisions of the legislation.

The trial court entered a declaratory judgment **pro**nouncing the several acts as valid, and dismissed the complaint. On appeal, our Supreme Court reversed the judgment of the trial court, and said:

"While the Act contains a severability clause, we fail to see how the purpose of the Act could be carried out even though it be assumed that it is constitutional but for the appropriation feature. The legislative plan, as expressed by the legislation, is dependent upon the ability of the Authority to raise money. The removal of Section 18 from the Act introduces with full impact the limitation of section 7 on borrowing, and thus for practical purposes renders the Act ineffective in its present form.

"In view of our holding, it is unnecessary to consider other constitutional questions raised by plaintiff."

In the instant case, claimants are requesting an award for services and materials furnished in good faith

to an Authority created under a law, which the Supreme Court has found to be unconstitutional. If such an award could be made, the Legislature would in turn be called upon to implement the award with an appropriation from public funds.

Article IV, Section 19 of the Constitution of the State of Illinois, prohibits the General Assembly from paying any agent, servant or contractor, after services have been rendered, under any agreement or contract made without express authority of law. *Fergus vs. Brady*, 277 Ill. 272.

Since the Act creating the Authority is unconstitutional, and the Auditor and Treasurer are enjoined from disbursing public funds, there would be no way that the General Assembly could make a valid appropriation, as there is no existing law.

An award will, therefore, be denied.

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(No. 4844—Claim denied.)

GLADYS SCHNELL and MANLEY W. SCHNELL, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed July 27, 1962.*

*Petition of Claimants for Rehearing denied December 28, 1962.*

EDWARD NEVILLE, Attorney for Claimants.

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

**HIGHWAYS—notice of hole in pavement.** Fact that hole had been patched on previous occasions is **not** notice of dangerous condition.

**SAME—contributory negligence.** Where evidence showed that claimant could have avoided hole in pavement had she been watching, freedom from contributory negligence was not proven.

PERLIN, J.

Claimants seek to recover for personal injuries sustained by Gladys Schnell on July 27, 1958, when the

motorbike, upon which she was riding, struck a hole in State Route No. 1 at a point approximately one and one-eighth miles north of the intersection of State Routes Nos. 1 and 33. The highway in question is under the jurisdiction of the State of Illinois.

The highway pavement, with which we are concerned, is twenty feet wide, and consists of eighteen feet of brick with a one foot strip of concrete at either edge. The evidence shows that the accident area was in a section of State Route No. 1, which covered a three or four mile distance of rough brick pavement, and which contained patches of blacktop in various places.

For claimants to recover, they must prove:

(1) That Gladys Schnell was in the exercise of due care and caution for her own safety;

(2) That the State of Illinois was negligent, as charged in the complaint; and

(3) That the negligence of the State of Illinois was the proximate cause of her personal injuries and damage to her property. (*McNary vs. State of Illinois*, 22 C.C.R. 328.)

The accident occurred on the afternoon of Sunday, July 27, 1958, while claimants were riding motorcycles with a group of other riders in a southerly direction. Claimants presented testimony of the four other motorcyclists, who were riding with claimant, Gladys Schnell, to the effect that there was a hole near the center line of the highway, which was approximately five feet in length and two to three feet in width, and that the deepest point, located at the southern-most edge of the hole, reached a depth of six inches.

The evidence further indicates that Mrs. Schnell, aged 39, was operating her motorcycle at a speed of 40 to 45 miles per hour when the front wheel of the motorcycle allegedly hit the hole in question, and threw it into the

air. The motorcycle then skidded down the highway some 150 feet beyond the hole.

The group of five cyclists had been riding in a "staggered" formation. Russell Mattoon, who was riding ahead of Mrs. Schnell, said he noticed the hole and rode to the side of it, but did not call out a warning, since he was too far ahead. Another rider, Leland Cooley, was also riding ahead of Mrs. Schnell, but did not notice the hole, since he was operating his cycle near the outside edge of the road.

One of claimants' companions testified that 45 miles per hour was a safe speed.

Claimants presented the testimony of the four cyclists, and that of Donald Walker, a State Highway patrolman, who stated that blacktop had been put in the hole at some time prior to the accident. The patrolman also said that he knew of the hole before the accident. Claimants contend that, because the hole had been previously patched, respondent had actual or constructive notice of its condition, and was, therefore, negligent.

Three employees of the Division of Highways testified for respondent. Ira Harbaugh, District Supervisor for the section of highway upon which the accident occurred, testified that he traveled on the particular section on July 25, 1958, two days before the accident occurred, looking for holes and defects, and did not notice the hole at that time. LeRoy Plew, a Highway Maintenance man, said that he had done some patching on the section generally, on July 24 and 25, 1958, and was over the stretch of highway where the accident occurred on the day after the accident, and did not find the hole. Another maintenance helper failed to observe the hole on July 24 and 25, 1958.

In the opinion of this Court, claimant, Gladys Schnell, has failed to prove her freedom from contributory negligence. The accident occurred in daylight; the hole should have been readily visible from the motorbike, which is normally a highly maneuverable vehicle. The hole in question extended at most 3 feet into the lane of traffic, which allowed 7 feet of pavement width to avoid striking it. It would appear that a person riding such a vehicle at a speed appropriate to prevailing conditions should have been able to avoid striking the alleged hole in this case. The evidence showed that this was a rough brick road, and travelers upon such a road should be alert for irregularities in the surface.

In *Bloom vs. State of Illinois*, 22 C.C.R. 582, 584; the Court stated :

“It has been well established, and this Court, as well as other courts, have held many times that the State is not an insurer of those traveling upon the highway; and that, where people are aware of a condition, such as in this case, they should use care and caution, which an ordinarily prudent person would use under the same or similar circumstances.”

Two other riders in the same party had passed the hole without difficulty, and one, who had apparently been riding in about the same position as Mrs. Schnell, had noticed the hole and avoided it. We can only conclude that, had claimant been reasonably alert and observant, she could have avoided this unfortunate incident.

Furthermore, it appears that the State was reasonably diligent in maintaining this stretch of highway, since they had been examining and repairing this area only two days before the accident.

Claimants have failed, in the opinion of this Court, to sustain their burden of proof, and an award is, therefore, denied.

(No. 4950—Claimants awarded \$723.33.)

NORTHWESTERN NATIONAL INSURANCE COMPANY OF MILWAUKEE, WISCONSIN and STANDARD INSURANCE COMPANY OF NEW YORK, A Corporation, subrogees of WILLIAM SCHWARTZ and FRANCES SCHWARTZ, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 8, 1963.*

ABNER GOLDENSON, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; HAROLD A. COWEN, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*negligence*. Evidence supported finding that respondent was negligent in operating a tow plane, which dropped a target on, and caused damages to the house and contents of claimants' insured.

NEGLIGENCE—*res ipsa loquitur*. When property of claimants' insured was damaged by two targets falling from a National Guard plane, *res ipsa loquitur* was properly involved.

PERLIN, J.

Claimants bring this action as subrogees of William Schwartz and Frances Schwarz for damages caused to real and personal property owned by said subrogors at 1445 Talcott Road, Park Ridge, Illinois, on December 6, 1958, when a Del Mar aerial target fell from an airplane operated by a member of the Illinois National Guard.

Claimant, Standard Insurance Company, who had insured the real property, paid the sum of \$593.43 for its repairs, and Northwestern National Insurance Company paid the sum of \$129.90 for damages to the personal property contained therein. Claimants bring this action under the subrogation provisions of the insurance policies issued by them, and seek reimbursement for the amounts paid the insureds.

Claimants contend that respondent, through its agents, members of the Illinois National Guard, was negligent in the operation, control and maintenance of the aircraft and the Del Mar target attached thereto.

The parties have stipulated that, on December 6, 1958, an airplane operated by the Illinois National Guard was pulling a Del Mar target in the general area of Park Ridge, Illinois. They have also stipulated that, if the State is found liable, the amounts requested by claimants in this proceeding represent the actual damage sustained.

William Schwartz, the owner of a ranch-type house located at **1445** Talcott Road, Park Ridge, Illinois, testified as follows: He and his wife had left their home on Talcott Road about 11:00 A.M. on December 6, 1958. At that time the building and contents of the house were in good condition. They returned about 1:00 P.M. that same day and found insulation, plaster and debris spread all over the living room. Mr. Schwartz immediately ran outside, and saw what appeared to be a rocket protruding from the roof of his home. Schwartz called the police, who noticed the telephone number of O'Hare Field on the protruding object.

Schwartz then called O'Hare Field, and about fifteen minutes later several men in uniform arrived, and removed the object, later identified as a Del Mar target, from the roof. Upon further inspection, Mr. Schwartz found part of the target lying outside the house. Pictures of the target and damage to the building and contents were taken by officers from O'Hare Field, and copies were introduced into evidence by claimants.

Mr. Schwartz further testified that the officers tried to clean up the damage, and that someone came over to cover the hole in the roof temporarily.

The following day, in response to a call from O'Hare Field, Mr. and Mrs. Schwartz visited the Field, and were shown the plane involved in the accident, and the cable which had been attached to the target. The cable had been taken apart, and was being examined to determine the cause of the break.

Respondent introduced the testimony of three witnesses. These witnesses described the nature of the target as follows: That it is made of fiberglass, and fits into a cone-shaped "ring" called the "basket", which is put into a position off the wing of the plane; that the cable to which the target is attached is made of high tensile steel, and is .034 inches in diameter and some 8,000 to 9,000 feet long; it is operated by a propeller, and held in check by an electrical brake; that the cable extends from the basket out on the wing through a series of pulleys; that there is no warning light to indicate when the cable is extended, but there is a counter in the cockpit, which indicates the number of feet the cable is extended.

Respondent's first witness was Major Thomas W. Alles, the pilot of the plane in question. He testified that, shortly after take-off for a scheduled low target mission, he noticed a warning light on the instrument panel indicating a malfunction of the landing gear. He continued to orbit the airport while checking the condition of the aircraft, and just east of the airport he glanced around to check traffic. He noticed the Del Mar target, which is a large red object, flapping violently off on the right hand side of the aircraft. He stated that "before we could take any action, the Del Mar broke loose and left the airplane." One of the interceptor airplanes taking part in the maneuvers viewed the aircraft aloft, but saw no visible damage. There was about ten feet of cable trailing out of the basket, which was retracted, and the plane continued its mission.

Major Alles testified that before taking off he examined the basket for tightness, checked to make certain that the target fit snugly, and checked the cables to see if they were taut. He did not inspect the reel mechanism nor the brakes, because these mechanisms are hidden.

The Major said that in the instant case the target had extended some way by itself, and was approximately ten feet past the end of the plane at the time he first noticed it. He further testified that the actual cause of the target falling was a rupture of the cable, and that the target apparently extended without his releasing it due to some defect'in the mechanism, probably a slipping of the brake.

Major Alles also said that he was accompanied by a second pilot on the mission, Captain John Sheedy. Captain Sheedy was not called to testify, but his statement was included in a Departmental Report filed with the Court. His report states that he was scheduled to operate the target towed by the plane, but that a malfunction of the gear took his attention, and he was reading through the check list of gear operations when the mishap occurred.

Respondent then introduced testimony of National Guard Quality Control Supervisor Leonard Cox as to the inspection routine usually followed, but he could produce no evidence as to any inspection made on this particular flight. Sergeant Cox said that there were periodic inspections of the target and reel, but he had no knowledge of when such check was made on the plane in question. Sergeant Cox did not produce any records of alleged checking, explaining that the records are required to be kept only six months, and that more than two years had elapsed at the time of this hearing.

Sgt. Michael Calzaretta, a Radar Mechanic for the Illinois National Guard, testified for respondent. He stated that he had examined the aircraft after the accident, but knew nothing about its inspection prior to take-off. He said that the end of the cable was frayed, and that there was tangled material, which was snipped off so it would be ready for service again. He stated that

the break in the cable occurred 5 or 6 feet from the end of the wire, and that on the usual pre-flight inspection the reel is drawn out and 150 or so feet of cable is snipped off. Sergeant Calzaretta further stated that no inspection is made of the brake after the safety pin is removed prior to flight, but that a slight entanglement in the wire within the reel itself could have caused the target to be released, as well as a partial release of the brake. He did not personally know if anyone had made a pre-flight inspection.

There is obviously no question of contributory negligence in this case.

Respondent contends that claimants have failed to show any specific negligence on the part of respondent, and have not proved their case by a preponderance of the evidence.

In the opinion of this Court, the doctrine of *res ipsa loquitur* is properly invoked by claimant. In *Charles M. Kenney, Administrator, vs. State of Illinois*, 22 C.C.R. 247, 257, the Court stated:

“Under the maxim ‘res ipsa loquitur’, our courts have announced many times that where a thing, which has caused injury, is shown to be under the management of the party charged with negligence, an accident is such as in the ordinary course of things does not happen, if the management uses proper care. The accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from want of proper care.”

In the Kenney case, a tree limb on the Illinois State Fair Grounds fell, killing a pedestrian. Respondent’s evidence that it did not know the condition of the tree, and that it kept a crew, which inspected the trees and the grounds, was held insufficient to rebut a presumption of negligence.

The Court in the Kenney case also quotes from *McCleod vs. Nel Co. Corp.*, 350 Ill. App. 216, 223, where plaster in a hotel room fell upon guests while they were sleeping, causing personal injuries :

“In 38 Am. Jurs. 1,003, title ‘Res Ipsa Loquitur’, Section 306, it is said that the doctrine has had frequent application in cases of injuries resulting from falling objects and substances; that, in order to Invoke this doctrine in an action for injury from a falling object, the fall of the object must, according to common experience, be so unusual in occurrence, when due care is exercised by the defendant, as to carry inherent probability of negligence on his part.”

In *Mertel vs. State of Illinois*, 21 C.C.R. 558, this Court allowed recovery for damage incurred by a truck when a bridge guard gate dropped on it, where the Court found no evidence in the record sufficient to rebut the presumption or inference of negligence raised by the application of the doctrine of *res ipsa loquitur*.

In the instant case, respondent has offered no evidence to rebut the presumption of negligence raised by the facts. There is no question but that the Del Mar target was under complete management and control of the agents of respondent, and that the target would not ordinarily drop off had respondent used proper care, thus bringing this case within the *res ipsa loquitur* doctrine.

In the opinion of this Court respondent is liable for the damages inflicted on the real and personal property of William and Frances Schwartz, and we accordingly award damages in the amount of \$593.43 to the Standard Insurance Company of New York, and \$129.90 to the Northwestern National Insurance Company of Milwaukee, Wisconsin.

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(No. 4980—Claimants awarded \$1,660.97.)

**EDWARD OLTMAN** and **MAURICE TRANSPORT Co., INC.**, Claimants,  
**vs. STATE OF ILLINOIS**, Respondent.

*Opinion filed February 22, 1963.*

DUNN AND DUNN, Attorneys for Claimants.

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

NEGLIGENCE—*notice*. Evidence that bridge inspectors had noticed defects in bridge, and reported their findings to Highway Department over two months prior to accident caused by fall of the bridge truss, indicated that respondent had actual notice of dangerous condition.

HIGHWAYS—*failure of bridge truss*. Where bridge truss **broke**, lowering pavement twelve inches under claimant's vehicle, claimant was entitled to damages.

PERLIN, C. J.

Claimants, Edward Oltman and Maurice Transport Co., Inc., seek to recover damages to property and for personal injuries, which were allegedly incurred as a result of the drop of a bridge owned and controlled by respondent.

On June 15, 1960, at approximately 5:00 A.M., claimant Edward Oltman, an employee of claimant Maurice Transport Co., Inc., was driving a petroleum transport consisting of a 1960 International Tandem Tractor and 1959 Fruehauf Trailer from North Pekin, Illinois to DeCATUR, Illinois. Both units mere six months old at the time. As he approached Lincoln, Illinois on Route No. 121, he had occasion to cross a bridge approximately four miles north of Lincoln. He did not notice anything unusual, as he entered upon the bridge and proceeded to cross; whereupon, as he reached the south end, he hit a bump, which caused the unit to be thrown into a series of bumps down the highway. He was able to bring the unit under control approximately one-fourth of a mile past the bridge. It was then discovered that the south end of the bridge had fallen 8 to 10 inches, thus causing the series of bumps.

As a result of the accident, the trailer was damaged, and repairs mere necessitated to the extent of \$910.97, which amount claimant Maurice Transport Co., Inc., requests in this proceeding. Claimant Edward Oltman requests \$8,000.00 damages for personal injuries he allegedly incurred from the accident. He claims to have

bumped his head on the roof of the truck a number of times before it was brought under control.

Claimants allege that respondent was negligent in its duty to provide a safe surface for travel on the bridge in that it failed to inspect said bridge and maintain it in good repair. Respondent is charged with permitting a concrete footing of the bridge to break loose, thus causing the south end of the bridge to fall nearly one foot, causing an unsafe and dangerous condition and obstruction to ordinary traffic.

Respondent denies that it was negligent in any manner, and contends that it did not have notice, either actual or constructive, of the alleged defect.

George Garvey, a State Trooper, who investigated the accident, testified that the bridge had dropped between 8 and 10 inches below the floor of the bridge on the south end.

Nicholas Szabo, the Civil Engineer for the Illinois Division of Highways district in which the bridge was located, testified that he had made an inspection of the bridge on April 8, 1960. His inspection report made at this time was offered in evidence. The report stated that pier gaps and the bearings of the truss beam were cracked, and that there was scouring on the south side of the south pier of the truss span. The report further indicated that the general condition of the bridge was good, and there was no indication on the report that repairs should have been made.

Mr. Szabo testified that one of the cracked piers, which he examined, was the one which was responsible for causing the bridge drop. He explained that the scouring noted in his report was erosion of soil about five or ten feet from the south pier in question. However, he stated that the cracks looked like they were of a "weath-

ering variety”, and did not need immediate repair, nor did the scouring condition itself require immediate correction. Mr. Szabo further testified that his report was in the hands of the Department of Highways a week to ten days after it was made on April 8, 1960, some two months prior to this accident.

The District Maintenance Engineer, Paul Pearson, testified that he instructed Mr. Szabo to make the inspection, and that he received the report. He stated that the last repair made to the bridge occurred about four years before the accident. He examined the bridge the day of the accident, and testified that, in his opinion, the cause of the collapse was the longitudinal crack in the south pier weakened by the dead weight of the bridge itself and the passing vehicle. He stated that the fall of the truss would cause the floor of the bridge to drop approximately twelve inches.

In view of the above testimony, and the accompanying pictures and reports, the Court cannot accept respondent’s argument that it had neither actual nor constructive notice of the condition of the bridge. It is clearly shown that two months before the accident the Department had in its possession a report, which indicated the nature of the defect—a crack in the bearings of the south pier, which ultimately caused the accident.

This Court has ruled that respondent is bound by a greater degree of care in the maintenance of bridges than the maintenance of other portions of the highway (*Skaggs vs. State of Illinois*, 21 C.C.R. 418). Respondent is, in the opinion of the Court, chargeable with negligence, which was the proximate cause of the accident.

The next question here involved is the extent of the damage to claimants. There is apparently no disagreement over the amount of \$910.97, which is sought by

claimant Maurice Transport Co., Inc., for property damage to the tractor and trailer. However, damages in the amount of \$8,000.00 requested by claimant Edward Oltman is not supported by the evidence.

The evidence reveals that claimant Oltman bumped his head several times in the course of the accident, and afterwards noticed that he had a headache and "was aching all over." He continued **work**, and three days after the accident first went to a doctor. He was given medical treatment consisting of diathermy and pills for a period of about six months, and has incurred medical expenses of \$118.00.

Claimant's doctor testified by deposition that claimant was, as of June, 1961, still alleging lumbar-sacral pain.

Claimant Oltman testified that, despite his complaints, he lost no **work** because of his injuries, and was at the date of this hearing able to engage in his normal **work** and athletic activities.

It is the opinion of this Court that claimant Edward Oltman be awarded damages in the sum of \$750.00, and claimant Maurice Transport Co., Inc., be awarded \$910.97.

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(No. 5042—Claimant awarded \$1,199.06.)

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

*Opinion filed February 22, 1963.*

BARBER AND BARBER, Attorneys 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.

**TOLSON, J.**

On June 11, 1962, International Harvester Company filed its complaint alleging that on October 20, 1960 respondent engaged claimant to make certain repairs to an International Harvester truck, which was owned by the State.

A Departmental Report filed in this case recites that the work was ordered, and thereafter performed by claimant in a satisfactory matter, and that the charge in the amount of \$1,199.06 was usual and reasonable.

The Departmental Report further alleges that the bill was not forwarded to the Division of Highways until after September 30, 1961, at which time the 71st biennial appropriation had lapsed. It, therefore, could not be paid.

A stipulation was entered into by claimant and respondent stating that the complaint and the Departmental Report shall constitute the record in this case.

After an examination of the files, it is apparent that claimant is entitled to reimbursement for services performed as set forth in the complaint.

"This Court has had occasion to pass upon several matters of a similar nature. In these previous cases, we have held that an award would be entered where there were sufficient unexpended funds available in the appropriation to pay the claim had it been received in apt time. Funds were available in the present case at the time the services were performed. The materials were furnished, and the work satisfactorily performed and accepted by respondent. The only reason it was necessary for claimant to file the claim under consideration was due to the fact that the appropriations from which it could have been paid had lapsed." (*Material Service Corporation, an Illinois Corporation, vs. State of Illinois*, 22 C.C.R. 735.)

An award is, therefore, made to the International Harvester Company, A Corporation, in the amount of \$1,199.06.

(No. 5050—Claimant awarded \$1,873.65.)

STANDARD OIL COMPANY, DIVISION OF AMERICAN OIL COMPANY, INCORPORATED, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion* filed February 22, 1963.

GILLESPIE, BURKE AND GILLESPIE, Attorneys for Claimant,

WILLIAM G. CLARK, Attorney General; EDWARD A. WARMAN, 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.

**PERLIN, C. J.**

Claimant, Standard Oil Company, seeks to recover \$1,873.65 for sales of merchandise to various departments of the State of Illinois during the years of 1960 and 1961.

In addition to the complaint filed on July 5, 1962 and the exhibits attached thereto, the record consists of a motion of respondent to dismiss, because of lack of an attorney's appearance for claimant; an order denying such motion to dismiss; a stipulation of the parties; and an order of the Chief Justice waiving briefs.

The stipulation entered into between the parties hereto includes the following:

“1. That claimant is a corporation engaged in the manufacture and sale of petroleum and petroleum products.

2. That, during the years 1960 and 1961, certain sales of gasoline, oils, greases, tires, tubes and services were made to various departments of the State of Illinois by claimant, acting through its dealers, agents and employees, and that claimant is lawfully authorized to file its said claim in the Court of Claims of the State of Illinois, and receive payment for all of said items aforesaid.

3. That claimant has tendered to the various departments of government of the State of Illinois invoices and statements for the merchandise purchased by the State of Illinois, but payment was refused, because said statements and invoices were not received by the proper department or departments in time to be included within the appropriations of the Seventy-Second General Assembly of the State of Illinois, which adjourned June 30, 1961.

4. That, since the filing of its said claim with the Court of Claims of the State of Illinois, the sales charges or schedules attached to said complaint have been verified and confirmed by each of the departments of the State of Illinois, which show an aggregate indebtedness of **\$1,873.65**.

5. That no third person, nor anyone else, has any interest in said claim, and that said sum of \$1,873.65 is lawfully due claimant from the State of Illinois."

This Court has consistently held that claims based upon satisfactory merchandise and reasonable bills Will be allowed when appropriations for the biennium have lapsed before the bills have been submitted, and there was sufficient money on hand at the time the merchandise was furnished.

Claimant, Standard Oil Company, is hereby awarded **\$1,873.65**.

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(Nos. 4726, 4727 and 4728—Consolidated—Claims denied.)

**ALBERT J. WENDLER, ANNA MAE PIZZINI, and HELEN S. FRANCIS,**  
Claimants, vs. **STATE OF ILLINOIS,** Respondent.

*Opinion filed March 24, 1961.*

*Petition of Claimants for Rehearing denied March 18, 1963.*

**BAKER, KAGY AND WAGNER and FRANCIS D. CONNER,**  
Attorneys for Claimants.

**WILLIAM L. GUILD,** Attorney General; **C. ARTHUR NEBEL,** Assistant Attorney General, for Respondent.

**JURISDICTION—amendments** to Court of Claims Act. Increases in tort liability by act of the legislature are not retroactive. *Shockley vs. State of Illinois*, 21 C. C. R. 346.

**NEGLIGENCE—evidence.** Evidence proved that defective condition of the brakes on automobile of third party was the proximate cause of accident.

**FEARER, J.**

Three separate complaints have been filed by Albert J. Wendler, Anna Mae Pizzini, and Helen S. Francis growing out of an accident, which occurred on July 13, 1955 near a curve approximately 500 feet west of the city limits of Fairmont City, Illinois, on U. S. Route No. 40,

between an automobile being driven by Joseph Bruske, who was traveling in an easterly direction, and an automobile owned and driven by Albert J. Wendler, in which the other two claimants were riding, being driven in a westerly direction toward St. Louis, Missouri.

The record consists of the following :

1. Copies of complaints in each case
2. Departmental Report
3. Transcript of evidence
4. Motion of claimants for an extension of time to and including January 25, 1958 in which to file abstract and brief, together with attached proof of service of a copy on the Attorney General
5. Order of the Chief Justice granting the motion of claimants for an extension of time to and including January 25, 1958 in which to file abstract and brief
6. Motion of claimants for a further extension of time to and including March 25, 1958 in which to file abstract and brief, together with attached proof of service of a copy of the motion on the Attorney General
7. Order of the Chief Justice granting the motion of claimants for a further extension of time to and including March 25, 1958 in which to file abstract and brief
8. Order of the Court dismissing cases for want of prosecution
9. Petition of claimants to expunge order dismissing cases, for leave to reinstate, and for an extension of time in which to file abstract and brief
10. Order of Judge Wham granting the petition of claimants to reinstate cases, and further ordering claimants to file abstract and brief on or before August 30, 1958, or cases to be dismissed for want of prosecution
11. Abstract of evidence
12. Brief of claimants
13. Motion of claimants for leave to amend the ad damnum clauses of complaints
14. Order of the Chief Justice denying the motion of claimants for leave to amend the ad damnum clauses of complaints
15. Statement, brief and argument of respondent
16. Commissioner's Report

The highway upon which the vehicles were traveling was U. S. Highway No. 40 in St. Clair County, which is under the jurisdiction of respondent. It is a four-lane concrete highway having two traffic lanes, each 10 feet in width, for eastbound traffic, and two traffic lanes, each 10 feet in width, for westbound traffic. The traffic lanes were properly marked, including the division of east-

bound and westbound traffic, which consisted of intermittent lines running down the center as a division line, with yellow strips on each side thereof indicating a no passing zone.

The highway in question was constructed in two slabs with an expansion joint in the center.

Claimants are predicating their claims upon the negligence of respondent and its agents in the construction and maintenance of this particular section of road, and are contending that a crack existed in the center of the road, which was filled periodically with bituminous material in the center of the crack, which the evidence shows runs for a distance of some 1,500 feet, with a variance in the width and depth of the crack.

There is a great conflict in the evidence as to the size of the crack, and the care and maintenance of the crack. However, it was testified to that after the alleged accident bituminous material was applied to the center of the road in attempting to correct the condition in the highway.

If the crack or separation in the highway referred to was the proximate cause of the automobile being driven by Joseph Bruske going out of control and running head-on into the automobile being driven by Albert J. Wendler traveling in the opposite direction, in which the other claimants were riding, there is no question in our mind but that, if this crack or separation put into motion the events which subsequently followed, respondent had actual and constructive notice.

Claimants, in traveling in a westerly direction, were traveling on the inside traffic lane, being the passing lane for westbound traffic.

Joseph Bruske, traveling alone in his automobile, had pulled to the inside lane, or the passing lane for east-

bound traffic, as he was going into the curve in question, or just prior to the curve, and at said time and place claimants were coming out of the curve, and, as the Bruske vehicle pulled along side of the truck traveling in the same direction, the truck started to veer to its left toward the Bruske vehicle, at which time Joseph Bruske testified that he was traveling approximately 35 m.p.h. He applied his brakes, the brakes grabbed, and his car crossed the center line, being the dividing or separation in the highway in question, striking the automobile in which claimants were riding, completely demolishing both vehicles, and severely injuring all three claimants.

Joseph Bruske was insured with the Western Casualty and Surety Company for \$5,000 and \$10,000, \$5,000 property damage, so that the insurance company settled with all three claimants under a covenant not to sue in the following amounts: Anna Mae Pizzini—\$3,433.33, Helen S. Francis—\$3,333.33, and Albert J. Wendler—\$3,333.34.

At the time of the accident, the jurisdiction of this Court for personal injuries was the maximum of \$7,500.00, which later was amended and increased to \$25,000.00, and the ad damnum in the three complaints have been increased by order of this Court. It is the contention of counsel for claimants that the amendment to the Court of Claims Act increasing the ad damnum is retroactive.

We have had occasion to pass on this question before, and we have held that the amendment was not retroactive. *Shockley vs. State of Illinois*, 21 C.C.R. 346.

We cannot help but be concerned with the wide variance in the testimony as to what was the proximate cause of the Bruske automobile going out of control,

whether it was the grabbing of the brakes, which caused his car to swerve, or the crack or separation dividing eastbound and westbound traffic.

There is also conflict as to where the accident happened, as the testimony is fairly consistent that, within the 1,500 foot area where the separation was located, it varied in width from practically nothing to as high as 4 to 6 inches.

On direct examination, Joseph Bruske testified before the Commissioner that he was driving a 1953 Hudson on State Route No. 40 on the last curve going into Fairmont City, which curved to the left; that he had an accident, which happened about 8:00 in the morning of July 13, 1955, and that he was traveling at a speed of between 30 and 35 m.p.h. At the time of the collision he was approaching a curve, and was attempting to go around a truck, which was traveling at about the same rate of speed; that, when he was along side of the truck, he decided he had better not pass, because it was bearing over onto him when going into the curve. He testified that he applied his brakes and slowed up, and tried to fall behind the truck. As he started to do this, he hit a separation in the road with his left wheels, which dropped into the separation, and threw his car out of control. It then crossed the center line and collided with the Wendler car head-on. (Abst. 1.)

He estimated the separation at the center of the highway to be about six inches wide and four or five inches deep; that the separation was in the center of the highway, which divided the two eastbound lanes and the two westbound lanes. (Abst. 2.)

On cross-examination, he testified that he had driven on Route No. 40 before that day, and that he was on his way home from East St. Louis at the time of the acci-

dent, having gotten off work at 7:00 A.M., and the accident occurred about 8:00 A.M. He testified that he drove back and forth every day, mostly on this route, and that the weather was clear, the pavement was dry, and visibility was good. He testified he had control of his car just prior to this accident, and that the collision happened when he was behind the truck ; that he had decided to pass the truck, and that, “after I pulled up alongside, on the inside of the truck, he started to go into this curve and listed over towards me, and I decided I had better not try to pass him. I applied my brakes, and then my left wheel caught in this crack, and I lost control of the car. When I applied the brakes they responded, but the car seemed to pull over to the left towards the center of the road.” (Abst. 3.)

Further quoting from his testimony on page 4 of the abstract: “When I lost control of my car, I was in my own lane. I was in the passing lane at that time. After I lost control of my car when I went in that crack or crevice, I went across the yellow line. I knew the crack was there before this accident happened. I don’t know if this crack had been filled before. (Abst. 4.)

“I was arrested about an hour after the accident by a State policeman in the emergency room at the hospital. I don’t recall what I told him. I had to pay a fine. The crack, in my best judgment, is four or five inches across and about four or five inches deep, but I have never measured it. (Abst. 5.)

“I was conscious after the accident. The weaving started a little bit after I applied my brakes. The brakes pulled a little to the left. I didn’t attempt to turn back to the right. (Abst. 6.)

“The weaving back and forth started after my car dropped its wheel into the crack after I lost control of the

car. I couldn't say how long the wheel was in the crack before the weaving started. All I know is when I applied my brakes, and before I knew it, the car was out of control, to the best of my knowledge." (Abst. 6 and 7.)

This accident was investigated by William H. Thompson, a State police officer, living in Collinsville, Illinois. He testified that, in making his investigation, he was able to locate the point of impact, and could identify where the two cars had come together; that they had hit in the center of the westbound lane, which was the passing lane, and that all of the debris was in that particular lane of traffic. The road was marked with lines to indicate the lane of traffic, that the center line, which divides east and west lanes, is a yellow line, and on each side of this the two lanes are divided by a single line, and that is black and white, alternate.

He further testified that the lines were visible to a driver in a vehicle; that he talked to Joe Bruske at the hospital in the emergency room; that at the time Mr. Bruske did not seem to be seriously injured, and was conscious; that, in interrogating him, Mr. Bruske was asked this question: "How come you got onto his side of the road?" and his answer was: "I don't know. I applied my brakes, and I felt my wheels lock, and I just ran over onto the side of the road."

Mr. Bruske was arrested for being in the wrong lane of traffic. He pleaded guilty, and paid a fine before a police magistrate in Fairmont City.

On cross-examination of the officer, it was brought out that at the time of the interview, immediately after the accident, Mr. Bruske never mentioned a crack or separation in the pavement.

It was also brought out by the officer that the crack in the pavement referred to by the witnesses was farther

down the road than where the accident happened, as the accident occurred right at the westerly edge of the curve as you come out of Fairmont City.

After considering all of the evidence as to the condition of the road, the testimony of the witnesses, the physical facts and the exhibits referred to, it has not been definitely established that the Bruske car was thrown out of control and into the wrong lane of traffic by reason of the crack, as Mr. Bruske's testimony is contradictory. In one instance, he testified it was the crack, which threw his car. However, at the same time, he did admit that the truck forced him closer to the center of the road, and that, in applying his brakes, they grabbed, and that is the last he remembered. In another breath he says that it was the crack, which varied from four to six inches, which caused his car to swerve into the wrong traffic lane and the car in which claimants were riding.

Immediately after the accident he told the officer that it was the grabbing of the brakes, which forced him over into the other traffic lane, while he was attempting to pass the truck and slow down, because the truck was bearing over on him, and at that time he said nothing about running into a crack in the center of the road.

We also have some doubt as to whether or not this accident occurred where the crack was slight, or where there was a crack, or where the crack was from four to six inches wide. There is no way to reconcile this testimony. However, it is convincing, and there is no question but what Joseph Bruske is the only person who knows just what happened, and his first impression and first statement did not relate to the crack in the center of the road, but the cause of his car going out of control and into the other traffic lane, and striking the car in which claimants were riding was the grabbing of the brakes, and we are inclined to believe that this is a true state-

ment. If he had laid great stress upon the crack being a contributive factor, he certainly would have stated this to the policeman. This witness was entirely familiar with the road, as he had been over this particular highway daily for a considerable length of time in going to and from his work.

We are mindful of the fact that there is absolutely no contributory negligence involved in these cases, and that claimants were innocent victims.

We are also cognizant of the fact that two or more defendants can be liable, if it was their negligence which was the proximate cause of the accident in question. However, if the evidence reveals, and if we feel in sitting in this case, as a trier of facts, that the sole proximate cause of the Bruske car going out of control was its defective brakes, which were applied when the passing of the truck was attempted, and was being forced over towards the center of the road, which caused the car to go out of control, and not any defect in the highway, then it would be our duty to find respondent not guilty. This is true even though the center of the highway did have a separation in it. However, if the accident did not happen where the separation occurred, which was great enough to cause a car to go out of control, then, of course, in that event, it would be our duty to find respondent not guilty.

We have held many times that respondent is not an insurer of all persons traveling upon its highways.

Claimants' counsel has cited in his brief an analogy between these cases and one that this Court passed upon in 21 C.C.R. 480, being the case of *Visco, Et AZ, vs. State of Illinois*. That case is easily distinguishable from the present one in that we found in that case that the driving into the hole was what caused the car to go out of control, and there was no other contributing factor or improper

operation of an automobile, such as we have in the present cases. And, also, in that case there was the question of contributory negligence, which we do not have here.

These cases have to be decided wholly upon the question as to whether or not the division in the center of the highway caused the car to go out of control and into the other traffic lane, or whether it was the grabbing of the brakes, which threw the Bruske car out of control.

Claimants, understandably, do not know what caused the Bruske car to come over into their traffic lane and strike them. This is solely within the knowledge of Mr. Bruske, and, in our minds, his testimony immediately after the accident is more convincing than when these cases were tried. Furthermore, there are too many discrepancies in his testimony to convince us, along with the physical facts and circumstances and evidence to involve respondent as being negligent along with Mr. Bruske, which was the proximate cause of the accident.

We find that the sole proximate cause of the accident was the negligence of Mr. Bruske in the operation of his vehicle in such a manner as to cause it to go out of control, and the operation of his vehicle in a defective condition, as to his brakes.

An award is, therefore, denied.

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(No. 4812—Claim denied.)

EDITH BURRIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 18, 1963.*

SORLING, CATRON AND HARDIN, Attorneys for Claimant.

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

**NEGLIGENCE—*injury to licensee.*** Passive acquiescence on part of State of Illinois in allowing third parties to use State premises does not make claimant, a participant in a third party memorial service, an invitee of the State.

**SAME—*duty fo licensee.*** Degree of care required is not *to wilfully* or wantonly injure a licensee.

**SAME—*evidence.*** Evidence failed to show any breach of duty to claimant, or that claimant was free from contributory negligence.

### **FEARER, J.**

Claimant, Edith Burris, age 59 years, brings this action to recover \$10,000.00 in damages for injuries to her person, which she sustained on March 2, 1956, in a fall in the State Capitol Building, Springfield, Illinois, while she was attending a public function celebrating the 75th Anniversary of the American Red Cross. The function was under the sponsorship of the American Red Cross, and claimant at said time was a "Gray Lady."

A platform was erected for the purpose of seating certain State Dignitaries, including the Governor. It was also built for the purpose of placing the large birthday cake thereon, which was to be officially cut by the Governor of the State of Illinois at said time. The platform was erected in the rotunda of the State Capitol Building, with the permission of the State of Illinois, by a contractor, who erected said platform and steps leading thereto for the American Red Cross. It does not appear that this was done under the supervision and direction of an agent for the Department of Grounds and Buildings. At the time James Walsh was superintendent for said department.

The accident occurred at approximately 1:30 P.M. after the ceremonies had taken place. Claimant, who had been sitting on the platform, and, having descended the three steps, walked around said platform in a group of people on her way to receive refreshments being served,

testified that she struck her ankle against the corner of the steps, which caused her to fall.

Claimant was assisted to the first aid department, which is maintained by the Department of Public Health, and was under the supervision of a registered nurse by the name of Norma Chambers. The nurse noted that she had an abrasion on the lower part of her right leg, and that she experienced some discomfort in her right ankle, but at said time she made no complaints as to other injuries, which she is now contending she received by running into said step.

She was advised by the nurse to consult with her own physician, and, in response thereto, stated, "that she didn't want to go to see Dr. Richard Allyn, because he had been treating her for a heart ailment, and didn't want her to be out at the time." The nurse in attendance did not notice any swelling or bleeding in or about her mouth or lips, nor did she notice or observe any other injuries other than the abrasion to her right leg, and the subjective complaint of discomfort in her right ankle.

Claimant did not call or produce any medical testimony at the trial. She testified as to her injuries, which are as follows: Injury to her right instep, right ankle, mouth and jaw, broken dentures, and broken eye glasses, which fell to the floor and were stepped on by someone in attendance at the ceremony,

Exhibits Nos. 1 to 8, inc., were offered, and certain objections were made thereto by the Attorney General representing respondent for the reason that there was insufficient testimony and remoteness of dates of the bills, so that it could be determined that the bills were the outgrowth of, and had any causal connection with the injuries complained of.

We find that there is a great discrepancy in the dates when the services were performed in relation to the date of the injury, and there is an absence of any causal connection between the injuries and the exhibits.

In the Commissioner's Report, it is noted, which is borne out by the evidence, being solely her testimony, that she failed to go to see her own doctor whom she had been consulting in regard to her heart ailment. She did consult a Dr. F. N. Brill the next day for treatment, and some four months later she obtained eye glasses; and then, almost eight months later, she had repairs to her dentures, and eleven months later she was hospitalized. A cancelled check in the amount of \$150.00 was offered in evidence, which was dated some year and three months after the accident.

No other witnesses testified on behalf of claimant. A unique piece of evidence was offered, namely, answers to certain interrogatories propounded to a Mr. Robert H. Schuelke, who at said time resided in Kansas City, Kansas, and who apparently was at the time of the accident in some way connected with the American Red Cross, and apparently was responsible for being granted permission to have the platform and steps in question erected in the rotunda.

The answers to the interrogatories cannot be considered for the reason that notices were not served on the Attorney General in accordance with the statute for the taking of evidentiary depositions, either oral or written interrogatories, namely Chap. 110, Sec. 101.19-7. Such evidence produced, which was objected to, would not give the Attorney General an opportunity of cross-examination.

Claimant is contending that she was an invitee of respondent, that the steps she struck were negligently

constructed, that they were constructed by respondent's agent, and that, therefore, respondent is liable in damages for the alleged injuries, which she testified to.

As to the question of whether or not she was an invitee of respondent, she has not maintained the burden of proving this. We find that she has failed to maintain this burden of proof, and that she was a mere licensee, the distinction being that one, who is a mere visitor on the premises of another, is a licensee, while one, who is an invitee, is brought upon the premises of another where business is being conducted, and is invited upon the premises for the purpose of conducting business, there being a common interest or mutual advantage to be obtained from the visit. In the case of the licensee, which we believe was the situation in this case, her visit in the State Capitol was for her mere pleasure or benefit.

The fact that the Department of Public Works and Buildings might have permitted the American Red Cross to have erected in the rotunda a platform and steps leading thereto, and permitted the American Red Cross to have their 75th Anniversary observance there is a mere passive acquiescence by the State officials in the use of its property, which would not make in effect, legal or otherwise, claimant an invitee.

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.

From the only competent evidence produced at the trial, we cannot by any stretch of the imagination conceive of how there could be any responsibility on respondent for the injuries, which claimant is seeking to recover.

In the first place, it appears, and this is uncontradicted, that claimant was advised by her treating physician not to go out into the public because of her heart condition. It could have been that this pre-existing condition caused her to fall. At least there was no testimony offered by anyone for claimant in rebuttal to the testimony of the nurse in this regard.

Secondly, she was aware of the location of the platform, the steps leading to the platform, and there was no evidence that this was located in an area, which was not well lighted. In fact, it is common knowledge that in the daytime the rotunda is light, and there is no evidence of any flaw in the floor or anything surrounding the platform, which would cause her to fall.

Thirdly, this was not a function of respondent, but of an organization of which claimant was a part of, in that she was a "Gray Lady." In fact, we cannot see wherein claimant has established her case by a preponderance or greater weight of the evidence that she was free from negligence, and that respondent was guilty of negligence, which was the proximate cause of the accident resulting in her injuries.

The State of Illinois is not an insurer of everyone entering the State Capitol.

Therefore, an award to claimant must be and is hereby denied.

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(No. 4917—Claim denied.)

ARTHUR H. KROLL, Claimant, vs. STATE OF ILLINOIS, Respondent.

*opinion filed March 18, 1963.*

COSTIGAN, WOLLRAB AND YODER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; WILLIAM SOUTH, Assistant Attorney General, for Respondent.

**HIGHWAYS—road under construction.** Evidence disclosed that State had taken sufficient precautions in notifying traveling public of condition of road, which was under construction.

**EVIDENCE—accident reports.** Accident reports will not be received in evidence, but may be used by a witness to refresh his recollection.

**FEARER, J.**

This is a claim for property damage in the sum of \$1,500.00 as a result of an accident, which claimant had on August 17, 1959, at or about the hour of 9:20 P.M.

Claimant at said time was driving his 1959 Nash Rambler in a northerly direction on U. S. Route No. 51, approximately ten miles north of Normal, McLean County, Illinois, north of a "T" intersection on said highway and the Lake Bloomington Road, which, at said time, was undergoing repairs and reconstruction under contract entered into with the Division of Highways. This stretch of road was under the jurisdiction of the State of Illinois.

Claimant, a resident of Mesa, Arizona at said time, was en route from his home to the State of Wisconsin.

Within the vicinity where the accident occurred, the pavement narrowed from a two lane 24 foot pavement to an 18 foot pavement. The evening was clear, the highway was dry, even though it had rained earlier in the day, and visibility was good.

Claimant ran off of the highway into a depressed area on the shoulder described as a hole, but the exact point where he ran off is in dispute. The tires on the righthand side of his car blew out, and his car in coming back onto the highway rolled over several times, and came to rest on the west side of the road up against a bank. There were extensive damages to his automobile, and his claim consists of costs of repair, traveling expenses, meals, and loss of earnings.

The claim is predicated upon failure of respondent to properly post and warn the traveling public of the

hole in the shoulder and the narrowing of the pavement. It is contended that respondent had either actual or constructive notice of this condition, and that its negligence in failing to properly warn the public caused claimant's automobile to run off of the highway, which was the proximate cause of the accident resulting in the damages alleged.

Claimant called as one of his witnesses, Merle Duane Holliger, who was a State Trooper riding in the area in question on the date of the accident.

The accident report was marked as claimant's exhibit No. 1, and offered in evidence. However, accident reports are not admissible in evidence in the trial of cases of this kind, and cannot be considered as evidence. The accident report, however, was used by this witness to refresh his recollection, which, of course, is perfectly proper upon laying the proper foundation of exhausting his memory as to the facts determined by his investigation.

Briefly, he testified that the road was under reconstruction; that he found that claimant had slipped off of the pavement first, and then later ran into a hole; that he determined that both tires on the righthand side had blown out; that the car came back onto the highway, crossed the road, and came to rest on the west bank headed south. He described the hole or depressed area as being one and one-half to two feet in length, and about one foot in depth. He testified that there were road improvement signs, a sign advising the traveling public that the pavement narrowed, and that there were signs advising of the resurfacing of the highway. He testified that there were barricades all along the construction area, some having flashers, and some without flashers, and that there were wooden horses painted yellow and black. He further testified that the pavement was dry, the skies

were clear, and there were no obstructions to visibility. He determined that claimant had traveled approximately sixty feet on the narrow pavement before his car left the pavement, and that his car came to rest approximately one hundred and fifty feet from the hole in the shoulder. He stated the flashers were working on the barricades, and that there were many such flashers within the entire area.

Claimant then called as his next witness, William R. Woosley, who was a farmer within the area where the accident occurred, and who had occasion to drive this road approximately twice a day.

He testified that there was a hole on the shoulder just beyond the barricade, and that the hole was not too wide, but was maybe three feet long and a foot deep. He further testified that there was a sign advising that the roadway narrowed, and that there were barricades with flashers on them.

There were no other witnesses called, other than claimant himself, who testified that he did not see any signs or barricades, and that the accident happened so quickly that he didn't see the hole. He made no complaint to the State Trooper about lack of signs or barricades advising him of the condition of the roadway. He did, however, testify that he knew the road was under construction, but that he was only driving between 45 and 50 m.p.h. His testimony concluded with his bills and claim for damages.

Respondent called Ferdinand Mariani, who was a civil engineer for the Division of Highways, and was the resident engineer on this project. He testified as to the type of project, the signs advising the traveling public of the narrowing of the pavement, and the barricades with flashers in existence at the time of the accident. He

further testified that there were four construction signs and pavement narrow signs, and that one-half of the barricades were reflectorized.

The only other witness called by the State was Leo Eaton, the contractor, who further verified all of the signs, barricades and flashers. He further testified that he did not see any hole in the shoulder, which would cause a car to go out of control. We have held many times, of course, that the State of Illinois is not an insurer of all persons who travel upon its highways. We have also held that the State of Illinois is not obligated to keep its shoulders in the same condition as it would the paved portion of the road.

Claimant is the only witness, who did not see the warning signs as to the pavement narrowing or as to the construction work.

From the evidence, we find that claimant had sufficient notice that there was construction work ahead, and that the pavement narrowed, and that he should have had his automobile under proper control so that it would not run off the road onto the shoulder.

Furthermore, it does not appear from the evidence that it was the hole in the shoulder, which was the proximate cause of the accident, causing his tires to blow out, but it could just as well have been his failure to heed the warning of the narrowing of the pavement, the running off onto the shoulder before he got to the hole, and attempting to pull back onto the road too suddenly without keeping his car under control, which caused his tires to blow out, and his car to overturn and travel another 150 feet.

We find that claimant has not maintained the burden of proving first that he was free from contributory negligence, and, secondly, that it was the negligence of the

State in the maintenance of the highway and failure to give sufficient warning, which was the proximate cause of the accident resulting in the damages suffered by claimant.

It is, therefore, the order of this Court that claimant's claim is hereby denied.

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(No. 4920—Claimant awarded \$1,000.00.)

**LUCIUS STEWARD FLOURNOY**, a minor, by **LULA MAE FLOURNOY**, his Mother and next friend, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed March 18, 1963.*

**WARREN F. AND ROBERT L. LANDSMAN**, Attorneys for Claimant.

**WILLIAM G. CLARK**, Attorney General; **SHELDON K. RACHMAN**, Assistant Attorney General, for Respondent.

**PRISONERS AND INMATES**—*personal* injuries. Evidence disclosed that State was negligent in not instructing inmate of fifteen years of age in the proper way to close elevator door, which was not equipped with closing strap, where at all times respondent's employee was present to give directions.

**FEARER, J.**

Claimant, **Lucius Steward Flournoy**, a minor, by **Lula Mae Flournoy**, his Mother and next friend, brings this action against the State of Illinois as a result of an accident, which occurred on April 25, 1960.

Claimant, **Lucius Steward Flournoy**, at said time was an inmate of the Illinois State Training School for Boys at St. Charles, Illinois. He was fifteen years of age, and for the first time was assigned to work in the cannery building along with three other boys. It appears that this was the first time that he had ever been in the cannery building. His immediate supervisor, or foreman, was a Mr. William Dawson, who directed the boys to

push two carts on the elevator to be taken to the second floor.

Claimant is relying upon the fact that he was a minor, fifteen years of age, and taking into consideration his age, intelligence, and experience for a boy fifteen years of age, he did not have sufficient knowledge without ample instruction to close the elevator doors, which he claims he did at the insistence of Mr. Dawson, without any previous knowledge and instructions. Futhermore, that the device or strap, which was ordinarily used in the closing of the doors, which were divided in the middle, and were of heavy gage steel, was missing, and that the only place that the boy could reach to close the doors was on the outside where he could take hold of a flange and pull the top door down, which would cause the bottom door to come up, so that the elevator could be moved.

Several photographs were introduced into evidence showing the outside and inside, and also showing a strap on the upper door on the inside, which was put on after the accident.

There is further evidence that the elevator doors had been equipped with a strap, which was ordinarily used in the closing of the doors.

There is evidence that there mas a flange or angle inside and on the bottom of the upper door, approximately one inch wide and one and one-half inches in depth, which could have and should have been used by claimant in the closing of the doors.

Claimant, in closing the doors by reaching outside and pulling down, sustained an injury to his middle finger on his right hand, which was repaired by surgery, resulting in scarring, not only on his finger but keloid formations on the dorsal surface of the third finger, right hand, as well as on the inner right forearm where skin was taken for the purpose of making the flap over the finger.

First aid was given in the infirmary located on the grounds, and claimant was later taken to the Illinois Research and Educational Hospital, Chicago, Illinois, where he was hospitalized from April 25, 1960 to May 21, 1960, and surgery was performed.

Re was later returned to the State Training School, where he was assigned and given light duties until his finger became healed and less tender.

Claimant is seeking damages for the loss of part of the right middle finger, right hand; deformity of the middle finger, right hand; keloid scarring and discoloration on the dorsal side of the distal phalanx of his ring finger, right hand; and, keloid scarring and discoloration of the inner aspect of the right forearm, the sight of the graft.

This Court has held in numerous cases that an inmate of a training school can maintain an action in this Court.

In passing upon this claim we are taking into consideration the age, intelligence and experience of a boy of the age of claimant; the duties to which he was assigned, and the question of whether or not he was properly instructed in the closing of the elevator doors, which is a part of the operation of the elevator; and, also, the lack of the device or strap, which had been formerly attached to the inside of the door, and used in the closing of the elevator doors.

The burden of proving freedom from contributory negligence is upon claimant. Again we are taking into consideration this boy's age, intelligence and experience; the negligence of respondent's agent, Mr. Dawson, who was in charge of claimant at the time in directing the work, the elevator, and the device used in the closing of the elevator doors; and, as to whether or not this boy

was sufficiently instructed in the closing of the doors; and, whether or not this door should have been equipped with a strap to be used in the closing of the doors, which would have been readily apparent to anyone even a boy of his age, intelligence and experience.

There is a dispute in the evidence as to whether or not claimant had been sufficiently instructed in the closing of the doors. Also, there is some dispute as to the sufficiency of the angle iron on the inside of the door, the height of it; and, whether the only means that claimant had in the closing of the doors was to reach outside, grab onto the angle iron, and pull down on the door, which would cause the bottom door to come up, the top door to come down, and be properly closed.

Respondent is relying upon certain conversations having taken place between claimant and his attorney, wherein he was asked, "Whether or not he was instructed in the closing of the doors", and his answer thereto was, "that he was."

Respondent makes no effort to go into any detail as to what instructions were given to this boy, or any other boy, in the operation of this elevator.

It appears from the record that it was difficult at first to put the top door in motion, but, once it was placed in motion, the action was rapid, which caused the doors to come together before claimant could remove his arm sufficiently to keep from having his finger severed.

It appears that the only person, who would be in a better position to know the action of the door in pulling it down, and the rapidity in which the two pieces of steel would come together, would be Mr. Dawson, and Mr. Dawson must have realized in working with claimant that he was an immature, inexperienced and inadequate boy for a boy of his age. We only make this last statement from

the evidence introduced as to the boy's schooling. The only thing that Mr. Dawson said to him was, "Look out", and this statement was made too late to avoid the accident.

We undoubtedly would look at this claim differently if we were dealing with an adult as distinguished from an immature boy of fifteen years of age, or, if we had a more intelligent boy than we are dealing with here.

We are also impressed with the fact that originally this elevator had a strap on it, which was used in the closing of the doors, and after the accident the strap was returned to be used for the closing of the elevator doors.

There is nothing to be gained by having this boy, or any other boy, close the elevator doors. We believe Mr. Dawson should have performed this act, particularly in view of the fact that, had he looked, he could have seen the boy put his arm outside, and he knew that a strap had been provided previously, but was not on the elevator door at the time. Therefore, the least he could have done would have been, if he asked this boy to close the elevator door, to instruct him not to place his hand outside, but if at all possible to pull down on the inside, as Mr. Dawson must have known that, once the two pieces of steel were placed into motion, the balance of the action would be rapid and dangerous.

After considering all of the medical testimony, viewing the exhibits, including the X-Rays, and counsel for claimant's reference to the Workmen's Compensation Act, irrespective of the fact that it is improper for anyone to place a specific percentage loss on the injury, we believe that a fair award would be \$1,000.00.

An award is, therefore, made to claimant, Lucius Steward Flournoy, in the amount of \$1,000.00.

(No. 5030—Claimant awarded \$259.63.)

ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 18, 1963.*

ALBERT SIEGEL, Attorney for Claimant.

WILLIAM G. CLARK, 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.

FEARER, J.

This claim arises by reason of the lapse of an appropriation prior to the payment of an amount due claimant, Armour Research Foundation of Illinois Institute of Technology, by the State of Illinois. At the time the appropriation lapsed, there were sufficient unexpended funds available to cover the amount of the claim.

The record consists of the complaint, stipulation, motion for leave to waive the filing of briefs, together with attached consent of the Attorney General, and order of the Court directing that neither claimant nor respondent be required to file a brief.

There is attached to the complaint a bill of particulars, in which the claim is set forth in detail.

A stipulation has been entered into between the attorney for claimant and the Attorney General's office for respondent, wherein it is stipulated that the complaint correctly sets forth services and charges therefor, and all pertinent matters, and that claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits.

The basis for the claim is in accordance with the terms of requisition No. MTS 58-34, wherein respondent sought the scientific services and materials to be supplied

by claimant, as needed and when available, for technical assistance in design or modification of the Cartographotron, revision and audit of schematic diagrams of the Cartographotron as assembled and drawn by the Chicago Area Transportation Study, assistance and preparation of a complete preventative maintenance schedule for the Cartographotron, and assistance in the assembly and completion of an operation manual for the Cartographotron.

The amount remaining due, and for which the claim is filed, is \$259.63.

The claim of Armour Research Foundation of Illinois Institute of Technology is, therefore, allowed in the sum of \$259.63.

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(No. 5060—Claimant awarded \$389.56.)

COMMONWEALTH EDISON COMPANY, AN ILLINOIS CORPORATION,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion* filed March 18, 1963.

JOSEPH C. SIBLEY, JR., and EMMET T. GALLAGHER, Attorneys for Claimant.

WILLIAM G. CLARK, 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.

**FEARER, J.**

This claim arises by reason of the lapse of an appropriation prior to the payment of an amount due to claimant, Commonwealth Edison Company, An Illinois Corporation, by the State of Illinois. At the time the appropriation lapsed, there were sufficient unexpended funds available to cover the **amount of** the claim.

There is no dispute that the amount is due and owing, and a stipulation has been entered into between the attorneys for the Commonwealth Edison Company and the Attorney General's office, wherein it was stipulated that the State of Illinois was indebted to claimant in the amount of **\$389.56**.

The record consists of the complaint, Departmental Report, which verifies the figure stipulated to, stipulation, motion of claimant for leave to waive the filing of brief and oral argument, and order of the Chief Justice granting the motion of claimant for leave to waive the filing of brief.

The supplying of electricity to respondent, Department of Public Works and Buildings, Division of Highways, District 10, at said District's special instance and request, during the period from March 1, 1961 through June 30, 1961, inc., for the operation of diverse traffic signals located in various suburbs immediately north of Chicago, Illinois, is the basis for this claim. Attached to the complaint is a bill of particulars wherein the various rates and charges are set forth, and is the basis for this claim. After allowing all just credits and set-offs, there is due claimant the sum of \$389.56.

The claim of Commonwealth Edison Company, An Illinois Corporation, is, therefore, allowed in the sum of \$389.56.

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(No. 4848—Claimant awarded \$3,500.00.)

FRED J. PRICE, as Administrator of the Estate of CATHERINE PRICE, Deceased, and FRED J. PRICE, an individual, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 29, 1963.*

JAMES N. REEFE and HOWARD L. SNOWDEN, Attorneys for Claimants.

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

NEGLIGENCE—*duty of emergency vehicle to give warning.* Evidence disclosed that police vehicle, while in pursuit of suspected violator, failed to warn public by sounding siren, etc., and that such failure was the proximate cause of the accident.

PERLIN, C. J.

Claimant, Fred J. Price, filed this action in two counts, one as Administrator of the Estate of Catherine Price, Deceased, and the second in his own behalf. Each count claimed damages of \$7,500.00 as a result of an accident, which occurred when claimant's car was struck by a squad car driven by an Illinois State Highway trooper.

The evidence shows that on March 17, 1958, at approximately 12:50 A.M., a 1957 Ford, a squad car, owned by the State of Illinois and being driven by State Trooper Alfred D. Hendricks, smashed into the rear of a car being driven by claimant, Fred J. Price. Officer Hendricks was accompanied by State Trooper Robert Shank. Claimant's wife, Catherine, a passenger in claimant's 1939 Chevrolet coupe, was killed, and plaintiff was injured.

The accident occurred on U.S. Highway No. 24, approximately two miles west of Fowler, Adams County, Illinois. This highway runs in an easterly and westerly direction, and the squad car was proceeding east at the time of the collision.

Claimant, Fred J. Price, had entered U.S. Highway No. 24 from the south just before the collision. He had been traveling north on a gravel road, which intersects U.S. Highway No. 24, and had turned right (or easterly) onto said highway when he was struck.

A stop sign is located at the intersection of U.S. Highway No. 24 and the gravel road in question for ve-

hicles entering the highway. There is a dispute as to whether or not Mr. Price stopped fully at this sign.

Both Hendricks and Shank testified that at the time of the collision they had been chasing a suspected speeder; that they had reached speeds up to 105 miles per hour; that they had approached this intersection at 90 miles per hour without any warning of their approach; and, that they did not use their siren, flashing red light, or horn. Trooper Shank testified that they had pursued the speeding automobile for about 5 or 6 miles. Trooper Hendricks testified that they were acting pursuant to department instructions to get an accurate clocking of the speeding vehicle before using the siren or the red light.

The troopers stated that they had seen the Price car enter the highway; that he did not stop at the stop sign, and they did not then warn of their approach. Officer Charles Lenz, who investigated the accident, testified that, when he spoke to claimant after the accident, Mr. Price told him he did not fully stop at the stop sign, but had shifted into second gear.

Claimant Price testified that he fully stopped at the stop sign; that he saw a car coming about a half-mile to the west; that he then shifted into second gear and entered the highway, turning right. He said he was struck by the police car before he had moved 100 feet along the highway.

Officer Lenz further indicated that, in police training, troopers are taught that, when clocking a speeder, it is more important to afford an approaching vehicle due warning by means of lights and warning sirens than to determine the speed of another car.

Sec. 212(b) of Chap. 95½, 1957 Ill. Rev. Stats., in effect at the time of this accident, provides that, when

an authorized emergency vehicle is operated in the immediate pursuit of an actual or suspected violator of the law, the driver of such vehicle shall sound a siren, whistle or bell when necessary to warn pedestrians and other drivers of its approach.

It is clear from the foregoing that the agents of respondent were guilty of negligence, and that such negligence was the proximate cause of this accident.

Whether or not claimant, Fred Price, did in fact come to a complete stop appears to be of minor importance, since his action does not appear to be a contributing factor in causing the accident. The evidence is clear that claimant had already completed his turn, and had driven about 100 feet when respondent's agents crashed into the rear of his car.

The question next arises as to the amount of recovery, which should be allowed claimant. Prior to the filing of this claim against the State of Illinois, Fred J. Price, as Administrator of the Estate of Catherine Price, Deceased, gave a covenant not to sue Alfred Hendricks and Robert Shank for the consideration of \$3,000.00. Fred J. Price, as an individual, gave a covenant not to sue Alfred Hendricks and Robert Shank for the consideration of \$1,000.00. These amounts must be considered in the rendering of any award, *Martin vs. State of Illinois*, 22 C.C.R. 179.

Since damages for wrongful death are limited to pecuniary loss, it is necessary to examine the claim of the Estate of Catherine Price for \$7,500.00. Mrs. Price left eight grown children surviving. According to the testimony, she did free baby-sitting, sewing, canning, cooking and cleaning regularly for six of them, in addition to tending to her own housework.

According to the mortality tables admitted into evidence, the life expectancy of a female, aged **65**, was **15.5** years. It is the opinion of this Court that the Estate of Catherine Price be awarded, in addition to the \$3,000.00 it has already received, the sum of \$2,000.00.

Claimant, Fred J. Price, testified that he had not worked from the time of the accident to the time of the hearing, a period of  $2\frac{1}{2}$  years; that he could no longer carry with his left hand, or lift anything; that he **was** regularly employed as a farm hand, earning **\$125.00** per month, plus being furnished with housing before the accident; that his medical bills amounted to **\$259.20**. He said that after the accident he lived first with a son, then a daughter, and did not return to his home. Other than claimant's own testimony and the bill of particulars, there was no corroborating medical report, either written or oral, as to the extent or permanency of the injuries allegedly suffered by Fred J. Price.

It is the opinion of this Court that Fred J. Price be awarded, in addition to the **\$1,000.00** he has already received, the sum of **\$1,500.00**.

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(No. 4850—Claimant awarded \$300.00.)

**ERNEST W. MAMMEN**, Claimant, vs. **STATE OF ILLINOIS**,  
Respondent.

*Opinion filed Mmck 29, 1963.*

**COSTIGAN, WOLLRAB AND YODER**, Attorneys for Claimant.

**WILLIAM G. CLARK**, Attorney General; **WILLIAM H. SOUTH**, Assistant Attorney General, for Respondent.

**HIGHWAYS**—*where negligence action limited to damages. Where respondent's negligence was decided in previous case involving same accident, question of amount of damages was the only subject of inquiry.*

**PERLIN, C. J.**

Claimant seeks recovery of \$7,500.00 for personal injuries and property damage allegedly incurred as a result of an accident on December 26, 1956, when the car he was driving crashed into a barricade erected by respondent across old Route No. 66.

That respondent's negligence caused the accident was decided by this Court in the companion case of *Sue Mammen vs. State of Illinois*, No. 4786, wherein claimant's wife was awarded \$5,000.00 for injuries suffered in the same accident. In that case the Court held as follows :

"Respondent was negligent in failing to maintain adequate signs warning of this particular danger, which obviously was known by it to exist long prior to the happening of this occurrence.

"We further find that claimant and her husband were in the exercise of ordinary care for their own safety at the time of this occurrence, and that the negligence of respondent proximately caused claimant's injuries."

Therefore, the only question presented in the instant case is the extent of damages, if any, sustained by claimant as a result of the accident.

Claimant testified that he was driving a 1945 or 1946 Mercury in the accident, which occurred in December, 1956. He sold the car for junk for about \$75.00, although he does not remember the exact amount. He estimated that the fair cash market value of the car was about \$300.00, but had not checked the value in the Blue Book. Claimant presented no corroborating evidence as to his estimate of the value of his car.

According to claimant, he suffered physical injury when his car struck the barrier, and he was thrown against the windshield and the steering wheel, striking his chest. Since that time, he claims he has had pain in his chest, and can work or be active for only a short time. He first noticed a shortness of breath or pains when he was driving a few days after the accident.

Claimant further testified he was unable to continue working in his real estate business since the time of the

accident, and had no income since that time. He said that he sold farm property, and sometimes he found it necessary to walk several miles on one project, which he was now unable to do. Since the accident, however, one or two people have asked him to handle the sale of farms, and he has also accepted four or five listings of property.

Claimant started in the real estate business when he was about 65 years of age. He was 77 years old at the time of the hearing on November 20, 1959. He said that he "probably" had an annual income of \$2,000.00 to \$2,500.00. No income tax returns or business records were offered to substantiate this claim.

Claimant's son, Dr. William Mammen, testified that he had examined his father on the day of the accident. At that time claimant was complaining of pain in his chest, which he said was incurred when he struck the steering wheel. There were bruises on his chest, but apparently no fractures. Claimant complained of soreness of the chest and pain when he moved. The doctor examined his father again about a week after the accident, determined that the pain was of an anginal origin, and prescribed nitro-glycerine tablets.

According to Dr. Mammen, there is a causal relation between contusion to the chest and angina. In his opinion, the blow that his father received in the accident was the cause of the angina, since he had no complaints before the accident. Dr. Mammen further testified that the type of anginal pain suffered by his father does restrict activity; that claimant cannot be active; that he has seen claimant suffer from shortness of breath and pain from over-exertion.

It is the opinion of this Court that claimant has failed affirmatively to prove that he suffered any loss on

the sale of his old automobile for \$75.00. He submitted no evidence other than his opinion as to its market value, and we are inclined to consider his appraisal excessive.

Despite claimant's alleged physical condition, he was still relatively active at the time of the hearing, and was able to drive and partake in limited business activity. From the facts before this Court, we believe the injuries received by claimant in this accident to have been fortunately of a minimal character.

The Court hereby awards claimant the sum of \$300.00.

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(No. 4870—Claimant awarded \$20,000.00.)

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

Opinion filed March 29, 1963.

LLOYD H. MELTON and HAROLD B. CULLEY, JR., Attorneys for Claimant.

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

*HIGHWAYS—notice of defect.* Evidence disclosed that State had actual knowledge of hole in pavement, and had ineffectively patched it on several occasions, but failed to place signs warning public of its existence.

*SAME—negligence.* State's negligence in failing to patch hole effectively resulted in claimant's damages.

PERLIN, C. J.

Claimant, John Sisco, seeks recovery for injuries received in an automobile accident, which occurred Saturday, May 3, 1958, on Illinois Highway Route No. 1, about 6 miles north of Cave-in-Rock, when the automobile driven by claimant struck a hole in the pavement, bounced over the center line, and collided with a car coming from the opposite direction in the other lane of traffic. The passenger riding in claimant's car was killed.

It is agreed that claimant was injured, and that he was taken to the Hardin County Hospital at Rosiclare, Illinois, and remained there for 68 days. He was subsequently taken to the Veteran's Hospital in Marion, Illinois, where he remained from July 11, 1958 until June 27, 1959, after which he was taken to the Veteran's Hospital in St. Louis, where he remained for approximately two months. Claimant presented evidence that, during the period of hospitalization, he was almost completely immobilized, and that at one time he was in a total cast except for his left knee and left shoulder. At the time of the trial, two years after the accident, he could not walk without crutches.

The evidence shows that claimant was 37 years old at the time of the accident; that he went to the 11th grade in school; that he had no special training for office work and the like; and that, after serving in the armed forces, the only work he did was at the Caterpillar plant in Peoria, Illinois, where he was a steam boot operator, engaged in the job of cleaning off motors. Because of the injuries incurred by claimant, he will not hereafter be capable of performing work of this character.

The issues raised in this case are (1) whether respondent was negligent, and, (2) whether claimant was free from contributory negligence.

Claimant testified as follows: He had left Peoria, Illinois about 10:00 P.M. He had worked his normal shift, and left on his trip immediately thereafter, picking up his 70 year-old landlady. He had about ten to twelve hours of sleep the previous night, and was in good physical condition. He stopped twice to put gas in the car en route to his home in Elizabethtown, Illinois. He made this trip about once a month, always using the same route.

He carried lunch and coffee with him, had nothing to eat or drink at any commercial establishment, and did not have any alcoholic liquor in the car. His car was a 1938 Chevrolet in good condition with good brakes. He had everything checked the day before he left. His tires were about a month old. At about 6:30 A.M. he was traveling south on Illinois Route No. 1 at about 40 or 50 miles per hour, at which time he struck a hole in the road, the right front tire blew out, and his car veered to the left over into the lane of on-coming traffic, and collided with another automobile. His car turned over as a result of the collision, and was almost completely demolished, and his passenger was killed. His hands did not come off the wheel at any time, and he did not lose control of the car. His car did not skid before the collision. He put his brakes on, but was immediately hit. He did not see the hole before the accident, nor has he seen it since, but he did feel it when his right front wheel ran down in it. There were no signs warning of the hole, although there was a "curve sign" about 500 feet before the hole. Claimant said he decreased his speed when he saw the "curve sign."

Claimant presented five witnesses, who were familiar with the particular stretch of highway where the accident had occurred. They stated the hole was about 12 to 18 inches wide, 12 to 14 inches long, and 4 to 8 inches deep in the center. Gary Austin, a milk truck driver, who traveled that section of Route No. 1 six or seven days per week, said the hole had been there for about three weeks, and he had hit it occasionally. He further testified that, when he hit the hole, there was a violent reaction to the steering of his vehicle, and it caused his vehicle to swerve one way or the other, and that it was deep enough that "if you run off in it, your tires would go clear down in it." Mr. Austin also said that the hole

was not readily apparent, and “you would almost have to know it was there, or be looking for it, before you could see it.”

Mr. Edson Jarrells, who drove over the road daily, said that; he had occasionally hit the hole, and it was not readily apparent from a great distance, and “you would hit it, if you didn’t know it was there.” He testified the hole had been there about three weeks to two months. He noticed that the hole had been fixed, but that in a short time the blacktop had worked loose, and had come out again.

Randall Oxford testified that the last time he hit the hole was about a week before the accident. It had a violent reaction upon his vehicle, and there was a jerking on the steering wheel when he hit it. He usually traveled from 40 to 50 miles per hour down that highway.

James Mathis also testified that this was not a hole one would readily see in traveling down the road, and that the hole had been there two months or longer.

Respondent presented two witnesses, who had been working for the State Highway Department at the time of the accident. John Angleton, an employee in the Highway Department, said that he had filled the hole in question about 5 days previous to the accident, and that it had been patched at least four times before the accident, since the water was coming from “underground somewhere”, and working the blacktop out.

Mr. Bert Scott, the sectionman for the section of the highway in question at the time of the accident, testified that, because of the mater pressure in the hole, it was harder to make the blacktop stick; there was no sign of any kind along the road that would indicate that there was a hole in the road; that the hole had been “breaking out there some three or four weeks”; that he

had repaired it at different times, and that it did not stay repaired “too long.”

Respondent contends that claimant was not free **from** contributory negligence, since it should be inferred that the right front tire on claimant’s car was substantially defective. This contention is without merit. Nowhere is evidence presented that the tire was defective. On the contrary, since the tire was only one month old, the inference might be that it was not defective. That the hole did not cause other cars to have blow-outs has no bearing on the instant case.

The evidence indicated that the hole was not readily discernible before it was hit, and that striking it did cause a violent reaction to many of the cars driving through it.

That respondent had actual notice of the defective area is undisputed, and substantiated by respondent’s own employees, who testified that they had **known** of the condition of the highway for at least three to four weeks, and that its frequent attempted repair was insufficient. There is also no dispute about the fact that there were no signs warning of this hole.

In *Mitchell vs. State of Illinois*, No. 4872, claimant recovered for damages to his automobile caused by driving over a hole in the highway. Although there was no evidence that the State had actual knowledge of the hole, the Court held that it had either actual or constructive knowledge, since the highway had been in a generally defective condition for a considerable length of time, and there were no warning signs, barricades or any warning whatsoever advising the traveling public of the break in the highway. In awarding the recovery, the Court stated :

“We are mindful of the fact that we have held several times that respondent is not an insurer of all people traveling **upon** its highways, but

it does have an obligation to keep its highways in a reasonably safe condition for motorists traveling over them, and, if the highways are in a dangerously defective condition, which might be hazardous to the traveling public, then the respondent is obligated to erect barriers or warning signs warning the people traveling over said highway of any dangerous or defective condition."

Since respondent in the instant case had ample actual notice that the hole existed, and that attempted repair by blacktopping was ineffective, it must be deemed negligent in not effectively correcting the condition, and in not erecting warning signs or barriers near the hole. The record indicates claimant to have been free from contributory negligence, and he apparently exercised due care for his safety.

In the opinion of this Court, respondent's negligence was the proximate cause of the accident. There has been no evidence adduced to indicate any negligence on the part of the vehicle with which claimant collided.

Claimant's injuries are patently severe. The evidence established that he will never be able to walk normally again, and that he is incapacitated from doing physical or manual work in the future. He has had no training for other types of work, although the doctor testified that even work done sitting at a desk could only be accomplished for short periods of time. The amount of medical costs, including the Veteran's Hospital bills of \$10,789.20, is indicative of the severity of claimant's injuries. It is fortunate that claimant was entitled to receive, without cost, the medical services of the Veterans' Administration.

. This Court, therefore, awards John Sisco the **sum** of \$20,000.00.

(No. 4900—Claimant awarded \$12,500.92.)

FRED M. MERSINGER, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed November 13, 1962.*

*Petition of claimant for rehearing denied March 29, 1963.*

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

WILLIAM G. CLARK, Attorney General; ROBERT A.  
SPRECHER, Special Assistant Attorney General, for Re-  
spondent.

CONTRACTS—*void contracts*. Where a contract is in violation of the State conflict of interest statute, it is void, and no part of it may be enforced.

SAME—*authorized work on illegal contract*. Where evidence showed that State officer, who had authority, authorized completion of contracts, which were originally void because of a conflict of interest, which had been removed, an award will be made for the work performed after the new authorization.

PERLIN, C. J.

Claimant, Fred M. Mersinger, a Certified Public Accountant, seeks recovery for accounting fees and expenses allegedly earned as a result of services performed by claimant and his organization for the State Auditor of Public Accounts during the biennium 1955-1957.

Claimant's original petition sought \$34,812.50. Claimant thereafter amended his claim to \$37,304.02 at the commencement of the hearing. The claim was reduced by claimant to \$29,909.07 during the hearing.

A claim for payment for work performed on eighteen State audits is at issue in this proceeding. Orville Hodge, as Auditor of Public Accounts, authorized such audits. During this period, Edward Epping was Hodge's administrative assistant, and at the same time a 50% partner in claimant's firm. Dr. Lloyd Morey succeeded to the office of Auditor on July 18, 1956, and thereupon

dismissed Epping. Epping allegedly terminated his partnership relationship to claimant on July 20, 1956.

On or before July 20, 1956, claimant's firm had completed nine of the audits in question, bearing invoice numbers 239 to 247. Audits numbered 249 to 258, inclusive, were in progress on July 20, 1956. These were completed subsequent to that date pursuant to specific authorization by Dr. Morey. All other audit authorizations on which work had not yet begun were cancelled by Dr. Morey.

Respondent opposes Mersinger's claim on the grounds that the contracts, which had been awarded to his firm for auditing, were rendered null and void because of violation of Ill. Rev. Stats., Chap. 127, Sec. 75 (1951, 1953 and 1955), which provided :

*"No contract shall be let to any person holding any State office in this State or a seat in the General Assembly, or to any person employed in any of the offices of the State government, or the wife of a State officer, member of the General Assembly, or employee as aforesaid, nor shall any State officer, member of the General Assembly, or wife of employee as aforesaid, become, directly or indirectly, interested in any such contract, under penalty of forfeiting such contract and being fined not exceeding one thousand dollars. 1915, June 22, Laws 1915, p. 671, Sec. 12."* (Emphasis Supplied.)

and, Ill. Rev. Stats., Chap. 102, Sec. 3, which provides:

*"No person holding any office, either by election or appointment under the laws or constitution of this State, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void."* As amended 1949, May 6, Laws 1949, p. 1162, Sec. 1. (Emphasis Supplied.)

Mersinger testified that he had two partners, Edward Epping and Harold Storck; that his partnership

with Epping became effective on April 1, 1952; that the partnership agreement was reduced to writing as of November 1, 1952, and provided that Epping would be a 50% partner of Mersinger. He further testified that the partnership with Epping was dissolved on July 20, 1956.

The record further shows that, shortly after Hodge assumed the office of Auditor of Public Accounts on January 12, 1953, Epping also began to serve as Hodge's "administrative assistant, or executive assistant, or the right-hand-man of the Auditor" (*People vs. Epping*, 17 Ill. (2d) 557, 162 N.E. 366 at p. 370). Epping was dismissed from the Auditor's office by Dr. Lloyd Morey, who succeeded to the position of Auditor on July 18, 1956. Although Mr. Epping was not technically on the payroll of the State, the evidence shows that he performed executive functions for the State, such as approving vouchers of the Auditor's office. For a short period after Epping went to work for the State, he billed the State of Illinois on a time basis. Hodge and Epping then arranged for the State to pay \$1,000.00 per month plus Epping's expenses to the Mersinger firm, which in turn paid Epping.

Edward Epping was called as a witness in the instant proceeding, but refused to testify by invoking his constitutional rights against self-incrimination.

The Illinois Supreme Court affirmed the conviction of Epping for the crime of embezzlement by a public officer or his servant in *People vs. Epping*, cited above. The action was based on Sec. 80 of the Illinois Criminal Code, Ill. Rev. Stats., 1951, 1953, 1955, Chap 38, Sec. 214, which provides as follows:

"If any state, county, township, city, town, village or other officer elected or appointed under the constitution or laws of this state, or any clerk, agent, servant or employee of such officer, embezzles or fraudulently converts to his own use, or fraudulently takes or secretes with intent to do so, any money, bonds, mortgages, coupons, bank bills, notes, warrants,

orders, funds or securities, books of record, or of accounts, or other property belonging to, or in the possession of the state or such county, township, city, town or village, or in possession of such officer by virtue of his office, he shall be imprisoned in the penitentiary not less than one nor more than fifteen years." (Emphasis Supplied.)

Epping acted as a State official in recommending assignments of audits to "independent" agencies, such as F. M. Mersinger & Co., which received 90% of such assignments. He then worked on such audits as a partner in the Mersinger firm, and then he approved and reviewed his own audits in the guise of a State official. The evidence showed that completed audits were delivered to and accepted by him.

Claimant Mersinger billed the State of Illinois for a total of \$532,563.30 for the period of February 13, 1953 to December 15, 1956, of which the State of Illinois has paid a total of \$497,730.80. In *People ex rel Smith vs. Mersinger*, 18 Ill. (2d) 486 (1960), the Supreme Court refused to allow the State to recover this amount. That action was based on a 1955 conflict of interest statute, which first provided for a forfeiture of certain contracts, and subsequently was amended to provide for a fine only. The Court held that the contract was fully executed on both sides, and could not be declared forfeit insofar as recovery of monies already paid were concerned. It did not consider the legality of the contract itself.

If Orville Hodge, who held office by election under the Constitution of the State of Illinois, took or received, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his action in his official character, then any contract made and procured in such manner would be void (Chap. 102, Sec. 3, as quoted above).

The authorization for all services supplied by Mersinger, and represented by the eighteen invoices at issue in the instant case, was originally given by Hodge. Dur-

ing this same time, Epping was a partner in the Mersinger firm and Hodge's assistant. Claimant introduced copies of sixteen letters of authorization, signed by Hodge as Auditor, ordering the audits upon which the claim herein is based, and testified that the two other letters of authorization had also been executed by Hodge.

Mersinger testified that on March 14, 1953 he loaned \$10,000.00 to the Hodge Insurance Agency, and on the same date received a note for \$10,000.00, executed by the Hodge Agency and by Orville Hodge, personally. Mersinger further testified that on or about the same date Epping also loaned Hodge or the Hodge Agency \$10,000.00. The principal amount of \$20,000.00 loaned by Mersinger and Epping to the Hodge Agency has never been repaid. The Hodge Agency was owned solely by Orville Hodge.

Hodge became State Auditor on January 12, 1953, and the Mersinger Company received its first State of Illinois warrant issued during Hodge's term on February 13, 1953. In the following three and one-half years the Mersinger firm was paid the sum of \$497,730.80 by the State of Illinois for work ordered by Orville Hodge.

Harold Storck testified that he was a Certified Public Accountant, and a resident partner in the Springfield office of F. M. Mersinger & Co. from August 1, 1955 to April 15, 1957. He testified that the Springfield office had a system by which the partners, associates and employees kept a record of their time and expenses. Testimony revealed that, during 1954, 1955 and 1956, John Casper received salary and traveling allowances from the Mersinger Springfield office in the total sum of \$7,201.50; Thelma Casper received \$7,201.50; and James Erickson received \$15,775.00. These sums were allotted in monthly installments. Evidence further showed that John Casper was a driver for Orville Hodge, and a custodian of

Hodge's lake home; Thelma Casper was Orville Hodge's housekeeper, and James Erickson was a chauffeur for Mrs. Orville Hodge. No services were rendered *to* the Mersinger firm by any of these persons.

Of nineteen checks made payable to James Erickson, each in the amount of \$75.00, one or two were signed by Epping, and the rest were signed by Harold Storck. At least thirteen of these checks had been cashed by Hodge, and deposited in his so-called "brown envelope" account at the Southmoor Bank and Trust Company in Chicago.

The evidence further shows that, when Dr. Morey assumed the office of Auditor of Public Accounts, he authorized claimant Mersinger's firm to complete audits numbered 249 through 258, which had already been begun, although he cancelled all other engagements for which no work had as yet been started. Morey also accepted the audit reports in question as satisfactorily meeting the engagements.

The transcript of the record quotes Dr. Morey's testimony as follows:

"I found on taking office that some work had been done on all of these engagements [249 to 258]. *Therefore, I authorized Mr. Mersinger's firm to continue and complete those audits and submit reports.* . . . On these nine audits the reports **of** the audits were not—they were in due time received by my office. They were examined and accepted as satisfactorily meeting the engagements and the reports disposed of in the usual manner. (Emphasis Supplied.)

"We received itemized statements of time and expenses which were examined. With respect to the hourly rate of pay it was my conclusion that—referring to my specific notes here—with respect to the scale of per diem charges, these were within customary and reasonable rates in our opinion.

"Q. You don't then, sir, specifically have a copy of the letter where you directed the Mersinger Company to proceed to complete the nine audits?

A. I do not find such a letter.

Q. You distinctly remember, however, having written such a letter?

A. I cannot say that a letter was written. I have reason to believe that it was, but it hasn't been furnished me by the office, which I judge means they have not been able to locate it.

Q. Dr. Morey, at the time you directed Mr. Mersinger's firm to complete these nine audits that were in progress on July 15, 1956, did you feel or were you advised that you had sufficient statutory authority to direct these audits be concluded? . . . Were you advised, sir, that you had specific statutory authority, or did you know of specific statutory authority to have audits made of State agencies?

A. I did believe at that time I had full statutory authority to make such audits—to have such audits made.

Q. At the time you directed the Mersinger firm to complete these nine audits did you, sir, have personal knowledge from the records maintained in your office that there were sufficient sums on hand in the appropriations made for these types of services to pay the Mersinger firm the amount of money that would be required if they completed the services?

A. Yes. Otherwise I would not have confirmed those commitments."

Where a statute expressly declares that certain types of contracts are void, there is then no doubt of the legislative intent, and any agreement of the nature thus voided by statute is unlawful. The same is true where the contract is in violation of a statute, although not therein expressly declared to be void (13 C. J., Contracts, Sec. 351, p. 420). Therefore, violation of Ill. Rev. Stats., Chap. 127, Sec. 75, or Chap. 102, Sec. 3, heretofore set forth, would render Mersinger's auditing contracts void and unenforceable. That both statutes have been violated must be readily concluded from the evidence presented. The Supreme Court recognized that Epping was a State employee at the same time that he was a partner in claimant Mersinger's firm.

The record is also clear that Hodge accepted at least \$50,178.00 directly or indirectly for his own benefit from Mersinger, Epping, and Mersinger & Company. A reasonable inference may be drawn from the foregoing, when coupled with the fact that Mersinger received at least 90% of the auditing contracts awarded by Hodge, that Hodge took "money or other thing of value as a gift or bribe or means of influencing his . . . action in his official character", as prohibited by Ill. Rev. Stats., Chap. 102, Sec. 3.

It has been held that a contract may be illegal and void, yet not be an absolute nullity. This principle is stated in **13 C. J., Contracts, Sec. 339, p. 410**, as follows:

“The expression ‘void’ as used in this connection has the meaning of not affording legal remedy rather than of absolute nullity, since such contracts when executed may be indirectly effective in that no relief will be granted to either party.”

Hence, a contract may be non-forfeitable yet unenforceable, and a decision holding the contracts authorized by Orville Hodge unenforceable in the Court of Claims would not conflict with the decision of the Supreme Court in *People ex; rel Smith vs. Mersinger*, cited above, which did not allow forfeiture of executed portions of the contract.

It is the opinion of this Court that recovery for work done on audits numbered **239** to **247** should be denied on the grounds that the contracts involved are illegal, and illegal contracts are unenforceable. Those audits were authorized by Hodge and Epping, and were completed before Hodge had left office and Epping had resigned from the Mersinger firm, all in violation of the statutes upon which respondent relies.

The question next arises as to the effect of Dr. Morey’s direction that claimant proceed to completion with audits numbered **249** to **258**. Under Illinois law, as defined by a series of cases, it appears that an illegal contract may not be ratified. In the case of *State Bank of Blue Island vs. Benzling*, **383 Ill. 40** at p. **54**, the Supreme Court stated:

“A contract void because it is prohibited by law can in no manner be enforced. The law does not prohibit and also enforce a contract. (*Knass vs. Mad. and Kedzie Bank*, **354 Ill. 554**; *People vs. Wiersma Rank*, **361 Ill. 75**.) Where a contract is *ultra vires*, it is not only voidable but wholly void and of no legal effect and cannot be ratified, nor can performance by the parties give it validity or become the foundation of any right upon it,

nor is either party, by assenting to it or by acting upon it, estopped to show it was prohibited. (*People vs. Wiersema Bank*, 361 Ill. 75; *Steele vs. Fraternal Tribunes*, 215 Ill. 190.)"

This Court holds, therefore, that no part of the contracts, which were rendered void because of violation of Ill. Rev. Stats., Chap. 127, Sec. 75; and Chap. 102, Sec. 3, may be enforced. However, when Dr. Morey specifically authorized Mersinger to complete audits 249 through 258, and Mersinger did so in reliance thereon, the State received a positive benefit untainted by illegality, and should pay for such services rendered subsequent to July 20, 1956.

A review of the detailed computations in this proceeding will reveal that work in the sum of \$9,916.63 was performed by claimant prior to July 20, 1956, and work performed after that date amounted to \$19,992.44. A sum of \$2,491.52, attributable to previously unbilled time and expense, was included in the figure of \$19,992.44. Since this amount had never been billed to the State, it is not recoverable in this action. The amount involved is, therefore, reduced to \$17,500.92.

The evidence herein further reveals that a number of payments in advance were received by claimant from the State of Illinois. In particular, we note warrant No. 589 027. A total of \$5,000.00 of this warrant was allocable to invoices Nos. 250 and 254, both of which were among those completed subsequent to July 20, 1956. We hold such sum of \$5,000.00 to be an equitable offset against the obligation of respondent, and we accordingly award to claimant the sum of \$12,500.92.

(No. 4975—Claimant awarded \$2,079.50.)

LAURENCE E. KENT, MINA M. KENT and STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY, Claimants, vs. STATE OF  
ILLINOIS, Respondent.

*Opinion filed March 29, 1963*

PEEL, STICKELL, HENNING AND MATHERS, Attorneys  
for Claimants.

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

PRISONERS AND INMATES—*damage by escaped inmates.* Where evidence showed only two security guards for a 159 acre institution for the insane, and State knew of inmates desire to escape, respondent was negligent in allowing inmate to escape.

HIGHWAYS—*Uniform Act Regulating Traffic On Highways.* Uniform Act Regulating Traffic on Highways does not apply to vehicle at any place other than on the public highways.

**PEZMAN, J.**

On April 23, 1959, one George Dobrich escaped from the Galesburg State Research Hospital, and took the automobile of Laurence E. Kent, which was in his garage with a key in the ignition. Before taking the automobile, Dobrich threatened and frightened Mina M. Kent, the wife of claimant, Laurence E. Kent. He again frightened her when he backed the car from the garage. The car did not strike her. Dobrich, after leaving the Kent residence, wrecked the 1956 Cadillac two-door sedan, and the State Farm Mutual Insurance Company paid claimant, Laurence E. Kent, the sum of \$2,950.00, as the car was considered a total loss. The sale of the salvage of said automobile reduced the insurance company's loss to \$2,079.50. Claimant, Laurence E. Kent, contends the market value of the 1956 Cadillac in the Galesburg area was \$3,200.00. Therefore, he suffered a loss of \$250.00. Mina Kent claims that, as a result of pain, suffering, loss of sleep

and nervousness, due to the threats by George Dobrich, she sustained damages in the sum of \$2,500.00. The State Farm Mutual Insurance Company is asking for the sum of \$2,079.50, which sum it has paid out on behalf of Laurence E. Kent.

George Dobrich, the inmate, weighed in excess of 200 pounds, was five feet ten inches tall, and thirty-four years of age. He was suffering from an illness classified as insanity. He was admitted to the hospital on December 19, 1958, and on December 22, 1958 was transferred to a locked ward. He subsequently was given a limited permit to be out of the ward for short periods of time. This permit, however, was withdrawn on or about March 13, 1958, because of his demands to go home to his mother. According to the hospital records, he was classified as an uncooperative patient. On April 23, 1958, Dobrich was housed in Ward C-3, which had standard wooden doors with glass panels in the upper half. There was one attendant on duty in Ward C-3 at the time of his escape. To escape, he forced the wooden doors of Ward C-3, passed through a sun porch, where there was no attendant, and then out of the building. While leaving the hospital grounds he attempted to secure car keys from one attendant, and, when the attendant did not have them, he started in a threatening manner toward another employee. This female employee recognized Dobrich, and got into a car and locked the doors. At the time of the escape, there was a maximum of two security officers on duty in the hospital grounds, which covers 159 acres. According to the testimony of one of the witnesses, approximately forty-five or more inmates leave the grounds each year without permission. Following his escape, Dobrich went to the residence of claimants, Laurence E. Kent and Mina Kent. He told Mrs. Kent that he had a gun, and took possession of the automobile belonging to

claimants. He backed out of the garage at such a rapid pace that it was necessary for Mrs. Kent to jump back to avoid being run over. He then drove the car until it was subsequently damaged beyond repair.

Where the State, by legal process, removes a person from the normal stream of activity, and places him in a mental institution, then it must be anticipated that, because of the patient's condition, certain precautions of care and restraint are required of the State in its control of such inmate. In *Dixon Fruit Company, Et Al, vs. State of Illinois*, 22 C.C.R. 271, this Court held:

"The State is not an insurer against damages caused by property being stolen by escaped inmates. Claims under the statute will be allowed only in the event that the State is found to be at fault."

In the case at hand there were only two guards on institutional security duty with an area of 159 acres constituting the hospital property. The patient had evidenced in the past the desire to go home to his mother, and the authorities were well aware of this desire. The Institutional Administrator testified that about forty-five inmates a year leave the hospital grounds without permission.

We, therefore, conclude that respondent was negligent in allowing the inmate to escape.

Respondent contends that claimants were contributorily negligent in that the keys to the ignition were left in the car, and that this was the proximate cause of any loss, referring to Sec. 189 of Chap. 95½, 1957 Ill. Rev. Stats.

We do not agree with respondent's contention. The facts show that the Kent automobile was parked in the garage at their home, and the keys were left in the ignition. This Court in the case of *United States Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, held as follows:

"It is noted from the testimony of the only witness testifying in the case on the particular point that the automobile was parked in the driveway of a private residence at the time it was stolen and not upon a public highway.

"Sec. 189 does not specifically refer to any particular place, and, therefore, by the terms of the Uniform Act Regulating Traffic on Highways, does not apply to a vehicle left unattended at any place other than on the public highway.

"This is the only reasonable construction of the statute. If it applied to all places, then leaving the key in an automobile while parked in a locked garage would be as much a violation of the statute, as would parking it in a car port or private driveway at a residence. This could not have been the Legislature's intention.

"We know of no rule at common law requiring the owner of an automobile to keep it locked under the circumstances involved herein, and do not intend to announce such rule ourselves."

We, therefore, find that claimant, State Farm Mutual Automobile Insurance Company, be awarded the sum of \$2,079.50.

We further find that claimants, Laurence E. Kent and Mina M. Kent, have failed to establish their cause for compensable damages, as set forth in their petition.

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(No. 4983—Claim denied.)

MARY JUNE SCHEMP, Administrator of the Estate of WALLACE SCHEMP, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 29, 1963.*

SCHMIEDESKAMP, DEEGE AND LEWIS, Attorneys for Claimant.

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

**HIGHWAYS**—*contributory negligence*. Evidence disclosed that claimant was contributorily negligent in making a left turn into lane of limited access highway into path of oncoming vehicle.

**NEGLIGENCE**—*elements of proof*. Before a party may recover damages, it must be proven that the party was in the exercise of due care and caution for his own safety, that the State was negligent, and that such negligence was the proximate cause of the accident.

PERLIN, C. J.

Claimant seeks recovery of \$25,000.00 as Administrator of the Estate of Wallace Schempp for his alleged wrongful death as a result of a two-car collision at the junction of U.S. Route No. 24 and Illinois Route No. 96, about six miles north of Quincy, Illinois.

The accident occurred on December 17, 1960 at approximately 10:30 A.M., when Wallace Schempp was returning from Mendon, Illinois, to his place of residence in Quincy, Illinois. He frequently traveled on this highway.

U.S. Highway No. 24 was a newly constructed limited access, divided freeway, consisting basically of four lanes running in a northeasterly-southwesterly direction. This highway intersects with Illinois Highway No. 96, a two lane highway, which runs in a due north and south direction, and crosses U.S. Highway No. 24 on the same level.

According to eyewitness, James Russell Williams, who was stopped at the intersection stop sign on Route No. 96, the 1954 Ford car driven by Mr. Schempp was approaching from the east on Route No. 24, and making a left turn to the south onto Route No. 96. Mr. Williams also saw a 1951 Cadillac traveling east on Route No. 24. When Mr. Williams first noticed the Ford, it was in the left-hand turn lane on Route No. 24, and was traveling slowly across the northerly of the two lanes for eastbound traffic. The Ford was approximately in the middle of the east bound lanes when it was struck by the Cadillac. After the impact, the Ford was knocked in an easterly direction, and a man, later identified as Mr. Schempp, flew out of the door of the Ford. Mr. Williams said that, in his opinion, the Cadillac was not traveling excessively fast. He did not know if the Ford had come to a com-

plcte stop before it made the left turn, since it was in the process of turning at the time he first saw it.

The record shows that Wallace Schempp died 45 minutes after arrival at St. Mary's Hospital as a result of a skull fracture, brain damage, shock and fractures of the arm and forearm.

Claimant contends that respondent was negligent in its duty to regulate, warn and guide traffic by failing to place proper signs and markings at the intersection, since the intersection was allegedly confusing and hazardous. Claimant further contends that the 1959 Ill. Rev. Stats., Chap. 95½, Sec. 126, imposed the duty to provide signs and markings by the following language:

"The Department shall place and maintain such traffic-control devices. . . 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."

John R. Short, an Illinois State Police Trooper, who investigated the accident, testified that there were stop signs for Route No. 96 at the intersection, but there were no traffic control signs for traffic approaching from the west on Route No. 24. There was one small sign with black and white stripes situated on the dividing island, which was visible to traffic approaching from the east.

Trooper Short stated that the surface of the road at the intersection was dry at the time of the accident, and the road was clear. He also testified that the Ford had been struck in the right front end by the Cadillac.

Before claimant can recover damages from the State, she must prove that Wallace Schempp was in the exercise of due care and caution for his own safety; that the State of Illinois was negligent, as charged in the complaint; and, that such negligence was the proximate cause of the accident. *McNary vs. State of Illinois*, 22 C.C.R. 328,334;

*Bloom vs. State of Illinois*, 22 C.C.R. 582, 585; *Link vs. State of Illinois*, No. 4719.

Nowhere in the record is there evidence that Wallace Schempp was in the exercise of due care and caution for his own safety. From the evidence adduced, we must conclude to the contrary. Ill. Rev. Stats., 1959, Chap. 95½, Sec. 166, provides as follows:

“The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction, which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this Act, may make such left turn, and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the vehicle making the *left turn*.”

There is no evidence that Schempp had stopped in order to yield to oncoming traffic, or that he had signaled. His car was in motion when it was seen by the witness. The Cadillac was apparently traveling at a reasonable speed.

Route No. 24 had been completed several weeks before the accident, and Schempp was evidently familiar with the road and the intersection, having been in the habit of traveling on the road to Mendon to get his hair cut. According to the testimony, he had probably passed the intersection in question on the morning of the accident.

Schempp was not, in our opinion, met with a condition, which was extremely and inherently dangerous and hazardous, or unknown to him. He knew he was crossing two lanes of a limited access freeway. There was no danger of his being struck in the rear on Route No. 24, as contended by claimant, since the highway had an additional lane at the intersection for the sole use of automobiles making left turns onto Route No. 96.

The statutory duty imposed upon the State by the 1959 Ill. Rev. Stats., Chap. 95½, Sec. 126, is only to “place and maintain such traffic control devices . . . as it shall deem necessary . . .”. The statutory regulations covering the conduct of left turns at all unmarked intersections would constitute a sufficient guide for drivers in such circumstances. The fact that the State subsequently posted a stop sign for westbound cars turning left onto Route No. 96 does not manifest any negligence of respondent prior thereto.

The proximate cause of this accident was the lack of due care exercised by either the deceased or the driver of the Cadillac. It was in no way the result of any act or omission by the State of Illinois.

This Court sympathizes with the great hardship imposed upon the widow and child of the deceased, because of their loss of the head of the family. However, we have consistently held that the State of Illinois is not an insurer of all persons traveling upon its highways. Claimant has failed to prove that the deceased was free from contributory negligence, or that the negligence of respondent was the proximate cause of the accident.

An award to claimant is, therefore, denied.

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(No. 5053 — Claimant awarded \$6,546.68.)

FREESSEN BROS., INC., AN ILLINOIS CORPORATION, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed March 29, 1963.*

ROBINSON, FOREMAN, RAMMELKAMP, BRADNEY AND  
HALL, Attorneys 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.

TOLSON, J.

On July 27, 1962, Frcesen Bros., Inc., A Corporation, filed its complaint seeking an award in the amount of \$6,546.68.

The complaint alleges that claimant constructed a road in Mason and Cass Counties for the Department of Conservation, and, due to a flooding condition, it was unable to complete the road within the time prescribed by the contract. In addition to the contract, claimant installed a twenty-five foot culvert as an extra at the request of the department.

On January 27, 1962, claimant submitted its statement, and was advised that the appropriation had lapsed on September 30, 1961, and that as a result no funds were available for payment.

On December 18, 1962, a Departmental Report was filed by the Department of Conservation acknowledging the propriety of the claim, and further stating that the work was satisfactory, and that the amount sought by claimant corresponded to the records of the department.

As a result of this Report, on January 28, 1963, a joint stipulation of facts was filed by claimant and respondent, which recited in substance that the complaint properly set forth the essential facts, that the amount requested was true and correct, and would have been paid in due course had the appropriation not 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 a statement was presented, the appropriation lapsed, an award will be made.

Continental Oil Co. vs. State of Illinois, 23 C.C.R. 70

*M. J. Holleran, Inc. vs. State of Illinois*, 23 C.C.R. 17

An award is hereby made to Freesen Bros., Inc., An Illinois Corporation, in the amount of \$6,546.68.

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(No. 5084—Claimant awarded \$411.50.)

GERALD LEE BRADLEY, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed March 29, 1963.*

KENNETH H. OTTEN, Attorney for Claimant.

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

**CIVIL SERVICE ACT—salary for period of unlawful suspension.** Evidence disclosed that claimant was entitled to back salary from lapsed biennial appropriation, less set-off for actual earnings during period of unlawful suspension.

TOLSON, J.

On January 22, 1963, Gerald Lee Bradley filed his complaint seeking an award in the amount of \$411.50 by reason of a lapsed appropriation.

On March 15, 1963, a stipulation of facts was filed by claimant and respondent reciting the following :

1. Gerald Lee Bradley was a certified employee holding the position of Park Custodian I.

2. On March 13, 1961, the Director of the Department of Conservation initiated a disciplinary suspension against claimant for a period of 30 days. (March 17, 1961 to April 15, 1961.)

3. A discharge proceeding was initiated against claimant designating April 14, 1961 as the date of separation.

4. On January 18, 1962, the decision of the Hearings Referee of the Civil Service Commission was not approved by the Commission, and it was ordered that claim-

ant be reinstated as of March 1, 1962, and receive back pay from April 14, 1961 to March 1, 1962, *minus earnings from other employment during that period.*

5. That claimant was paid from July 1, 1961 to March 1, 1962, but the Department could not pay for the period from April 14, 1961 to July 1, 1961, as the appropriation had lapsed.

6. The salary of claimant for the period was \$646.00, less \$234.50 earned by him from Oilwell Service, Inc., leaving a balance due of \$411.50.

This Court has held in previous cases that it is the duty of a Civil Service employee to mitigate damages by seeking employment elsewhere while his petition for reinstatement is pending.

*Schneider vs. State of Illinois, 22 C.C.R. 453*

It appears that the Civil Service Commission adequately protected the State by its inquiry, as it appears that claimant was employed, and the amount of \$234.50 was deducted from the claim.

This case, therefore, may be disposed of as a lapsed appropriation case.

Where it appears from the evidence that a claim is proper, and would have been paid in due course had the appropriation not lapsed, an award will be made.

*Standard Oil Co. vs. State of Illinois, 23 C.C.R. 72*

*Village of Barrington vs. State of Illinois, 23 C.C.R. 29*

An award is, therefore, made to Gerald Lee Bradley in the amount of \$411.50.

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(No. 4882—Claimant awarded \$2,500.00.)

RAYMOND A. HARPER and PHYLLIS M. HARPER, Claimants, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

SCOTT AND SEBO, Attorneys for Claimants.

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

*HIGHWAYS—damage by construction of improvement.* Where private property is not taken by reason of the construction of a public improvement, but is damaged, the owner is entitled to recover the difference between the fair cash value of the property unaffected by the improvement, and its fair cash market value as affected by it.

*SAME—damages for inconvenience of new access.* No damages arise from mere inconvenience in new access provided for property, since claimants have no property right in the use of the highways.

PERLIN, C. J.

Claimants seek recovery of \$7,500.00 for damages allegedly sustained to real estate owned by them. It is claimed that the damages resulted from the alteration by the State of Illinois of State Route No. 9 and U.S. Route No. 24, and the intersection of these routes in the Village of Banner, Fulton County, Illinois.

Claimants have alleged the following :

Claimants purchased the property, which will be designated herein as Tracts I and II, on contract in 1942. In 1944, they obtained a deed to the premises, having paid \$1,500.00 for both tracts. Tract I was improved with a home, where the parties lived from 1942 to 1954, a garage, a well, and a storm cave. Tract II was, at the time of the purchase, and is now unimproved. Tract I abuts the right-of-way of U.S. Route No. 24 on the north, and abuts the right-of-way of a portion of Route No. 9 on the west. It is separated from the south edge of the right-of-way of Route No. 9 by a small tract of land. Tract II lies south of Tract I, and abuts Route No. 24 on the south.

Claimants rented their home on Tract I for \$35.00 per month from 1954 to August, 1958, when the tenants were forced to move because of flooding. No tenants have lived there since.

Claimants spent approximately \$2,000.00 on improvements to the house while they lived on the premises, in that they, among other improvements, added a room, installed a septic tank, repaired the foundation, and put doors on the cave and the garage.

In 1958, the State of Illinois commenced reconstruction of Routes Nos. 24 and 9. The intersection and claimants' access to said routes were changed. Claimants' driveway now empties onto Route No. 24 at a 90° angle, and their former direct access to Route No. 9 is cut off. To go northeast on Route No. 24, one must now cross a raised divider. Prior to the construction, claimants were able to drive onto a curve and immediately onto Route No. 9 or 24.

In the spring of 1958, the State of Illinois commenced to grade the slopes, remove trees and shrubs, and completed the change in the intersection. Route No. 9 was raised, and the grades increased in slope toward the property of claimants. Heavy rains fell, and surface water poured down the graded slopes of Routes Nos. 9 and 24, particularly Route No. 9, washing down with it great quantities of mud and silt. The basement of the house and the cave filled with mud, and, at the time the water level was highest, it came to a point approximately six inches below the windows in the kitchen, approximately four feet high. Water and silt covered the back porch, and the basement was completely flooded. As a result, the foundation cracked and settled, the boards swelled, the septic tank was destroyed, and the walls of the house cracked. Since the flooding in August of 1958, the basement has flooded on two different occasions. The amount of mud now flowing across Tract I has diminished, but water still flows across the tract and past the house at a greater rate and quantity than before the change in

roads. The well on Tract I was contaminated by this flooding. The yard was covered by mud up to one foot thick in spots, and the driveway cannot be used to get into the garage after a rain. The lot is presently without utilities.

.Tract II has not been used for any purpose for several years, but was once used as a garden by claimants. Tract II has been flooded most of the time since the change in the roads. Claimants were offered \$500.00 for Tract II three or four years prior to the road change.

Claimants testified that, from 1942 until 1958, they had trouble with water on Tract I on only one occasion. In 1942 water seeped from the cave and into the basement. The property has always been below the level of the highways.

According to Alvin Moine, respondent's engineer, mud and silt did flow across claimants' property. He testified that Route No. 9 was widened and resurfaced, the shoulders were widened, the slopes were flattened, the grades were changed about three or four inches, and the shoulders were raised approximately three or four inches. He stated that, prior to the rain on June 24, 1958, the removal of the trees, shrubs and top soil had been done, and that more water will flow across this type of area than one which has foliage. A paved ditch, flume and burn, which, according to Mr. Moine, is a deterrent to water flow, had not been constructed by respondent at the time of the rainfall in June, 1958. This project was completed in July, 1959.

Article 11, Sec. 13 of the Illinois Constitution of 1870, provides :

"Private property shall not be taken or damaged for public use without just compensation."

It is the opinion of the Court that the damage to claimants' property was in fact caused by the State of

Illinois through its reconstruction of Routes Nos. **9** and **24** through grading and alteration of drainage in conjunction with rainfall, which caused silt, mud and water to wash across claimants' property.

The remaining question is the extent of damages to claimants' property.

Harold W. Omer, called as a witness on behalf of claimants, testified that he appraised property for estates and for the bank of which he is cashier. In his opinion, Tract **I** was worth approximately \$3,500.00 to \$4,000.00 prior to the spring of 1958, but was worthless at the present time. He stated that the premises could not be lived in or sold to anyone as living quarters, and did not have a commercial value in its present state.

Ray Hartle, a carpenter, and a contractor in the building, renovation and repair of homes, estimated that it would cost about \$4,800.00 to restore the property to useable and liveable quarters.

Respondent presented the testimony of Berwyn D. Johnson, who also appraised Tract **I**. Prior to August, 1958, he estimated the property to have been worth \$4,500.00. He estimated the value of the property at the time of the hearing to be about \$2,000.00, since he feels the commercial value of the property has increased since August, 1958.

The Court has held that, where private property is not taken by reason of the construction of a public improvement, but is damaged, the owner is entitled to recover the difference between the fair cash market value of the property unaffected by the improvement, and its fair cash market value as affected by it. *Nauyoks vs. State of Illinois*, 11 C.C.R. 542; *Harbeck vs. State of Illinois*, 13 C.C.R. 70.

Claimants' request for recovery because of mere inconvenience in access to Routes Nos. 24 and 9 is without merit, since the law is clear that claimants have no property right in the use of the highways. *City of Chicago vs. Rhine*, 363 Ill. 619; *Williams vs. State*, 21 C.C.R. 357.

Claimants have not proved any ascertainable amount of damage in connection with Tract 11.

The determination of damages in an instance such as this is a difficult task. The Commissioner, who has had a first-hand opportunity to observe the demeanor of the witnesses, has recommended that the Court assess damages of \$2,500.00. We believe his conclusion to be reasonable.

We, therefore, award claimants the sum of \$2,500.00.

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(No. 4972—Claimants awarded \$11,250.00.)

VERNA M. LOTT, as Administratrix of the Estate of HUGH B. LOTT, JR., VERNA M. LOTT, Individually and as surviving spouse of HUGH B. LOTT, JR., deceased, and as next friend for HUGH BENWICK LOTT, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

JOHN E. CASSIDY, JR., and BEN C. LEIKEN, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; STANLEY W. CRUTCHER, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*death claim*. In personal injury or death 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 Workmen's Compensation Act in effect in the State of Illinois at the time the action arose.

PERLIN, C. J.

On March 14, 1959, Hugh B. Lott, Jr., a Second Lieutenant in the Illinois Air National Guard, was killed while flying a jet fighter plane over Peoria County, Illinois. 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.

Claimants in this proceeding are Verna M. Lott, Administratrix of the Estate of deceased and his surviving spouse, and Hugh Benwick Lott, son of the deceased, who was born on June 19, 1959. Recovery is sought in the sum of \$21,000.00 in behalf of Hugh Benwick Lott, and \$30,000.00 in behalf of Verna M. Lott.

Although this case was commenced under Ill. Rev. Stats., Chap. 129, Sec. 143, that section was changed in 1957 to Ill. Rev. Stats., Chap. 129, Sec. 220.53 (1957), which provides as follows :

“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”

The provisions of former Sec. 143 and current Sec. 220.53 are substantially similar, and the arguments of the parties in this case are applicable to the new as well as the old statutory sections.

Claimant contends there is no limitation on the amount, which may be awarded under the above statute, and that her claim is reasonable.

We have great sympathy for the grievous loss suffered by the wife and child of the deceased. The Court of Claims, however, has established a policy of limiting the amount of recovery in such cases.

In *Ward vs. State*, No. 4897, the Court stated:

“It is the opinion of this Court that, while the section of the statute under which recovery is here sought appears to impose no maximum amount on its face, the Legislature adopted this provision as remedial legislation, and did not intend that it be applied without equal standards or reasonable limitation of amount.”

The Court further held that “liability without fault must be necessarily limited to protect the State from astronomical claims, which might be urged by claimants under the Military and Naval Code, just as the State is protected from injury claims by ordinary State employees under the Workmen’s Compensation Act.”

The Court established the premise that, in personal injury or death cases brought pursuant to the Military and Naval Code, Sec. 220.53 and similar provisions, recovery shall be limited to 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. In determining the extent of aid to be contributed by the State, it is the policy of the Court to disregard payments from the Federal Government or other sources.

The maximum amount allowable to a widow and one child under the Workmen’s Compensation Act in effect on the date of the accident herein (Ill. Rev. Stats., 1957, Chap. 58, Sec. 138.7) was \$11,250.00.

We, therefore, award to claimant the sum of \$11,250.00.

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(No. 4986—Claim denied.)

**LUTHER FREY**, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed May 14, 1963.

**R. W. HARRIS**, Attorney for Claimant.

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

**PRACTICE AND PROCEDURE**—*notice of intent to sue for personal injuries.* Where claimant failed to file proper notice pursuant to Sections 22-1 and 22-2, the claim will be dismissed.

**PERLIN, C. J.**

Claimant seeks **\$25,000.00** recovery for injuries allegedly suffered while he was an inmate in the Illinois State Penitentiary at Menard, Illinois, on September 2, 1960.

Respondent urges that an award be denied and the complaint be dismissed because of the failure of claimant to comply with Sections 22-1 and 22-2 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named," Pars. 439.22-1 and 439.22-2 of Chap. 37 of the 1959 Ill. Rev. Stats. These sections provide as follows :

**"22-1:** *Within six months from the date that such 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.*

**"22-2** *If the notice provided for by Section 22-2 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."* (Emphasis supplied.)

In the instant case, the required statutory notice was not filed in either the office of the Attorney General or the Clerk of the Court of Claims until April 25, 1961, more than six months after the date of the alleged accident herein.

Since the notice herein was not filed within the six-month period required by the statute, this Court must deny the claim. The complaint is hereby dismissed. (*Gossar vs. State of Illinois*, No. 4828.)

(No. 4998—Claimant awarded \$13,547.00.)

JOHN P. STEPHANITES, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed May 14, 1963.*

HOLLERICH AND HURLEY and WILLIAM J. WIMBISCUS,  
JR., Attorneys for Claimant.

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

**CIVIL SERVICE ACT—Police Merit Board.** *Payment of salary during period of unlawful discharge.* Where evidence showed that claimant was unlawfully discharged, and no de facto employee was hired to fill his position, an award will be made.

*SAME—duty of discharged employee to mitigate damages.* Claimant must prove that he did all in his power to mitigate his damages by seeking employment. If he does not so prove, it is the function of the Court to determine the reasonable amount whereby an award should be mitigated.

PERLIN, C. J.

Claimant seeks \$16,916.18 in damages allegedly incurred by loss of salary during his suspension as an employee of the Illinois State Highway Police.

The parties have stipulated as follows: On October 2, 1958, claimant, John P. Stephanites, was employed as a State Police Officer in the State of Illinois with the rank of Sergeant. He had been so employed since July 15, 1941. On October 3, 1958, claimant was suspended on the complaint of William H. Morris, Superintendent of the Division of State Highway Police of the Department of Public Safety. A complaint was filed by said William Morris with the State Police Merit Board charging said claimant with conspiracy, together with other persons, to violate the over-weight and over-width statutes of this State. After several hearings the Merit Board, in a decision dated March 23, 1959, found claimant guilty, and ordered his discharge from the Illinois State Highway Police.

On April 17, 1959, claimant filed a complaint in the Circuit Court of Bureau County requesting a judicial review of the decision of the State Police Merit Board. Upon hearing, the Circuit Court of Bureau County entered an order reversing the decision of the Merit Board, and thereafter the Merit Board appealed the decision of said Circuit Court to the Appellate Court of Illinois, Second District. In its decision of May 1, 1961, the Appellate Court sustained the order of the Circuit Court of Bureau County reversing the State Police Merit Board. No further proceedings have been held in the matter, and the decision of the Appellate Court is now final. On August 16, 1961, claimant was reinstated to his former position as a Sergeant of State Highway Police, and since that date has been and is now performing the duties of such position.

The parties have further stipulated that claimant has received no salary from the State of Illinois for the period of October 3, 1958 to August 16, 1961, and that he would have, during said period, received \$17,517.00 in salary from the State of Illinois had he not been suspended.

Respondent argues that claimant should not recover any back salary, since claimant did not prove that at all times during his three-year period of suspension he made every reasonable effort to obtain employment. Respondent further contends that claimant had been replaced in his position in the department, and is, therefore, not entitled to recover any back salary under the rule that payment to de facto employees is a complete bar to a cause of action for **back** salary.

The evidence does not support the affirmative defense alleged by respondent that claimant had been replaced in his position in the department. Respondent's witnesses

testified that the records do not indicate whether anyone was hired specifically to handle the duties of claimant, although there were some promotions made after his suspension. A letter from State Highway Police Superintendent Morris to the Attorney General, admitted as respondent's exhibit No. 1, states: "therefore, we cannot say with any certainty that any one man was promoted or hired to replace any individual suspended."

However, it is well established that it is the duty of all suspended State employees to mitigate damages incurred through loss of salary due to suspension and discharge, and to do all in their power to seek, find, and accept other employment during the period following discharge. *Schneider vs. State of Illinois*, 22 C.C.R. 453; *Otto vs. State of Illinois*, No. 4744; *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Kelly vs. Chicago*, 409 Ill. 91.

Claimant must prove that he did all in his power to mitigate his damages by seeking employment. If he does not so prove, it is the function of this Court to determine the reasonable amount whereby an award should be mitigated. *Schneider vs. State of Illinois*, 22 C.C.R. 453.

Claimant testified that he made numerous attempts to search for jobs. His principal efforts were directed at jobs with construction companies and factories. He obtained employment on approximately four occasions. On two of these occasions he worked for a construction company. He also did odd jobs for the City of Spring Valley, and worked for the cemetery sexton. None of these jobs lasted more than a week, and his total earnings from these endeavors was only \$600.83 for nearly a three-year period.

Claimant contends that he was hampered in obtaining employment because of his lack of education or special training, the fact that he was not a member of a union,

and the further fact that he was more than 50 years of age.

It is the opinion of the Court that claimant has not established that he did all in his power to mitigate his damages by seeking and obtaining employment. We presume that one, who has attained the position of Sergeant in the Illinois State Highway Police, is a person of substance, and has reasonable ability to undertake a variety of jobs. Even if claimant sought menial work, he should have been able to earn \$1.00 an hour for a forty-hour work week. The record shows that claimant concentrated his efforts to obtain employment principally on selective types of higher rated jobs.

In the light of the facts herein, it is the opinion of the Court that claimant's recovery should be mitigated to the extent of \$40.00 per week for the time he was unemployed. For the period involved, this would equal the sum of \$4,970.00.

Claimant is hereby awarded \$13,547.00.

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(No. 5005—Claimant awarded \$9,678.78.)

ROBERT WORDEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

BARASH AND STOERZBACH, Attorneys for Claimant.

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

*CIVIL SERVICE ACT—Police Merit Board—payment during period of unlawful discharge.* Claimant is entitled under the evidence to an award for the salary he would have earned as a Police Officer less the amount he actually earned during the period of unlawful discharge.

PERLIN, C. J.

Claimant, Robert Worden, seeks recovery for loss of wages incurred when he was suspended and discharged

from his duties as a State Police Officer from October 4, 1958 until his reinstatement on August 16, 1961.

The facts of this case disclose that claimant was employed as an officer of the Division of State Highway Police of the Department of Public Safety from February 6, 1950 until October 4, 1958. On such date he was suspended from his duties as a State Police Officer for an indefinite period, pending disposition of charges filed by the State Police Merit Board. After a hearing before the Board on charges filed against claimant, he was discharged from the Illinois State Highway Police on March 23, 1959. He appealed the order of discharge to the Circuit Court of Bureau County, Illinois. That court adjudged the order of the State Police Merit Board to be erroneous, and reversed the decision and order of the Board. The Merit Board then appealed the Circuit Court decision to the Appellate Court of Illinois, Second District. On May 6, 1961, the Appellate Court affirmed the order and decision of the Circuit Court of Bureau County.

Upon demand by claimant to Mr. William H. Morris, Superintendent of the State Highway Police, he was reinstated to his position as an officer of the Division of State Highway Police on August 16, 1961.

The parties have agreed that the sum, which would have been paid to claimant had he not been suspended or discharged from October 4, 1958 to August 16, 1961, is \$17,459.06.

This Court has 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 with set-offs of any earnings during the time of removal.

(*Schneider vs. State of Illinois*, 22 C.C.R. 453 at 460; *Poylster vs. State of Illinois*, 21 C.C.R. 393; *Smith vs. State of Illinois*, 20 C.C.R. 202.) In the *Schneider* case and *Otto vs. State of Illinois*, No. 4744, this Court has further held that a claimant in this situation must do all in his power to mitigate damages.

In the instant case, claimant has testified and presented evidence in the form of full income tax returns showing that, after his suspension and discharge, he earned \$857.25 during the remainder of 1958; \$3,976.48 during 1959; and \$2,941.47 during 1960. Claimant explained that his net income for 1961 until August 16 was only \$5.08, since his earnings were offset by the losses incurred in the operation and sale of his service station. Claimant testified that he was required to dispose of the business upon reinstatement to the State Highway Police Department, because it is a departmental policy that an officer may not have a business interest in his own name, or have an active part in business interests.

It is the opinion of the Court that claimant has amply demonstrated his intent to mitigate his damages, despite the loss from the sale of his service station. He acted reasonably in obtaining a business, which could be expected to sustain himself and his family, and provide employment.

Claimant earned \$7,780.28 during the period of his suspension. This amount will be used in mitigation of his claim of \$17,459.06.

Claimant is hereby awarded the sum of \$9,678.78.

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(No. 5017—Claimant awarded \$629.54.)

**BOOKER T. YOUNG**, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

**PAUL F. BLANKE**, Attorney for Claimant.

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

**CIVIL SERVICE ACT—*payment during period of unlawful discharge.*** Evidence disclosed that claimant was entitled to an award for the salary he would have earned during period of unlawful discharge.

**PERLIN, C. J.**

Claimant seeks recovery of \$684.54 in wages lost due to suspension from his position as a Psychiatric Aide at the Manteno State Hospital at Manteno, Illinois.

The facts in this case are undisputed, and the filing of briefs or arguments were waived. On April 10, 1961, claimant was suspended from his position as a result of charges filed against him by the Department of Public Welfare and approved by the Department of Personnel.

On May 5, 1961, the Civil Service Commission of the State of Illinois held a hearing on such charges, and by decision dated September 12, 1961 judged the testimony supporting the charges against claimant to be insufficient, and ordered that he be retained in his position.

As a result of his suspension, claimant did not work from April 11 until October 4, 1961. After returning to work on October 4, 1961, claimant was allowed, and was paid full salary payments from July 1, 1961. He did not receive any salary or compensation for the period beginning April 11, 1961 to and including June 30, 1961.

The parties stipulated that, on and before April 10, 1961, claimant was paid by the State of Illinois and the Department of Public Welfare at the basic pay rate of Two Hundred Sixty Dollars (\$260.00) per month.

The decision of the Civil Service Commission concerning claimant's suspension and discharge, which was entered on September 12, 1961, provided:

"It is, therefore, the decision of the undersigned Hearings Referee that the respondent be and he is hereby retained in his position as 'Psychiatric Aide I' in the Department of Public Welfare, State of Illinois, petitioner

herein, with **full** compensation, as provided in Section 11 of the Personnel Code (Chap. 127, Par. 63 b 111, Ill. Rev. Stats., 1959)."

Claimant, Booker T. Young, testified that, during the period of April 11, 1961 to June 30, 1961, he did not receive any wages or compensation for work or services or employment performed of any nature. The only income he received was \$55.00 from the Township Relief Office in Kankakee. Apparently the appropriations provided in the legislative biennium had lapsed for the period prior to July 1, 1961.

Claimant is, therefore, entitled to the sum of \$684.54, less the \$55.00 paid by the Rankakee Township Relief Office.

Claimant is hereby awarded \$629.54.

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(No. 5019—Claimant awarded \$9,481.00.)

**ALBERT J. BARAUSKI**, Claimant, **vs. STATE OF ILLINOIS**, Respondent.

*Opinion* filed May 14, 1963.

CHARLES M. NELSON and JAMES D. O'GRADY, Attorneys for Claimant.

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

CIVIL SERVICE ACT—*damages* from unlawful *discharge*—*set-off*. Where claimant had permission to work part-time as a compositor, while employed as a State policeman, his total earnings as a full-time compositor during period of unlawful discharge will not be used as a set-off in mitigation of damages.

SAME—*mitigation of damages* during unlawful discharge. Where claimant mitigates damages by seeking other employment during his discharge, the set-off of earnings must be reasonable.

PEZMAN, J.

Albert J. Barauski, claimant, seeks to recover the sum of \$17,352.00 in salary for a period of suspension from October 12, 1958 to August 16, 1961, when the claimant was restored to his position as a Sergeant in the Illi-

nois State Police as the result of a decision by the Appellate Court of the State of Illinois.

The evidence discloses that claimant was employed as a State Police Officer by the State of Illinois from March 28, 1949 to October 11, 1958, at which time he was suspended from duty by the Superintendent of the Illinois State Police. At the time of his suspension he was a Sergeant. Hearings were held before the State Police Merit Board relative to the charges filed against claimant, and, by order and decision of that Board, dated March 23, 1959, claimant was discharged. Claimant filed an application for judicial review of the decision of the State Police Merit Board, and, after a hearing, the Circuit Court of Bureau County, Illinois, reversed the findings of the Merit Board. The State of Illinois, respondent, then appealed to the Appellate Court of the State of Illinois in the Second District. This Court considered the merits, and affirmed the decision of the Circuit Court of Bureau County, reversing the State Police Merit Board. No further proceedings were held relative to the matter, and the decision of the Appellate Court became final. Claimant was restored to duty on August 16, 1961. There is no dispute as to the amount, being \$17,352.00, in salary lost during the period of suspension.

Respondent contends that it is entitled to a set-off for wages earned by claimant during the period from October 11, 1958 to August 16, 1961, and that all earnings of claimant during the period of suspension and wrongful dismissal be used as a set-off in determining the amount of the claim against the State of Illinois.

Claimant contends that he had applied for and received permission from the superintendent of Illinois State Police, Phil M. Brown, to perform off-duty employment, and that this provision had never been revoked. He

testified that he had authority to work 20 to 25 hours a week, based on 4, 5 or 6 hours a day, as a compositor. Claimant stated that he made reports from time to time to his superiors relative to his off-duty employment. Claimant argues that, in the event respondent is entitled to a set-off, the entire amount of claimant's earnings during his period of suspension should not be taken into consideration, because claimant had permission to work a portion of this time. Claimant testified that after his wrongful suspension he took up his trade on a full-time basis. It is this contention of claimant upon which the Court has focused its greatest attention. This Court has recognized time and time again that it is the duty of the claimant to mitigate his alleged damages by doing everything in his power to seek, find and accept other employment during the period of his illegal suspension. This position has been supported by *Schneider vs. State of Illinois*, 22 C.C.R. 453, *Otto vs. State of Illinois*, No. 4474, *Kelly vs. Chicago*, 409 Ill. 91, *Poynter vs. State of Illinois*, 21 C.C.R. 393, and many others cited by this Court on numerous occasions.

The evidence shows that claimant was a compositor by trade prior to his employment by the Illinois State Police, and that upon his suspension he returned to this trade as a full-time employee. The same transcript of evidence discloses that, during his employment by the Illinois State Police from March 28, 1949 until the time of his resignation subsequent to his restoration, claimant had always worked the shift from 12:00 M. to 8:00 A.M., in order that he could work part-time at his trade as a compositor. The evidence clearly discloses that his superiors were fully aware of his extra employment, and that he had complied with the regulations of the Department with regard to procuring approval for part-time work outside of his regular hours of employment as a

State Policeman. Claimant testified that he had the authority to work 20 to **25** hours a week, based upon **4, 5 or 6** hours a day, and this testimony was not disputed by any of respondent's witnesses.

It is the contention of claimant that, should this Court find that he is not entitled to the full amount of his salary lost by him during the period of his suspension and wrongful dismissal, he should be entitled to a reasonable application of the mitigation rule by virtue of the fact that he had previously been given the right to work at least half of the amount of time that he was working during his suspension. The proof in the case at hand further indicates that he was not able to work more than **40** hours per week as a compositor during the period of his suspension. We find some merit in claimant's contention as to the reasonableness of the application of the rule to mitigate, and believe that the set-off must be reasonable. Claimant establishes a total loss of salary during his suspension of **\$17,352.00**. The evidence introduced in his behalf indicates that his earnings during that same period of time amounted to **\$15,742.00**. We hold that claimant should not be penalized, and his claim only mitigated to the extent of one-half of his earnings, or the sum of \$7,871.00.

Claimant is, therefore, awarded the sum of \$9,481.00.

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(No. 5020—Claimant awarded \$1,603.33.)

**NICHOLAS MELLAS**, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed May 14, 1963.*

**WOLSLEGEL AND ARMSTRONG**, Attorneys for Claimant.

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

CIVIL SERVICE ACT—*duty to mitigate damages during period of unlawful discharge.* It is the duty of every suspended State employee to mitigate damages incurred through loss of salary due to suspension and discharge.

**SAME—same.** Mitigation rule is subject to particular facts of each case. Where claimant was busy preparing a defense, and occupied with hearing on his suspension, no mitigation was required for that period.

**PEZMAN, J.**

Claimant, Nicholas Mellas, by reason of his reinstatement by the Illinois Civil Service Commission following his disciplinary suspension and wrongful discharge by the Illinois Youth Commission, seeks to recover back salary in the amount of \$1,603.33.

The parties hereto stipulated as follows: That claimant, presently a Guard Sergeant at the Industrial School for Boys in Sheridan, Illinois, was appointed to his present position on February 16, 1954, and performed his duties until written charges seeking a thirty day disciplinary suspension pending discharge was served on claimant on February 20, 1961; that notice of grievance concerning this disciplinary suspension pending discharge was filed with the Chairman of the Illinois Youth Commission on March 1, 1961; that on March 20, 1961 written charges seeking the discharge of claimant, effective March 20, 1961, were served on claimant; that claimant appealed by written notice of appeal to the Illinois Civil Service Commission; that a hearing was held before John Morrow, Hearings Referee, on April 28, 1961, and, on November 22, 1961, Morrow's decision was that claimant be retained in his position as Guard Sergeant at the Illinois Industrial School for Boys with full compensation; that the decision was unanimously concurred in by the Illinois Civil Service Commission on November 29, 1961; that claimant requested the Director of the Department of Personnel to review the thirty day disciplinary suspension in accordance with the Department of Personnel Rule No. 25; that the Department of Personnel,

through its Director, replied by letter stating 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 pay and other benefits were concerned; that on December 15, 1961 the Director of the Department of Personnel, by letter, recommended to the Chairman of the Illinois Youth Commission that claimant be paid his regular monthly salary from February 20, 1961 to March 20, 1961, the period of disciplinary suspension.

In the cause at hand, claimant Mellas testified that he had no employment, and earned no money during the time he was wrongfully suspended and discharged except the sum of \$112.00 in National Guard drill pay. He further stated he had received no salary for the period from February 20, 1961 to July 1, 1961, but that he was paid \$1,530.70 back salary from July 1, 1961 to December 10, 1961 by the Youth Commission. Claimant further testified that his gross salary of \$1,603.33 for the period from February 20, 1961 to July 1, 1961 was not paid due to the fact that the appropriation for the salary for the period in question had lapsed. These facts were confirmed by the testimony of Dr. Arthur E. Wright, Superintendent of the Illinois Industrial School for Boys at Sheridan, who was also called as a witness. Dr. Wright testified claimant was paid back salary for the period from July 1, 1961 to November 30, 1961, and further stated that claimant would have been paid his salary from February 20, 1961 to July 1, 1961, if the appropriation had not expired. Respondent raises the argument that it was the duty of claimant to mitigate his alleged damages by securing employment; that, in fact, it became incumbent upon claimant to show that all times during his ten month period of suspension he made every effort consistently to obtain employment.

The principle that it is the duty of every suspended State employee to mitigate damages incurred through loss of salary due to suspension and discharge, and to do all in their power to seek, find, and accept other employment during the period following discharge is well established. *Schneider vs. State of Illinois*, 22 C.C.R. 453; *Otto vs. State of Illinois*, No. 4744; *Poynter vs. State of Illinois*, 21 C.C.R. 393; *Kelly vs. Chicago*, 409 Ill. 91, and many others. However, the mitigation rule cannot be broadly applied without distinction as to the particular facts of each case. In the case at hand, we are only concerned with the period from February 20, 1961 to July 1, 1961, or a total of approximately four months and ten days of the total suspension of ten months. The Youth Commission has already paid him his back salary from July 1, 1961 to November 30, 1961, after being told to do so by the Department of Personnel. During the four month period involved in the claim at hand, claimant was grossly occupied defending the charges against himself. The facts reveal that written charges were served on claimant on February 20, 1961. These charges sought a thirty day disciplinary suspension pending discharge. Subsequently, on March 1, 1961, a notice of grievance concerning this disciplinary suspension was filed with the Chairman of the Youth Commission. On March 20, 1961, written charges seeking the discharge of claimant, effective March 20, 1961, were served on claimant, and after that claimant appealed by written notice of appeal to the Illinois Civil Service Commission for a hearing in defense of the written charges. A hearing was held before the Hearings Referee on the 28th day of April, 1961, and again later on November 22nd of the same year. It is easy to discern that claimant had his hands full defending the charges against him during the period for which the

appropriation has lapsed for salary that he claims. The basic facts are not in dispute between the parties hereto, nor are the amounts claimed by claimant disputed by respondent, and, in fact, the chief witness called by respondent, Dr. Arthur Wright, Superintendent at the Industrial School, testified that claimant was not paid for the period of February 20, 1961 to July 1, 1961, but was paid for the period from July 1, 1961 to November 30, 1961, and that claimant would have been paid his salary for the prior period starting February 20th, if the appropriation had not expired.

It is the opinion of this Court that claimant has clearly established his right to recover his back salary for the period involved, February 20, 1961 to July 1, 1961, without the application of the rule requiring him to mitigate by seeking and obtaining employment. The application of this rule has been distinguished herein, and the particular facts involved in this cause, including the short span of time, the large number of charges and defenses required of claimant, cause this Court to believe that claimant could not have had much time during the four month and ten day period within which to mitigate, and still prepare his own defense.

Claimant is hereby awarded the sum of \$1,603.33.

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(No. 5047—Claimant awarded \$1,450.00.)

BONGI CARTAGE, INC., A CORPORATION, AND SALVATORE ANNORENO,  
Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

JOSEPH I. BULGER, Attorney for Claimants.

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

TAXES, FINES AND PENALTIES—*involuntary payment.* Where involuntary payment was wrongfully transmitted to State Treasurer, claimants are entitled to recover.

*SAME—ex parte forfeiture of bond.* Evidence showed that forfeiture of bond was ex parte and involuntary, and transmittal of bond less costs to State Treasurer was erroneous.

**PEZMAN, J.**

Claimants here seek to recover, the sum of \$1,500.00 by reason of their contention that the Police Magistrate's order of forfeiture of a fine was illegal and void and ex parte and without legal effect, and that, as a result thereof, the transmission of the bond to the State Treasurer of the State of Illinois was without warrant in law, and should not have been made. Claimants seek to have this Court enter an order directing the State Treasurer to return to claimants, through their attorney, the monies held by the State Treasurer.

From the pleadings and exhibits in this cause, it appears that, on May 3, 1961, claimant, Salvatore Anoreno, was arrested for an alleged violation of the Illinois Motor Vehicle Law for gross over-weight, over-weight on license, and no identification card in the cab of the truck. Two tickets were issued, and he was ordered to appear on May 11, 1961 at the hour of 4:00 P.M. before the Police Magistrate.

It further appears that claimant, Bongi Cartage, Inc., posted as bail, guaranteeing the appearance of claimant, their check No. 32397 in the sum of \$1,500.00. The check was payable to Police Magistrate James E. McBride. Claimants then engaged the services of an attorney, Joseph I. Bulger, to represent them at the hearing before the Police Magistrate, who entered his appearance on behalf of claimants, and requested that he be notified of the date of trial. The evidence at hand clearly indicates that no answer was ever received either by claimants or by their counsel as to the date the case was continued to, and, further, we find that an ex parte judgment was entered against claimants, and there was a forfeiture of the

\$1,500.00 bond. Subsequently, the bond funds were transmitted in the sum of \$1,450.00 to the State Treasurer by the Police Magistrate. We presume that the \$50.00 was retained as costs. Subsequently, claimants' counsel successfully filed a petition to vacate and set aside the bond forfeiture, and to have the cause reinstated and set down for trial.

On June 29, 1962, claimants' counsel, Joseph I. Bulger, filed a complaint in the Court of Claims seeking to recover the forfeited bond. On July 12, 1962, respondent filed a motion to strike and dismiss the complaint of claimants, and, on November 13 of the same year, this Court in an order entered principally by the three Judges thereof, denied the motion to strike and dismiss, and held as follows :

"In the present case, the forfeiture was ex parte and involuntary, without claimants having the benefit of a hearing to determine their guilt or innocence. For the reasons above stated, it is, therefore, the order of this Court that respondent's motion to strike and dismiss is hereby overruled.

"It is further ordered that the order of the Police Magistrate should be carried out, and that hearings be held on the violations set forth.

"It is further ordered that the monies deposited with the State Treasurer be held until a final determination of the violations set forth by exhibits A, B and C has been finally made."

On March 19, 1963, claimants' counsel filed with this Court a certified copy of the order of the Justice of the Peace in Cook County determining the causes involved in which the Bongi Cartage Company and Salvatore Anoreno were defendants. The Justice of Peace Court determined the causes on behalf of the defendants. We quote in part from that decision:

"This court having been advised that heretofore the said bail was forfeited and erroneously remitted to the State Treasurer in the sum of \$1,450.00 by the aforesaid Police Magistrate, and the defendants have heretofore filed their petition to recover said bail in Cause No. 5047 in the Court of Claims of the State of Illinois, which Court has entered an order, which this court has duly considered, therefore, since the matter has been adjudicated in favor of the defendants said money be returned and forwarded to this court."

The order is signed by C. August Taddeo, Justice of the Peace, Village Hall, Melrose Park, Illinois.

At this setting, this Court feels that it has neither the power to order the State Treasurer of the State of Illinois to refund any monies, which have been transmitted to the Treasury, nor the power to order said funds transmitted by the Treasurer of the State of Illinois to the Justice of the Peace in Melrose Park, Illinois. However, we feel strongly that claimants have been wronged in the manner in which their cause was handled in the original Police Magistrate Court, and said claimants have clearly established that \$1,450.00 of their money has been transmitted into the hands of respondent through the Treasurer of the State of Illinois. In the case of *Richard F. Smith vs. State of Illinois*, 21 C.C.R. at page **459** and **460**, claimant paid his fine to the Clerk of the County Court, and the money was then remitted to the State Treasurer. This Court, in that case, stated as follows: "No statute is cited making provision for repayment of fines voluntarily paid. Such a voluntary payment is made under a mistake of law, if it develops that the fine should not have been imposed."

The Court held further, "Similarly, when a fee or tax is paid voluntarily, with knowledge of the fact, it cannot be recovered in the absence of a statute authorizing such recovery." *Great American Insurance Company vs. State of Illinois*, 19 C.C.R. 91; *American Can Company vs. Gill*, **364 Ill. 254**. We feel that the decision of this Court, as written by Judge Farthing in the Smith case, supports claimants in the case at hand. Claimants in the cause we are considering paid the bond involuntarily, and this same bond was illegally transmitted to the State Treasurer of the State of Illinois after an ex parte hearing in which judgment was found against claimants. Clearly,

in this case, claimants have protested long and loud, and have acted to protect their rights after the involuntary payment. Claimants' counsel filed a petition to vacate and set aside the previous order of the Police Magistrate, and then later, after a change of venue to a Justice of the Peace, obtained an order or adjudication in favor of his clients with relation to the charges that were contained in the original hearing before the Police Magistrate.

We find this cause on behalf of claimants, and award them the sum of \$1,450.00.

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(No. 5079—Claimant awarded \$2,726.23.)

COMMONWEALTH EDISON COMPANY, An Illinois Corporation,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1963.*

JOSEPH C. SIBLEY, JR., and EMMETT T. GALLAGHER,  
Attorneys for Claimant.

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

CONTRACTS—*lapsed appropriation*. Where evidence showed that the only reason claim was not paid was because appropriation lapsed prior to its presentment for payment, an award will be made.

PERLIN, C. J.

Claimant, Commonwealth Edison Company, seeks recovery of \$2,726.23 for the temporary relocation of its company facilities to clear construction for a new dam across Fox River at Geneva, Illinois.

The parties hereto have stipulated in part as follows :

“1. Commonwealth Edison Company, An Illinois Corporation and claimant herein, is a public utility engaged in the business of generating, distributing and selling electricity in northern Illinois.

2. Commonwealth Edison Company and the State of Illinois, Department of Public Works and Buildings, Division of Waterways, entered into an agreement at the special instance and request of said Division of Water-

ways whereby Commonwealth Edison Company was to temporarily relocate and later restore certain of its poles, conductors and other facilities to clear construction for a new dam being constructed by the State across the Fox River in Geneva, Kane County, Illinois, and the State was to reimburse Commonwealth Edison Company for the actual cost of such work.

\* \* \* \* \*

5. The Seventy-first 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 Waterways, and Commonwealth Edison Company was so advised by letter, a true copy of which is attached to the complaint herein as exhibit 'D.'

There being no questions of law or fact in controversy, as reflected by the stipulation of the parties hereto, by and through their respective counsel, an award is hereby made to claimant in the sum of \$2,726.23.

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(No. 5081—Claimant awarded \$12,903.00.)

THE COUNTY OF RANDOLPH, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion* filed May 14, 1963.

WILLIAM A. SCHUWERK, Attorney for Claimant.

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

COUNTIES—*reimbursement* for *writs* of habeas corpus *in forma pauperis*. Upon stipulation of facts and expenses, an award was entered pursuant to Ill. Rev. Stats., 1957, Chap. 65, Secs. 37-39; and Chap. 37, Sec. 439.8.

PERLIN, C. J.

Claimant, County of Randolph, seeks reimbursement of \$12,903.00 in 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 :

“First: That divisions of the Illinois State Penitentiary, a State penal institution of the State of Illinois, are situated in Randolph County, Illinois;

“Second: That Petitions for Writs of Habeas Corpus *in forma pauperis* by inmates of the Illinois State Penitentiary, not residents of or committed from Randolph County, are frequently filed in the Circuit Court of Randolph County;

“Third: That by virtue of certain statutory provisions (Chap. 65, Pars. 37, 38 and 39, Ill. Rev. Stats., 1961) the State of Illinois is required to assume and pay the necessary expenses, including all costs and fees of County officers, arising from such Petitions for Writs of Habeas Corpus;

“Fourth: 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 October 31, 1960 and October 31, 1962, inclusive, which 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 and State’s Attorney’s fees, Writs of Habeas Corpus were issued and hearings held before the Circuit Court of Randolph County;

“Fifth: 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 and State’s Attorney’s 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 Claim No. 4854, 23 C.C.R. 136, and again in Claim No. 4959, opinion filed May 9, 1961;

“Sixth: That none of the petitioners set forth in exhibit ‘A’, attached to the complaint herein, were residents of or committed from Randolph County, Illinois;

“Seventh: 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;

“Eighth: 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 for library purposes as authorized by Ill. Rev. Stats., 1961, Chap. 81, Par. 81;

“Ninth: That this stipulation is entered into solely as a stipulation of fact for the purpose of avoiding the necessity of presenting testimony, and, if conclusions are included herein, they are not to be binding upon either the parties or the Court.”

The Commissioner’s Report stated that the Commissioner, the State’s Attorney of Randolph County, and an Assistant Attorney General of the State of Illinois appeared in the Circuit Court of Randolph County, and

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 \$12,903.00.

We, therefore, award the County of Randolph the sum of \$12,903.00.

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(No. 4722—Claim denied.)

JOANNE KAVALAUSKAS, A MINOR, and PATRICIA KAVALAUSKAS, A MINOR, By EMILY KAVALAUSKAS, Their Mother and Next Friend, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 20, 1963.

PERLIN AND LEE, Attorneys for Claimants.

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

HIGHWAYS—*negligence*. Evidence failed to show that negligence of respondent was the proximate cause of the accident.

SAME—*notice*. Evidence failed to show that respondent had any notice of opening in the street by a contractor under a permit from the City of Chicago.

PEZMAN, J.

Joanne Kavalaukas, a minor, and Patricia Kavalaukas, a minor, by Emily Kavalaukas, their mother and next friend, claimants, by their attorneys, Perliii and Lee, filed their complaint herein against the State of Illinois, on May 21, 1956, based on injuries received by claimants growing out of an automobile collision, which occurred on November 23, 1951 at 6535 S. California Avenue, Chicago, Illinois. Claimants, Joanne Kavalaukas, then age 15, and Patricia Kavalaukas, then age 6, were passengers in an automobile, which was being driven on California Avenue by one Franciska Zeruolis. It is alleged that the automobile struck an opening in the street, which had been made for the installation of a

sewer, which opening was approximately 3 feet by 5 feet and approximately 1 to 1½ feet deep. Claimants contend that they were seriously injured as the direct result of the automobile running into said hole, which caused the driver to swerve the car out of control and into a parked automobile. They further contend that, because of the negligence of the State of Illinois in allowing the street to remain unrepaired and failure to provide proper maintenance, said claimants were seriously injured.

Respondent did not file an answer, but made a general denial. A subsequent Departmental Report was made a part of the record. In it the State clearly admits that it has the exclusive right and responsibility to issue permits for cutting openings into or through the pavements under its jurisdiction. The same Report further indicates that the opening referred to in this cause was made by one certain Peter Loye of 5735 S. Peoria Street, Chicago, Illinois, in accordance with Permit No. 7736, issued by the City of Chicago, through its Department of Streets and Sanitation, Bureau of Streets. It was substantially proved that the City of Chicago had no authority to issue such a permit, or to grant the right to cut an opening into the street.

The State of Illinois is not an absolute insurer of any accident, which occurs upon its public highways. Claimants herein must prove that the negligence of respondent was the proximate and direct cause of the accident, and must do so by a preponderance of the evidence. We find that the evidence herein does not reveal such negligent acts on the part of respondent. The opening was apparently made by a contractor, Peter Loye, in the course of his business, and in accordance with the permit, which he had obtained from the City of Chicago.

The State of Illinois was never notified that he was going to make the opening, and there was no evidence in the transcript that the opening was in the street for any sustained period of time before the accident, nor any proof that the State of Illinois had knowledge of the opening.

We find that claimants have failed to prove their case by a preponderance of the evidence, and have not established the negligence of respondent as the proximate cause of the injuries.

An award to claimants is, therefore, denied.

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Judge Perlin did not participate in the consideration and determination of this case.

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(No. 5102—Claimant awarded \$997.37 )

ANDREW J. LINDEEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 20, 1963.*

VAN METER AND OXTOBY, Attorneys for Claimant.

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

CIVIL SERVICE ACT—salary for *period* of *unlawful* discharge. Evidence disclosed that claimant was entitled to back salary from lapsed biennial appropriation, less set-off for actual earnings during period of unlawful discharge.

PERLIN, C. J.

Claimant, Andrew J. Lindeen, was suspended from duty as an officer of the Division of State Highway Police of the Department of Public Safety, State of Illinois, on February 16, 1961, pending disposition of charges to be filed with the State Police Merit Board. At that time claimant held the rank of Captain in the State Highway Police. On March 17, 1961, a hearing before the Illinois State Police Merit Board found claimant guilty as charged, and the Superintendent was ordered to discharge him from the Illinois State Police Force.

Claimant thereafter sought a judicial review of the order of discharge. The Circuit Court of Sangamon County upon trial reversed the decision of the State Police Merit Board, and ordered claimant reinstated to his former position as Captain with back salary from the date of his suspension. The Merit Board subsequently appealed said decision to the Illinois Supreme Court. On September 28, 1962, the Supreme Court remanded the case to the Board for further hearing.

However, no further proceedings were conducted by the State Police Merit Board, because an agreement was effected by the parties. The charges filed against claimant were withdrawn, and the matter dismissed without prejudice.

On January 10, 1963, claimant was restored to the Force, and accepted a demotion to the rank of Corporal effective February 16, 1961.

Claimant has received back pay from July 1, 1961. He has received no salary from the State of Illinois from February 16, 1961 to June 30, 1961, and claims salary for such period in the amount of \$2,385.00 less a set-off of his earnings for such period of \$1,261.09. The biennial appropriation had lapsed for said period.

A stipulation of the parties in this case provides in part as follows:

“ . . . that the record in this case shall consist of the Report of the Department of Public Safety, dated May 7, 1963, signed by Robert Davlin, Technical Advisor, together with copies of correspondence attached thereto and by reference made a part thereof. . . ”

An order was entered by this Court granting leave to waive the filing of briefs and arguments.

The report of the Department of Public Safety, dated May 7, 1963, states that the base pay for a Corporal during the period of time in question was \$505.00

per month. The following statement also appears therein: "Accordingly, deducting the earnings during the period of suspension of \$1,261.09, there would be due the sum of \$997.37 rather than \$1,123.91 as alleged." There appears to be no subsequent correspondence in the record, and we assume that the figure of \$997.37 is the agreed sum involved.

Claimant is hereby awarded the sum of \$997.37.

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(No. 4887—Claim denied.)

**RUSSELL F. SCHOENEICH**, Claimant, vs. **STATE OF ILLINOIS**,  
Respondent.

*Opinion filed March 29, 1963.*

*Petition of Claimant for Rehearing denied July 26, 1963.*

**JOHN R. SNIVELY**, Attorney for Claimant.

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

**PRISONERS AND INMATES—personal injuries—contributory negligence.** Evidence disclosed that State was not negligent in the maintenance of a punch press, and that claimant was guilty of contributory negligence in not removing his hand from the machine.

**TOLSON, J.**

On October 16, 1959, claimant filed his complaint seeking an award in the amount of \$25,000.00 for the loss of the distal phalanx of the second finger of his left hand.

Claimant alleges that the State was negligent in not providing proper safeguards on the punch press, which he operated while an inmate at the Joliet Branch of the Illinois State Penitentiary.

The case was heard by Commissioner George W. Presbrey, and his report is set forth as follows:

"The evidence was heard in the above entitled cause on February 23, 1962. John R. Snively represented claimant, Russell F. Schoeneich, and Edward Finnegan, Assistant Attorney General, represented respondent, State

of Illinois. This is a claim by Russell F. Schoeaeich, an inmate of the Illinois State Penitentiary, against the State of Illinois to recover damages for personal injuries sustained by him while an inmate in the Illinois State Penitentiary.

"On March 23, 1959, while claimant was operating a punch press, his hand was caught in the die of the machine, crushing the distal phalanx of the middle finger of the left hand. The first joint or distal phalanx of said middle finger was amputated.

"The facts in this case are not particularly unique. There is a difference of opinion between claimant and respondent as to whether claimant was assigned to work at the metal shop, or whether he was directed to do so by the prison authorities. Respondent contends that work at the metal shop is sought by the prisoners, and they are only assigned to the work in said shop upon receiving a request by the inmate in question. A worker in the metal shop is paid approximately \$12.00 per month. Claimant contends that he was directed to work in the metal shop.

"It appears that claimant was first assigned to work in the power house. He was subsequently transferred to the metal shop, and was assigned to operate a grinder, and thereafter a punch press. The claimant was familiar with the operation of a punch press. He had operated the punch press in question for a period in excess of nine months prior to the date of the alleged accident.

"The machine in question is operated by a foot pedal. Claimant contends that the punch press 'double punched'. In other words, the machine punched the first time when the pedal was operated by claimant, and again operated without the foot pedal being depressed. Claimant stated the machine had never double punched before.

"Clinton Vaught, Superintendent of the Sheet Metal Shop, testified that a prisoner is first placed on a non-pay job, and then goes to a waiting list. Subsequently, when their turn comes, they are placed on the pay job. They are usually given some choice as to the type of job upon which they are placed.

"It appears that the machine in question was approximately five years old at the time of the accident. He testified that they had had no trouble with this machine prior to or subsequent to said accident. The foot lever is covered, so that a person other than the operator could not trip said machine. The operator of the machine must slip his foot into a covered slot to operate the machine. The only safety device on the machine was the trip lever in question.

"Claimant contends that the Health and Safety Rules of the State of Illinois, as adopted by the Industrial Commission, provide that toggles, or a device to pull back the arms of the operator when the machine is tripped, should have been installed on the machine in question. The machine in question did not have such a device. On cross-examination, Vaught stated that the only repairs to the machine were made approximately one year ago.

"If the press double punched, then respondent could be liable for the injuries, for an inference of negligence would certainly be present on the part of respondent. If, however, the machine in question did not double

punch, but the plaintiff had merely negligently caught his hand in the die of said machine, then claimant would be guilty of contributory negligence, and would not be entitled to recover.

“There is evidence in the record that respondent installed a different type of switch on the machine after the accident. Vaught testified this was merely for additional protection, and that there has never been any trouble with the machine double punching. Claimant had operated the machine for a period of approximately nine months prior to the accident. There is no evidence in the record that there had ever been any trouble with the machine in question on a prior occasion.

“In the opinion of this Commissioner, it appears that claimant inadvertently stepped on the operating lever without removing his hand completely from the hazardous area. He would, therefore, be guilty of contributory negligence.

“There is some testimony that the Health and Safety Act, passed by the Industrial Commission, required that a device be placed on a punch press, which would remove the operator’s arm when the machine is in operation. This machine did not have such a device. There is no evidence, however, that the violation of the statute was the proximate cause of claimant’s injuries.

“It would, therefore, appear that claimant has failed to affirmatively prove that respondent was guilty of negligence, and his claim should be denied.”

From a review of the report and the evidence, it appears that the machine was in proper working order, and that claimant was familiar with the machine from previous use. Since the only way that the machine can be operated is by means of placing the foot into a covered slot, which action thereby activates the machine, it would appear that claimant tripped the press without first removing his hand.

Claimant has the burden of proving that he was free from contributory negligence. The record does not support this proof.

An award is, therefore, denied.

(No. 4969—Claim denied.)

ARTHUR HAMMOND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion* filed March 29, 1963.

*Petition of Claimant for Rehearing denied* July 26, 1963.

ROBERT P. SHONKWILER, AND APPLEMAN, ZIMMERLY AND McKNELLY, Attorneys for Claimant.

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

*HIGHWAYS—removal of headwall —failure to warn public.* Where head-wall on culvert was removed, and respondent failed to place safety post at headwall because it was out of posts, respondent's negligence was proven.

*SAME—use of shoulder by farm vehicles.* Farm vehicles have a right to use shoulder of highway as they see fit.

*CONTRIBUTORY NEGLIGENCE—evidence.* Evidence disclosed that claimant, who was aware of unmarked culvert, drove his tractor without benefit of head lights into an area of known danger, which he might have avoided by the exercise of ordinary care.

TOLSON, J.

This action was brought to recover damages for injuries to claimant occasioned by the alleged negligence of the State in failing to place a warning post or sign, where it had removed the headwall or protruding abutment of a culvert, on the shoulder of a public highway, which resulted in the remaining portion of the culvert and ditch being invisible to users of the shoulders. No questions were raised on the pleadings.

Plaintiff's theory is that respondent is liable for damages resulting from its failure to install adequate warning posts or signs indicating the presence of the concealed culvert. The State had adequate notice of the defect, and its plans called for a warning post to be in place at the scene of the injury, since at least the preceding April. The injury herein complained of occurred on October 2, 1959. Respondent admitted there were no warning devices present on the date of the injury.

This case was heard by Commissioner George W. Presbrey on May 18, 1961, and on November 9, 1962 he filed an exhaustive report, the first seven and one-half pages of which are in the following words and figures:

"The evidence was heard in the above entitled cause on May 18, 1961 at Monticello, Illinois. Phillip C. Zimmerly and Robert Shonkwiler represented claimant, Arthur Hammond, and Lawrence W. Reisch, Assistant Attorney General, represented respondent, State of Illinois.

"This action was brought by claimant, Arthur Hammond, to recover damages for injuries to him by the alleged negligence of the State of Illinois in failing to place a warning post or sign where it had removed the headwall or protruding abutment of a culvert on the shoulder of a public highway. The claimant contends that, as a result of the removal of this headwall, the remaining portion of the culvert and ditch became invisible to users of the shoulder of the highway. The claimant was driving a tractor, without lights, on the shoulder of the road. He did not notice the culvert and ditch. His tractor overturned, causing serious injuries. The accident occurred at 6:35 A.M. on October 2, 1959. It is admitted that there was no warning post or sign present on the day of the accident.

"The accident in question occurred on Illinois State Highway No. 10, at a point between 1 and 1½ miles east of DeLand, Piatt County, Illinois. Route No. 10 is a conventional, two lane concrete highway, 18 feet wide, centered on a right of way 40 feet wide. The shoulders on each side are approximately 11 feet wide. The highway is flat and level, and runs directly east and west. The weather on the day of the accident was clear. Usually at this hour at this time of year the sun had been up, but there had been an eclipse of the sun on the morning in question, so that it was still dark at the time of the accident, and the vehicles using the highway had lights on.

"The culvert in question is located about 400 feet east of the farmhouse known as the Clifton Home. It had originally been a conventional box culvert with a protruding headwall or abutment above the shoulder. There is a conflict as to whether the abutment or headwall protruded 10 inches or 18 to 24 inches before it was removed. Sometime between April 21 and May 17, 1959, respondent had removed the headwalls either 6 or 8 inches below the ground level.

"At the time of the accident, claimant was driving east on a tractor owned by his employer. He had taken feed to the tenant house where he lived, and he had been instructed to return the tractor and wagon on the morning he was injured. The claimant was late for work, his usual hours of employment being from 6:00 A.M. to 6:00 P.M., six days a week. He had waited for the sun to rise and for it to get light, because there were no lights on either the front or rear of the tractor, or on the wagon he was pulling. The head lamp of the tractor had been removed by the employer, and the tail light was not working. As previously stated, there had been an eclipse of the sun on the morning in question. There were no raps of

the sun visible nor any land marks, as he was driving, and, in the words of claimant, 'It was light enough that I could see objects. It was light enough to have seen a stick there at the culvert.'

"Claimant lived on a 24 acre farm owned by his employer. He worked primarily on the employer's 640 acre main farm. The main farm was  $3\frac{1}{2}$  miles north and east of the tenant place. The tenant place was south of Route No. 10, and the section line road going north did not go beyond Route No. 10. It was a dead end pavement. Claimant had to take Route No. 10 to the east for at least one mile, and then he could turn north on another section line at the Clifton house. On the south side of Route No. 10 and the mile he had to traverse, there were two culverts with headwalls broken off. The first was about  $\frac{1}{10}$  of a mile from where he turned onto Route No. 10. He thought he had passed the second culvert at the time of the accident. He could not see it from the pavement. On the same mile on Route No. 10 there were three other field entrance culverts on the right of way, which remained with their full headwalls. Claimant stated that they were visible to him, as he drove along.

"Claimant normally drove to work in his 1952 Ford, which had conventional lights. He had never before driven between the places in the dark on a tractor.

"Claimant stated that he kept watching for traffic approaching from either direction. When he saw headlights behind him, he drove off onto the shoulder, so that he would not be hit, because he didn't have any lights on the tractor or the wagon. He stated that he kept looking directly ahead of him, and got far enough off, so that the oncoming traffic would not sideswipe him. He continued driving forward until he dropped off into the hole. The rear wheel of the tractor fell off the edge. The front wheels of the tractor passed the concealed culvert. He was not struck by another car. The right rear tire tread of the tractor could be traced straight west of the culvert 40 feet, and the marks of its lugs clearly appeared on the remaining portion of the headwall after the accident, which showed where they had slipped off of the southern declining edge.

"The tractor in question was six feet wide. Riding on the center of the tractor, claimant was about eight feet south of the edge of the pavement. The seat of the tractor was five feet off the ground. The rear wheels of the tractor were 6 feet 4 inches from the outside to outside. They were large, shoulder height wheels.

"A westbound driver, driving a tractor trailer with dim lights, saw what he thought was a big piece of tar paper blown across the road. The driver stated, 'As I approached it, it turned out to be a tractor lying in the ditch, upside down.'

"Following the accident, claimant blacked out, but was unconscious only momentarily. Persons arriving at the scene tried to move him, but he was in too much pain. He was subsequently removed, and taken by ambulance to the hospital in Monticello. After the X-Rays he was taken to St. Mary's Hospital in Decatur.

"He had a comminuted inter-trochanteric fracture of the right hip, with marked displacement. There was a fracture of the acetabulum on the left

side, a fractured pelvis, a fracture of the left scapula, contusions of the abdomen, abrasions of the right leg and extensive perineal contusions. The fractured right hip was held in place with a Jewett 4% inch nail, which is permanently imbedded in the hip of claimant. He had a delayed union of the femur, which has delayed his recovery. A pressure sore on the groin developed from being on the operating table, where he had to have extension on both legs pulling against the post of the groin. The post pressed against cords, which became infected. The testicle became inflamed, which could, and did, affect his potency. He is now impotent.

"Following the accident, claimant was in bed for two weeks, was ambulatory in a walking device, and was then trained in the use of crutches. Dr. Ciney Rich testified that it would be at least a year before claimant could throw away the crutches, and, at the time of his testimony, the patient was totally disabled. How long he would remain in this condition depended upon the union he had in the area of his main fracture. The doctor hoped this would be within a year's time. The patient lost approximately 15 lbs. following the accident. He has considerable atrophy of the right leg from the hip to the ankle. However, the doctor stated that a lot of the muscular strength should return when he can use the leg. Claimant has some loss of motion in the hip joint. The right thigh measured 37 centimeters in circumference compared to 43 centimeters in the left. The right calf is 28 centimeters as compared with 30 centimeters. The doctor stated that he would suffer a permanent impairment in the use of his right leg in the amount of 30 to 35%.

Claimant's medical expenses, totalling \$1,642.35, were as follows:

Dr. A. D. Furry .....	\$ 20.00
Kirby Hospital, Monticello .....	20.50
Trigg Funeral Home, ambulance services ..	25.00
Dr. J. F. Allman, Jr. ....	5.00
Dr. Ciney Rich .....	600.00
St. Mary's Hospital, Decatur .....	68.75
Raycraft Drug Co., Decatur .....	6.85
St. Mary's Hospital, Decatur, for care from October 2 to November 4, 1959, inc —	896.25

"In addition to the above medical expenses, claimant has been unemployed since the day of the accident, October 2, 1959. He worked for his employers for six or seven years. Each month he received \$210.00 in cash; house rent free, worth \$30.00 a month; a cow, its feed, and the milk therefrom, worth approximately \$20.00 to \$30.00 a month; the cost of gasoline going back and forth, about 20 gallons a month at 31c a gallon. Since the accident the wife has been the sole support of the family, although before the accident she was not employed.

"Claimant cannot dress or bathe himself. His wife must do this for him. He cannot sit long. He was using crutches at the time of the hearing, and he cannot get around without them. It was stated that he is nervous, easily upset, moody, short tempered, and is unable to drive a car. He is despondent over not being able to make a living, nor having worked since

October 2, 1959. He is unable to tie his shoes, or put on his socks. The claimant is 47, and has been married to his wife, who is 40 years old, since November, 1938. They have two boys, age 8 and 16. He has a life expectancy of 24.41 years.

"John C. Mulgrew, a Civil Engineer, employed by the Illinois Division of Highways, District No. 5, testified that he was Assistant Maintenance Engineer in the area of the accident on October 2, 1959. In 1959, he stated that he had issued instructions to the Field Engineer that all roads leading to Champaign be mowed by October 3rd in preparation for the Illinois-Army Football game. The engineer stated that the purpose of the shoulder of the road is to be used as a transition from the edge of the pavement to a ditch and also for emergency stopping. The State usually cuts the grass of the shoulder three times a year to the ditch line. Fence mowing takes place twice a year. The time of the mowing depends upon the seasonal growth of the grass. The first mowing would be about the latter part of May, and the second around the first part of July. After Labor Day in September would be the beginning of the final mowing.

"The part of the headwalls above ground were removed by the labor unit, which operates over the State out of the Springfield Bureau of Maintenance. The engineer testified that, in his opinion, headwalls protruding above the ground on culverts are an unsafe condition.

"On cross-examination, the engineer stated that the mowing takes place by the use of a sickle bar, which is approximately three feet thick, and the mower itself rides on little skids. The State does not rake any grass or debris that is cut, but the debris remains where it falls. There were no records to show when the mowing actually took place in the area involved in the accident. The engineer further stated that there was no regulation against farm vehicles using the shoulder as they saw fit.

"He further testified that they had a program started of putting safety posts at all headwalls, which were broken off. The safety program was part of the general program of knocking the headwalls off. It was not an after thought. The designs and intentions were that knocking out the headwalls and putting up the safety posts would go hand in hand. Unfortunately, District No. 5 ran out of a supply of posts. It was intended to have a post at the culvert before October 2. They did not do so before that date; however, they did get their supply of posts in September.

"Len Parrish testified on behalf of respondent. He was a regular maintenance man, employed by the Highway Department. He stated that he probably mowed the grass and cut weeds on the shoulder of highway No. 10 sometime prior to October 2, although he could not say any special date when he mowed the weeds near the culvert in question. He had no independent memory as to when the actual mowing took place, nor were there any records.

"Robert Norton, a maintenance man for the Highway Department, stated that he did mowing along highway No. 10 east of DeLand, although he had no independent recollection of mowing the specific area. He did not know the condition of the grass or weeds as to this particular culvert.

"In the opinion of this Commissioner, the State of Illinois was guilty of negligence. Claimant's exhibit No. 1 includes the area of the culvert in question. The culvert is not visible in this photograph. Exhibit No. 2 is a photograph of the area showing the relationship of the grass, weeds, shoulder and the culvert. The grass stood about ten inches above the remaining headwall, and the grass was allowed to remain where it fell after mowing. The headwall of the culvert in question should not have been removed, unless some sort of warning could have been put in place immediately upon the removal of the headwall.

"It would appear that the major issue to be determined in this case by the Court is whether claimant was guilty of contributory negligence. There is no question but what claimant has been seriously and permanently injured, and, if the Court determines that he is free of contributory negligence, he should be awarded the maximum amount of \$25,000.00."

The crux of this case is whether or not claimant is guilty of contributory negligence, as the negligence of the State is beyond dispute. Since the burden of proving that he was not guilty of contributory negligence is squarely upon claimant, a review of his testimony is pertinent. He stated that he left his home about 6:30 A.M., and that he was driving a tractor, which did not have lights, front or rear. He stated that on the south side of Route No. 10 there were two culverts with the headwalls broken off. One of them was a tenth of a mile from where he turned onto the road. He stated there were no rays of sun visible. There were no landmarks visible.

He further stated that, when he looked back, and saw a car approaching from the rear, "I did not know exactly where I was with reference to the second culvert on the south side. I thought I was by it. I knew such a culvert existed. After I looked back, I pulled off on the shoulder, and kept looking directly in front of me. I went about 400 feet after I pulled off." (Abstract of record, page 29.)

This, in essence, is the testimony offered by claimant to satisfy his burden of proof. Claimant was not a stranger in the vicinity. He had driven between the two places every working day since 1954. (Abstract of record,

page 33.) He knew of the two culverts with the head-walls knocked off, yet he drove his tractor, without lights, into the area where the culverts were located.

“A person may not knowingly expose himself to danger, and then recover damages for an injury, which he might have avoided by the exercise of care for his own safety.”

*Ames vs. Terminal R.R.*, 332 Ill. App. 187

Claimant knowingly exposed himself to danger by driving his tractor in this area without adequate lights. He did not exercise ordinary care for his own safety, and was thereby guilty of contributory negligence.

An award is, therefore, denied.

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(No. 4907—Claim denied.)

JAMES McABEE, JR., Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 18, 1963.*

*Petition of Claimant for Rehearing denied August 30, 1963.*

ANNA R. LANGFORD and THADDEUS B. ROWE, Attorneys for Claimant.

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

HIGHWAYS—*contributory negligence*. Claimant, who was riding a bicycle on a clear day with no obstructions to mar visibility, was contributorily negligent in not seeing a defect in the pavement.

NEGLIGENCE—*contributory negligence*. A person will not be excused, who testifies that he looked and did not see.

FEARER, J.

James McAbee, Jr., has filed his complaint in this Court seeking to recover damages against respondent, charging respondent with certain acts of negligence in its failure to maintain a street, which was under its control, and for which it had a duty to maintain on the date

of the accident. It is also alleged that the State failed to give warning by the posting of signs as to the disrepair of the street, after it had either actual or constructive notice.

The accident occurred on June 9, 1959, at approximately 11 A.M. At said time and place, claimant was riding his bicycle in a southerly direction upon South Park Avenue, having just crossed the intersection of Marquette Avenue (67th Street) on the approach of the New York Central viaduct in the City of Chicago, Illinois.

Claimant contends that, while riding said bicycle, he ran into a hole in the street. He was hurled from said bicycle with such force that he sustained certain injuries, namely, laceration to his tongue, several teeth knocked out, abrasions and contusions.

No answer was filed by respondent. Therefore, a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

Respondent filed a Departmental Report on March 24, 1961. Commissioner Immenhausen, who heard this case, has ably summarized the testimony of respective witnesses testifying for and on behalf of claimant and respondent. He summarized claimant's testimony as follows :

On the day of the accident, he was 23 years old, and resided at 7845 South Indiana Avenue, Chicago, Illinois. He was riding his bicycle in the southbound lane approximately two to three feet from the west curb. The day was clear, visibility was good, and traffic at said time was normal. Just prior to the accident, there was a car directly in back of him and one to his left. There were two lanes of traffic at that point, and he was keeping a lookout ahead. He had never ridden a bicycle in this area before. The bicycle he was riding was in good mechanical

condition. Just prior to the accident, lie passed over a manhole, and, in looking ahead, noticed traffic. All of a sudden everything stopped, and he was on the ground, dazed and hurt. He described the hole, which he had hit, as being two feet in length, about six to eight inches in depth, and about four inches in width; and stated that it wasn't even, one part being a little bit lower than the other. After he fell, he heard the screeching of the tires of cars behind him. The area south of the pavement was patched and broken, but there had been some patch work done with asphalt. Two weeks after the accident, he went back, and the hole was fixed. He mas assisted at the scene of the accident by a man by the name of Charles Akins, who took him to the hospital.

On cross-examination, he testified that there were no vehicles in front of him, but that there were vehicles in back and to liis left. Upon being asked how far the hole was in front of him when he first saw it, he answered "Actually I didn't see it. Not before I hit it." He also answered on cross-examination that there was nothing to obstruct his view. The commissioner interrogated claimant as to why he couldn't see the hole when he noticed the manhole, which was approximately four or 5 feet from the hole. His answer was "I just didn't see it."

The witness, who took him from the scene of the accident, was a policeman. Claimant testified that he could not locate him at the time of the trial, nor could he secure his address.

Claimant's next witness was Anna R. Langford, an attorney, who had represented claimant and identified certain exhibits, being photographs, and testified that the photographs of the area in question were true photographs and true representations of the area. After she

received the photographs, she stated she notified the Highway Department of the condition of the street on June 30, 1959, and three days later the pavement was repaired. Later she took claimant to the spot where the accident occurred and talked to him, asking him to point out the place in the pavement, which was in disrepair, and so indicated on claimant's exhibits Nos. 8 and 9. She examined the hole, which was a few feet south of the manhole cover, and was approximately two feet in length, six or seven inches in depth, and irregular as to lines.

Respondent called, as one of its witnesses, Robert C. Washburn, who was employed as a maintenance field engineer in June and July of 1959, and was assigned to the area wherein this particular street was located. He stated he had occasion to personally examine South Park Avenue on July 20, 1959, and was unable to find any holes in the pavement, but it was wavy.

The next witness for respondent was Walter Rae-ghowski, who formerly was employed by respondent between the periods of May, 1958 and August 1, 1959, as a section truck driver. His duty was to inspect the area to see if any repairs were necessary to the streets including South Park Avenue on which the accident occurred. Prior to the accident, he inspected this particular street, and did not discover any holes, bumps or depressions, but did find the pavement to be wavy. At the time of the trial, he was not employed by respondent. He stated that, to the best of his knowledge, he did not make any repairs on this particular street in June or July in the year 1959.

Judge Immenhausen, in his commissioner's report, has recommended that the claim be denied, basing his decision primarily on the fact that it is a little hard to

believe that on a clear day, when the pavement was dry, and there were no obstructions to claimant's visibility, that, if there was a hole in the street in the area, which claimant testified to, he should have seen the hole, and thereby avoided the accident. In not so doing, claimant was thereby guilty of contributory negligence.

He also found that it was very questionable that such a hole existed, which caused claimant to fall, based upon the testimony produced at the time of the trial. He was in a better position to pass upon the testimony offered, the demeanor of the witnesses, and the manner in which they answered questions to arrive at his conclusion as to the facts presented by the evidence.

Because of our findings in this case, we do not believe it necessary to prolong the opinion in citing or commenting on the various authorities cited by claimant and respondent in their briefs. As we have held many times, and as have other courts, this Court will not tolerate one testifying that they looked and did not see something, which appeared from their testimony would be very apparent. Also, this Court has held that respondent is not an insurer, any more than a municipality is, of everyone who travels upon its streets or highways. There is a responsibility placed upon the traveling public to operate vehicles in a manner commensurate to conditions claimed, if they do actually exist. If they fail to do so, respondent should not be held liable for damages.

We hereby deny the claim of claimant, James McAbee, Jr.

(No. 5035—Claimant awarded \$318.86.)

JOLIET MOTOR SALES, INCORPORATED, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 26, 1963.*

GRAY, THOMAS, WALLACE AND O'BRIEN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD A. WARMAN, 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.

This is a claim by the Joliet Motor Sales, Inc., for work performed and parts supplied for motor vehicles assigned to District No. 5, Division of State Highway Police.

Upon the stipulation of facts by the parties and the recommendation of the Attorney General, and it further appearing that the appropriation has lapsed, an award is entered in favor of claimant, Joliet Motor Sales, Inc., in the amount of Three Hundred Eighteen Dollars and Eighty-six Cents (\$318.86).

(No. 5103—Claimant awarded \$200.00.)

WILLIE TAYLOR, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 26, 1963.*

PETERSON, JOHNSON AND GUY, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; EDWARD A. WARMAN, 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 Ill. Rev. Stats., Chap. 95½, Sec. 7-503.

DOVE, J.

On April 29, 1963, claimant, Willie Taylor, filed a claim seeking refund of a responsibility security bond deposited with the Secretary of State of the State of Illinois, as required by Section 42-12 of the Motor Vehicle Laws of the State of Illinois.

From the stipulation of facts by the parties, it appears :

1. That on or about the 13th day of November, 1958, claimant, Willie Taylor, was involved in an automobile accident with Maizie Fate.

2. That on or about March 2, 1959, claimant, Willie Taylor, deposited with the Secretary of State of the State of Illinois, a Two Hundred Dollar (\$200.00) responsibility security bond, as required by Section 42-12 of the Motor Vehicle Laws of the State of Illinois.

3. That on or about June 7, 1959, the said Maizie Fate filed a civil suit for damages arising out of said automobile accident against said Willie Taylor in the Municipal Court of Chicago, Case Number 59 M 15312; that claimant, Willie Taylor, was found not guilty.

4. That on August 1, 1962, the Secretary of State transferred the sum of Two Hundred Dollars (\$200.00), so deposited by claimant, to the General Revenue Fund in the State Treasury. (Chap. 95½, Sec. 7-503, Ill. Rev. Stats.)

5. That on January 15, 1963, a demand was made upon the Secretary of State of the State of Illinois for a refund of the said security in accordance with the Motor Vehicle Laws.

6. That to date claimant has not received a refund of the responsibility security bond from the Secretary of State of the State of Illinois, or the State of Illinois, as required by said Motor Vehicle Laws.

Section 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, Willie Taylor, in the amount of Two Hundred Dollars (\$200.00).

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(No. 3025—Claimant awarded \$2,677.77.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion filed November 12, 1963.*

GOSNELL AND BENECKI and JOHN W. PREIHS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL, 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 June 1, 1962 to February 1, 1963.

PEZMAN, J.

On April 22, 1963, claimant filed her petition for reimbursement of monies expended for nursing care and help, medical services, and expenses for a period of time from June 1, 1962 to February 1, 1963.

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 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 her physical condition, as she is bedridden, and requires constant care by physicians and practical nurses.

Attached to the complaint is a bill of particulars, supported by receipts. It discloses the amounts expended by the petitioner for the period of time claimed, i.e., June 1, 1962 to February 1, 1963, as follows:

1. Nursing and practical help _____	\$860.20
2. Room and board _____	428.75
3. Drugs and supplies _____	479.28
4. Physicians and professional services _____	909.54
Total _____	\$2,677.77

From an examination of the petition and the supporting exhibits, it appears 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 \$2,677.77 for the period of time from June 1, 1962 to February 1, 1963.

The Court reserves jurisdiction for further determination of claimant's needs for additional care.

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(No. 4821—Claim denied.)

FRED L. WALDEN, as Administrator of the Estate of JULIA WALDEN VALENTINE, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 18, 1963.*

*Petition of Claimant for Rehearing denied November 12, 1963.*

APPLEMAN, ZIMMERLY AND McKNELLY, Attorneys for Claimant.

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

**HIGHWAYS—negligence—evidence of other accidents.** Evidence of previous accidents is not competent, unless it can be shown that all of the surrounding conditions and circumstances were the same.

**SAME—evidence.** Evidence showed that proximate cause of accident was negligent operation of automobile, and was not caused by any acts of respondent.

**FEARER, J.**

A complaint has been filed in this Court by Fred L. Walden, Administrator of the Estate of Julia Walden Valentine, deceased, for the wrongful death of Julia Walden Valentine.

The accident in question, resulting in the death of Julia Walden Valentine, occurred on May 18, 1957, at or about the hour of 4:00 A.M., when decedent was riding as a passenger in an automobile, owned and driven by Ames Chester, which automobile was being driven in a westerly direction on Illinois Highway No. 150. The accident occurred on a curve in said highway, immediately east of the Village of Ogden, Champaign County, Illinois. The highway in question ran in a generally easterly and westerly direction, being a two lane macadam highway with a dividing line down the center thereof, which separated traffic traveling in an easterly and westerly direction.

The visibility at the time of the accident was very poor. This was a dark, foggy morning.

Decedent, at the time of the occurrence in question, was riding in the back seat, and, from the evidence, was asleep at the time.

The owner and driver of the vehicle, Ames Chester, was also killed in the accident. The only survivor was Ira Valentine, who was riding in the front seat, and was also asleep at the time of the accident in question.

Claimant was appointed Administrator of the Estate of Julia Walden Valentine by the County Court of Champaign County, Illinois on June 24, 1957. At the time of

filing the complaint, he was the duly qualified Administrator of said Estate. Decedent left surviving her, as her only heirs at law, two sons, Ira Peyton Valentine, Jr., and Walden Valentine, and one daughter, Emily Dyer.

It is alleged that decedent, at all times, was in the exercise of due care and caution for her own safety; and, farther, that the next of kin mere in the exercise of due care and caution for the safety of decedent.

The acts of negligence, with which respondent is charged as being the proximate causes of the accident resulting in the death of Julia Walden Valentine, are as follows :

A. That said curve was negligently designed or planned so that it was not reasonably safe for public travel, and said defective design or plan was obviously and palpably dangerous;

B. That the existence of said sharp curve, the illusion of continuity of said highway, and the absence of adequate and well lighted warning devices were breaches of duty of employees of the State to maintain said right of way in a safe condition;

C. That said employees negligently failed to post sufficient signs or signalling devices indicating and warning of said curve, although said devices were reasonably necessary to make said right of way safe for public use;

D. That said employees negligently failed to properly construct and maintain said roadway at said point;

E. That said employees negligently failed to abate a known nuisance, consisting of a public right-of-way unsafe for use in the absence of adequate signs and warning devices;

F. That employees of the State responsible for the proper maintenance of said roadway negligently permitted said conditions to continue after actual and constructive notice of their existence ;

G. That employees of the State were otherwise negligent in and about the performance of their duties to maintain said roadway at said point in a safe condition for use by the general public at any hour and under all weather conditions.

Ira Peyton Valentine, Jr., the only survivor in this accident, testified that they had been in Indianapolis attending an organ concert by the Youth Branch of the National Association of Negro Musicians of which decedent was National Youth Director ; and, further, that she also was giving piano lessons, and was very active in many associations.

He further stated that they left Indianapolis at approximately 1:15 A.M., and that decedent had gone to sleep immediately after leaving Indianapolis, and she did not awaken before the accident. That he went to sleep at Fithian, Illinois, which is about five or six miles east of Ogden, where the accident occurred. The last he remembers was that the weather was foggy, there being intermittent fog, and it had been that way most of the way back, and the last speed he remembered of the car was about sixty miles per hour. The next thing he remembered was being awakened in the hospital, where he was questioned by the coroner.

He further testified concerning his mother's earnings, the associations and organizations that she belonged to, and her contribution to the support of her children.

On cross-examination, he testified that he and the driver of the car, before leaving Indianapolis, went to a bar, and each had two drinks. That other than stopping for gas, they made no other stops. That they started running into patches of fog thirty minutes out of Indianapolis, and there was intermittent fog all the way back.

That neither he nor his mother said anything to Mr. Chester about the way he was driving the automobile. That neither he nor Mr. Chester were intoxicated, and his mother did not know that they had had anything intoxicating to drink.

In addition to the allegation in the complaint as to other occurrences at this particular curve, which is paragraph 13 in the complaint, which, in our opinion, would not be a proper pleading, there was testimony offered by other witnesses for claimant as to previous accidents, which, of course, is not competent, unless it can be shown that all of the surrounding conditions were the same at the time of the other accidents as at the time of the occurrence in question, and that the conditions then existing were the proximate cause of the accident in question, resulting in the death of claimant's intestate. In order for this evidence to be competent, there would have to be a showing of prior accidents occurring at the same place and under similar circumstances. This would be for the purpose of showing that the unsafe thing or condition causing the accident was the condition or cause common to such independent accident, and that the frequency of such accidents tended to show respondent's knowledge of such a condition.

*Welter vs. Bowman Dairy Co.*, 318 Ill. App. 305 at 363

*Budek vs. City of Chicago*, 279 Ill. App. 410 at 422

*Gerrard vs. Porcheddu*, 243 Ill. App. 562 at 567

In the Departmental Report filed in this case, it appears that there were numerous signs, some of which were reflectorized, bearing the notation, "SLOW 30 M.P.H." There were also signs characterizing the curve by an arrow. In fact, we can find nothing in the record wherein this curve was not properly marked as a warning to traffic traveling thereon.

This Court has held numerous times that the State of Illinois is not an insurer of all persons traveling upon its highways.

*Grant vs. State of Illinois*, 21 C.C.R., 563, 568

*Stanley vs. State of Illinois*, 22 C.C.R., 438 at page 440

In reading the transcript and in an examination of authorities, this Court is of the opinion that it is very apparent that the proximate cause of the accident, resulting in the death of Julia Walden Valentine, was the negligent operation of the car in which she was riding, which was being driven by Ames Chester. It appears from the testimony and from the record that, just prior to the time of reaching this curve, Ames Chester was driving this automobile at a fast and dangerous rate of speed, taking into consideration the weather, conditions and **lack** of visibility.

It is, therefore, the order of this Court that the claim of Fred L. Walden, as Administrator of the Estate of Julia Walden Valentine, be and the same is hereby denied.

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(No. 4878—Claim denied.)

CAM-RECORD CO., INC., A Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1963.*

RAYMOND E. TRAFELET and GEORGE E. DOLEZAL, and RATHJE, KULP, SABELAND SULLIVAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; ROBERT A. SPRECHER, Special Assistant Attorney General, for Respondent.

STATE OFFICERS AND AGENTS—*conflict of interest*. Where evidence showed that owner was a state employee—contracts between State and claimant were void.

**SAME—same.** Fact that employee is not on a State payroll, but is paid on a contractual basis, does not remove him from the provisions of the conflict of interest statute. (Ill. Rev. Stats., Chap. 127, Par. 75, 1953, 1955.)

**PERLIN, C. J.**

Claimant, Cam-Record Co., Inc., seeks recovery of \$25,056.87, allegedly due Cam-Record Co., Inc., from the State of Illinois for material furnished and delivered pursuant to contract.

Clarence J. Reuter, President of claimant company, testified as follows :

He had been in the continuous forms business since 1940 or 1941. In the latter part of **1953** he was consulted by Orville Hodge, the Auditor of Public Accounts of the State of Illinois, in regard to microfilming warrants of the State stored in the Auditor's office. Reuter told Hodge that he had had experience in general office services but not in microfilming. Reuter studied the situation, and claims to have tried to get the microfilming work done on a brokerage basis. After discussion with Hodge, however, Reuter decided to go into the microfilming business himself.

Reuter agreed to microfilm the State warrants under the name Cam-Record Co., not a corporation at that time, and he negotiated a contract with the Auditor's office, dated January 18, 1954, which provided for a price of \$2.75 per thousand acceptable warrant images. This contract was to expire on December **31**, 1955. The price was set by Reuter and Hodge, but most, if not all, of the other provisions of the contract were negotiated between Reuter and Edward Epping, Hodge's Administrative Assistant.

The terms of the contract identified Cam-Record Co. as the Seller, and the Auditor of Public Accounts of the State of Illinois as the Buyer. It provided that the contract was not transferable or assignable by either party,

and the document was declared to constitute the full understanding between the parties.

Mr. Hodge instructed Reuter that all of the details should be handled with Epping. Epping suggested that a lawyer-friend of his in St. Louis help set up Cam-Record Co. as a corporation, and that Mersinger and Co., of which Epping identified himself as senior partner, keep the books for \$250.00 per month. On February 18, 1954, Cam-Record Co. was formed as a Missouri Corporation with an initial capital of \$2,000.00 furnished by Reuter, and \$500.00 furnished by Epping. Epping then procured the recording of the company's charter in Missouri. A certificate of authority to commence business was issued by the Secretary of State of Missouri on March 10, 1954, and Cam-Record Co., Inc., was licensed to do business as a foreign corporation in Illinois by the Secretary of State of Illinois on May 4, 1954.

After its incorporation, Cam-Record Co. proceeded with the microfilming of warrants for the State. The invoices, upon which the claim herein is based, were rendered, and the services allegedly performed on dates ranging from March 21, 1955 to June 27, 1956.

Reuter was, from the beginning, President of the Cam-Record Co. When Cam-Record Co., Inc., commenced doing business as a corporation, it issued 20 shares of stock, of which 10 were distributed to Reuter, 5 to Henry H. Rickey, secretary and a Director of Cam-Record Co., and 5 to an employee of Mersinger and Co. named Allen, who was described by Reuter as holding the shares as a "dummy". The stock certificates were held in Epping's office "for safekeeping", including Reuter's certificate for 10 shares. Some months later Epping requested that the certificates be signed over to him in blank. All of the stock certificates were eventually endorsed in blank to

Epping. The total gross business done by Cam-Record Co. during the time of its existence was \$220,000.00, of which about \$200,000.00 was for the Auditor of Public Accounts. Mr. Epping kept the ledger of Cam-Record Co. in his office, in addition to the accounts receivable and payable. Epping did all of the bookkeeping, and prepared the Cam-Record Co. checks, although he did not sign them. Epping did not have the authority to sign the checks, which were sent over to the Cam-Record Co. office for signature.

No payments were made directly to Edward Epping, other than the fact he was a partner in the Mersinger Company, which received the \$250.00 per month. This amount was described by Reuter as being for “so-called services”, but, the only service rendered was the making of ledger entries. Total payments to Mersinger and Co. by Cam-Record Co. amounted to about \$7,500.00.

Reuter did not know the purpose or use intended for many of the checks sent to the Cam-Record Co. office by Epping for signature. Sometimes Mr. Rickey would sign them, and Reuter would not even know they had been signed. In some cases, these checks were payable to cash. Checks handled in this manner amounted to approximately \$3,500.00. In regard to these checks, Reuter stated: “They were for nothing. It was pure—pure, what do you want to call it? Another extension of the intimidation and robbery . . .”

Cam-Record Co. also made monthly payments of \$150.00 to Adam Sales and Service Company, of which Lloyd E. Lane was owner or president. Lloyd E. Lane was also employed in the Auditor’s office. Reuter stated as follows with regard to these payments: “We paid to Adam Sales and Service Company. They did the hauling, and we were not supposed to pay them. Our con-

tract covered the documents being brought to us in good condition, delivered to us, and we were forced to pay the transportation despite the existence of the contract at the time, and the verbal agreement, in addition, that we would not have to pay the hauling, but we did pay the hauling.”

Attorney Robert A. Sprecher testified on behalf of respondent to the effect that an audit revealed that respondent’s exhibit No. 9, a Cam-Record Co. check, dated May 24, 1955, in the amount of \$1,750.00 payable to Henry H. Rickey, signed by Rickey, endorsed by him in blank, and cashed on May 27, 1955 at the Southmoor Bank, appeared in the “brown envelope account”, a private account, which Orville Hodge kept at the Southmoor Bank. He further testified that, on May 26, 1954, a check, a State warrant payable to Reuter Business Systems, Multi-Copy Office Forms, in the amount of \$549.95 was deposited by Hodge in said “brown envelope account”, and a total of nine checks of \$150.00 each, issued by Cam-Record Co. and payable to Adam Sales and Service, were deposited in Hodge’s account between May 26, 1954 and May 27, 1955.

The record shows that the license of Cam-Record Co. to do business as a corporation in Illinois was revoked on November 15, 1957. The complaint in the instant case was filed by Cam-Record Co., A corporation, as claimant on August 4, 1959. The Missouri Charter of Cam-Record Co. was revoked on January 1, 1959.

Respondent has sought to justify its refusal of payment to claimant on several grounds. Although a number of its contentions appear meritorious, and might well be appropriate basis for this Court’s decision, we deem it unnecessary to discuss at length the several defenses advanced by respondent. We consider of primary importance the argument that Edward Epping’s dual role

as an owner of claimant company and agent for the State of Illinois nullifies the contract, and renders it unenforceable.

Ill. Rev. Stats., Chap. 127, Par. 75 (1953, 1955), provided :

*“No contract shall be let to any person holding any State office in this State or a seat in the General Assembly, or to any person employed in any of the offices of the State government, or the wife of a State officer, member of the General Assembly, or employee as aforesaid, nor shall any State officer, member of the General Assembly, or wife of employee as aforesaid, become, directly or indirectly, interested in any such contract, under penalty of forfeiting such contract, and being fined not exceeding one thousand dollars. 1915, June 22, Laws 1915, p. 671, Sec. 12.”* (Emphasis supplied.)

Claimant argues that Epping is not within a class forbidden by law to be interested in a State contract, and that, while Epping was Hodge’s Administrative Assistant, this was not a position created by law, therefore, Epping was not an “officer.” Claimant further argues that Epping was not an employee of the State, because he was not carried on a payroll, but instead the State paid Mersinger and Company \$1,000.00 per month, which in turn was paid to Epping.

Respondent has submitted an official report entitled “State of Illinois, Report and Recommendations to Illinois Budgetary Commission with Respect to Investigation on Behalf of the Commission as to the Operations of the Office of Public Accounts of Illinois under Orville E. Hodge”, which includes the following statement on pages 26 and 27:

“Hodge and some of his employees and consultants were repeatedly and consciously guilty of serving their personal interests in conflict with and betrayal of their fiduciary responsibilities, and at the expense of the public interest.

. . .

“Edward A. Epping ostensibly served Hodge as a professional accountant consultant. However, he actually served as the Auditor’s executive assistant, with authority, direction and control over the Auditor’s employees, despite the fact he was neither carried on the payroll as an employee, nor did he

otherwise have a recorded official status. As we have reported elsewhere, **he** was a partner in the accounting ~~firm~~ of F. M. Mersinger and Company of East St. Louis that was retained by Hodge to do auditing work.

"Payments of \$1,000.00 a month were made to F. M. Mersinger and Company for Epping's services. . .

. . .

"Epping was also personally interested in Cam-Record Co., Inc., which entered into an exclusive contract with the Auditor's office to microfilm all State records retained by that office. Cam-Record paid \$250.00 per month to F. M. Mersinger and Co. for accounting work allegedly performed by Epping. At one time Epping had in his possession all of the stock of the company endorsed in blank."

Claimant's own witness, Mr. Reuter, testified that Epping approved "almost everything" in the Auditor's office, and would generally approve new systems or forms.

A case in point is *United States vs. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), where the government and the Mississippi Valley Generating Company contracted for the construction and operation of a power plant by the Company. Before the plant was constructed the government cancelled the contract, because the power was no longer needed. The Company sued the government for expenses incurred prior to cancellation.

The Supreme Court held the contract unenforceable due to the activities of Adolphe Wenzell, an officer and director of the First Boston Corporation, a financial institution. He acted as part-time consultant to the Bureau of the Budget at \$10.00 per day plus transportation expenses. Although Wenzell took no part in the final negotiations, which led to a formal contract, he did give advice of major importance in the preliminary negotiations. First Boston was subsequently chosen by the sponsors of the project to conduct the major part of the financing.

The Company argued that Wenzell was not an officer or agent of the United States, because "he took no oath of office; he had no tenure; he served without salary, except for \$10.00 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary,

and were not prescribed by statute; and, he was permitted to continue in his position as one of the vice presidents and directors of First Boston Corporation, and to draw his salary from that company.’,

The Supreme Court held (page 552) :

“A key representative of the Government, who has taken no oath of office, who has no tenure, and who receives no salary, is just as likely to subordinate the government’s interest to his own, as is a regular, full-time compensated civil servant.”

The Court further declared that the sponsors themselves were guilty of no wrongdoing, but the public must be protected from the “corruption, which might lie undetectable beneath the surface of a contract conceived in a tainted transaction.” Although the federal conflict of interest statute (18 U.S.C., Sec. 434 ) does not specifically provide for the invalidation of contracts made in violation of it, the Supreme Court held that such contracts are unenforceable, and refused to allow recovery for the loss suffered by the company.

The issue of whether or not Edward Epping as Hodge’s Administrative Assistant was a State employee in violation of paragraph 75 also arose in this Court in the recent case of *Fred M. Mersinger vs. State of Illinois*, No. 4900. This Court held that Epping was within the class of persons prohibited by statute from being interested in a contract under Chap. 127, Par. 75, as an employee of the State, citing *People vs. Epping*, 17 Ill. 2d 557, 162 N.E. 2d 366. In *People vs. Epping*, the Illinois Supreme Court affirmed the conviction of Epping for the crime of embezzlement by a public officer, or “any clerk, agent, servant or employee of such officer.” At page 370 of that decision, the Court stated that Epping was variously described by witnesses as Hodge’s “administrative assistant, or executive assistant, or the right-hand-man of the Auditor.”

No matter his title, Epping was unquestionably acting as an agent of the State, and receiving \$1,000.00 monthly compensation therefrom, indirectly, if not directly.

The conflict of interest statutes prohibiting public officers and employees from having an interest in contracts are declaratory of the common law, and are designed to protect the public from the evils that would result if public officials were interested in public contracts. The authorities indicate that at common law such contracts were voided on the grounds of public policy to protect the government from being defrauded by its own servants.

It is the opinion of this Court that the contracts upon which this action is based are unenforceable, because of the conflict of interest of Edward Epping, who acted as agent of the State in negotiating and administering the terms of the contracts with a company in which he had a financial interest, amounting at one time to holding all the shares endorsed to him in blank.

The claim of Cam-Record Co., Inc., is hereby denied.

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(No. 4905—Claimants awarded \$1,000.00.)

ROBERT CLYDE SHILLING, HARRY FLOYD SHILLING, and SOUTH SIDE TRUST AND SAVINGS BANK OF PEORIA, Trustees, Claimants,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1963.*

SUTHERLAND AND SUTHERLAND, Attorneys for Claimants.

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

*HIGHWAYS—consequential damages by reason of Public improvement—flooding.* Surface waters cannot be diverted into new channels so as to increase the flow from a dominant estate over a servient estate.

*SAME—flooding by increased surface waters.* Evidence showed that drainage was changed to claimants' damage.

DOVE, J.

On March 24, 1960, claimants filed their complaint seeking an award in the amount of \$4,000.00 for damages sustained by reason of flooding, caused by the construction of S.B.I. Route No. 29.

The complaint alleges that, prior to May of 1958, surface waters flowed southwesterly along the northwesterly line of the Chicago, Rock Island and Pacific Railroad, and drained off into holes in the ground.

The complaint further alleges that the State constructed a four lane highway in 1958, and that by reason thereof the grade water fell upon 1,500 feet of the highway, ran off into a 6 x 6 cattle pass located under the railroad, and was then cast upon 1.63 acres belonging to claimants.

There is a dispute in the record as to whether the 6 x 6 underpass flooded upon the area prior to the construction of the highway. However, joint exhibits Nos. 1 and 2 indicate that the watershed drained generally to the east and into the Illinois River.

Exhibit No. 2 also discloses that to the west on the four lane highway a fairly large subdivision exists, which would likewise drain under the highway and railroad underpass in an easterly direction.

"While the flow of surface water from the dominant estate upon the servient estate may, in the interests of good husbandry, be increased by ditches and drains, in its natural flow from the surface in one channel, it cannot be diverted into another and different channel so as to increase the flow upon the servient estate." *Village of Crossville vs. Stuart*, 77 Ill. App. 513, 67 C. J., Sec. 873.

There is little doubt but what the run-off from the highway and the subdivision would increase the flow across the servient tenement owned by claimants. The difficulty is apportioning the amount of the flow, as it

would appear that the whole area involved consisted of about 250 acres.

The evidence discloses that the only damage was to the north 75 feet of the 1.63 acre tract, and that the value of the tract, if not flooded, would have been between \$1,000.00 and \$1,500.00. That by reason of the flooding of said tract the value would be not more than \$200.00 per acre, and would probably be of no value.

An award is, therefore, made to claimants in the amount of \$1,000.00.

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(No. 4927—Claim denied.)

JESSIE B. CURTIS and JAMES F. CURTIS, Administrator of the Estate of LUCY L. R. CURTIS, Deceased, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1963.*

CHARLES KENNEY and OLSEN and CANTRILL, Attorneys for Claimants.

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

*HIGHWAYS—negligence, damages.* Claimants were adequately compensated for their injuries from insurance policies of respondent's employees, which preclude any additional awards.

PERLIN, C. J.

Claimants, Jesse B. Curtis and James F. Curtis, Administrator of the Estate of Lucy L. R. Curtis, deceased, seek recovery of \$12,000.00 and \$13,000.00, respectively, for damages arising out of a collision between two automobiles on August 1, 1959.

The evidence shows that claimant, Jesse B. Curtis, was driving one of the automobiles in a northerly direction on U.S. Highway No. 66. His mother, Lucy L. R. Curtis, was a passenger. The other vehicle, an unmarked 1957 Ford passenger automobile, was being driven in a

southerly direction on U.S. Highway No. 66 by Clarence U. Swain, Illinois State Highway Police Trooper, and carried Julius B. Luder, a State Trooper, as a passenger. Both Swain and Luder, at the time of the accident, were acting in the course of their duties as special investigators assigned to the Central Office of the Illinois State Highway Police. Trooper Swain and Lucy L. R. Curtis died as a result of the collision, which occurred near the intersection of U.S. Highway No. 66 and Route No. 124 on Route No. 66.

There appears to be no dispute concerning the facts of the case, since respondent in its statement, brief and argument "generally accepts claimants' statement of facts."

The accident occurred shortly after 1:00 P.M. According to witnesses, the weather was clear and dry, and visibility excellent. The car driven by Trooper Swain was traveling south on Highway No. 66, when he apparently lost control and whirled to the left into the path of traffic in the northbound lanes, colliding with the vehicle driven by claimant, Jesse B. Curtis.

The only question presented to this Court is the amount of damages, if any, to which claimants may be entitled.

Claimant, Jesse B. Curtis, has received \$12,500.00 for his individual claim from Trooper Swain's insurance company, and claimant, James F. Curtis, has received \$12,000.00 in behalf of the estate of Lucy L. R. Curtis, with \$500.00 of that amount going to a minor son of Lucy L. R. Curtis, who was 19 years old at the time of the accident. In consideration of such settlements claimants gave covenants not to sue. Respondent urges that, because of the reasonable and generous nature of the insurance settlement, no additional money damages be awarded.

Claimant, Jesse B. Curtis, incurred actual salary loss and medical expenses totalling **\$4,411.02**. He was able to continue his work as a teacher. None of the medical reports submitted by claimant were current, the latest examination having been made by Dr. H. G. Woody more than a year before the hearing in the case was held. That report specifically stated that the report was not a permanent disability evaluation, and further stated that, since August 14, 1959, "Mr. Curtis has made a fairly uneventful recovery." No permanent injury, which would hamper claimant's activities, has been effectively demonstrated.

There has in the opinion of this Court been no presentation of evidence to justify an award in excess of the insurance settlement already received by claimants.

The claims of Jesse B. Curtis and James F. Curtis are hereby denied.

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(No. 4953—Claimant awarded \$15,000.00.)

ELIZABETH ANN MURRAY, a Minor, by her next friend, ELIZABETH MURRAY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1963.*

J. D. QUARANT, Attorney for Claimant.

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

STATE PARKS AND MEMORIALS — duty to public. State owes a duty to the public to exercise reasonable care in establishing, maintaining and supervising its parks.

SAME—*negligence*. Evidence showed that respondent was negligent in failing to maintain adequate signs or barricades warning of a danger it had known existed long prior to claimant's accident.

PERLIN, C. J.

This action is brought in behalf of Elizabeth Ann Murray, a Minor, for \$25,000.00 for damages incurred

because of personal injuries sustained on July 3, 1960, when she was walking in Cave-in-Rock State Park in Hardin County, Illinois.

Claimant alleges that the pathway upon which she was walking gave way, and plunged her to the floor of a cave, some 35 or 40 feet below the level of the path. This was her first visit to the park, and the accident occurred about 25 minutes after her arrival. Claimant was 14 years old at the time of the accident. She was following her girl friend up the path, which was about 18 inches wide, and was "right behind her." Claimant, who was not aware of the location of the cave, testified that she was on the path when she fell.

Claimant contends that respondent was negligent in that, "having notice and knowledge of a pre-existing condition", it neglected to do anything about it. "Also, it built flagstone walks and pathways alongside this opening, a picnic area with tables just 300 feet away, on the same gradient level, accessible to motor vehicles, impliedly inviting the public to this particular area, of the park."

Floyd Angleton, Custodian of the Cave-in-Rock State Park, described the scene of the accident as follows: A gravel path about 18 or 20 inches wide on a high hill, about 3 feet from the hole into which claimant tumbled. The hole is about 15 feet long and about 8 feet wide. There is brush along the path and above the path, and vegetation all around the hole. There is a place where the path leaves a flagstone walk, and goes to the opening where claimant fell. The path is maintained by the State, and material is put on it to keep it from getting muddy.

When asked whether the hole was visible to a person walking on the path the morning of the accident, Angleton replied: "It is visible to me. I don't know about

other people, but it is to me.” Angleton also stated that “in some places the pathway was pretty close to the hole.” There are picnic tables about 300 feet north of the hole, and ‘everybody picnics there.’”

Angleton further testified that the previous custodian, Joe Garland, had poles placed at the opening in question for protection, but that they were torn down. On the date of this accident, there was no fixed fence at the opening, and Angleton knew of no signs in the park warning people of the opening or of dangerous holes there.

Clyde Flynn, Jr., who lives near Cave-in-Rock State Park, and is familiar with the area, testified that there are many caves and openings in the park, but only one has a grill over it. There are no guards or fences around the other openings, nor are there warning signs. He had talked to several State employees, including Custodians Angleton and Garland, about the dangerous conditions. Flynn further stated that “this particular cave, with which you are concerned, is not more than 3 or 4 feet from the path.”

Clyde Kaylor, a former employee of the State at this park, testified he was familiar with the area in question. He had never noticed any barricades, warning signs, or notices as far as “this particular opening” or any other opening in the park area, although in one place in the main cave there is a rock wall around it, and a heavy wire screen over it. The nearest part of the hole, through which claimant fell, is several feet from the flagstone walk. There is a well-defined path leading from the flagstone walk, used by the public to go around the hole. He often mentioned to Mr. Garland that there ought to be some precaution not only at that hole, but at the whole bluff. He further testified that there are trees growing around this opening, which could tend to obstruct the

view of a person approaching the opening along the pathway.

Claimant has submitted an affidavit of Bernard Kaegi, who was Custodian of Cave-in-Rock State Park on or about May 12, 1960. Kaegi's affidavit stated that on or about that date a Leo Flynn fell into the same cave opening into which claimant, Elizabeth Ann Murray, fell.

Respondent argues that the State is not an insurer of the safety of users of State property, and was not negligent under the facts of this case, and that the "negligence of Elizabeth Ann Murray in stepping off of a well-defined path was the proximate cause of her injury."

It is the opinion of this Court that claimant has not been proven to be contributorily negligent. Respondent has presented no evidence, which would tend to show that claimant was acting other than with due care for her safety, or that she in fact left the "well-defined" path. The path in question was near a popular picnic area maintained by respondent. It ran dangerously close to the hole into which claimant tumbled. Although the hole was obscured by trees and other vegetation, there were no warning signs or barricades. A reasonable person, unfamiliar with the area, could not have foreseen such peril.

That respondent had notice of the danger is demonstrated by the previous attempts to erect guard posts, as indicated by the testimony of witnesses, who had reported the hazards of that hole and other danger points in the park to State officials long before this accident occurred, and by its knowledge of at least one prior accident in the same opening.

The State owes a duty to the public to exercise reasonable care in establishing, maintaining and supervising its parks. *Kamin vs. State of Illinois*, 21 C.C.R. 467,

**473;** *Stedman vs. State of Illinois*, 22 C.C.R. 446, 448. Respondent was negligent in failing to maintain adequate signs or barricades warning of the danger, which was known by it to exist long prior to the happening of this occurrence.

The remaining question concerns the extent of damages incurred by claimant as a result of this accident. Claimant's mother, Elizabeth Murray, testified that, up to the time of the hearing on June 9, 1961, claimant had been unable to attend school because of her injuries. She was a graduate of the eighth grade and an honor student. Claimant could not climb stairs, which allegedly necessitated the family's moving from their third floor apartment to another on a first floor.

According to Drs. Albert Goldstein and John R. Duffy, who treated claimant, her injuries included head and facial injuries, multiple scalp and other lacerations, concussions and abrasions, a complete fracture to the left pelvic area, leaving the pelvis asymmetrical in shape, a deformity to the sacroiliac junction, damage to the left acetabulum, a tilted pelvis,  $\frac{1}{2}$  inch high on the left side, and one leg  $\frac{1}{2}$  inch shorter, bladder damage with subsequent incontinence, paralytic ileus, injuries to the soft tissue of the abdomen and accompanying menstrual abnormalities. Dr. Goldstein testified that plaintiff will be able to walk, although he could not state whether or not she will be able to run. Dr. Duffy testified that she could be in pain after walking, and Dr. Goldstein indicated that in the future she might experience pain in walking, engaging in activities and sports, and climbing stairs.

The doctors further testified that, as a result of her injuries, claimant will probably have difficulty in the termination of pregnancy. Up to the time of the hearing the amounts for medical care and treatment for claimant totalled approximately \$1,525.00.

This Court is of the opinion that claimant has suffered substantial damage, and she is hereby awarded the sum of \$15,000.00.

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(No. 4989—Claimant awarded \$3,500.00.)

**ROY E. CLIFTON**, Administrator of the Estate of **CAROL S. CLIFTON**, Deceased, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed November 12, 1963.*

**SORLING, CATRON AND HARDIN**, Attorneys for Claimant.

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

**STATE INSTITUTIONS, PARKS AND MEMORIALS—negligence—duty to safeguard patients.** State must take reasonable precautions to protect patients in mental institutions from dangerous insane persons committed to its custody.

**SAME—wrongful death.** Evidence disclosed that State was negligent in not ascertaining patient's dangerous propensities prior to ward assignment, and in not taking precautions to safeguard other patients.

**PERLIN, C. J.**

Roy E. Clifton, Administrator of the Estate of Carol S. Clifton, brings this action claiming damages of \$25,000.00 arising from the alleged wrongful death of Carol S. Clifton, his son.

The parties have submitted a stipulation, which includes the following facts:

“3. During the month of October, 1960, and prior thereto, respondent, through its Department of Public Welfare, owned and operated a hospital for mentally ill persons in Jacksonville, Illinois, known as the Jacksonville State Hospital.

4. Carol S. Clifton, deceased, in September of 1960, voluntarily entered and was accepted by the Jacksonville State Hospital, and was assigned a bed in a ward thereof, known as Veteran's Nine.

5. On September 30, 1960, respondent accepted to its Jacksonville State Hospital Marvin Robertson, pursuant to an order of commitment from the County Court of Macon County, Illinois.

6. On October 3, 1960, Marvin Robertson was transferred to and lodged in Veteran's Nine of Jacksonville State Hospital, where he remained until after the death of Carol S. Clifton, on or about 12:15 A.M., Monday, October 24, 1960."

The Departmental Report of the Department of Mental Health admits the following description of the occurrence, which led to the death of Carol S. Clifton:

"Marvin Robertson, a mentally ill person of a violent and dangerous character, on October 24, 1960, obtained the opportunity to, and did assault and physically strike with the metal roller of a mop bucket Carol S. Clifton, as he slept in his bed in Veteran's Nine, inflicting immediately fatal injuries to the latter."

Although the Department denies that it had knowledge of the violent and dangerous character of Robertson, claimant alleges that respondent's negligence was the cause of Carol S. Clifton's death, in that it failed to make a reasonable effort to ascertain that Marvin Robertson was a mentally ill person of a dangerous and violent character; that, notwithstanding respondent's knowledge of the dangerous and violent character of Marvin Robertson, it failed to take adequate measures to restrain and control him, so as to prevent injury to other patients of the Jacksonville State Hospital; that respondent failed to adequately supervise the ward, known as Veteran's Nine of the Hospital, where it bedded mentally ill persons, and where an assault and physical attack on one patient by another was a constant possibility and reasonably foreseeable; that respondent failed to take reasonable precautions to prevent mentally ill patients bedded in said Veteran's Nine ward from obtaining instruments capable of inflicting serious and fatal injuries.

Respondent contends that it was guilty of no negligence, and that each inmate was supervised and placed where he had a right to be; that "the State is not an insurer of the safety of the inmates", and that "to hold otherwise would require respondent to anticipate in every

instance the actions planned in the distorted minds of the inmates of its mental institutions.”

The first question to be determined by this Court is whether respondent was negligent in its duty to operate the Jacksonville State Hospital in a reasonably safe manner, so as to prevent injury to its patients.

The record reveals the following facts:

A Decatur Police Officer, Roy D. Shumard, testified that, on September 23, 1960, he found Marvin Robertson loitering in the Police Station. Robertson appeared to be concealing something in his pocket. When Shumard tried to investigate, Robertson attacked him with a kitchen knife, and attempted to stab him. Robertson also seized the revolver of a Police Sergeant, and thrust it into another policeman's abdomen.

Four days later, on September 27, 1960, a Petition for Commitment was filed by D. C. Robertson, father of Marvin Robertson, in the County Court of Macon County, requesting that the Court adjudge Marvin Robertson to be a mentally ill person, or a person in need of mental treatment, and commit him for care and treatment to a suitable public or private hospital.

Also filed in the County Court at the same time was a Physician's Certificate by Dr. V. T. Turley, which contains the following report:

“That I personally made examination of Marvin Robertson residing at Decatur, Illinois on this 26th day of September, 1960, and found him to be mentally ill. 1. Was prowling in the police station. 2. Attacked an officer with a knife. Required three officers to subdue him. 3. Delusions.”

The Report of Commission filed in the County Court on September 29, 1960, and signed by Dr. Mary Zeldes and Dr. William Mundt, states that Marvin Robertson was “suffering from abnormal behavior, such as burning his clothes, going off by himself, and wanting to be alone. Schizoid type of behavior.”

The Order of Commitment was entered September 29, 1960 in the County Court.

The Hospital Record Progress Notes state that Marvin Robertson was admitted to the Jacksonville State Hospital on September 30, 1960. The first notation states that the patient was brought by a Deputy Sheriff from the Macon County Jail, and farther states "Read the Report of Commission." It was signed by a P. Reynolds, who did not testify in the instant case.

Dr. Pedro Lense testified that, at the time of the occurrence in question, he was a ward physician at Jacksonville with the responsibility of making the initial admission note, and the physical and mental examination of the patient. He prepared the Initial Examination for Marvin Robertson, which consisted of a ten or fifteen minute interview, and physical examination, dated September 30, 1960, as follows:

"Brief Statement of Mental Condition—

Patient is alert, quiet and cooperative. Does not talk freely, and seems hostile. His speech is hesitant and very rambling. States that police brought him here. He does not know why, he says, but tells he was in jail, because he was carrying a 'deadly weapon' (a kitchen knife). Explains he went to see his brother, he thought he was in the police station, and entered there the wrong way (back door). The police searched him, found the knife, put him in jail, and beat him . . ."

Dr. Lense made no effort to determine what actually did occur at the Decatur Police Station. Since the patient was a veteran, he was immediately transferred to the Veterans' ward. "This was not my duty to keep investigating about . . . each patient."

Dr. Lense testified that he did not remember whether the documents entitled "Report of Commission of the Macon County Court", "Petition for Commitment", and "Warrant of Commitment" were available at the time he examined Robertson. However, his testimony reveals that

Robertson's record would have made little difference in his disposal of the case. It was, as follows:

"Q. Would I be correct in saying that, regardless of what information you had about a patient, whether he had a history of prior violent attacks on third parties, as long as he wasn't violent at the time you examined him, he was automatically transferred to Veteran's Nine?

A. Yes."

Robertson remained in the admitting ward from September 30 to October 30, 1960. Dr. Lense further testified that he did not know what security measures were taken in Veteran's Nine, but that it was supposed to be a closed ward, where the patients were kept under surveillance and under observation until the final mental work-up is done. He was not aware that Veteran's Nine had three separate dormitories or a cafeteria, and did not know the number of patients or the number of attendants in the ward.

Dr. Surab Gam, the ward physician, testified that he handled the daily problems in six wards, including Veteran's Nine. The diagnosis of a patient took four to six weeks, and during a patient's stay in Veteran's Nine the diagnosis was not known. Dr. Gam stated that a normal procedure would be to utilize hospital records in examining and treating the patient, although he could not recall whether he used Marvin Robertson's records. He stated that, if the folders did not have full summaries, he may not have read his record, although he agreed that good hospital procedure would require the records to be kept up to date.

Lloyd Meyer, a psychiatric aide assigned to Veteran's Nine in October, 1960, testified that Veteran's Nine had about ten rooms, and only one psychiatric aide was assigned per shift. There were about twenty-two patients in Veteran's Nine at the time of the homicide. He testified that one day Clifton (the deceased) came up to him, took him aside quietly, and reported that

Robertson had something hidden in his pocket. He had Robertson empty his pockets, and took away a bed caster tied with a handkerchief. When Meyer asked why he had it, Robertson said he didn't know. Meyer reported the incident to Dr. Gam, who instructed him to give Robertson a tranquilizer, and said he would see him later. Meyer then noted this in the ward incident book, which is used by the ward attendants for their daily record, and underlined it in red, because he "wanted it to stand out." Meyer testified that Veteran's Eight, another diagnostic facility, was available for veterans, if they were combative, and differed from Veteran's Nine in that two attendants were always on duty.

An entry in the "Progress Notes" of the hospital record, dated October 9, 1960, and initialed by Dr. Gam, states that "Patient removed rollers from bed, tied them in a handkerchief, and hid them in his pocket. When asked why, he stated that he wanted to practice spinning." This was followed by a notation that Compazine had been prescribed. Dr. Gam testified that he had prescribed tranquilizers at that time, but the doses were low, and not for the purpose of keeping the patient harmless, since five times the amount prescribed for Robertson was normally given for such purposes.

Dr. Gam stated he saw Robertson about fifteen or twenty times, and he was not combative at these times. He said that, if a patient showed signs of violence outside, he would probably be given special consideration, and would not ordinarily be placed in Veteran's Nine. Those with homicidal tendencies might be placed in East Hydro, the top security ward, or Veteran's Eight, which has two attendants twenty-four hours a day, with closer supervision and more restricted freedom than Veteran's Nine. Dr. Gam testified, upon being shown the Physi-

cian's Certificate from the Macon County Court record, that he had never seen it. Dr. Gam further testified that Marvin Robertson was not diagnosed until after the homicide on October **24**, 1960.

Witness, Lloyd Meyer, who worked the shift prior to the homicide on October **24**, 1960, said that he did not have occasion to open the cleaning closet wherein the mop equipment was stored, but that the shift preceding his probably had access to it. He did check to see if the closet door was locked. He did not know whether the rollers were missing off the mop equipment.

The attendant in charge of the earlier shift was not called to testify, and respondent states in its Departmental Report that investigation did not reveal the way in which Robertson obtained the instrument used in his attack.

Meyer also testified that the mop buckets were subsequently changed from the roller type to the squeeze type, and that, in addition to two attendants now on duty in the Veteran's Nine Ward, there are more frequent checks of patients and their possessions. He said that the purpose of locking the door in the cleaning closet was to prevent patients from obtaining instruments, which they might use to injure themselves and other patients.

Rubin Sanders, the attendant in charge of the ward during the time of the homicide, testified that he came on duty that night about 11:00. He checked the ward to see if all the patients were in bed, then proceeded to make out his nightly ward reports, which generally take him an hour and a half to complete. He was the only attendant on duty for the three dormitories, and from his station he could see patients going in and out, but could not see into the wards. He did have a patient in the ward, who was designated homicidal and suicidal. This patient was kept in a dormitory by himself at the door where he could

be seen from the nurse's station. Sanders testified that Robertson got up and went into the toilet about 12:00 or 12:15, then returned to the dormitory. Clifton and Robertson were in the middle dormitory with a total of fourteen patients. After Robertson went back to the dormitory, Sanders heard a noise like heavy breathing. A patient called to him to come up there at once. When Sanders got there, he found Clifton injured, and "breathing slower"), a mop roller was lying between two beds, and Robertson was standing by himself between two other beds. Sanders further testified that after the homicide the supervisory nurse brought Robertson's records down, and said lie was homicidal and suicidal, "but we didn't know that."

Leslie Robinson, Chief Security Officer of the hospital, testified that in investigating the homicide he opened the utility room where the buckets were kept, and discovered that the roller had been removed from one of the buckets, but no one knew when the roller was removed.

The diagnosis of Robertson found in the hospital record is dated October 24, 1960, and includes the following :

"A 21 year old colored male, single, eighth grade education. Has recently been taking training in shoe repair. Ever since lie was discharged from the Air Force in 1958, the parents state he has been seclusive, withdrawn and acting peculiarly. He burned his clothing, slept on the floor, preferred to be in the basement at night, and would have a rug over his head. It is possible he has been hallucinating. He lost about fifteen pounds in the past six months. The police picked him up for carrying a concealed weapoii (knife), and he was committed to this hospital. On admission, he was quiet and cooperative, would not talk freely; his speech was hesitant and very rambling. He could not explain why he carried a kitchen knife. He admitted hearing voices while in the Air Force. On the ward, he would smile frequently and inappropriately. About ten days earlier, it was reported he had a bed roller wrapped in a handkerchief in his pocket. On the night of October 24, 1960, he struck another patient, who was asleep, with an iron roller from a mop bucket, killing the other patient. At first, he denied having anything to do with it, but, on further investigation, he

finally admitted he had struck the patient once, would not give any other explanation. . . .”

The diagnosis further stated that, “in view of the patient’s homicidal tendency, it is recommended that he be transferred to the Illinois Security Hospital” with close supervision as a special precaution.

The question of the degree of care owed by the State in operating a mental institution was determined by this Court in *Callbeck vs. State of Illinois*, 22 C.C.R. 722 at 728 :

“The State, in operating a mental institution and caring for mentally ill persons, is, of course, not an insurer of the safety of its employees. The State is, however, under the same duty as a private person or institution having custody of insane persons. It 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. *Malloy vs. State of Illinois*, 18 C.C.R. 137; *Fisher vs. Mutimer*, 293 Ill. App. 201, 220; *Restatement of the Law of Torts*, Sec. 319; *Smart vs. U. S.*, 11 F. Supp. 907, 909; *Rossing vs. State of New York*, 47 N. Y. Supp. 2d 262.”

It is the opinion of this Court that respondent was negligent in the following particulars :

1. Although respondent claims to have had no knowledge of the dangerous and violent character of Marvin Robertson, it is difficult to accept the premise that reasonable precautions to determine the nature of his disturbance upon his commission to the institution would not include an inquiry as to the incidents, which precipitated such commission. Although informed by the patient himself that an incident involving a deadly weapon was at least partially responsible for his commission, no effort was apparently made to read or to obtain the proper public records, which would have detailed the incident, nor was any investigation of such incident even considered. Mere reading of the original ‘Physician’s Certificate’, which was or should have been readily available, would have revealed that Marvin Robertson had dangerous propensities.

2. Respondent acknowledges that a sudden, unpredictable assault and physical attack on one patient by another is a constant possibility and calculated risk in any ward of any mental hospital. Assuming this, when the nature of a person's illness has never been determined, as in this instance, it is unreasonable to place these undiagnosed patients in a virtually unsupervised ward. The mere size and nature of Veteran's Nine would seem to call for more than one attendant, and, subsequent to the homicide, two attendants were indeed placed on duty. If Marvin Robertson had been supervised, as his case warranted, he would have received the special attention given the one homicidal-suicidal patient in Veteran's Nine, or he would have been placed in Veteran's Eight, which took greater security precautions.

3. The incident of the bed caster two weeks before the homicide was apparently of sufficient significance to be placed in the "Incident Book", and underlined in red, as well as to be used in the final diagnosis, and should have alerted the proper personnel to exercise more precaution over Robertson.

4. In the Departmental Report, respondent states that the investigation did not reveal the way in which the assailant obtained the instrument used in his attack, but the rules governing the storing of equipment are intended to make it impossible for disturbed patients to obtain material, which could be used as weapons. It appears that respondent failed in this instance adequately to safeguard such material.

The second question presented to this Court is the extent of damage sustained by claimant. Claimant testified that at the time of the homicide his son was 32, and claimant was 68. The deceased first experienced mental illness in 1959. He was allegedly never irrational, but

had attacks of depression, and found it difficult to perform his work. In 1959, Carol Clifton voluntarily entered the Jacksonville State Hospital. He was discharged after a period of 58 days. He earned about \$50.00 per month doing odd jobs in the neighborhood, and allegedly contributed this money to the household. He chauffeured his father in his father's car, took care of appliances, and assisted claimant in the maintenance of their home and garden, and raised strawberries, raspberries, and rabbits for home consumption and for market.

**An** evidence deposition by Dr. F. G. Norbury, physician for the deceased, was submitted by claimant, in which the doctor stated that Carol Clifton suffered from schizophrenic reaction or dementia praecox, characterized by anxiety and depression. It was difficult for the patient to engage in full time productive employment, but he did have a history of engaging in odd jobs for hire, such as mowing lawns and cutting wood. His likely course of illness was stationary with no marked improvement or deterioration. He should not have required continued hospitalization, and could allegedly have assisted his father, and could have performed household jobs.

It is noted, however, that, in completing forms at the time Carol Clifton entered the hospital, claimant stated "I support the patient myself."

It is the opinion of this Court that claimant be awarded the sum of \$3,500.00.

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(No. 5049—Claimant awarded \$4,339.50.)

SANGAMO CONSTRUCTION COMPANY, A DELAWARE CORPORATION,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1963.*

**BROWN, HAY AND STEPHENS, Attorneys 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.

**PERLIN, C. J.**

Claimant, Sangamo Construction Company, seeks recovery of \$4,339.50 as the balance remaining on a contract for construction work at the Litchfield Armory at Litchfield, Illinois.

The parties have stipulated in part as follows:

“. . . that Sangamo Construction Company, A Corporation, entered into a contract with the State of Illinois, acting through the Department of Public Works and Buildings on behalf of the Adjutant General, for the complete work for roads, walks, grading, etc., at the Litchfield Armory, Litchfield, Illinois, on June 30, 1961 . . .

“. . . that all work done under said contract has now been completed, as is further shown by the report of the Military and Naval Department. . .

“. . . that total contract price was \$30,540.00, of which a total of \$26,190.50 has been paid by the State of Illinois, leaving an unpaid balance of \$4,339.50, which is now due and owing pursuant to the contract.”

It appears from the record that the appropriation for the project lapsed June 30, 1961, and the project was not satisfactorily completed until April 26, 1963.

The Departmental Report of May 3, 1963 states that a final payment in the amount of \$4,339.50 is justified.

The only reason for non-payment of this claim by respondent was lapse of the appropriation. At the time that the appropriation lapsed, there were sufficient unexpended funds available to cover the amount of this claim.

There being no question of law or fact in controversy, as reflected by the stipulation of the parties hereto, an award is hereby made to claimant in the sum of \$4,339.50.

(No. 5 115—Claim denied.)

JOHN ROBERT TELFORD, Claimant, vs. THE BOARD OF TRUSTEES  
OF SOUTHERN ILLINOIS UNIVERSITY, Respondent.

*Opinion* filed November 12, 1963.

MILLER AND PFAFF, Attorneys for Claimant.

C. RICHARD GRUNY, Legal Counsel for Respondent.

PRACTICE AND PROCEDURE—*failure to file notice of intent to sue for personal injuries.* Statute requiring notice of intent to sue State of Illinois in Court of Claims includes claims against any State Authority involved in any action cognizable in the Court of Claims.

SAME—Where claimant filed suit for personal injuries against The Board of Trustees of Southern Illinois University without having first filed the six month notice, claim will be dismissed.

PERLIN, C. J.

Claimant has brought action against The Board of Trustees of Southern Illinois University to recover for damages allegedly suffered as a result of personal injury sustained on June 12, 1961.

Respondent has filed a motion to dismiss on the ground that no notice was filed in the office of the Attorney General and in the office of the Clerk of the Court of Claims within six months from the date of injury, as required by Sec. 22-1 of “An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named.” (Ill. Rev. Stats., Chap. 37, Sec. 439.22-1, hereinafter referred to as the Court of Claims Law.) A secondary basis for respondent’s motion is its statement that “the petition is substantially insufficient in law.”

Claimant alleges that a copy of the notice of its claim was mailed to the Trustees of Southern Illinois University on October 24, 1962. Claimant asserts the novel argument that the notice requirements of Sec. 22-1 of Chap. 37 refer only to actions brought directly against the State of Illinois, and do not refer to actions against

respondent, The Board of Trustees of Southern Illinois University.

Sec. 22-1 provides as follows:

“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.” (Added by Act approved July 10, 1957.)

Sec. 22-2 provides :

“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 cause of action accrued for any personal injury shall be forever barred from further action in the Court of Claims for such personal injury.” (Added by Act approved July 10, 1957.)

Whether Sees. 22-1 and 22-2 refer only to claims against the State of Illinois to the exclusion of other claims cognizable under the Court of Claims Law must be determined according to applicable rules of statutory construction. In *Scofield vs. Board of Education*, 411 Ill. 11, 103 N.E. 2d 640, the Supreme Court declared at page 642:

“It is a generally accepted principle of statutory construction, and has been so held by this court many times, that, in constructing a statute or determining its constitutionality, all of its sections are to be construed together in the light of the general purpose and plan, the evil intended to be remedied, and the object to be obtained, and, if the language is susceptible of more than one construction, the statute should receive the construction that will effect its purpose rather than defeat it.”

Another applicable rule is stated in I.L.P., Statutes, Sec. 123, as follows:

“In construing a statute to ascertain the intention of the General Assembly, the statute should be construed as a whole or in its entirety, and the legislative intent gathered from the entire statute rather than from any one part thereof.” *Phiakos vs. Illinois Liquor Commission*, 143 N.E. 2d 47, 11 Ill. 2d 456; *People ex rel Nordstrom vs. Chicago and Northwestern Ry. Co.*,

142 N.E. 2d 26, 11 Ill. 2d 99; *People ex rel Nelson vs. Olympic Hotel Bldg. Corp.*, 91 N.E. 2d 597, 405 Ill. 440; *Ill. Bell Telephone Co. vs. Ames*, 4 N.E. 2d 494, 364 Ill. 362.

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. *Donaldson vs. Village of Dieterich*, 247 Ill. 522, 93 N.E. 366; *Murphy vs. City of Chicago*, 318 Ill. App. 166, 47 N.E. 2d 494.

It is the opinion of this Court that, unless the Court of Claims Act specifically states otherwise, the term "State" or "State of Illinois" refers to not only the State of Illinois, but to the State Authority involved in any action cognizable in the Court of Claims. When the Court of Claims Act is read as a whole, this result is inescapable. This is demonstrated, for example, by **Sec. 8B** of the Court of Claims Law, which states that the Court shall have jurisdiction to hear and determine the following matters :

"B. All claims against the State founded upon any contract entered into with the State of Illinois."

Nowhere in the statute is the Court of Claims specifically given jurisdiction to hear contract claims against other State Authorities. If claimant's restrictive interpretation of the statute were adopted, a contract claim against any other State Authority would have no forum. We do not believe the Legislature intended this result.

Claims against The Board of Trustees of Southern Illinois University are of the same family as other claims against the State of Illinois in that any appropriation for an award must be made from the same source—the State Treasury.

In view of the foregoing, this Court holds that it was the intent of the Legislature to apply the notice require-

ment to all cases cognizable in the Court of Claims (unless the statute specifically states otherwise) in order to protect the State from unjust claims, and to afford it an opportunity for investigation and preparation of a defense.

Respondent's motion to dismiss for lack of notice is hereby granted.

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(No. 4868—Claimant awarded \$126,135.30.)

GEORGE CASSIDY SONS Co., An Illinois Corporation, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion* filed December 20, 1963.

THOMAS A. GRAHAM and PAUL V. MATON, Attorneys  
for Claimant.

GRENVILLE BEARDSLEY, Attorney General; LESTER  
SLOTT, Assistant Attorney General, for Respondent.

CONTRACTS—*extra* compensation allowed under. Where evidence disclosed that respondent was responsible for delays, change of plans, lack of coordination of prime contractors and faulty plans, an award will be made for increased costs incurred by claimant.

DAMAGES—*burden of proof*. Where claimant's records are inadequate, Court will arbitrarily disallow portion of claim not sustained by the evidence.

SAME—*loss of use of equipment*. Where evidence failed to show that other equipment was rented, loss for tying up equipment will be disallowed.

NOTE, J.

On April 27, 1959, George Cassidy Sons Company, An Illinois Corporation, filed a complaint seeking an award in the amount of \$218,690.58 for damages, extra labor, and material costs incurred in the construction of a new dietary facility at the Kankakee State Hospital.

The complaint recites that the company was awarded contract No. 69662 on June 17, 1957, and that it immediately began construction according to the plans and specifications, which, among other things, provided that the work was to be completed in one year.

Before reciting the difficulties, which occurred on the job, two sections of the specifications should be set forth:

#### ARTICLE 22

The owner, without invalidating the contract, may make changes by altering, adding to, or deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract, except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

No change shall be made, unless in pursuance of a written order from the Supervising Architect, stating that the owner has authorized the change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such change shall be determined in one or more of the following ways:

- (a) By estimate and acceptance in a lump sum.
- (b) By unit prices, named in the contract, or subsequently agreed on.

#### ARTICLE 64

The General Contractor shall provide his own fuel, apparatus and heat as necessary for the thawing or heating of frozen ground and material, and, in the case of the latter, sufficient heat shall be maintained until material incorporated in construction has taken final set, and all danger of damage by frost is past. This shall in no case conflict with requirements of protection in Masonry Specifications.

Where available, all necessary steam for properly heating the building, or buildings, under construction will be furnished to the General Contractor at no cost, but the contractor shall pay for, and make all necessary arrangements with the Heating Contractor for all connections to and from the nearest available heating main and returns, and also for the furnishing and connecting of all temporary heating units sufficient to maintain an even temperature of at least 60 degrees in the building, or buildings, under construction. Heating period shall be as follows: Approximately October 1st to May 30th unless conditions warrant otherwise, then the final decision shall be made by the Supervising Architect's representative in the field.

The plans for this facility were prepared by Samuel A. Lichtmann, associate architect. Shortly after the commencement of the work, claimant noticed certain discrepancies in the plans and drawings. Claimant asked for information regarding a retaining wall, and the alternative bid to construct it, also specifications for slabs, column footings, floor gratings, extent of attic floor, foundation pilaster, glazed tile, and ceiling heights for the kitchen and dining room.

Soil borings were furnished by the State, which proved to be inaccurate, as the water table was higher than reported. As a result, the building was raised *six* inches, and claimant was directed to make the change. The work was delayed, because of differences of opinion with the associate architect as to the necessity of a retaining wall to keep out the water. Thereafter, the associate architect changed his mind, and ordered the retaining wall.

A series of delays thereafter occurred involving steel sash operations, reinforcing steel, color of tile and fabrication of aluminum entrances. The Division of Architecture finally directed claimant to disregard the selection by the associate architect, and it made the selection.

A dispute developed between the Division of Architecture and the associate architect as to the coursing of the masonry, and it was necessary for claimant to run his masonry out of line. As a result, the labor costs were greatly increased.

Final approval of the shop drawings for structural steel were not received until 4½ months after the job was started. During this time claimant had large crews of skilled laborers on hand, and he was obliged to pay "show-up" time in order to keep the men available.

In constructing the building according to the plans and specifications, there was a variance in roof heights, with no provision for closure between the two elevations. This prevented claimant from enclosing the building, so that it could use heat furnished by the State, as provided by Art. 64. As a result, claimant was obliged to furnish heaters and fuel oil to protect the then completed work.

Other prime contracts, which were an integral part of the contract, were not immediately awarded, nor correlated with claimant's work. It further appears that the

plans furnished such contractors were inadequate, or changed so, that, as a result, their inability to do the work caused additional delays to claimant.

Finally, claimant contends that he contracted to build the building in 365 days (June 17, 1957 to June, 1958), but, because of incomplete plans, disagreements between the Division of Architecture and Engineering and the associate architect, and changes of plans, he was delayed until March 31, 1959, a delay of 287 days.

Claimant is asking reimbursement from July 1, 1958 to December 31, 1958, and is not making claim for the period of January 2, 1959 to March 31, 1959.

Respondent's exhibit No. 1 is a copy of the Departmental Report, dated May 7, 1959. It recites in substance :

"1. During the progress of the work, revisions, corrections, alterations, and additional work were necessary to properly complete the project.

2. Claimant's complaint about lack of correlation with other prime contractors is true, and their delays delayed the claimant.

3. Inadequacies were found in the plans and specifications.

4. Claimant was ordered to make changes, and to delay work pending decisions on other matters.

5. Department is unable to check the figures quoted in claim, since day costs are not part of its duty. Therefore, it is impossible to estimate cost of additional compensation.

6. The Division of Architecture and Engineering has checked the estimated completion time, and has found that, under normal conditions, this project could have been completed within the allotted time."

Exhibit No. 3 is claimant's break-down of increased costs, and is the basis of the claim.

INCREASED COSTS		
Superintendent _____		\$ 6,500.00
Rental Equipment		
Compressor _____	\$ 1,950.00	
End Loader _____	6,825.00	
Mortar Mixer _____	1,170.00	
Welder _____	455.00	
Trucks (2) _____	4,800.00	
Heaters (6) _____	7,260.00	
Generator _____	910.00	

Crane _____	10,400.00	, 33,770.00
Additional Material (6" glazed tiles).....		2,310.00
Additional Insurance Premiums.....		2,090.00
Additional Fuel Costs .....		16,835.62
Additional Labor Costs .....	114,893.58	
Workmen's Compensation and Social Security .....	13,775.22	128,668.80
Supervision and Clerical .....		28,516.16
TOTAL COSTS .....		\$218,690.58

Respondent's exhibits Nos. 3 and 4 consist of hundreds of pages, and contain copies of letters between the department and the associate architect; letters between claimant, the department, and associate architect; change orders; and summaries of joint conferences. The matters therein contained are too voluminous to set forth, but this much is clear, the plans of the associate architect were so inadequate that the department should not have let the contract at the time, and ordinary prudence on the part of claimant should have advised it that this job was headed for trouble.

The notes on the joint conference, held on March 14, 1958, with reference to extras, delays, responsibilities, and procedure, illustrate the problem.

"Twelve ventilating diffusers were in error on the drawing. This held up the construction of the ceiling, lathing and plastering. The associate architect assumes part of the responsibility, as they were prepared by his associate mechanical engineer.

"In another matter, the associate architect complained that he was being by-passed by the department. The associate architect stated that the selection of paint colors and ceramic tile was an architectural function, but the department insisted that it would make its own selections."

There are many more items covered in the agenda, but the above illustration points out that there was serious bickering between the architects, and much delay was occasioned, because of their inability to agree. Claimant had to stand by while these differences were resolved.

At a hearing held on May 13, 1959, Mr. James N. Gaunt, Chief of Construction for the Division of Architecture and Engineering, was called as a witness by claim-

ant. He testified that he was acquainted with this job, as he had visited the site during construction. He stated that he was present at all of the meetings when many of the difficulties were discussed, and changes were made.

He stated that the associate architect prepares the plans and specifications; he determines the work to be done and type of material used. Unfortunately in this case the mechanical, electrical and general plans were not of such a nature that they could immediately be combined. In several cases, we (the department) had to make decisions that were normally his (the associate's) responsibility, because of his inability or indecision to do so.

Mr. Gaunt concluded his testimony by stating that the department did not keep day records, which would enable it to estimate the additional compensation due claimant, but he did state they were entitled to additional compensation.

It appears, therefore, from the testimony, records, and Departmental Report, that claimant performed this contract under the direction of the Department of Architecture and Engineering; that additional costs were incurred by reason of delays and changes; and, that claimant is entitled to additional compensation upon due proof of damages.

Returning to claimant's exhibit No. 3, the first item is salary of Superintendent, \$6,500.00. At page 12 of the transcript, Mr. Leo Cassidy testified that he charged the job for 26 weeks at \$250.00 per week, which was the Supervisor's full salary, and further stated that he was also running other jobs.

Copies of the payroll time sheets disclose that claimant had two contracts at the Manteno State Hospital in progress at the same time. It may be presumed that the

supervisor was also being charged to these jobs, and, therefore, the Kankakee State contract should not carry the whole load. Item 1 is, therefore, reduced to \$2,166.66.

Item 2 is a claim for rental of equipment in the amount of \$33,770.00. Claimant contends that their equipment was tied up from July 1, 1958 to December 31, 1958, and that, due to the unwarranted delay, it was not available for other jobs. If, in fact, claimant had to rent equipment for other jobs, its position would be tenable, but the proofs do not support this claim. At page 59 of the transcript, Robert Cassidy was asked :

“Q. Were you required to rent other equipment?

A. In some cases we had to rent other equipment.”

There is no proof in the record to show that claimant was “out of pocket”, because the equipment was at the Kankakee State Hospital from July 1, 1958 to December 31, 1958. Much of this equipment could be transported back and forth from the Manteno job, as the distance is only 12 miles. Since the claimant has failed to show any pecuniary loss, no award will be made for equipment rental.

Item 3 is a claim for additional material, glazed tile, in a total amount of \$12,310.00. Upon cross-examination of Robert Cassidy, it appears that claimant included, or should have included, 2 x 4 glazed tile in its original bid, and the fact that 6 inch glazed tile was used is not material. The witness concluded that the State was entitled to a credit of \$2,310.00. In effect, claimant has acknowledged an error, and, therefore, Item 3 for glazed tile will not be allowed.

Item 4 is a claim for additional insurance premium in the amount of \$2,090.00. At page 24 of the testimony, it appears that the invoice for insurance amounted to \$759.70, rather than \$2,090.00. No explanation was given

to account for the error. Therefore, the claim will be reduced to \$759.70.

Item 5 is a claim for fuel costs in the amount of \$16,835.62, and of this cost, \$12,483.00 is for fuel oil. Article 64, heretofore set forth, is ambiguous. Paragraph one requires the contractor to furnish fuel and apparatus at his own cost. Paragraph 2 states that, where available, all necessary steam will be furnished at no cost to the contractor. Claimant contends that, had he been able to finish the work according to schedule, he would have been under roof and used steam. He further stated that he bid the job on the basis of using State steam; otherwise, he would have included a charge for heat.

Page 8 of exhibit No. 3 purports to be an hourly break-down of fuel costs from July 1, 1958 to December 31, 1958. These figures do not jibe with reality. There would be no fuel oil needed for July, August and September, and to charge 3,612 hours of fuel for October, November and December is incredible.

The exhibit states that the crane used 1,040 hours of gasoline. 1,040 hours equals 130 eight-hour working days, and there were only 130 working days from July 1, 1958 to December 31, 1958. A crane is a special piece of equipment, and this Court is not prepared to believe that the crane was used eight hours a day for the 130 working days from July 1, 1958 to December 31, 1958.

In analyzing this page, it would seem that the total fuel costs would cover the entire building period. The first 12 months must be charged to the original contract, while the next six months could be attributed to the delay. In the absence of better proof in this regard, the Court will assume that one-third of the total bill is a fair adjustment, and this item will, therefore, be reduced from \$16,835.62 to \$5,611.87.

Item 6 consists of a claim for additional labor in the amount of \$128,668.80.

The testimony relates that, due to absence, inconsistency or change in plans, masonry walls were erected, torn down, and later reconstructed. Laborers would show up for work, and thereafter be released for the day, and claimant would be obliged to pay for four hours of "show-up" time.

Page 7 of exhibit No. 3 indicates the actual hours of labor performed by each trade. Claimant then includes an estimated number of hours, which should have been the hours required, had the job been completed on time. For example :

#### MASONS

Actual Hours	Estimated Hours	Difference	Rate	Total
13,570.5	6,880	6,690.5	\$3.60	\$24,085.80

From the above, it would appear that labor for masonry was almost twice the estimated price. A difficulty facing this Court is the use of claimant's figures as proof of damages. The figure of 6,880 estimated hours for masonry could be entirely self-serving.

The Attorney General did not question the figure, or offer any proofs to the contrary, and did not object to the exhibit being offered into evidence. The only corroboration as to their validity is found in the testimony of James N. Gaunt at page 81 :

"Q. As long as you have never seen them (payroll record), would you have any idea whether or not their payroll records are correct?"

A. I would not hazard a guess on that. Their payroll records are, in all probability, on file in a couple of departments of the State. I do not think they would dare offer them as evidence if they were not correct. The Department of Labor bases Workmen's Compensation payments on the basis of their records."

Pages 2, 3 and 4 of exhibit No. 3 are a break-down of all labor costs from the beginning of the job on June 12, 1957 to December 31, 1958.

The payroll records support the claim from July 3, 1958 to September 10, 1958, but there are no payroll records from September 10 to December 31, 1958. From the claim, the following must be disallowed:

Masons _____	133 hours @	\$3.60	\$ 478.80
Iron Workers _____	165 hours @	3.475	573.38
Carpenters _____	409 hours @	3.20	1,308.80
Laborers _____	112 hours @	2.45	274.40
			\$2,635.38

We are of the opinion that the claim for additional labor costs is excessive, and are, therefore, arbitrarily reducing it by an additional 15%. The labor claim is, therefore, reduced from **\$114,893.58** to **\$95,419.47**.

The claim for workmen's compensation, public liability and social security is based on 12% of the payroll records on the reduced amount. This would amount to \$11,466.74. As to the proofs under this item. Mr. Robert Cassidy at page 65 of the transcript testified, "We took what we considered a normal percentage in the industry, which was 12% for the total labor cost."

This statement hardly qualifies as proof, as social security charges during 1958 were 2¼% of payroll, and workmen's compensation charges ranged from 1.74 to 4.45, depending upon the trade and job conditions. Since the burden of proof is upon claimant, and there is inadequate proof, this Court will arbitrarily limit recovery to 6% of the payroll. This would amount to \$5,725.17.

Item 8 of the claim relates to supervision and clerical in the amount of \$28,516.16, and is based on a charge of 15% of all the items listed, except the claim for Superintendent. 15% of the revised amounts, \$109,682.87, would total \$16,452.43. This claim, at a rate of 15% for the extras involved, is in keeping with the usual charges of the industry, and is proper.

Page 1 of exhibit No. 3, heretofore referred to, would appear as follows with the deletions noted:

	Amount Asked	Amount Allowed
1. Superintendent _____	\$ 6,500.00	\$ 2,166.66
2. Rental of Equipment _____	33,700.00	None
3. Additional Material _____	2,310.00	None
4. Additional Insurance Premiums..	2,090.00	759.70
5. Additional Fuel .....	16,835.62	5,611.87
6. Additional Labor _____	114,893.58	95,419.47
7. Workmen's Compensation and Social Security _____	13,775.22	5,725.17
SUB-TOTAL _____		\$109,682.87
8. Supervisor and Clerical .....		16,452.43
TOTAL _____		\$126,135.30

Respondent, in its brief, does not deny the essential allegations of the claim, but contends that Article IV, Section 19, of the Constitution :

“The General Assembly shall never grant or authorize extra compensation, fee or allowances to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void; PROVIDED, the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion.”

prohibits the General Assembly from making any appropriations to pay the claim, and cites *Fergus vs. Brady*, 277 Ill. 272. J. B. Fergus filed a bill seeking an injunction against the Auditor and Treasurer of the State from paying various sums appropriated by the General Assembly to certain boards and individuals. The bill alleged that appropriations amounting to more than \$400,000.00 were illegal, because they were in excess of the revenue authorized to be raised by taxation. Demurrers and special demurrers were filed, and the case was thereafter decided as a matter of law.

The court construed Sec. 18, which is not germane to our case, and with reference to Sec. 19 at page 279, the court stated :

“In Sec. 19, claims under any agreement or contract made by express authority of law are excepted, and, if there is some particular and specific thing, which an officer, board or agency of the State is required to do, the performance of the duty is expressly authorized by law.”

The court then affirmed the trial court, and held there was no express authority of law to authorize the payments.

A recent case decided by this Court, *George E. Beardsley vs. State of Illinois*, No. 5048, is a perfect example of the application of Sec. 19. In 1961 the General Assembly passed a statute creating the Illinois Industrial Authority. George E. Beardsley was employed as General Manager at a salary of \$12,000 per year, and he thereafter set up an office, and engaged clerical help. He was paid his salary and expenses until March 23, 1962, when the Supreme Court found the statute was unconstitutional. The Auditor and Treasurer then refused to issue warrants for unpaid bills, and a claim was filed in the Court of Claims.

This Court held that a statute, found unconstitutional under Sec. 19 of Art. IV of the Constitution, would prevent this Court from making an award, as it would constitute a payment *without express authority of law*.

The test in this case, therefore, is to determine whether or not there is express authority of law, which would authorize the Department of Public Welfare to enter into this contract, to create additional charges for extras, and be accountable for undue delays.

The largest Code Department of the State of Illinois is the Department of Public Welfare. It employs more than 13,500 persons. It operates 26 institutions, containing more than 10,000 acres, and has under its

control 1,430 buildings. It feeds, houses and cares for many thousands of people, and, while the amount of the appropriation does not appear in evidence, it is common knowledge that it amounts to many millions of dollars.

It is also common knowledge that the State is constantly expanding the services of the department by authorizing the construction of new clinics and hospital facilities. Due to the complexity of its operations, it is undoubtedly true that contracts cannot be completed within the biennium, and, as a result, vast sums of appropriated money do lapse.

With this background, it is apparent that the department is authorized by law to expend large sums of money for the ever increasing demands of the State.

Attention is directed to Article 22 of the plans and specifications, wherein the State, as owner, reserves the right to alter, add, or deduct work from the contract, and it agrees to pay by estimate and acceptance of a lump sum or by unit price. This is a standard provision in building contracts, whether the builder be the State or an individual as a practical matter. There is no alternative to the provision, as the State must reserve the right to make changes or add to the work, and it must be assumed that the department will act in good faith, and complete a structure for its best intended use.

The Court, therefore, finds that this contract, with its provisions for changes and alterations, was authorized by law.

This Court has held that, where a contractor has been prevented by the State from completing his contract due to delays, changes in plans, and increased costs, an award will be made.

*Divane Brothers Electric Company, A Corporation, vs. State of Illinois, 22 C.C.R. 546*

*Hyre Electric Co., An Illinois Corporation, vs. State of Illinois, 22 C.C.R. 554*

This Court has also held in previous cases that, if funds were available under an appropriation, which could have been used to pay authorized bills, and would have been used, if, in fact, the fund had not lapsed, an award will be made.

*M. J. Holleran, Inc., vs. State of Illinois, 23 C.C.R. 17*

*Standard Oil Co., Indiana, Inc., A Corporation, vs. State of Illinois, 23 C.C.R. 72*

*Sankey Bros., Inc., A Corporation, vs. State of Illinois, 23 C.C.R. 223*

From the Departmental Report, it is apparent that, if the contract had been completed within the biennium, the department would have determined an amount, which it believed was fair and proper, and paid claimant, but, since the appropriation had lapsed, claimant has been obliged to seek redress in the Court of Claims.

The Court, therefore, finds that claimant, George Cassidy Sons Company, A Corporation, is entitled to an award in the amount of \$126,135.30.

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(No. 5095—Claim denied.)

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

*Opinion filed December 20, 1963.*

JAMES QUALL, Claimant, pro se.

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

*SERVICE RECOGNITION BOARD—practice and procedure.* To sustain an award, complaint must allege that claimant obtained an honorable discharge, or that his case was pending before the Service Recognition Board on May 20, 1953.

DOVE, J.

James Quall, claimant, filed his claim in this Court on February 27, 1963, alleging:

That he enlisted in the United States Naval Reserve in the Board of Trade Building, Chicago, Illinois on July 14, 1942; that he reported for active duty on September 3, 1942, and was honorably discharged on August 3, 1943. On August 4, 1943, he accepted appointment as an Ensign in the United States Naval Reserve, and reported for active duty. He was discharged from the Naval Reserve under honorable conditions on June 2, 1944. Attached to the complaint is a copy of a letter received by claimant from the Department of the Navy Board for Correction of Naval Records, and copy of claimant's honorable discharge from the United States Navy. Claimant requests that an award be made to him under the Illinois Bonus Act.

On October 9, 1963, this Court granted leave to respondent, upon motion duly made, and upon giving notice to claimant, to file a motion to strike and dismiss the claim. No objections were filed to the motion, and this cause now comes on for hearing upon the complaint and motion filed by respondent thereto.

The question presented here concerns Sees. 52 and 65, Chap. 126 $\frac{1}{2}$ , Ill. Rev. Stats. These read as follows:

"All applications for compensation under this Act must be made to the Service Recognition Board before July 1, 1951, and no payment shall be made under this Act except on applications received by the Service Recognition Board before that date

"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."

Claimant does not allege that he obtained an honorable discharge prior to July 1, 1953, nor does he allege that he had a claim pending before the Service Recognition Board on May 20, 1953. In our opinion both allegations are necessary before this Court could make an award to claimant.

The decision of the Board for Correction of Naval Records, under the date of April 26, 1962, reads as follows :

“Decision—It is the decision of this Board that petitioner’s dismissal be changed to a separation under honorable conditions.”

We are of the opinion that the complaint filed herein does not state a cause of action, which would entitle claimant to an Illinois Bonus. (*Sargeant vs. State of Illinois*, 22 C.C.R. 475.)

It is the opinion of this Court that the motion to strike the complaint filed herein should be, and the same is hereby allowed, and the complaint filed herein dismissed.

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(No. 5120—Claimant awarded \$283.00.)

FRANK HUBBARD ELECTRIC CO., A CORPORATION, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion* filed December 20, 1963.

DOWNING, SMITH, JORGENSEN AND UHL, Attorneys 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.

PERLIN, C. J.

Claimant, Frank Hubbard Electric Co., A Corporation, seeks recovery of \$283.00 as the balance remaining

due on a contract for electrical work at the Litchfield Armory Building, Litchfield, Illinois.

The parties have stipulated in effect as follows:

“Claimant, on June 22, 1961, submitted a firm bid in the amount of \$725.00 for electrical work on the Litchfield Armory Building;

“The acting supervising architect for respondent accepted said bid by letter, dated June 30, 1961;

“Claimant completed the work in accordance with the plans and specifications, and, on November 27, 1961, made an application for a certificate of payment for the final payment of \$225.00;

“Claimant received a letter, dated May 17, 1962, from the acting supervising architect for respondent stating that the funds necessary to pay claimant were no longer available, and that it would be necessary to file a claim with the Court of Claims;

“That, upon request of the acting supervising architect, claimant did an additional \$58.00 worth of work on said Litchfield Armory, not called for in the original contract between the parties;

“That there is now due and owing to claimant by respondent the amount of \$283.00.”

It appears from the record that the appropriation for the project lapsed June 30, 1961, and the project was not completed until September 15, 1962.

The only reason for non-payment of this claim by respondent was the lapsing of the appropriation. At the time that the appropriation lapsed, there were sufficient unexpended funds available to cover the amount of this claim.

There being no question of law or fact in controversy, as reflected by the stipulation of the parties hereto, an award is hereby made to claimant in the sum of \$283.00.

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(No. 5065—Claimant awarded \$2,844.00.)

**HERSCHEL L. SUNLEY, Claimant, vs. STATE OF ILLINOIS,  
Respondent.**

*Opinion filed February 28, 1964.*

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

CONTRACTS—*lapsed appropriation.* mere 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.

PERLIN, C. J.

Claimant, Herschel L. Sunley, seeks to recover the sum of \$2,844.00 for constructing two wash racks at the Illinois State Fair Grounds in Springfield, Illinois.

The Departmental Report of the Department of Agriculture, submitted by Louis London, Assistant State Fair Manager, states in part as follows:

“1. Mr. Sunley was the general contractor at the Illinois State Fair residing in Springfield, Sangamon County, Illinois.

2. Mr. Sunley was employed by the Department of Agriculture, Division of Illinois State Fair, during the months of May, June and July, 1960 to perform various duties of contracting work, and to furnish certain materials, as requested by the general manager.

3. J. Ralph Peak, who was General Manager at the time, requested Mr. Sunley to furnish all labor and materials to erect two livestock wash racks, one being between Barns L and M, and the other between Barns N and O at the State Fair Grounds.

4. Mr. Sunley and his men performed all work, and furnished material to erect the two wash racks, which were later accepted by the Department during the month of July, 1960, and are still in use.

5. As far as I know, payment has not been made to the claimant for any of the work done on these two wash racks.”

Mr. Sunley, who was the only witness called by either of the parties, testified that he presented two proposals for the construction of wash racks to the Department of Agriculture, State of Illinois, in 1960, one calling for work and materials in the amount of \$1,478.00, and the other calling for work and materials in the amount of \$1,366.00. Copies of such proposals were received in evidence.

Mr. Sunley further testified that the proposals were accepted by the Department of Agriculture, and that he thereafter performed the work. The labor and materials were accepted by the State, and the State has been using the wash racks since they were erected. Sunley stated that he has been paid nothing for the work,

and that \$1,478.00 and \$1,366.00, respectively, are due him for the two jobs. The jobs were completed about August 1, 1960. Mr. Sunley testified that a bill submitted shortly thereafter was not paid.

Since there appears to be no dispute concerning the fact that claimant was engaged to construct the two wash racks, and that the work was performed satisfactorily, claimant is hereby awarded the sum of \$2,844.00.

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(No. 5067 — Claimant awarded \$1,493.35.)

JACK MUSE, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed* February 28, 1964.

VANDEVER AND VANDEVER, Attorneys for Claimant.

WILLIAM G. CLARE, 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.

PERLIN, C. J.

Claimant, Jack Muse, Inc., seeks recovery in the amount of \$1,493.95, as the balance remaining due on a contract with the State of Illinois, acting by and through its Department of Public Works and Buildings, Division of Architecture and Engineering, for mechanical work at the Litchfield Armory, Litchfield, Illinois.

The net amount of claimant's contract, dated June 30, 1961, was \$4,289.00. Jack Muse, President of claimant corporation, testified that claimant had completed all work under the contract, and had been paid \$2,795.65, leaving a balance of \$1,493.35.

The Departmental Report of the Military and Naval Department, to which the funds had been appropriated, stated that claimant had completed the provisions of the

contract, and inspection and approval had been made on April 26, 1963, "which now justifies final payment in the amount of \$1,493.35." The Report, signed by Donald R. Grimmer, Assistant Adjutant General, also stated that the reason for nonpayment was that the contract was not completed by September 30, 1961, when the funds were lapsed and returned to the General Revenue Account.

Where a contract with the State 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, this Court will enter an award for the amount due. *National Korectaire Co. vs. State of Illinois*, 22 C.C.R. 302,305.

It appears that all qualifications for an award have been met in the instant case. Claimant is hereby awarded the sum of \$1,493.35.

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(No. 5127—Claim denied.)

JOHN W. McDONALD, Claimant, vs. THE TEACHERS COLLEGE BOARD, Respondent.

*Opinion filed February 28, 1964.*

ANDERSON AND ANDERSON, Attorneys for Claimant.

DUNN, DUNN AND BRADY, Attorneys for Respondent,  
The Teachers College Board.

NEGLIGENCE—*notice of intent to sue.* Where pleading showed that claimant had not filed a notice pursuant to Sec. 22-1 of the Court of Claims Act, his claim will be dismissed.

DOVE, J.

Claimant filed his complaint in this Court on October 18, 1963 alleging:

1. That claimant resided at 509 Nichelson Street, Joliet, Illinois;

2. That on the 4th day of September, 1961, claimant, prior to the commencement of the first semester of the academic year 1961-1962, was engaged in the practice of football at Northern Illinois University, DeKalb, Illinois, under the direction and supervision of the Athletic Department of said University;

3. That on the said 4th day of September, 1961, while so participating in the said practice of football, claimant received a blow to his left knee, thereby injuring the same ;

4. That on the 5th day of September, 1961, claimant reported to Dr. Otto J. Keller, Director of the Student Department of Health Service, and was advised by the said Dr. Otto J. Keller of the necessity for consultation with an orthopedic specialist:

5. That upon consultation with Dr. Frank H. Hedges, Jr., claimant's family orthopedic specialist, it was found necessary that claimant submit to an operation; that said operation was performed on the 23rd day of December, 1961; and that all expenses of said operation have been borne and paid by claimant, and without reimbursement of any kind or nature ;

6. That the expenses of the operation, as set forth in Paragraph 5, amount to the sum of \$831.25, and that, after allowing all set-offs, there is now due and owing claimant by respondent the sum of \$831.25;

7. That the said claim has been presented to Northern Illinois University for payment, and the said University, by and through its Athletic Director, George G. Evans, and its co-ordinator of Student Financial Aid, Philip L. Shields, has denied payment of said claim on the grounds that no funds were available to pay said claim; that claimant is the sole owner of said claim; that claimant has made no assignment or transfer of in-

terest thereof, and prays judgment against respondent herein in the sum of \$831.25.

Attached to the compl.int is exhibit A, which sets forth the amount of the doctor's statement and hospital bills, totaling \$831.25.

On November 7, 1963, respondent, The Teachers College Board, filed a motion to dismiss this matter, and furnished therewith a proof of service of a copy on counsel for claimant. No objections were filed to the motion, and this cause now comes on for hearing upon the complaint and motion filed by respondent thereto.

The question presented here concerns Chap. 37, Sees. 439.22-1 and 439.22-2 of the 1961 Ill. Rev. Stats., which reads as follows :

"Within six months from the date that such 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.

"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."

Claimant does not allege that he has filed notice, as provided by the above statute, and we are, therefore, of the opinion that the complaint filed herein does not state a cause of action, which would entitle claimant, John W. McDonald, to recover from respondent, The Teachers College Board.

It is the opinion of this Court that the motion to strike the complaint herein be and the same is hereby allowed, and the complaint filed herein dismissed.

(No. 4791—Claimant awarded \$110,412.13.)

MATTHEW M. WALSH and JOHN J. WALSH, A Co-Partnership,  
D/B/A WALSH CONSTRUCTION COMPANY, Claimants, vs. STATE  
OF ILLINOIS, Respondent.

*Opinion filed* May 12, 1964.

GRAHAM, WISE AND MEYER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; SAMUEL J.  
DON and LAWRENCE W. REISCH, JR., Assistant Attorneys  
General, for Respondent.

CONTRACTS—*extra compensation allowed under.* where evidence disclosed that respondent was responsible for delays, errors and omissions, which prevented contractor from completing his contract, an award will be made for the increased cost necessitated thereby.

DAMAGES—*burden of proof.* An alleged loss of records by the State does not excuse claimant from keeping adequate records, and, in the absence thereof, the Court will not speculate on damages alleged by claimant.

PEZMAN, J.

On September 30, 1957, claimants filed their original complaint seeking an award in the amount of \$151,549.89 for losses, alleged to have been sustained by them in the construction of certain buildings at the Tinley Park State Hospital, Tinley Park, Illinois. On April 24, 1959, claimants filed an amendment to the complaint by adding additional items to the bill of particulars, and thereby increasing the ad damnum to \$216,788.61.

The above entitled cause was heard by a Commissioner on December 19, 1958 at Chicago, Illinois. Claimant, Matthew M. Walsh, was the sole witness for claimants. Respondent's evidence consisted of the Departmental Report. On the 2nd day of June, 1959, the Court on its own motion found that the record was inadequate and insufficient for a proper consideration of the cause and of claimants' damages, and ordered the matter heard "en banc". The cause was heard in 1960 by the Court of Claims, consisting of Judge Gerald W. Fearer, Judge James B. Wham and the late Joseph J. Tolson, Chief Justice.

Since the facts of the case are extremely complex, a preliminary statement identifying the separate contracts, the location of the buildings, and the problems confronted are hereafter set forth.

Prior to June 1, 1951, the State of Illinois determined that a new hospital was needed, and a large tract of land, formerly a farm, was purchased near Tinley Park, Illinois. The firm of Skidmore, Owens and Merrill of Chicago, Illinois, was engaged as associate architects to prepare plans and specifications, and thereafter bids were taken for the proposed work. The project involved multiple bids for the different kinds of work to be performed, and claimants were the successful bidders on three of the jobs.

- |   |              |
|---|--------------|
| 1. Contract No. 66921 — Power Plant.....          | \$370,411.00 |
| 2. Contract No. 6748 — Water Treatment Plant..... | 334,000.00   |
| 3. Contract No. 6745 — Swage Treatment Plant..... | 227,000.00   |

The work was commenced at a time when the Korean War was in progress, and the matter of obtaining priorities for needed material was of great significance in the performance of the contracts.

For the purpose of clarity, each of the jobs will be identified by its number and discussed separately, and thereafter a summary of each claim will be set forth in a recapitulation.

### CONTRACT NO. 66921 POWER HOUSE

The plans and specifications called for the construction of a two story brick and glass building, together with a full basement and smaller brick building located nearby.

Matthew M. Walsh testified that he examined the plans and specifications, and, prior to May 1, 1951, went out to the site to examine the premises, so that he could prepare a bid. (The plans were in accordance with usual

practices, requiring a bidder to inspect the site, as he would thereafter be charged with knowledge of bidding conditions.) An access road was under construction at the time, and he stated, though it was rough, he could and did drive over it to the area where the contracts were to be performed, if his firm was the successful bidder. The contract for the road had been let at a prior time, and was to be finished in **45** days, so that the other contractors would have access to the interior of the farm land to perform their work.

Claimants submitted their bids on May 5, 1951, and the State extended the time for acceptance to June 30, 1951, as the road was incomplete. Mr. Mocardell, Chief of Construction, assured claimants that the road would be completed when construction started. The road was not completed in the **45** days, and, in fact, was not completed until 1956 due to a peat condition, which was discovered in the road bed.

Claimants lay great stress on this absence of an access road, as their bid was predicated on the plans, which described the road in the blueprints, and their examination of the building site, which showed the road under construction, and their assurances that a hard road would be ready for them to haul in steel, concrete, etc., needed in the performance of their contract.

On July 10, 1951, claimants started the excavation of the basement, and completed it on August 17, 1951. Wooden perimeter forms were set so that the concrete floor could be poured.

At this state of the construction, plumbers should have been installing drains, and electricians should have been installing conduits, and, if this had, in fact, been done, the entire floor would have been in place by September 4, 1951.

It was then discovered that the plans for plumbing and electrical work were incomplete, and Mr. Gilbertson, Field Superintendent for the State, stopped the pouring of the concrete.

While claimants waited for the State to procure plans and specifications for the plumbers and electricians, who were bidders on separate contracts, torrential rains hit the area, and claimants were obliged to pump the excavation for many days, and thereafter to remove and clean the reinforcing steel, remove and wire brush the steel rods, reset and realign the forms.

On October 5, 1951, claimants were directed to pour the slab despite the fact that the electrical conduits were not in place. At this point, claimants allege that the State was negligent in not having plumbing and electrical plans available, so that the work could have been performed a month earlier, and, if they had been available, claimants would not have had to pump the excavation, and re-do the work that was in place ready for concrete.

On October 25, 1951, claimants started work on the walls. This work was stopped by the State, as the electrical plans were still incomplete, and no provisions were made for sleeves for the pipe contractor.

Claimants made repeated efforts to get the State Architect and the associate architect to complete the drawing, so that they could continue with the work. Months went by, and it was not until March 5, 1952 that claimants were authorized to proceed with the work. The basement concrete was not finished until April 24, 1952, many months behind the schedule.

The slab floor and walls had been poured with reference to the location of the steel to be erected on the area built up for a certain type of diesel motor and generator. It appeared that the electrical contractor was given the

option to install another type of equipment, and, when he exercised his option, the slab had to be altered, footings had to be cut, the roof had to be altered, and changes had to be made in the type and kind of steel.

Claimants urge that the State should have inquired as to the type of electrical equipment to be installed before directing claimants to comply with the original plan, and thereby avoided the additional work.

In summarizing Contract No. 66921, claimants allege that they bid the job, so that it could be completed in 360 working days, i.e., June 30, 1952. They allege that the State failed to provide other contractors with plans and specifications on time, so that their work could be correlated into his contract. They allege that changes in the plans threw their work schedule behind, so that they did not complete the building until June of 1954, and that they incurred great expense because of the neglect of the State.

#### CONTRACT NO. 6745 SEWAGE TREATMENT PLANT

Claimants were the successful bidders on the treatment plant, as their bid was accepted on July 20, 1951. The contract was to be completed in 360 days.

The excavation was started, but on August 1, 1951 they were instructed to suspend operations due to a pending revision of plans. On November 23, 1951, claimants were instructed not to have any steel fabricated for the sewage plant, as further revisions were being made.

On March 26, 1952, claimants began the excavations for the main control house, when peat was discovered. The architects directed claimants to halt operations. Work was again started, and the basement and walls were completed on July 1, 1952. When claimants requested the structural steel, it was found that none was available, and

the steel did not arrive until November or December of 1952.

Since the structure could not be placed under roof, due to the absence of steel, the rains, mentioned previously, filled the basement twice, and required days of pumping.

Claimants allege an unwarranted delay of nine months in furnishing plans as to all buildings, except the trickler filter, and, as to this structure, the delay was 13 months.

Claimants further allege the State was responsible for a four month delay in furnishing steel.

#### CONTRACT NO. 6748 WATER TREATMENT PLANT

This contract called for the construction of a control house, a water softening basin, a reservoir, 3 pump houses, and a water tank. Claimants' bid was accepted on July 20, 1951 with work to be completed in 360 days.

Despite the contract, a series of revisions were made by the architects, so that the work did not get underway for 23 months. The revised plans called for work that was not included in the original contract, and the claim for damages is summarized in the recapitulation.

Claimants in their brief have set up their claims under certain categories, as they affected all three contracts, and, for purposes of expediency, they were set forth as follows :

#### BOX-OUTS AND SLEEVES

All of the buildings constructed under the three contracts required pipes to be inserted in the outer walls for water, steam, sewage, etc.

Box-outs are forms inserted in the walls prior to the pouring of concrete, which are thereafter removed, so

that sleeves may be placed in order that pipes may be inserted inside the sleeves.

If the plans had been completed properly and on time, the box-outs would have been installed when the forms were set, and the walls would have been poured in the conventional manner.

For reasons that were never explained by the architects at the hearing, the plans were totally deficient as to type, size, and location of these box-outs, and, after the walls were poured, claimants were instructed to go back and cut the walls, frame, brace and grout, and install the box-outs.

As to this element of damage, the State has admitted its error in the plans, and the work was thereafter ordered to be performed by claimants. The summary of this claim is as follows:

No. 66921—Power Plant		
Constructing box-outs .....	\$675.54	
Forming, bracing, grouting .....	578.13	
No. 6754—Sewage Treatment Plant		
Constructing box-outs .....	6,530.69	
Forming, bracing, grouting .....	5,881.55	
No. 6748—Water Treatment Plant		
Constructing box-outs .....	1,853.98	
Forming, bracing, grouting .....	2,167.48	
Total .....	\$17,687.37	

With respect to this claim, Mr. Gaunt, Chief of Construction for the State of Illinois, was requested by the Department of Public Welfare, to prepare a cost breakdown of the claim. He testified that, in his opinion, the amount of damages sustained was \$13,748.18.

#### LACK OF ACCESS ROAD

As was mentioned earlier in the opinion, the plans showed an access road, which was under construction in May of 1951. This contract was let on January 9,

1951 with a completion date of 45 days. Due to the peat condition encountered, the road was not completed until 1956, and was, therefore, unavailable to claimants.

Claimants allege they bid the job on the assurances that the road would be available, and, therefore, arrived at a figure using batch concrete at a cost of \$8.50 per cubic yard.

The only other road available was a farm lane, and in wet weather this road became a sea of mud.

Claimants allege that they were unable to move trucks into the field to prepare batch concrete, and were compelled to buy ready-mix concrete at a cost of \$10.75 a yard, a difference of \$2.25 per yard. They were only able to accomplish this by hooking a bulldozer to the ready-mix truck, and pulling it to the job site.

The three contracts called for 7,200 yards of concrete, 1,500 yards of which were batch concrete, and the balance was ready-mix.

Claimants allege that they rented a bulldozer for 162 days at a cost of \$80.00 per day to pull the ready-mix trucks through the fields.

Claimants also allege that they were obliged to truck their employees to and from the job site due to lack of roads with the attendant loss of working time.

As further proof of undue delay on the part of the State, claimants allege that repeated requests were made upon the State to secure the necessary priorities for steel. Mr. Gaunt testified that it was the responsibility of the State to get the priority, but for some reason the State neglected to do so.

The amended complaint summarizes the balance alleged to be due claimants as follows:

Power Plant—

Increases in the cost of labor and materials, supervision, overhead, insurance, etc., on Contract No. 66921.... \$31,396.31

## Water Treatment Plant—

Increases in the cost of labor, materials, supervision, overhead,  
insurance, etc., on Contract No. 6748.....25,851.78

## Sewage Treatment Plant—

Increases in the cost of labor, materials, supervision, overhead,  
insurances, etc., on Contract No. 6754.....19,825.72

Pumping of excess water from farm drainage systems, Con-  
tract No. 66921..... 8,351.70

Pumping of excess water from farm drainage systems, Contract  
No. 6748 .....7,530.60

Pumping of excess water from farm drainage systems, Contract  
No. 6754 .....5,117.70

Additional labor necessary to complete Contract No. 66921  
.....66,492.60

Additional labor necessary to complete Contract No. 6748  
.....37,193.30

Additional labor necessary to complete Contract No. 6754  
.....35,028.90

Total ..... 236,788.61

Paid by respondent on above.....20,000.00

Balance due ..... \$216,788.61

When this case was tried before the Court, claimants discovered that certain payroll records were duplicated on some of the exhibits, and, to conform to the proofs, the ad damnum was reduced from \$216,788.61 to \$166,053.43.

Mr. J. N. Gaunt, Supervising Architect, testified as an adverse witness for claimants and as a direct witness for the State. He confirmed generally the allegations of claimants as to unreasonable delays, failure to provide plans and specifications on time, changes in plans, failure to obtain priorities, increases in the cost of labor and materials throughout the building period, but he denied the rights of claimants to the profits on the work done, as prayed for in the amended complaint. He summarized his estimate of their losses as follows:

- |  |              |
|--|--------------|
| (a) Box-out openings .....                                       | \$ 13,748.18 |
| (b) Increased cost of concrete and materials to<br>the job ..... | 25,875.00    |
| (c) Increased cost of direct expense .....                       | 17,100.00    |

(d) Increased cost of labor and materials.....	27,747.88
(e) Additional labor based on $\frac{1}{3}$ of the claim .....	25,941.07
Total .....	\$110,412.13

This case has been tried twice, once before the Commissioner, and again before the Court en banc. The record is voluminous, and hundreds of exhibits have been introduced in the case. It is difficult to summarize the many facets of the case, but, in general, it appears that there was a great need for a hospital facility, and the State decided to build it at the time despite shortages. The general contracts were let before the plans and specifications of the sub-contracts were in bidable form. The most glaring error in the all-over program was the lack of available drainage for the project. This, coupled with unprecedented rains, did more to increase the costs of the contracts than any other matter.

The State has admitted from the outset that claimants were entitled to additional compensation, but it is apparent from the testimony that this project, with all its complexities, developed ill will between the associate architect, the State Architect's Office and claimants to the point where it was impossible to review and adjust these differences while records were available in the respective offices.

The State has acknowledged the errors and omissions on its part, and concludes that claimants are entitled to additional compensation in the amount of **\$110,412.13.**

Claimants allege that they need not prove their claim with mathematical certainty, and state that they furnished the associate architect and the State with numerous receipts and invoices that would prove their claim, but that such records were lost or misplaced by them; so that they were not available to claimants when requested.

The Court does not believe that such alleged loss of records by the State should excuse claimants from keeping adequate records of their own, and in this regard the Court will not speculate on damages that are alleged by claimants.

It further appears to the Court that claimants have engaged in institutional building for a number of years. When the innumerable problems arose, a prudent contractor would have stopped the job until the several contracts were in shape, so that the work would be done in accordance with good building practices, and, since they failed in this regard, they must share in part of the responsibility.

This Court has held that, where a contractor has been prevented from performing his contract by the State, an award will be made for the increased costs necessitated by the delay. *Divane Bros. Electric Co., A Corporation, vs. State of Illinois*, 22 C.C.R. 546.

Where it appears that a contractor was damaged by reason of a change of plans by the State, an award will be made, and, if extra work is ordered, a claimant will be entitled to an award. *Hyre Electric Co., An Illinois Corporation, vs. State of Illinois*, 22 C.C.R. 555.

The State is liable for actual damages sustained by a contractor arising from unreasonable delays caused by the State. *Bosley Wrecking Company, An Illinois Corporation, vs. State of Illinois*, 23 C.C.R. 126.

On the basis of the above authorities, the Court finds that an award should be made to claimants.

Pursuant to motion on behalf of claimants, the suggestion of death of John J. Walsh on the 25th day of September, 1961 was entered of record, and it was ordered by this Court that the suit proceed in the name of Matthew M. Walsh d/b/a Walsh Construction Company.

An award is, therefore, made to Matthew M. Walsh, d/b/a Walsh Construction Company, in the amount of **\$110,412.13.**

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(No. 4951—Claim denied.)

**BARNABAS F. SEARS and WILLIAM S. BODMAN, Claimants, vs. STATE OF ILLINOIS, Respondent.**

*Opinion* filed May 12, 1964.

WILLIAM J. LYNCH, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; BERNARD GENIS and EDWARD A. BERMAN, Assistant Attorneys General, for Respondent.

STATE OFFICERS AND AGENTS—when State elected officers may hire independent legal counsel. The Attorney General has inherent power to appoint special Assistant Attorneys General.

**SAME—compensation.** Where the Attorney General appointed special Assistant Attorneys General, and in the letters of appointment specified that compensation was to be sought from either the funds of the savings and loan association to which the litigation related or out of the appropriation for the Auditor of Public Accounts, there can be no claim for legal fees based upon a contract with the State of Illinois, when, in fact, there was no appropriation for the Auditor of Public Accounts.

PEZMAN, J.

The case at hand was brought by Barnabas F. Sears and William S. Bodman to recover an award from the State of Illinois for the legal services they performed, pursuant to an appointment by the Attorney General of Illinois, in representing the Auditor of Public Accounts and the Director of Financial Institutions in protracted and rather heavily complex litigation resulting from a custodial seizure by the Auditor of Public Accounts of a savings and loan association.

Mr. Sears seeks an award for services he performed as a Special Assistant Attorney General from November 1, 1957 to June 6, 1960. Mr. Bodman requests an award for his services as a Special Assistant Attorney General for the period from October 1, 1957 to April 18, 1960.

On April 25, 1957, the Auditor of Public Accounts of the State of Illinois, Elbert S. Smith, pursuant to the applicable provisions of the Illinois Savings and Loan Act, took custody of the City Savings Association, a **sav-**ings and loan association, located in Chicago, Illinois. City Savings, at that time, had some twenty-six thousand (26,000) share-holders, and assets in excess of Thirty-Five Million Dollars (\$35,000,000.00). Less than **a** week after custody of City Savings was taken by the Auditor, an action was filed by the Association (later amended to include its officers) to enjoin further custody by the Auditor. The litigation eventually involved numerous other parties in that and other related legal proceedings.

On May 2, 1957, two days after the complaint was filed by City Savings, the Attorney General wrote to Mr. Sears and Mr. Bodman, and appointed them Special Assistant Attorneys General to represent the Auditor of Public Accounts in the litigation relating to the custody of savings and loan associations seized by the Auditor. Since the appointment by the Attorney General is of basic importance to this Court in its consideration of the cause, we will set forth in complete detail at this time the two letters of appointment.

EXHIBIT A  
LATHAM CASTLE  
ATTORNEY GENERAL  
State of Illinois  
160 North LaSalle Street  
Chicago 1, Illinois

May 2, 1957

Barnabas F. Sears, Esq.  
Attorney at Law  
One North LaSalle Street  
Chicago 2, Illinois

Dear Barney:

**You** are hereby appointed Special Assistant Attorney General for the purpose of representing Honorable Elbert S. Smith, Auditor of Public Accounts, in litigation relating to the custody of building and loan associations

by the Auditor of Public Accounts, and in relation to the confirmation of appointment of receivers of building and loan or savings and loan associations.

Your service as Special Assistant Attorney General is to be compensated otherwise than out of the appropriation for the office of the Attorney General. You will be paid either from funds of the savings and loan association to which the litigation relates, as authorized by law, or out of the appropriation for the office of the Auditor of Public Accounts.

Very truly yours,  
 (Signed) Latham Castle  
 Latham Castle  
 Attorney General

EXHIBIT B  
 LATHAM CASTLE  
 ATTORNEY GENERAL  
 State of Illinois  
 160 North LaSalle Street  
 Chicago 1, Illinois

May 2, 1957

W. S. Bodman, Esq.  
 Attorney at Law  
 120 West Adams Street  
 Chicago, Illinois

Dear Mr. Bodman:

You are hereby appointed Special Assistant Attorney General for the purpose of representing Honorable Elbert S. Smith, Auditor of Public Accounts, in litigation relating to the custody of building and loan associations by the Auditor of Public Accounts, and in relation to the confirmation of appointment of receivers of building and loan or savings and loan associations.

Your service as Special Assistant Attorney General is to be compensated otherwise than out of the appropriation for the office of the Attorney General. You will be paid either from funds of the savings and loan association to which the litigation arises, as authorized by law, or out of the appropriation for the office of the Auditor of Public Accounts.

Very truly yours,  
 (Signed) Latham Castle  
 Latham Castle  
 Attorney General

The record shows that Mr. Sears and Mr. Bodman immediately embarked upon the performance of their duties as counsel for the Auditor of Public Accounts. As a result of the nature of the litigation in which they became involved while representing the Auditor, and the

ancillary proceedings, which arose from the primary action, Mr. Sears and Mr. Bodman were required to and did devote a substantial amount of their time during the following three years to the performance of their duties as Special Assistant Attorneys General. In the first 18 months during which the Mensik litigation was pending, claimants worked day and night on the litigation and related matters. Because of the emergency nature of the litigation and the great amount of time required, it appears that they had little time left to devote to the usual business of their law firms. They have testified at length before this Court concerning the nature and extent of the services they performed, and the time consumed by them in representing the Auditor and later the Director of Financial Institutions, who succeeded the Auditor as Administrator of the Savings and Loan Act.

Each claimant regularly, and in accordance with his usual standard office practice, maintained a detailed time record of the work and services performed for his client. The same procedure was followed by them in the Mensik-City Savings matters. Detailed compilations of the time records mentioned above were admitted in evidence during the hearings in the Court of Claims as exhibits Nos. 3 and 21. A copy of exhibit No. 3, indicating in some detail Claimant Sears' time and services, is attached to the claim filed with this Court as a Bill of Particulars, as is a copy of exhibit No. 21, which serves as a Bill of Particulars of the time spent by Mr. Bodman. These exhibits adequately reflect the elements of time and effort expended by these men. Claimant Barnabas F. Sears asks for \$59,243.75 as the reasonable value of his services for the period from November 1, 1957 to June 8, 1960. Claimant William S. Bodman seeks the sum of \$34,790.00 as the reasonable value of his services for the period from October 1, 1957 to April 18, 1960. Claimant Sears was

paid for his services, as well as for the services rendered by his associates, who worked on 'various phases of the litigation under both claimants' supervision, for the period from May 2, 1957 to October 31, 1957. Claimant Bodman was compensated for his services to October 1, 1957. Payment of the sum of \$63,000.00 for legal services rendered by claimants to those dates were made from the funds of the Association at the direction of the Auditor, and were later approved by the Supreme Court in its final decision in the Mensik case as reported at 18 Ill. 2d 591.

. Claimants base their case upon the theory that, pursuant to a contract of retainer, they performed substantial legal services for which they have not been compensated, and for which the State would, in law, be liable, **if** it were not a sovereign entity, and those services were performed. As a natural result, claimants also contend that the amounts set forth are the usual, customary and reasonable fees for the services performed, and that Claimant Sears is entitled to be compensated for the services performed by his associates under the direction and supervision of both Mr. Sears and Mr. Bodman.

Respondent in its original brief and argument never denies the claimants' contract for retainer as a basis for recovery, but spends a great deal of time upon the idea that the Court has the right to determine for itself how much time a certain litigation took, or should take; how much time is reasonable to put into certain litigation; and, in asserting that claimants' associates were not requested to perform any legal services by the State of Illinois, and that, therefore, there could be no recovery for those services rendered by the associates of Mr. Sears, since the appointment was a personal appointment of both Mr. Sears and Mr. Bodman to represent the Auditor of Public Accounts.

This Court will not expend much time or effort in considering the last two points of contention between claimant and respondent. The integrity and character of both Mr. Sears and Mr. Bodman are unimpeachable. This Court does not question that the services in fact alluded to by claimants were performed, nor does this Court doubt that the services rendered to the Auditor of Public Accounts and the Director of Financial Institutions were valuable. There were many protracted Master's hearings and court hearings, all of which terminated in a decree whereby inter alia the Circuit Court undertook the supervision of the City Savings Association. There was an appeal to the Supreme Court upon an extensive Master's Report, which was dismissed by a divided Court for want of a final judgment. There was active representation of the State Auditor and later the Director of Financial Institutions by claimants during the period the Court was supervising the Association. When a final decree was entered, there was another appeal to the Supreme Court. In addition, there were four separate mandamus petitions prepared by claimants. The first raised more or less technical questions with respect to the parties, and the motion for leave to file was denied. The second was prepared after the Court had entered a decree undertaking the supervision of the savings and loan association, and presented, among other things, important constitutional questions as to the separation of powers. Motion for leave to file this petition was allowed, and respondent was ordered to answer. Thereafter the Supreme Court, on its own motion, vacated its order allowing leave to file, and entered an order denying such leave. The third petition was prepared after the trial court had refused to enter a final order, and, although a motion for leave to file the petition was

denied, the order denying it granted leave to file a fourth petition. The fourth petition was prepared, and was filed pursuant to leave granted. The petition was argued before the Supreme Court, but that Court never had to decide the case, because a final order was entered.

This Court will give little weight or credence to the contention of respondent that Claimant Sears is not entitled to recover for the services performed by his associates. The Court of Claims, in the case at hand, is primarily interested in two isolated questions of prior importance. Let us consider those questions first.

1. Did the Attorney General have the authority to retain Claimants Sears and Bodman as Special Assistant Attorneys General? The Attorney General is the only State Official empowered to conduct the law business of the State. This precedent was clearly established in the case of *Fergus vs. Russell*, 270 Ill. 304, and acts to confirm the constitutional authority granted by Sec. 1 of Art. V of the Constitution, as well as the common law authority carried by the title, Attorney General. Because of this common law and constitutional authority as the chief legal officer of the State, the Attorney General has the inherent power to appoint Special Assistant Attorneys General. This is again reaffirmed in *Saxby vs. Sonnemann*, 318 Ill. 600, and was recently reaffirmed in the case of *The People vs. Toll Highway Commission*. (May, 1954), 3 Ill. 2d 218. In the Toll Highway Commission case, the Supreme Court held as follows:

“The tenth, and final, objection concerns itself with the right of the Commission to employ counsel under subsections 6 (d) and (e) of the Act. It is contended that these subsections violate Sec. 1 of Art. V of the State Constitution. Those sections authorize the Commission to appoint assistant attorneys by and with the consent of the Attorney General, and to retain special counsel subject to the approval of the Attorney General. It is expressly provided that such assistant attorneys and special counsel shall be under and subject to the control, direction and supervision of the Attorney General, and shall serve only at his pleasure. This Court has

held that the establishment of the office of Attorney General, under Sec. 1 of Art. V of our Constitution, endowed that office with all of its common law powers and duties. We have further held that neither the General Assembly nor the judiciary can deprive the Attorney General of any common law power inherent in that office. An inherent power of the Attorney General is the exclusive prerogative of conducting the law business of the State, both in and out of the courts, except where the State Constitution or a constitutional statute may provide otherwise."

2. Recognizing that the Attorney General has the power and the authority to appoint Special Assistant Attorneys General, 'the basic problem remains as to whether or not, when an Attorney General appoints a special assistant, he is obliged to pay him from his appropriation for special assistants, or can obligate the State of Illinois generally to make such payments when there is no appropriation providing for such payment or any other method with which to provide such funds. What happens to our normal inquiry as to whether or not such funds had in fact been appropriated, and were available for the purpose desired at the time that the contract of retainer was entered into? In the case at hand the Attorney General, realizing that both Mr. Sears and Mr. Bodman would and should be paid for their services to the Auditor of Public Accounts and State of Illinois, indicated in the letters of appointment that their compensation would be payable from one of two sources. Those letters state as follows :

"Your service as Special Assistant Attorney General is to be compensated otherwise than out of the appropriation for the office of the Attorney General. You will be paid either from funds of the savings and loan association to which the litigation relates, as authorized by law, or out of the appropriation for the office of the Auditor of Public Accounts."

If the State of Illinois were not a sovereign entity, the letter of appointment of the Attorney General would constitute the contract of retainer. The letters expressly provide for the method of payment to claimants for services rendered. The record in the case at hand does not disclose that there was ever, during any of the time that

legal services were rendered by Claimants Sears and Bodman, an appropriation for the office of the Auditor of Public Accounts for the payment of legal services, nor has there ever been such an appropriation for the office of the Director of Financial Institutions. Thus we see removed the possible payment for these services out of the appropriations for the offices of the Auditor of Public Accounts and the Director of Financial Institutions. In the Mensik-City Savings case in the Circuit Court of Cook County, the trial judge ruled in November of 1957 that no further payment of attorneys' fees could be made from the funds of the Savings and Loan Association. It is true that claimants were paid for their services from funds of the Savings and Loan Association for periods prior to those claimed herein. Our Supreme Court in *Mensik, Et Al, vs. Smith*, 18 Ill. 2d 572, confirmed the payment of previous fees to Sears and Bodman, but ignored the question of payment of any further fees in its final decision. Thus we see that it was not possible for claimants to be paid from funds of the City Savings Association after November, 1957. In the case before us, Claimants Sears and Bodman now seek recovery from the State of Illinois, through the Court of Claims, for services rendered without an appropriation for the payment of the same.

In *Fergus vs. Brady*, 277 Ill. 272, the Supreme Court stated :

"By Sec. 19 the General Assembly is prohibited from authorizing the payment of any claim, or part thereof, created against the State under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts are null and void, with the exception that the General Assembly may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection."

The Court further states :

"In Sec. 19 claims under any agreement or contract made by express authority of law are excepted, and, if there is some particular and specific thing which an officer, board or agency of the State is required to do,

the performance of the duty is expressly authorized by law. That authority is express, which confers power to do a particular, identical thing set forth and declared exactly, plainly and directly, with well defined limits, and the only exception under which a contract exceeding the amount appropriated for the purpose may be valid is where it is so expressly authorized by law. An express authority is one given in direct terms, definitely and explicitly, and not left to inference or to implication, as distinguished from authority, which is general, implied or not directly stated or given."

The rule in *Fergus vs. Brady* remains undisturbed by later cases.

In the "Coal Products" cases, (*Schutte and Koerting Company, Et Al, vs. State of Illinois, 22 C.C.R. 591*), this Court held as follows:

"We, therefore, hold that the Singh Company and Dr. Singh were the agents of the Illinois Coal Products Commission, and had the authority to bind the Commission in purchasing the materials for the pilot plant if, and only if, the Commission had the power and authority to make the purchases at that time.

"With respect to this question, it is fundamental that all governmental agencies, departments and commissions are strictly circumscribed in their powers and authorities by the Constitution and statutes of the State of Illinois."

This Court goes on to cite from *Fergus vs. Brady, 277 Ill. 272*, much of the same language given above.

In the "Coal Products" cases, this Court held:

"In the first place, if such had been the legislature's intention, it would have simply and plainly stated such intention (the right of the State to 'purchase the products' of the unauthorized agreements at an agreed price. (Explanation Supplied.)

"In the second place, the appropriation prohibits the Auditor from making any disbursements unless the Court of Claims in the ordinary conduct of its powers of settling claims against the State of Illinois has rendered an award. This Court's authority and power is subject to the Constitution and laws of the State of Illinois. We could not, if we wished, disregard any statutory or constitutional provision. We have no power to either restrict or extend the power of the legislature to pay claims against the State.

"The Supreme Court in *Fergus vs. Russell, 277 Ill. 20* at page 25, stated: 'The Court of Claims is a statutory body not provided for in the Constitution, and its action can have no effect upon the power of the legislature to pay claims against the State. If the legislature has no such power in any case, favorable action by the Court of Claims would not give the legislature power to pay such claim by making appropriations therefor. If it has the power to pay claims, it cannot be deprived of it by

an unfavorable action on such claims by the Court of Claims. The power or lack of power to appropriate money to pay claims depends upon the Constitution and not upon the action of the Court of Claims.

“It necessarily follows then that, in order to properly perform our function, we should not render a decision recommending the payment of a claim, which is clearly prohibited by the Constitution.”

In the cause at hand the Attorney General did not in fact provide a method for payment of compensation to claimants under the contract of retainer except as specified in the letters of retainer, and the Attorney General did explicitly and expressly deny Claimants Sears and Bodman the right to be paid from the Attorney General's appropriation. Claimants could only look to the City Savings and Loan Association or the appropriation for the office of the Auditor of Public Accounts for payment. There was no appropriation for the Auditor's office for this purpose, and there had never been such an appropriation, as we have related above.

The fact that the Circuit Court of Cook County stopped any further payments of fees to claimants from City Savings and Loan funds cannot be likened to the factual situation, which exists when there is a lapsed appropriation. There was no lapse of an appropriation of a department or division of the State of Illinois. Where a lapse of an appropriation occurs, the funds are returned to the “General Revenue Fund” of the State of Illinois. There is no possibility of a lapsed appropriation in the case at hand.

With no appropriation in the office of the Auditor of Public Accounts available, there is no claim for legal fees based upon a contract with the State of Illinois. The claims for services rendered are hereby denied.

(No. 4992—Claimants awarded \$6,500.00.)

ESTHER HARGRAVE and CHARLES E. HARGRAVE, Claimants, vs.  
STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1964.

WILLIAM D. HANAGAN and WHAM AND WHAM, Attorneys for Claimants.

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

NEGLIGENCE—*res ipsa loquitur*. Doctrine of *res ipsa loquitur* held applicable when a snowplow frame fell from truck under the exclusive control of respondent causing the truck to come to a sudden stop, and respondent did not rebut the presumption of negligence arising from such happening.

SAME—*contributory* negligence. Claimants must prove by a preponderance of the evidence that not only was respondent negligent, but that claimants were free from contributory negligence.

SAME—SAME—*contributory* negligence. Where evidence showed that claimant-driver was contributorily negligent in the operation of the automobile, which struck respondent's truck, and where evidence further disclosed that a hazardous condition existed on highway, claimant-driver did not clearly prove that he exercised due care for his own safety when his automobile struck respondent's well-lighted truck, which had come to a sudden stop. Claim for property damage was denied.

SAME—SAME—SAME—*imputation* of contributory negligence. Contributory negligence of claimant-driver was not imputed to claimant-passenger, who did not pay for any part of trip, where there was no evidence of a joint enterprise, or that claimant-passenger was herself contributorily negligent. Accordingly, claimant-passenger was allowed recovery for personal injuries.

PERLIN, C. J.

Claimants, Charles E. Hargrave and Esther Hargrave, seek the sums of \$500.00 and \$25,000.00, respectively, for damages arising out of a collision on February 25, 1961 between an automobile driven and owned by Charles E. Hargrave, in which Esther Hargrave was riding as a passenger, and a truck owned and operated by the State of Illinois.

Claimant Charles E. Hargrave testified as follows :

At approximately 6:20 A.M. on the above mentioned date, claimant was driving his 1954 Buick Sedan in a southwesterly direction on State Route No. 148 south of Mt. Vernon, Illinois, en route to Cobden, Illinois. His mother, Esther Hargrave, was riding with him as a passenger in the front seat of the automobile. The purpose of the trip was to transport Mrs. Hargrave to a doctor's appointment in Cobden, Illinois.

Route No. 148 was a two-lane highway. There was ice and snow in spots on the road. When claimants reached a point just south of Mason Road, a State of Illinois Highway truck, with a snowplow attached, was cleaning the highway, traveling south toward Waltonville on Route No. 148. Hargrave made several attempts to pass the truck, honked his horn and flashed his lights, but could not get around it, because claimant alleges the truck was not completely on its own side of the road. After the third attempt to pass the truck, Hargrave dropped back approximately 175 feet behind the truck waiting a chance to pass. As he followed the truck, he observed that the snowplow blade was scraping ice and snow off the highway; debris was flying from the blade, and it was making a rumbling noise. Both he and the truck were allegedly driving at 40 miles per hour. As he continued to follow the truck at this speed, the truck came to a sudden stop, and Hargrave's car slid into the back end of the truck. As a result of the collision, Esther Hargrave was injured, and the Hargrave car was damaged. It was learned after the collision that the snowplow had fallen off the truck.

The driver of the truck, Virgil Bushong, testified that he saw claimant's headlights in the rear view mirror for approximately a mile before the accident, but did not observe him attempting to pass. He stated that the truck

headlights, blinker light on top of the cab, cab lights, and three cluster lights in the back of the cab were lighted, and no portion of the truck or equipment had crossed the center line in the opposite lane of traffic. He estimated that he was going 18 or 20 miles per hour at the time, but did not know his exact speed, since his speedometer was broken. This was the first time he had operated the truck and the plow together. Bushong further testified that after the collision the pin that holds the framework of the snowplow was sticking over the center line of the road approximately 4 inches. He had never inspected the framework before this collision. He did not know what had happened except that the truck came to a sudden stop, and the snowplow probably became disconnected before the impact.

Donald Peterson, section foreman, was a passenger in the State truck at the time of the collision. He testified that the truck came to a sudden stop on the pavement, and ran up over the frame of the snowplow before it came to a stop. The center bolt that fits the frame of the plow to the truck was missing, and he looked for the bolt, but could not find it after the accident. The snowplow frame, which is located underneath the truck, was in place when the truck was received that morning. He also guessed the speed at 18 to 20 miles per hour, and said that they had been told by the State Engineer never to exceed that speed. He did not notice anyone trying to pass the truck.

Respondent submitted some evidence by way of the Departmental Report and testimony by Donald Raney, Maintenance Field Engineer for the State of Illinois, that the truck in question had been inspected in October, 1960. However, it is indicated that the frame holding the snowplow is not installed until after inspection of the truck.

Raney testified that the center bolt is one of the items that the operator should check “just like oil”, but that no instructions for checking it are prescribed. The truck involved was a utility truck, and the maintenance department installs the snowplow frames. In such trucks, Raney stated, no specific individual is charged with the duty of installation.

Claimants allege that respondent was negligent in its duty to exercise reasonable care in the operation and maintenance of its vehicles. They argue (1) that the truck came to a stop on the road, and the snowplow frame came off, because of the improper operation of the truck and snowplow; or, (2) that something was wrong with the snowplow frame, which caused it to come off.

In support of their first contention of improper operation, claimants argue that the truck was proceeding at a speed of 40 miles per hour in violation of instructions not to exceed 18 to 20 miles per hour when using the snowplow. Testimony by respondent’s witnesses that they were within the 18 to 20 miles per hour limitation must be discounted, claimants argue, since both witnesses testified that this was a guess only, as their speedometer was broken. Claimants further contend that the added stress to the snowplow frame caused by the higher speed could have caused the frame or bolts to give way, thus causing the truck to suddenly stop. Claimants point out that there is no evidence that the snowplow or snowplow frame was properly installed, or that respondent’s agents inspected the frame and its parts after it was installed on the vehicle.

The parties have stipulated that “at the time of the occurrence the vehicle was under the control of the State on State business, and at the time of the accident the State had the exclusive possession and control of the truck, snowplow and its component parts, and that at the

time of the occurrence respondent was in the exclusive control of the operation of the equipment through an employee.’’

Claimants allege that the doctrine of *res ipsa loquitur* should be applied in the instant case. This doctrine holds that, when an injury is caused by an instrumentality under the exclusive control of the party charged with negligence, and is such as would not ordinarily happen if the party having control of the instrumentality had used proper care, an inference or presumption of negligence arises. The burden then rests upon respondent to rebut the presumption of negligence arising from the facts of the case.

Respondent claims that this was an “unavoidable accident.” It is the opinion of the Court that the doctrine of *res ipsa loquitur* is properly applied in the case at hand, since, if proper care had been used, a snowplow frame does not ordinarily fall off a truck causing the truck to come to a sudden stop. Respondent did not rebut the presumption of negligence, which arises upon such a happening. Respondent did not prove that proper care was applied in installing, inspecting or operating the truck with the snowplow. In fact, a broken speedometer prevented an assured maintenance of the speed recommended by the authorities in charge. We conclude that the State was negligent in the maintenance and operation of this vehicle.

To recover in this action, claimants must prove by a preponderance of the evidence that not only was respondent negligent, but that claimants were free from contributory negligence. (Ill. Rev. Stats., Chap. 95½, Sec. 158, provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent.)

Claimant Charles E. Hargrave was well aware of the presence of the State vehicle, having followed it for several miles. Evidence shows that the truck was well-lighted, with a blinker light on top of the cab, and cluster lights in the rear. It was established that snow had been falling, although it had stopped by the time of the collision, and that there was scattered ice and snow on the highway. Claimant testified that he was approximately 175 feet behind the truck, traveling at 40 miles per hour when the truck stopped.

According to the "Driver's Manual", prepared by the U.S. Treasury Department, a car with excellent brakes traveling at 40 miles per hour will require for stopping a distance of 128 feet on dry pavement, 171 feet on wet pavement, or 311 feet on ice or packed snow. In view of the hazardous condition of the highway, it is our opinion that claimant did not clearly prove that he exercised due care for his own safety. Therefore, the claim of Charles E. Hargrave for recovery for property damage to his car is hereby denied.

Respondent argues that any contributory negligence of Claimant Charles E. Hargrave should be imputed to Esther Hargrave, since the sole purpose of the trip was to take her to the doctor's office. Esther Hargrave did not pay for any part of the trip, and there is no evidence that this was a joint enterprise in which the negligence of the driver of the vehicle is imputed to a passenger. Neither is there any evidence that Esther Hargrave was herself contributorily negligent merely because she did not warn her son about the distance between the automobile and the truck.

As a result of the accident, Mrs. Hargrave was confined to the hospital from February 25 until March 11, 1961, with, among other injuries, a fracture of the right patella, and contusions and abrasions to the forehead.

Her forehead was healed at the time of the hearing, but is sunken at the point of laceration. Dr. Charles Wells testified that he performed an operation on the fractured patella, and that there was soft tissue injury in and around the knee in addition to the bone injury. He stated that the injury is at times painful, and is apparently permanent. She has difficulty in maneuvering stairs, and must use her left leg first. He stated that whirlpool baths given to Mrs. Hargrave is in accord with standard practice in this type of injury.

Dr. Edward Stephens, who examined Mrs. Hargrave, testified that a complete loss of flexion and extension of the leg is expected with a reasonable degree of medical certainty. He would recommend a fusion operation for the purpose of relieving the pain.

Mrs. Hargrave testified that before the accident she was able to do all of her housework, and as a result of her injuries it was necessary to hire temporary household help. She further testified that she runs a power sewing machine in her work, and had earned **\$1.52** per hour, but now earns, on the average, **\$1.48**. At the time of the accident her average pay was **\$53.20** per week, and she missed sixteen weeks of work. She complains of pain in both her legs. She does most of her housework, but cannot get down on her knees to scrub floors, and the like, as she did before the accident.

Mrs. Hargrave stated that she received \$500.00 from the company, which insured her son's car, based on the medical pay clause of his policy.

According to claimant's bill of particulars and the evidence presented, Mrs. Hargrave has incurred **\$1,764.55** in actual damages. She has apparently suffered a degree of disfigurement and a partial loss of normal use of her right leg as a result of the accident. (Her earnings from

her work, however, do not appear to be demonstrably affected.)

The Court hereby awards Claimant Esther Hargrave the sum of \$6,500.00.

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(No. 5004—Claim denied.)

MARTHA J. THRIEGE, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

*Opinion* filed May 12, 1964.

JOHN T. DICKINSON and CHESTER THOMSON, Attorneys for Claimant.

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

PRACTICE AND PROCEDURE—*burden of proof*. In order for claimant to be entitled to an award, she must prove by a preponderance of the evidence the following elements: (1) that respondent was negligent; (2) that such negligence proximately caused the injury; and (3) that claimant was in the exercise of due care for her own safety, and, therefore, free from contributory negligence.

NEGLIGENCE—*contributory negligence*. Where claimant fell upon a step, which she had crossed just twenty or thirty minutes previously, she should have been aware of the existence of such step, and, therefore, failed to establish that she was free from contributory negligence.

PERLIN, C. J.

Claimant, Martha J. Thriege, seeks recovery in the sum of \$5,000.00 for personal injuries allegedly suffered on May 14, 1961, when she fell in a museum, which was owned and operated by the State of Illinois.

Mrs. Thriege testified as follows :

She is 73 years old. About 4:30 P.M. on the day in question she arrived at the David Davis Mansion in Bloomington, Illinois, accompanied by her niece and her granddaughter. She entered the premises by walking up several steps into a vestibule. She crossed the vestibule, and walked one step up into the mansion. She visited in the mansion about 20 or 30 minutes. As she

came out and approached the step to the vestibule, she saw a rubber pad floor covering, which protruded about 2 inches over the step or riser. She says she did not know that the mat was hanging out over space, but rather it looked like part of the step. She stepped on that portion of the mat, which protruded over the riser, and fell. She wrenched her ankle, but was prevented from falling to the floor by her two companions. She sat down for a short time, and was subsequently assisted to her car, and went home. Upon arrival at home, she called Dr. Fred Cunningham, who came to the house that evening. She went to the hospital the following morning, and spent 6 days there. Her treatment consisted of ice bags and medication. She returned to the mansion before the hearing, and noticed that the vestibule mat now had a white line over it. She wears glasses, but does not know whether she had them on at the time of the accident. She came out of the mansion the same way she went in, and, therefore, must have walked on the mat in both instances.

Mrs. Harry Johnson testified that she was employed as custodian of the David Davis mansion. The mansion had been open to the public since February, 1961. She saw Mrs. Thriege in the mansion on the day in question, and guided her through the home in a group of people. She saw Mrs. Thriege and the two girls, who accompanied her, when they came downstairs. "I was standing at the table where the registration book is located, and she (Mrs. Thriege) was ready to move out, and I said, 'there is a step there.' She missed the step. The two girls had preceded her. They were already down in the vestibule, and she followed the two girls down the step." Mrs. Johnson saw Mrs. Thriege turn her ankle. The two girls were standing at Mrs. Thriege's side. Mrs. Johnson and the girls then helped Mrs. Thriege to a chair. Mrs. Johnson described the step as being made of wood, and rising

about 5 inches, with a corrugated mat on top of it, which extended to its edge. The vestibule was lighted by sun coming through double glass doors. It was a bright day, and there were also lights on in the hallway.

Mary Pittman, one of claimant's companions at the time of the accident, testified that the mat or pad was extended over the end of the step a few inches, and looked like the end of the step. She stated that no one had warned them of the condition of the riser, or the position of the riser or step, as they came out of the mansion. She had stepped down into the vestibule at the time Mrs. Thrieger fell.

Mrs. Thrieger's twelve-year-old granddaughter, who had also accompanied claimant to the mansion, testified that no one had warned her grandmother about the step. She had seen the step when she entered the mansion, and had come down it without difficulty. When her grandmother tripped, she grabbed hold of her and kept her from falling to the floor.

In order for claimant to be entitled to an award, she must prove the following elements by a preponderance of the evidence: (1) that respondent was negligent; (2) that such negligence proximately caused her injury; and, (3) that claimant was in the exercise of due care for her own safety, and, therefore, free from contributory negligence.

Respondent contends that claimant assumed the risk of a known condition, such as the step in question, and cites the case of *Davis vs. State of Illinois*, 22 C.C.R. 11, in which claimant had climbed a stairway alleged to have irregularities in it, and later that evening fell upon descending the same stairway. The Court denied recovery, because it could not be said that claimant was unaware of the nature of the stairway, having ascended it earlier in the evening.

In the opinion of this Court, claimant has failed to establish that she was free from contributory negligence. She was, or should have been aware of the existence of the step, which she had crossed just 20 or 30 minutes previous to the time she fell. The custodian testified that she warned Mrs. Thriege of the step, although Mrs. Thriege and her companions say they were not aware of this warning. The companions walking with claimant had immediately preceded her down the step, and should have been aware of its existence.

Claimant has not established that respondent had actual or constructive notice of the defective condition, which is alleged to have caused her injury. Such notice of such condition would be a necessary requisite precedent to recovery in the negligence action herein.

In the opinion of this Court, claimant has failed in her burden of proof, and her claim is hereby denied.

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(No. 5006—Claimant awarded \$2,300.30.)

**CITY OF MURPHYSBORO, ILLINOIS, A MUNICIPAL CORPORATION,**  
Claimant, **vs. STATE OF ILLINOIS,** Respondent.

*Opinion filed May 12, 1964.*

**RICHARD E. WHITE,** Attorney for Claimant.

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

**CONTRACTS—***authority to enter into.* The Department of Public Works and Buildings has authority to enter into contracts with municipalities for the construction and maintenance of highways within the corporate limits of any municipality.

**HIGHWAYS—***acquisition of right of way.* Where agreement between claimant and respondent provided for the construction and relocation of certain roadways and streets, and specified that such construction would be without cost to claimant, and the failure of respondent to obtain a certain right of way resulting in a judgment against claimant, the Court held claimant is entitled to reimbursement.

PEZMAN, J.

This cause relates to damage to property in the City of Murphysboro, Illinois, owned by Willie D. Harris and Burchay Harris, his wife, and adjacent to South Fourth Street in the said City of Murphysboro.

On June 11, 1954, the City of Murphysboro, Illinois, a Municipal Corporation, passed and adopted a Resolution whereby the City requested and authorized the State of Illinois to enter into an Agreement with the municipality for the construction, relocation and reconstruction of a public street, known as Fourth Street in the City of Murphysboro. This Resolution was approved by the State of Illinois, Department of Public Works and Buildings, on November 7, 1956.

Among other things, the Resolution provided that the State of Illinois, acting by and through its Department of Public Works and Buildings, Division of Highways, should secure the necessary rights of way, prepare detailed plans, and construct the improvement without cost to the City of Murphysboro.

The Harris property is located on South Fourth Street, one-half block south of the main highway improvement known as S.B.I. Route No. 13, Section 12-1, Jackson County. The full extent of the improvement is from Carbondale to Murphysboro.

Prior to construction of the improved S.B.I. Route No. 13, Section 12-1, Jackson County, the Willie and Burchay Harris' residence was on an even level with Fourth Street, said Fourth Street being the frontage street of their home. Following the reconstruction and relocation of said Fourth Street, the Harris home is now at least twelve feet below the level of said street, and it is no longer possible to have direct access by drive to their home from said street. Claimant contends that Willie Harris and Burchay Harris, as a result of such

improvement, were further deprived of air, light and view by obstruction created by the raised Fourth Street.

In October, 1958, a suit was filed in the Circuit Court of Jackson County, Illinois, by Willie D. Harris and Burchay Harris against the City of Murphysboro, Illinois, in which it was alleged that plaintiffs' property had been consequentially damaged. Following a trial by jury in February, 1960, the Circuit Court of Jackson County entered judgment against the City of Murphysboro, in the amount of \$2,275.00 and costs of suit in the amount of \$25.30, making a total judgment of \$2,300.30.

The City of Murphysboro has paid the amount of the judgment, and has not been reimbursed for this payment. The City was provided with a release of judgment, which has been filed in the office of the Circuit Clerk of Jackson County, and has been recorded in Book 60 on page 528.

Claimant contends that, pursuant to an Agreement with the Department of Public Works and Buildings, Division of Highways of the State of Illinois, certain construction of roadways and streets was to be undertaken by the State of Illinois. Acting under this Agreement, the State of Illinois commenced the construction and completed the same. As a result of this construction project, the law suit hereinbefore referred to was filed against claimant. Claimant undertook to defend said law suit in good faith, giving proper notification to the State of Illinois of the pendency of the law suit within plenty of time for them to have acted upon the matter of defense. The facts in the case reveal that the State was notified on or before October 15, 1958 of the cause in the Circuit Court of Jackson County, Illinois, and that agents of the State assisted the attorney for claimant in preparing the defense to that original action. The case was tried in 1960.

The alleged Agreement between the City of Murphysboro and the State of Illinois is encompassed by the Resolution attached as exhibit A to the original complaint. This Resolution specifically provides that the Division of Highways of the State of Illinois shall “secure the necessary rights of way, prepare detailed plans, and construct the improvement without cost to the City of Murphysboro”, and “arrange for the adjustment of all public and private improvements. . . . all of the above enumerated work to be done without cost to the City of Murphysboro.” Testimony of J. L. Burnett, District Right of Way Engineer for the Division of Highways, discloses that the State paid for all the rights of way in the total construction project, and that the construction was to be without cost to the City. He further testified that the State did not purchase a right of way from the Harris property, because, in the opinion of the Division of Highways, there was no damage to the Harris property. In his testimony Mr. Burnett admitted that the State had not paid the Harrises for any right of way previous to the decision of the jury in the case of *Harris vs. City of Murphysboro* in the Circuit Court of Jackson County, Illinois.

The Department of Public Works and Buildings has the authority to enter into contracts with municipalities for the construction and maintenance of highways within the corporate limits of any municipality. This Department is also vested with the right to acquire property rights necessary for the construction of highways within the corporate limits of any city. The agreement between the City of Murphysboro and the State of Illinois is clearly established by the Resolution, which is made a part of the evidence in this case.

Respondent does not contend against the facts as related herein. Singly important and uncontroverted is

the fact that the State of Illinois made no effort to obtain a right of way from Will D. Harris and Burchay Harris prior to the construction.

Whether the City of Murphysboro was the agent of the State of Illinois, or the State of Illinois was the agent of Murphysboro is immaterial. We find that there was an Agreement between both parties for the construction and relocation of certain roadways and streets, including South Fourth Street, in the City of Murphysboro, Illinois. Said Agreement provided that such construction would be without cost to the City of Murphysboro. The failure of the State of Illinois to obtain a right of way from Willie D. Harris and Burchay Harris prior to the construction has resulted in cost to the City of Murphysboro, as a result of the verdict of the jury in the cause in the Circuit Court of Jackson County, Illinois, in February of 1960.

An award is, therefore, made to claimant in the sum of **\$2,300.30**.

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(No. 5015—Claimant awarded \$591.46.)

CITY OF ST. LOUIS, A Municipal Corporation, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed May 12, 1964.*

THOMAS J. NEENAN, THOMAS F. MCGUIRE and GARS M. GAERTNER; and HOTTO, FIELDER AND MARSH, Attorneys for Claimant. •

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

NEGLIGENCE—*res ipsa loquitur*. Where claimant's property was damaged as the result of an emergency landing attributable to material failure in the aircraft, *res ipsa loquitur* was properly involved.

ILLINOIS NATIONAL GUARD—*negligence*. Where airplane, which caused damages, was under the sole management and control of respondent's agent, it must be assumed that the accident would not have happened, if those, who were in control or management, had used proper care.

PERLIN, C. J.

The City of St. Louis, Missouri, seeks recovery of \$591.46 for property damage incurred at Lambert-St. Louis Municipal Airport, owned by claimant, when Captain E. H. Ramshaw of the Air National Guard of the State of Illinois, flying an Illinois National Guard F-84 jet aircraft fighter plane, attempted to make an emergency landing on said airfield, May 7, 1960.

E. H. Ramshaw testified as follows:

On May 7, 1960, he was on duty as a member of the Illinois National Guard. He was under orders to fly from Peoria, Illinois, to Gulfport, Mississippi, for a routine training mission, and then to return to Peoria. He had previously flown the particular aircraft in question. He took off from Peoria, Illinois, and about 18 minutes later, when he had reached the City of St. Louis, and was at an altitude of 38,000 feet, he experienced a complete engine failure. Rather than bail out, he elected to attempt an emergency landing at Lambert Airport.

Ramshaw notified the airport of his predicament by radio, and proceeded to the airfield by the most direct route. He was losing altitude, and had lost the electrical system, hydraulic system, speed brakes, flaps and landing gear. He had no power in the aircraft. He approached the runway 180 degrees opposite the direction he had originally intended. As he approached the runway, there was inadequate opportunity to decelerate. As he touched the ground, he pulled the drag chute, "which is a device underneath the rear fuselage of the jet used as a braking device. When the aircraft hit the runway, the landing gear was not down because of lack of hydraulic pressure, and the aircraft went out of control on the runway. "Then I went off the runway to the right, and the fire started, and I went through a dyke and other obstacles into a taxiway and across another runway."

Ramshaw left the aircraft while it was still moving and on fire. He did not know what damage was done to the airport facilities at the time of the landing. He had experienced no difficulty on the take-off or until the time when he was over St. Louis. When he took off from Peoria, the aircraft was in good shape according to all check lists, which are performed by the pilot. Inspection of records following the accident indicated that the engine trouble started with the failure of the rear main bearing. All F-84's were allegedly grounded after the accident until the main bearings were replaced with a different type of bearing.

The Departmental Report, signed by Adjutant General Leo M. Boyle, stated that Captain Ramshaw was forced to make an emergency landing at Lambert Field "resulting in the accident and the damages stipulated." It further stated that the official investigation of the accident established that the primary cause of the accident was material failure.

Arthur K. Muchmore, assistant airport manager at Lambert Field, testified that damage to the airport property as a result of the landing totalled \$591.46, which included **\$223.20** for a high intensity light, **\$352.50** for a six section taxiway guidance sign, and four hours of labor at \$3.94 per hour.

Claimant urges that the doctrine of *res ipsa loquitur* be applied in the instant case. The Court of Claims has recognized this doctrine as follows: When an injury is caused by an instrumentality under the exclusive control of the party charged with negligence, and is such as would not ordinarily happen if the party having control of the instrumentality had used proper care, an inference or presumption of negligence arises. The burden then rests upon respondent to rebut the presumption of neg-

ligence arising from the facts of the case. (*Hargrave vs. State of Illinois*, No. 4992.)

In the case of *Northwestern National Insurance Company vs. State of Illinois*, No. 4950, this Court applied the doctrine to an accident where a target being towed by an airplane operated by the Illinois National Guard fell from a cable, causing damage to claimants' property. Because the State offered no evidence to rebut the presumption of negligence raised by the facts, recovery was allowed.

In the instant case, the airplane, which caused the damage, was under the sole management and control of respondent's agents. It must be assumed that, in the ordinary course of events, the accident would not have happened, if those who were in control or management used proper care. Respondent has offered no evidence to rebut the presumption of negligence, which arises under the facts.

Therefore, claimant is awarded the sum of \$591.46.

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(No. 5025—Claimant awarded \$750.00.)

**ANN BIEL**, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

*Opinion filed May 12, 1964.*

**WOLFBERG AND KROLL**, Attorneys for Claimant.

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

*HIGHWAYS—negligence—when an award may be made.* Where evidence showed that the State had constructive notice of a loose manhole cover in a traveled section of the highway, it was negligent in not properly maintaining same, and an award may be made for damages, which were the proximate result of said negligence.

**PEZMAN, J.**

Claimant filed her claim herein seeking recovery for personal injuries suffered by her resulting from negli-

gence of the State of Illinois. Claimant alleges that the State negligently allowed and permitted a certain man-hole cover, immediately adjacent to the curb line, to remain in such a state of disrepair, as to create a hazard in the street; and further alleges that this hazardous condition was one, which remained uncorrected for an extended period of time, and of which the State had both actual and constructive notice. Claimant further alleges that the State was in control of a certain public highway, known as 95th Street, in the Village of Evergreen Park, Illinois, and had the duty to maintain such highway in a reasonably safe condition; that claimant, while in the exercise of due care and caution for her own safety, fell into said hazard, and sustained numerous and serious personal injuries, for which she is attempting to recover from the State of Illinois.

The transcript of evidence discloses that, on the morning of the accident, July 18, 1961, claimant was walking in a westerly direction on 95th Street at or near 2600 W. 95th Street, Evergreen Park, Illinois, en route to her employment at Little Company of Mary Hospital, Evergreen Park, Illinois. An automobile, in which three of her co-workers were riding, stopped alongside of her to give her a ride to the hospital. As she stepped off of the curb for the purpose of entering the said automobile, her right foot went through the broken manhole cover, which was in the street adjacent to the curb. Several rungs and part of one rung of said manhole cover were missing. Claimant's right leg entered said manhole past her knee. Her left leg broke her fall into the manhole.

One witness, William Eiler, testified as to the condition of the manhole. He stated his address was 2644 W. 94th Street, Evergreen Park, Illinois, which is three to four blocks from where this occurrence took place. He

testified that the condition of the broken manhole cover existed in March or **April** of 1961, approximately 60 to 90 days before the accident. He stated that he had occasion to walk by this particular corner **2** or **3** times a week. He further testified that he had reported the broken manhole cover to the Evergreen Park Police.

Claimant contends that the State of Illinois was negligent in allowing a hazard, created by a broken manhole cover, to remain in the highway, and failing to warn of such hazard; and further contends that the State of Illinois had both actual and constructive knowledge of the hazard, which was created by the broken manhole cover. On the other hand, respondent contends that claimant failed to establish her claim by a preponderance of the evidence, and failed to exercise that degree of care, which befitted the circumstances, and should have seen the broken manhole cover, if she had properly exercised her faculty of sight.

The transcript contains no evidence that claimant was guilty of contributory negligence. Prior to the accident, claimant was walking along the street, and had no occasion to observe the condition of the curb or the guttering. Her attention was attracted by the sounding of the automobile horn of her friends, and she watched the car, as she waited for it to pull over to the curb to allow her to step in. Her action cannot be characterized as negligent.

Both parties agree that the State is not an insurer of all persons using the highways, and respondent does not deny that claimant suffered the injuries alleged, nor does respondent anywhere deny that the manhole cover was defective.

The question of negligence on the part of the State of Illinois in the maintenance of manhole covers is not

new to the Court of Claims. (*Couchot vs. State of Illinois*, 21 C.C.R. 157, and *Mayer vs. State of Illinois*, 23 C.C.R. 93.) There is no question of the duty of the State of Illinois to maintain the manhole cover in proper repair for the safety of persons and vehicles upon the highway. The evidence indicates that the State had constructive notice of the condition of the manhole cover for a period of time, so as to charge respondent with negligence in failing to maintain it. In cases where there is a defect, which was either known, or could have been ascertained by reasonable inspection, and which would cause damage to persons or property upon said highway, the State would be negligent.

Claimant suffered contusions, lacerations, ecchymosis and bruises over the lower right extremity in the area of the thigh, knee and right ankle. Medical testimony indicates some scarring of the right leg. There is some evidence of injury to the left extremity resulting in varicosity. Medicals introduced amount to \$120.00.

An award is, therefore, entered in favor of claimant, Ann Biel, in the amount of \$750.00.

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(No. 5116—Claimant awarded \$806.43.)

SOCONY MOBIL OIL COMPANY, INC., A Corporation, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 12, 1964.*

GIFFIN, WINNING, LINDNER AND NEWKIRK, Attorneys  
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.**

On June 25, 1963, the Socony Mobil Oil Company, Inc., A Corporation, filed its complaint seeking an award in the amount of **\$806.43**.

The complaint alleges certain sales made to the Department of Public Works and Buildings of the State of Illinois, now unpaid for, amounting to **\$417.44**, and certain other sales made to the Department of Conservation of the State of Illinois, now unpaid for, in the sum of **\$388.99**, being an aggregate total of net sales to both of said departments, now unpaid, in the amount of **\$806.43**. Claimant further alleges that statement in the form of invoices or schedules for such sales were submitted in the regular and due course of business to each of said departments, respectively, but not until after the several appropriations from which the same might have been paid had lapsed, and, for that reason, payment therefor has not been made.

On February 24, 1964, a Departmental Report was filed indicating that no part of the bills to either department had been paid by either department, or by any division of either department, or by any other State agency, for the reason that the bills were not presented, scheduled and processed until sometime after September 30, 1961, when the 71st biennium appropriation had lapsed. The Departmental Report further states that each of the items was purchased by persons having proper authority, and was received in good condition, and that the charges, as itemized, are true and correct.

As a result of this report, on the same date, February 24, 1964, a joint stipulation of fact was filed by claimant and respondent reciting in substance that the Departmental Report shall constitute the record in the cause of action. The stipulation further indicates that its

purpose was to avoid the necessity of presenting testimony.

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

*Continental Oil Company, A Corporation, vs. State of Illinois, 23 C.C.R. 70*

*M. J. Holleran, Inc., vs. State of Illinois, 23 C.C.R. 17*

An award is hereby made to the Socony Mobil Oil Company, Inc., A Corporation, in the amount of **\$806.43.**

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(No. 5121—Claimant awarded \$2,353.68.)

**MATERIAL SERVICE DIVISION OF GENERAL DYNAMICS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed May 12, 1964.*

SCHRADZIE, GOULD AND RATNER, 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.

The claim, as set forth in the complaint filed herein, is based upon contracts for work and materials furnished by claimant to the Division of Highways of the Department of Public Works and Buildings of the State of Illinois, and work and materials actually furnished by claimant to the said Division of Highways, which contracts are evidenced by, and which work and materials were billed on invoices attached to the original complaint.

On December 2, 1963, a stipulation was duly entered into by and between claimant and the office of the Attorney General for the State of Illinois. The stipulation provides as follows :

"1. Claimant is a Delaware Corporation and successor by merger to Material Service Corporation (An Illinois Corporation), and is qualified to do business in the State of Illinois; and, by virtue of such merger, plaintiff has succeeded to and is the owner of, and is entitled to exert all claims and rights of said Material Service Corporation, including the claims as set forth in the complaint filed in the above entitled cause.

2. Claimant's exhibits Nos. 1 through 49 are true and correct copies of the documents they purport to be, and that they should be accepted as and admitted into evidence in this matter without further proof.

3. The claim of claimant is based upon contracts for work and materials furnished by claimant to the Division of Highways of the Department of Public Works and Buildings of the State of Illinois. work and materials were duly furnished by claimant to the said Division of Highways pursuant to various contracts as indicated by general purchase order numbers as set forth in the complaint. Said work and materials were billed on invoices, of which true copies are attached to the complaint filed in this matter, and are marked exhibits Nos. 1-45, inc.; and that the total amount due for work and materials furnished thereunder is Two Thousand Three Hundred Fifty-Three Dollars and Sixty-Eight Cents (\$2,353.68).

4. All of the invoices attached to the complaint as exhibits Nos. 1 through 45, inc., are true and correct in setting out work and materials actually and duly furnished by claimant, and accepted by respondent in accordance with the applicable contracts, requirements and regulations. All of the said invoices remain unpaid on statement of account.

5. Claimant presented its claim to the Department of Public Works and Buildings of the State of Illinois, Division of Highways, but, due to some error or oversight, payment was never made. Claimant resubmitted its claim on statement of account, dated December 31, 1960, a copy of which is attached to the complaint filed in this matter, and marked exhibit No. 46, but claimant was informed that these accounts could not be scheduled and vouchered for payment as the biennium appropriations from which they were payable had lapsed.

6. On account of work and materials duly furnished by claimant and accepted by respondent as alleged in the complaint filed herein, there is now due and owing to claimant from respondent the sum of Two Thousand Three Hundred Fifty-Three Dollars and Sixty-Eight Cents (\$2,353.68).

7. Claimant, Material Service Division of General Dynamics Corporation, is the owner of all of the claims set forth in the complaint filed herein; no assignment or transfer of said claims or any part thereof has been made, and no other person, firm or corporation has an interest therein. Claimant is justly entitled to the amount claimed from the State of Illinois, after allowing all just credits. No part of the amount due to claimant has been

paid, and there is due and owing to claimant from respondent the **sum of Two Thousand Three Hundred Fifty-Three Dollars and Sixty-Eight Cents (\$2,353.68)**."

The only question we now have to pass upon is whether or not an award can be made for the balance due on the contracts, where the appropriation has lapsed before said bills were properly certified for payment.

Where a contract with the State 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, this Court will enter an award for the amount due. *National Korectaïre Company vs. State of Illinois*, 22 C.C.R. 302. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$2,353.68.

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(No. 5130—Claimant awarded \$315.82.)

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

Opinion *filed* May 12, 1964.

**RAY S. THOMPSON**, Claimant, pro se.

**WILLIAM G. CLARK**, 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 November 21, 1963, Ray S. Thompson filed his complaint seeking an award in the sum of \$315.82.

The complaint alleges that he is the duly appointed Official Court Reporter of the 17th Judicial Circuit of the State of Illinois with his place of residence in Rockford, Illinois, and principally performing his official duties in the City of Rockford, Illinois; that for the periods of

July 14, 1961 through June 22, 1962, and June 4, 1962 through June 28, 1963, he incurred expenses for travel, meals and lodging in the official performance of his duties ; that the appropriation available during the 72nd biennium had lapsed, and payment has not been made.

On January 15, 1964, the Hon. Michael J. Howlett, Auditor of Public Accounts, filed his letter of report in the above cause, as a result of his investigation of claimant's allegations. In the letter, Auditor Howlett acknowledges that claimant was the duly appointed Official Court Reporter for the 17th Judicial Circuit, and that said claimant filed with the office of the Auditor of Public Accounts properly executed travel vouchers containing an itemized account of the travel expenses incurred for the periods of July 14, 1961 through December 7, 1961 ; January 1, 1962 through December 21, 1962 ; and January 23, 1963 to and including June 28, 1963, in the performance of his official duties, as certified by the appointing Judge, Albert S. O'Sullivan, and that the above cited vouchers complied with the provisions of the statutes in relation to expense accounts. Auditor Howlett further stated that the appropriation available during the 72nd biennium for travel lapsed on September 30, 1963.

As a result of the report by the Hon. Michael J. Howlett, Auditor of Public Accounts, a joint stipulation of facts was entered into by and between Ray S. Thompson, claimant in the case herein, and the State of Illinois, respondent, through its attorney, William G. Clark, Attorney General, The stipulation recites in substance that the complaint properly sets forth the essential facts, and that the amount requested is true and correct, and would have been paid in due course, if the appropriation had not lapsed.

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

*Continental Oil Company, A Corporation, vs. State of Illinois, 23 C.C.R. 70*

*M. J. Holleran, Inc., vs. State of Illinois, 23 C.C.R. 17*

An award is hereby made to Ray S. Thompson, claimant, in the amount of \$315.82.

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(No. 5145—Claimant awarded \$274.41.)

GULF OIL CORPORATION, A PENNSYLVANIA CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 12, 1964.*

CONCANNON, DILLON, SNOOK AND MORTON, Attorneys for Claimant.

WILLIAM G. CLARE, 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 claim, as set forth in the complaint filed herein, is based upon the sale of petroleum products furnished by claimant to the Division of Highways of the Department of Public Works and Buildings of the State of Illinois. The complaint was filed in the Court of Claims on February 13, 1964.

Thereafter, on April 7, 1964, a stipulation was duly entered into by and between claimant and the office of the Attorney General for the State of Illinois. It provides as follows :

"1. Claimant, Gulf Oil Corporation, is a private Pennsylvania Corporation qualified to do business in the State of Illinois, and engaged in the

business of distributing and selling petroleum and its products in the State of Illinois.

2. Claimant authorized various service stations selling its petroleum products and their services to the public to sell its products and furnish services on credit as and when requested by the State of Illinois, Highway Department—Maintenance District No. 5, and State Highway Police—Dist. Oper., District No. 13.

3. Attached to the complaint as exhibit A are true copies of schedules of such credit sales of products and services made during the months of April, May and June of 1963, which were mailed to the said Highway Department—Maintenance District No. 5, and State Highway Police—Dist. Oper., District No. 13, on or about the dates shown thereon.

4. The amounts of said schedules show there is due from respondent to claimant for petroleum products sold and services furnished the amounts of \$74.41, \$72.68, \$78.82 and \$48.50, a total sum of \$274.41.

5. Because said schedules were not forwarded to the Highway Department until after the end of the fiscal year in which incurred, funds to pay said bill were no longer available, and claimant was advised that it must present its claim to this Court for payment.

6. Claimant, **Gulf Oil Corporation**, 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 Gulf Oil Corporation, and that Gulf Oil Corporation is justly entitled to the sum of \$274.41 from the State of Illinois after allowing all just credits.”

The only question presented here is whether an award can be made for the balance due on the claim where the appropriation had lapsed before the bills were properly certified for payment.

Where a contract with the State 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 contract was entered into, this Court will enter an award for the amount due. *National Korectaire Company vs. State of Illinois*, 22 C.C.R. 302. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$274.41**.

(No. 5105—Claimant awarded \$887.74.)

CLIFFORD W. CORDES, Claimant, vs. STATE OF ILLINOIS,  
Respondent.

Opinion filed June 26, 1964.

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

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

CIVIL SERVICE ACT—*damages for illegal removal.* 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 the illegal removal.

SAME—*mitigation of damages.* claimant must do all in his power to mitigate damages during penod of illegal removal.

PERLIN, C. J.

Claimant seeks recovery of \$887.74 in back salary, which is allegedly due and owing to claimant for the period May 20, 1961 to July 1, 1961, and has not been paid him because of lapsed appropriations.

There is no dispute of either law or fact. Claimant was employed by the Department of Revenue from March 23, 1954 until his discharge on April 17, 1961. His salary of \$640.00 per month continued until May 19, 1961. His layoff continued until March 25, 1963 when the Supreme Court of Illinois in the case of *Cordes vs. Isaacs*, 27 Ill. 2d 383, 189 N.E. 2d 236, affirmed an order of the Circuit Court of Sangamon County reinstating claimant, and decreeing the payment of his salary from July 1, 1961 to the date of reinstatement.

Said order of the Circuit Court stated that claimant is entitled to all back salary from May 19, 1961, but noted that “any sums appropriated by the General Assembly of Illinois for payment of personal services by employees of the State of Illinois for the 1959-1961 biennium lapsed on or about July 1, 1961, and said sums

are not available for payment for personal services on the date hereof.”

Claimant testified that he earned no compensation from employment of any kind between the dates of May 20, 1961 and June 30, 1961, inclusive.

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.)

There is no evidence of failure to mitigate damages for the period involved in the instant case. Claimant apparently did obtain some employment for the period subsequent to July 1, 1961.

Claimant is hereby awarded the sum of \$887.74.

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(No. 5109—Claimant awarded \$386.51.)

AMERICAN OIL COMPANY, INC., A CORPORATION, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed June 26, 1964.*

GILLESPIE, BURKE AND GILLESPIE, Attorneys 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.

PERLIN, C. J.

Claimant, American Oil Company, Inc., A Corporation, seeks recovery for sales of products and services

rendered to various departments of the State of Illinois by claimant and its dealers during the years 1959 through 1962.

The evidence in this matter consists of a large number of invoices from claimant's company setting forth the amounts allegedly owed to it by respondent.

According to the stipulation submitted by the parties a balance of \$386.51 remained as due and owing to claimant. The Departments of the State of Illinois, which have incurred the debt in this matter, include the Department of Public Works and Buildings, the Department of Public Safety, the Department of Conservation, the Department of Registration and Education, and the Department of Finance.

The stipulation further stated that each of the items of merchandise included in the above sum was purchased by persons having proper authority, was duly delivered, and funds existed for payment at the time of delivery, if an invoice had been submitted prior to the lapse of the particular appropriation.

Where a contract with the State 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, this Court will enter an award for the amount due. *National Korectaire Co. vs. State of Illinois*, 22 C.C.R. 302, 305; *Jack Muse, Inc., vs. State of Illinois*, No. 5067. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$386.51.

(No. 4997—Claimants awarded \$621.35.)

LEONARD RUBIN and WESTERN STATES MUTUAL INSURANCE COMPANY, Claimants, vs. STATE OF ILLINOIS, Respondent.

*opinion filed July 24, 1964.*

WHAM AND WHAM, Attorneys for Claimants.

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

HIGHWAYS—*notice of relocation.* The State in relocating, repairing or changing a highway, where such action creates a hazardous condition, is bound to use reasonable diligence to warn the traveling public of the hazard.

PERLIN, C. J.

Claimants, Leonard Rubin and the Western States Mutual Insurance Company, seek recovery of the sums of \$50.00 and \$571.35, respectively, for damages allegedly sustained on January 1, 1961 to an automobile, owned and operated by Leonard Rubin, and insured for collision loss by the Western States Mutual Insurance Company.

The evidence shows that on January 1, 1961, at 12:30 A.M., Leonard Rubin was operating his 1961 Oldsmobile in a southerly direction on U.S. Route No. 51, a short distance south of the village limits of Shobonier in Fayette County, Illinois. Respondent had relocated Route No. 51 to the east and southeast of the original Route No. 51. Respondent had also constructed a curve and an approach leading from the old Route No. 51 in a southeasterly direction to connect that route with the highway on the relocation of said Route No. 51, which bypassed the Village of Shobonier to the east. Apparently a ditch had been cut through the old route at the southerly end of the curve from the old route to the relocated route.

Leonard Rubin testified that he is a farmer, 40 years old, and lives in Fayette County, Illinois. On January 1, 1961, he owned a new 1961 Oldsmobile automobile in good operating condition. He had obtained an automobile col-

lision insurance policy with the Western States Mutual Insurance Company, which contained a \$50.00 deductible clause.

On the date in question, Claimant Rubin was driving his automobile from Shobonier to Sandoval on Route No. 51 in a southerly direction. He was accompanied by Marvin Rubin and William Sachan, who were seated alongside him in the front seat. Claimant stated that he had "a few beers" that evening, but that he and his companions were sober. He knew that a road was being built, but did not know that the old road had been terminated by building a ditch across it. He was driving about 50 to 55 miles per hour when he first saw the ditch across the road. Apparently there was about fifteen feet of bare ground from the southernmost edge of the pavement to the ditch. There were no signs or any warning signals showing that the road terminated. He applied his brakes, but was going too fast to stop, and went into the ditch, which was about seven or eight feet wide, and four feet deep, his only alternative being to turn and take a chance of rolling the car. No one was injured. He left his car, and returned to the scene of the accident the next morning. The accident caused damage represented by a paid automobile repair bill of \$625.31. After the accident, Claimant Rubin noticed that the road on which he was traveling did connect with the new route by a sharp turn to the left from the direction in which he was heading.

Leonard Torbeck testified that he operated a body shop, and was familiar with the automobile owned by claimant. He stated that this automobile was in good condition before the accident. He recovered the car from across the ditch, which he estimated to be about four feet deep. Torbeck testified that the amounts charged for the repair of the car were fair and reasonable.

Ewald Krueenagel, representing the Western States Mutual Insurance Company, stated that he examined the scene of the accident on January 1, 1961, and did not see a sign along the stretch of road in question. On January 8, 1961, he returned and observed a sign, which had apparently been installed subsequent to the accident, with an arrow pointing toward the new highway. He testified that Western States Mutual Insurance Company paid the amount of \$625.31 less \$50.00 to Torbeck Garage and Leonard Rubin.

Mr. Marvin Rubin testified that he was with Leonard Rubin at the time of the accident, and that Leonard was sober. Claimant was driving 50 or 60 miles per hour on dry pavement when the road suddenly came to a dead end. There were no warning signs to indicate that there was a dead end or a ditch, or that the road was going to turn.

William Sachan testified that, in his opinion, claimant was sober at the time of the accident. He did not know that there was a ditch dug across the road. The night was dark and cloudy, and the pavement was dry. At the time of the accident old Route No. 51 was paved with regular cement, as it had been for years.

Paul Petard, a Civil Engineer with the Division of Highways District Office, testified that he was resident engineer for the State on the Route No. 51 bypass. The connection in question, where old Route No. 51 joined with the new bypass, was completed about October 14, 1960. At the time of the accident, the pavement of old Route No. 51 from Shobonier up to the point where the old pavement was torn out was still in the same condition, as it was before the project ever started. In 1961, blacktop was put on the new connection. There was a stop sign up at the entrance of the connection with old Route No. 51 and

the new one, about 270 feet from where old Route No. 51 was terminated. Mr. Petard had left the project on December 9, 1960. The old pavement was to be removed, and some had already been removed when he left the job. Petard further stated that there could have been an open ditch at the north end of the removed pavement.

There was no evidence that claimant failed to exercise due care, or that he was intoxicated, as respondent contends. According to witnesses, he was sober, and was proceeding at a speed consistent with driving conditions.

In the opinion of this Court, respondent was in fact negligent, and its negligence was the proximate cause of the accident. Claimant could not reasonably apprehend that the old Route No. 51 would end abruptly with a ditch across the road. There were no signs warning of the connection with the new route, or the termination of old Route No. 51 at that point. The roads were not differentiated by having blacktop put on the route, which connected with the new road, but the surface of concrete remained the same up to the point where the road ended, about 15 feet before the ditch. This condition had apparently existed for several weeks, since some of the old pavement had been removed by the first week of December. There was no barricade or signal warning of either the end of the pavement, or of the ditch cut across the road.

The case of *Kerr vs. State of Illinois*, 23 C.C.R. 211, also involved a change of location of an old highway where the State had failed to maintain signs designating the connection with the old route. In holding respondent liable, the Court stated at page 217:

“ . . . where the State is in the process of repairing, removing, or re-locating a highway, it is duty-bound to use reasonable care in warning the traveling public of a hazard, which it has voluntarily created.” (Citing *Dale Riggins vs. State of Illinois*, 21 C.C.R. 434, 438.)

Claimant, Leonard Rubin, is hereby awarded \$50.00, and the Western States Mutual Insurance Company is awarded the sum of **\$571.35**.

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(No. 5032—Claimant awarded \$3,500.00.)

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

*Opinion filed July 24, 1964.*

**G. WILLIAM HORSLEY** and **ROBERT F. VESPA**, Attorneys for Claimant.

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

**STATE PARKS, FAIR GROUNDS, MEMORIALS AND INSTITUTIONS—negligence.** Where claimant, an invitee, fell on an incline, where no handrail was provided, recovery was permitted, since it was the duty of respondent to keep the State Fair Grounds and buildings thereon in a condition reasonably safe for the use of those attending the Fair.

**SAME—notice of defects.** Where evidence showed a large splinter was sticking up from the bottom board of a ramp, respondent could have determined by proper inspection that the ramp was in a dangerous condition, and is chargeable with constructive notice of such condition.

**PERLIN, C. J.**

Claimant, Marie Welch, seeks recovery of \$25,000.00 for personal injuries allegedly suffered on August 19, 1961 as the result of a fall while claimant was attending the automobile races at the Illinois State Fair, Illinois State Fair Grounds, Springfield.

Claimant testified as follows:

On August 19, 1961, she attended the Illinois State Fair, and purchased tickets to attend the automobile races to be held that day. She could not get tickets to the Grandstand where she had previously sat for such races, but bought three tickets for the Bleachers. The Bleachers were dry when she arrived about 2:00 P.M. with her husband and grandson. She entered by going up a ramp constructed of wooden boards. Rain fell after she

was seated, and about 4:00 P.M. the races were called off. Claimant proceeded to leave the Bleachers by walking down the north side of the wooden ramp with her right hand on a wooden railing. The railing did not extend to the bottom of the ramp, but stopped about four boards short (approximately two and one-half feet). Her husband was walking on the south side of the ramp, which was about six feet wide. Claimant then apparently caught her toe on a splinter or crack, which she had not seen on the bottom board of the ramp. Her shoe came off, tearing the sole, and she was thrown forward on her face, allegedly sustaining the injuries of which she now complains. Claimant was wearing "wedgies", which have a solid heel and no back. She was not bumped from behind.

She was assisted to the First Aid Station, and the doctor in attendance said she had a dislocation of her shoulder. She then walked about a mile to the main gate, and went home. On August 21st she was x-rayed, and her arm put in a sling. Her doctor told her she had a "knob" broken off her shoulder. She was then hospitalized for one day.

Kenneth Welch, claimant's husband, testified that he and his wife walked up the ramp to the Bleachers using the handrail on the right-hand side. He came down the same side. The boards were damp, but not slick. About thirty minutes after the accident, he came back and looked at the ramp, and noticed the bottom board had a splinter sticking up about a half-inch and extending about two feet. In Welch's opinion, the splinter looked old. Welch formerly worked in a sawmill, and he stated that he could tell it had probably weathered for about six to eight months.

Pictures of the ramp revealing the splinter were received in evidence. Mr. Welch testified the pictures ac-

curately represented the condition of the ramp as it existed on the day of the accident.

The Departmental Report from the State Fair Office, dated May 16, 1962, written by Louis London, Assistant General Manager of the Illinois State Fair, stated that the ramp in question "was in perfect shape prior to the Fair, and still is in A-1 condition at the present time."

Mr. London testified that the ramp is intended to be permanent, and had been installed for about five or six years, but has been replaced a number of times. He stated that, before the State Fair opens, carpenters and maintenance men check the Bleachers and the ramp to see if there are obstructions. Mr. London indicated that the ramp is ten feet long, leads to an aisle about three feet above the ground, and the photographs submitted by claimant accurately portray the ramp. London testified that a carpenter foreman had been assigned to check the ramps in the entire section, but he could not say that the inspection was actually made. London could not identify the carpenter foreman assigned to check the section, but could apparently have found out by checking his work sheet.

London said that some new boards were replaced in the Bleachers, but records would not show exactly where the work was done. He did not know of the accident until approximately eight months after its occurrence.

Claimant argues that, since she was an invitee, respondent had the duty of exercising reasonable care and caution to keep the premises safe for her use. Claimant further argues that, if respondent had wanted to dispute claimant's charge of negligence, it would have called as a witness the carpenter foreman, who allegedly inspected the ramp prior to the opening of the Fair, and the ticket-taker or attendant, who, according to Mr. London, were on duty at the time in question.

Respondent counters that claimant did not prove respondent's negligence, claimant's freedom from contributory negligence, or the proximate cause of the fall.

In the opinion of this Court, respondent was negligent in the maintenance of the ramp. Photographs revealed that there was a large splinter sticking up from the bottom board. It would seem that the defect should have been discovered upon proper inspection. Respondent did not attempt to rebut the presumption, which was raised by the testimony of claimant's husband, that the splinter had existed for some time, and that the State had constructive notice of the condition of the board.

The unexplained failure of a party to call a witness in his employ is a circumstance from which the inference may be drawn that the testimony would be unfavorable to the employer, according to 53 Am. Jur. Tr., Sec. 475. This principle is applicable in Illinois, as set forth in the case of *In re Sandusky's Estate*, 321 Ill. App. 1, 52 N.E. 2d 285, where the court declared:

"When neither party calls an available witness, whatever presumption will be indulged in from the failure to call such witness will be against the party to whose interest such witness would most likely incline, and failure to produce such witness is, in such case, a proper subject of comment. *Zimmerman vs. Zimmerman*, supra." (P. 291 N.E. 2d.)

There was no evidence that the carpenter foreman, who had allegedly inspected the ramp, was not in the employ of respondent at the time of the hearing. It is difficult to understand respondent's failure to attempt to rebut the inference of notice by calling the carpenter foreman as a witness, or to explain why he was not called.

In the case of *Kenney, Admr., vs. State of Illinois*, 22 C.C.R. 247, where a tree limb fell from a diseased tree, killing claimant's intestate on the State Fair Grounds, the Court held that it was respondent's duty to make a proper inspection in order to safeguard the patrons at the State Fair. The Court also declared:

“It was the duty of respondent to keep the State Fair Grounds and the buildings thereon in a condition reasonably safe for the use of those attending the Fair, and it was obliged to use ordinary or reasonable care to accomplish this. Claimant’s intestate was entitled to rely on or assume the proper performance of this duty. A violation of such a duty constitutes negligence.”

There is no evidence to justify a conclusion that claimant was contributorily negligent. She apparently held onto the railing provided by respondent for as long as possible. However, for some unexplained reason, the railing ended about two and one-half feet before the bottom of the ramp was reached. It was in this unprotected area that the accident occurred. It appears that respondent should have, as a reasonable precaution to prevent falls such as the one suffered by claimant, provided a handrail in a place where there was still an incline. The crack was not readily apparent to those descending the ramp. As the Court stated in *Blue vs. St. Clair Country Club*, 7 Ill. 2d 359, “where a person invites another upon his premises, the law imposes a duty upon that person to exercise reasonable care for his visitor’s safety, and to warn the visitor of any defects, which are not readily apparent . . . this applies not only to known defects, but also to those conditions, which could have been known had the landowner used reasonable care.”

Respondent suggests that the nature of claimant’s shoes, and prior activities of walking a mile and sitting in the rain show that she was not in the exercise of due care and caution for her own safety. Claimant testified she was accustomed to wearing the shoes, and her activities prior to the accident have no bearing on the issue of whether she was exercising care at the time of the accident. There is no evidence to show that Mrs. Welch should have been aware of the defect, since she had gone up the opposite side of the ramp, and the splinter did not extend that far.

The remaining question is one of damages. Claimant testified that she was the owner of a thirty-five room hotel, and did the maid work at the hotel. She was not able to resume her regular duties at the hotel after the accident. She was in bed for three weeks, and wore a sling for three more weeks. She had taken seven physical therapy treatments. She is not able to do all the work, which she did at the hotel, although she can do some things such as dusting. She further testified that she suffers pain almost all the time, and cannot now drive a car, although she did drive before the accident.

Dr. Noah Koenigsberg, claimant's doctor, who describes himself as an internist, who does not treat fractures, testified that claimant suffered a fracture of the distal end of the right humerus, called the knob on the shoulder. He last examined her on January 14, 1963. At that time claimant complained of pain in the shoulder area, and was unable to hold objects in her right hand because of lack of muscular power. Examination revealed muscle atrophy in the right arm, and less than 50% motion in all directions. She has a discoloration in her right hand, which is due to the injury. Her shoulder muscle is described as atrophied from lack of use, but Dr. Koenigsberg expressed his doubt that the arm would recover entirely even if used. He could not venture an opinion as to permanency.

Dr. Basilius Zariecznyj, apparently an orthoped specialist with the Springfield Clinic, in a report dated December 6, 1961, described the fracture as "well-healed", and she "should regain normal motion in the right shoulder." He recommended exercise and physical therapy.

Claimant's medical bills amounted to **\$302.75.**

Claimant is hereby awarded the sum of \$3,500.00.

(No. 5093—Claimant awarded \$500.00.)

SOPHIA STRATTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion* filed July 24, 1964.

COHEN AND COHEN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; SHELDON K. RACHMAN, Assistant Attorney General, for Respondent.

NEGLIGENCE—when award *will* be made. Where claimant was proceeding in a line of traffic at a slow rate of speed, and sustained burns from a flare held by an employee of the State Highway Department, who was directing traffic, when sparks and phosphorus material flew from said flare into the window of claimant's car causing claimant's jacket to become ignited, an award was allowed.

DOVE, J.

Sophia Stratton filed her claim for injuries on February 1, 1963, and it appears from the files that all notices of intention to institute action in the Court of Claims have been duly and properly filed by said claimant.

The evidence discloses that on the morning of October 15, 1962 claimant was driving her automobile in the vicinity of Kingery Highway and Torrence Avenue, County of Cook, and State of Illinois. It was early in the morning, and the traffic was being re-routed because of a previous accident. The evidence further discloses that claimant was proceeding in a line of traffic at a very slow rate of speed; that a man identified as William C. Baier, an employee of the State Highway Department, was directing traffic, and had in his hand a red light or flare, with which he was motioning in a circular manner directing traffic; that he was approximately two feet from claimant when sparks and phosphorus matter flew from the torch into the window of claimant's car, causing the jacket of her cloth suit to become ignited and burning her on her right arm and chest.

The evidence further discloses that, as a result of said burns, she has a number of scars at the present time,

appearing on her left arm at the elbow, her left hand at the thumb, her right arm at the inner aspect of her elbow, her right wrist, and her left shoulder. These burns and scars were approximately the size of a penny, and will probably remain visible during the remainder of her lifetime. The two employees of the State of Illinois, William C. Baier and Nick Matecek, also testified as to the burns received by claimant, and the manner in which the accident occurred.

There is no evidence that claimant was guilty of any contributory negligence.

We find the State of Illinois guilty of negligence, and hereby make an award to said claimant, Sophia Stratton, in the amount of \$500.00.

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(No. 5114—Claim dismissed.)

VIVIAN SHOCKEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 20, 1963.

Cause dismissed without further *opinion* on July 24, 1964.

JACK R. COOK, Attorney for Claimant.

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

**PRACTICE AND PROCEDURE**—*cause of action not* stated. Where evidence showed no wrongful conduct on part of State in causing claimant's arrest for operating a trailer court without a license, complaint will be dismissed.

DOVE, J.

Claimant, Vivian Shockey, filed her claim, in which she alleged that the State of Illinois, by and through its duly authorized agent, did on the 21st day of September, 1962 appear before John S. Ghent, a Justice of the Peace for District No. 3 Winnebago County, Illinois, and falsely, maliciously, and without any reasonable or probable cause whatever, charged claimant with the

crime of “unlawfully, wilfully, and knowingly maintaining, conducting, and operating a trailer court park without having obtained therefor a license.”

Claimant further alleged that defendant without any reasonable or probable cause whatever caused claimant to be arrested and taken in the custody of the police authorities of Winnebago County, necessitating claimant to post a bond on her behalf, and hire an attorney to defend her, even though at such time of arrest she was confined to a hospital with a serious illness. On April 29, 1962, in response to a notice from said Justice Court, claimant appeared for trial at the place and time designated, and that, upon being ready for trial, no witnesses appeared against her, nor was any evidence produced. At said time the case was dismissed by said Justice of the Peace. Claimant alleges the actions of defendant have been malicious, unwarranted, and constitute an abuse of legal process in violation of claimant’s personal and constitutional rights. As a result of this, claimant has incurred great mental and physical suffering, public embarrassment, and injury to her reputation and standing in the community; that, because of her advanced age, her physical condition since the occurrence has deteriorated to a great extent; and, that claimant has had to expend the sum of \$75.00 for attorney’s fees, and \$20.00 for a professional bondsman, and prays for judgment against the State of Illinois in the sum of \$25,000.00.

A motion to strike the complaint was filed by the Attorney General stating that claimant had not attached to her complaint a copy of the criminal complaint referred to in paragraph two of her said complaint; that claimant had not set forth the names of the purported agents of the State of Illinois; that claimant failed to attach to her complaint a bill of particulars; and, finally, that claimant failed to set forth in her complaint whether

or not her claim has been presented to any other person, corporation, or tribunal.

Subsequently, claimant filed an amended complaint, and attached thereto a copy of the complaint filed in the Justice of the Peace Court. The amendment to the complaint then alleged that claimant is the owner of and the only person interested in this claim, and that no assignment or transfer of this claim, or any part thereof, has been made.

On August 19, 1963, a Departmental Report was filed, and it appears therefrom that, in April, 1962, a complaint was received by the Illinois Department of Public Health at its Northeastern Regional Office from the Rockford Mobile Home Operators' Association to the effect that a number of trailer parks were being operated in Winnebago County without a license in violation of "An Act Relating to the Licensing and Regulation of Trailer Coach Parks." On May 1, 1962, Thomas E. Philbin, Regional Engineer, directed Edwin D. Godbold, Assistant Engineer, to visit Winnebago County and investigate the alleged violations. Mr. Godbold inspected the premises owned by Vivian Shoekey, which were located at 3017 Prairie Road, Rockford, Illinois, and found that there were six trailers located upon these premises, and the Shockey Trailer Park was not licensed by the State Department of Public Health, as required by law. On August 9, 1962, Engineer Philbin again visited the Shockey Trailer Park, and found the same six trailers on the premises, as was reported by Mr. Godbold. Claimant, Vivian Shockey, was not at home, and he was advised by Mrs. Shockey's daughter that claimant was hospitalized in Belvidere, Illinois. On September 5, 1962, Engineer Philbin revisited the trailer park, and found that two trailers had been removed, but four remained. On Sep-

tember 21, 1962, Engineer Philbin again visited the Shockey premises, and found that the four trailers, which were there during his last visit, had not been removed. He then called at the office of the Winnebago County State's Attorney, at which time an information was prepared charging Vivian Shockey with operating a trailer park in violation of the Illinois Statutes. Engineer Philbin signed the complaint in the presence of the Justice of the Peace, John S. Ghent, but Engineer Philbin was not advised, nor was the Regional Office ever advised, that a hearing was to be conducted in the court of Justice of the Peace Ghent on April 29, 1963, or on any other date.

Secs. 162 and 166 of Chapter 111½, Ill. Rev. Stats., provide as follows :

“Trailer Court Park’ or ‘Park’ means an area of land upon which two or more occupied trailer coaches are harbored, either free of charge or for revenue purposes, and shall include any building, structure, tent, or enclosure used or intended for use as a part of the equipment of such trailer coach park.

“No person, firm, or corporation shall establish, maintain, conduct, or operate a trailer coach park after April 30, 1954, without first obtaining a license therefor from the Department. Such license shall be issued for one year, and expire at midnight on April 30 of the year next following the issuance thereof, and the license shall be renewed from year to year upon payment of the annual license fee herein provided.”

It is amply clear from the Departmental Report that claimant, Vivian Shockey, was in violation of the statutes of the State of Illinois. We are of the opinion that claimant has not stated a cause of action; that she has sustained no damages; and, that the motion of the Attorney General to strike should be allowed.

It is hereby ordered that the claim of Vivian Shockey be, and the same is hereby stricken.

(No. 5131—Claimant awarded \$3,661.05.)

GILBERT-HODGMAN, INC., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed July 24, 1964.*

HOBAN AND HORAN, 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.

This claim is Eased upon a contract for electrical work, together with materials, which were furnished by claimant to the Division of Architecture and Engineering of the Department of Public Works and Buildings of the State of Illinois. Said contract is evidenced by claimant's exhibit attached to the original claim.

Subsequently, a stipulation was duly entered into by and between claimant and the office of the Attorney General for the State of Illinois. The stipulation provides in part as follows: That claimant under contract No. 71531 furnished materials and performed work for respondent in air conditioning the offices of the Department of Registration at the State of Illinois Building, 160 North LaSalle Street, Chicago, Illinois; that claimant presented its bill to respondent, and that the same was not paid, because the biennium appropriation from which it was payable had lapsed; that claimant is the owner of said claim; that no assignment or transfer of the claim in this cause, or any part thereof or interest therein, has been made by claimant herein; and, that there is due and owing from respondent, the State of Illinois, to claimant herein, after allowing all just credits, the sum of \$3,661.05.

The only question presented here is whether or not an award can be made for the balance due on the contract above referred to where the appropriation has lapsed.

Where a contract with the State 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 contract was entered into, this Court will enter an award for the amount due. *National Korectaire Company vs. State of Illinois*, 22 C.C.R. 302. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$3,661.05.

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(No. 5147—Claimant awarded \$1,407.22.)

THE PITTSBURG AND MIDWAY COAL MINING CO., A CORPORATION,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed July 24, 1964.*

SCHIFF, HARDIN, WAITE, DORSCHER AND BRITTON, 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.

The claim, as set forth in the complaint filed herein, is based upon a purchase order for coal to be shipped and delivered to the Dixon State School, covering 215.50 tons of coal in the amount of \$1,407.22, which purchase order is evidenced by invoices attached to the original complaint.

Thereafter a stipulation was duly entered into by and between claimant and the office of the Attorney General for the State of Illinois. This stipulation provides as follows :

“1. On or about June 22, 1963, as a result of competitive bidding, respondent, through its Department of Finance, Purchases and Supplies Section, by and through James A. Ronan, Director of Finance, issued to claimant a written purchase order bearing the aforesaid date and numbered 526983 (hereinafter referred to as the ‘purchase order’), a copy of which is attached to the complaint herein as exhibit A. Said purchase order was amended and partially cancelled by a written cancellation of purchase order, dated April 17, 1963, a copy of which is attached to the complaint herein as exhibit B. Except as hereinbefore stated, said purchase order has not been cancelled or amended by the parties. The contract evidenced by the purchase order is listed on page three of the Tabulation of Annual Coal Contracts for 1962-1963, dated July 23, 1962, by the Department of Finance, State of Illinois. A copy of pages one and three of said Tabulation are attached to the complaint herein as exhibit C.

2. All the coal required under the purchase order, as amended, to be shipped and delivered to the Dixon State School (hereinafter referred to as ‘the School’) has been delivered to and received by the School, freight prepaid. Pursuant to such delivery, receipt, and acceptance of coal, claimant has invoiced respondent, through the School, the amounts legally due and owing from respondent to claimant by virtue of such delivery, receipt, and acceptance. All such invoices, being the legal obligation of the State of Illinois, have been duly paid by respondent with the exception of an invoice (hereinafter referred to as the ‘invoice’) covering 215.50 tons of coal in the amount of \$1,407.22. A copy of said invoice is attached to the complaint herein as exhibit D. Said invoice is supported by prepaid freight bills, dated May 20, 1963, June 3, 1963, June 4, 1963 and June 24, 1963, copies of which are attached to the complaint herein as exhibits E, F, G and H, respectively.

3. Said invoice was returned unpaid to claimant by respondent, through the School, under cover of letter, dated November 22, 1963, a copy of which is attached to the complaint herein as exhibit I. Such letter stated that said invoice was not received until September 23, 1963, that the last day for vouchering invoices from the 72nd biennium was September 20, 1963, and that, although the coal covered by the invoice was received, and claimant was entitled to payment, it would be necessary to file a claim against respondent through the Court of Claims.

4. Subsequent to the institution of this action in the Court of Claims, the Department of Finance of the State of Illinois has advised the Attorney General that it has no ‘defense to the claim.

5. Claimant has performed all conditions and terms required on its part to be performed, and is the only person to have any interest in the claim above stated. No assignment or transfer of the claim, or any part

thereof, has been made by claimant. Neither this claim nor any other claim relating to the occurrence, which gave rise to this claim, has been previously presented to any person, corporation or tribunal other than the State of Illinois and its representatives.

6. Claimant, The Pittsburg and Midway Coal Mining Co., A Corporation, is, therefore, entitled to an award in the sum of \$1,407.22."

The only question we now have to pass upon is whether or not an award can be made for the balance due upon the contract where the appropriation has lapsed.

Where a contract with the State 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 contract was entered into, this Court will enter an award for the amount due. *National Korectaire Company vs. State of Illinois*, 22 C.C.R. 302. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of **\$1,407.22.**

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(No. 4774—Claimants awarded \$32,520.49.)

**JOHN C. BYRNES, THOMAS J. FITZGERALD, ROMAN HABRELEWICZ, JOSEPH ONESTO, GEORGE PESTKA, JOHN SIEGEL, HAROLD THOMPSON, TONY JOHNSON, CHARLES MAEYS, and ROSEMARY RACINE, Administrator of the Estate of WALTER RACINE, Deceased, Claimants, vs. STATE OF ILLINOIS, Respondent.**

*Opinion filed May 14, 1963.*

*Petitions of Claimants and Respondent for Rehearing withdrawn August 20, 1964.*

**MICHAEL F. RYAN, and SEARS, STREIT AND TYLER, Attorneys for Claimants.**

**WILLIAM G. CLARK, Attorney General; BERNARD GENIS, Assistant Attorney General, for Respondent.**

CIVIL SERVICE ACT—*payment for period of illegal discharge.* Where evidence showed that claimants were Civil Service employees of the Depart-

ment of Agriculture, and were illegally discharged, **Court** held **they** were entitled to the payment of salaries during **the** period of their illegal removal less any sums earned during said period, or a reasonable amount deducted for mitigation of damages where claimants failed to seek with due diligence other employment.

**FEARER, J.**

John C. Byrnes, Thomas J. Fitzgerald, Roman Habrelewicz, Joseph Onesto, George Pestka, John Siegel, Harold Thompson, Tony Johnson, Charles Maeyes, and Rosemary Racine, Administrator of the Estate of Walter Racine, deceased, were all Civil Service employees of the Department of Agriculture of the State of Illinois on and before June 30, 1953. They are **now** suing for back salaries for the period of their removal, which was between June 30, 1953 and July 1, 1955.

Claimants, during their period of service, were Foods and Dairies Inspectors in the Department of Agriculture of the State of Illinois, and were removed from their positions on June 30, 1953. Subsequent to their removal on September 21, 1953, John C. Byrnes, Thomas J. Fitzgerald, Roman Habrelewicz, Joseph Onesto, George Pestka, Walter Racine, John Siegel and Harold Thompson filed a complaint for mandamus in the Circuit Court of Cook County, Illinois against Stillman J. Stanard, Director of the Department of Agriculture of the State of Illinois, Maude Myers, Saul A. Epton and Warren D. Moyer, members of the Illinois State Civil Service Commission, Orville E. Hodge, Auditor of Public Accounts of the State of Illinois, and Elmer J. Hoffman, Treasurer of the State of Illinois, in which complaint claimants requested reinstatement to their Civil Service positions with the Department of Agriculture of the State of Illinois, from which they asserted they had been illegally removed on June 30, 1953, together with payment of back salary from the date of their removal. Thereafter, on November 4, 1953, claimants, Tony Johnson and Charles

Maey's, were given leave to file their intervening complaint in the mandamus proceeding seeking the same relief as the original parties.

On March 15, 1954, the trial court entered judgment for the plaintiffs, and ordered the defendants to reinstate and recompense the plaintiffs the salary appropriated for their respective positions during the period of their removal.

Thereafter, the defendants appealed, and, on June 13, 1955, the Appellate Court of Illinois for the First District, **affirmed** the trial court's decision, and denied the defendant's petition for rehearing in the case of *People ex rel John C. Byrnes, Et Al*, vs. *Stillman J. Stanard, Et Al*, 6 Ill. App. (2d) 441.

Thereafter, defendants petitioned the Supreme Court of Illinois **for** leave to appeal, which was allowed, and, on September 25, 1956, the Supreme Court affirmed the findings in favor of the plaintiffs, and denied a petition for rehearing as reported in *People ex rel John C. Byrnes, Et Al*, vs. *Stillman J. Stanard, Et Al*, 9 Ill. (2d) 372.

Consequently all the claimants were reinstated, and are before this Court personally, or by legal representatives, seeking back salaries for the period from June 30, 1953 to July 1, 1955.

Summarily disposing of respondent's contention that claimants are barred from receiving an award, the law is well settled that illegally removed Civil Service employees may recover back salaries during the period of their separation after subsequent reinstatement subject to mitigation based on salaries from supplemental employment, *Schneider vs. State of Illinois*, 22 C.C.R. 453, as well as conscientious efforts to obtain employment and credibility of their testimony evidencing their efforts.

In order to arrive at the award to which claimants are entitled, we must consider each case individually.

John C. Byrnes may seek back pay for 24 months at \$300.00 per month, or \$7,200.00, less credit to the State for supplemental earnings during said period of time in the amount of \$4,588.71, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of \$2,611.29.

The record shows that claimant was approximately 26 years of age, in apparent good health, and did not become gainfully employed until December 22, 1953. Therefore, his claim will be mitigated further for the period of time he was unemployed, i.e., from July 1, 1953 to December 22, 1953, in the amount of \$576.00, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed, leaving a net amount of \$2,035.29.

Thomas J. Fitzgerald may seek back pay for 24 months at \$300.00 per month, or \$7,200.00, less credit to the State for supplemental earnings during said period of time in the amount of \$5,889.98, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of \$1,310.02.

Roman Habrelewicz earned more during the period of separation than his salary as a Civil Service employee. Therefore, he is not entitled to an award.

Tony Johnson may seek back pay for 24 months at \$310.00 per month, or \$7,440.00.

The record shows that claimant only sought employment in a very small community, and that other part-time employment was available. Claimant was approximately 64 years of age, in apparent good health at the time of separation. Therefore, his claim will be mitigated fur-

ther for the period of time he was unemployed, i.e., from July 1, 1953 to August 1, 1954, in the amount of \$1,344.00, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed. However, his claim will not be further mitigated from July 1, 1954 to July 1, 1955, since claimant will have by that time achieved the age of retirement, leaving a net amount of \$6,096.00.

Joseph Onesto may seek back pay for 24 months at \$300.00 per month, or \$7,200.00, less credit to the State for supplemental earnings during said period of time in the amount of \$5,361.16, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of \$1,838.84.

The record shows that claimant was approximately 39 years of age, and in apparent good health at the time of the separation. He did not become gainfully employed until October 15, 1953. Therefore, his claim will be mitigated further for the period of time he was unemployed, i.e., from July 1, 1953 to October 15, 1953, in the amount of \$308.00, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed, leaving a net amount of \$1,530.84.

George Pestka may seek back pay for 24 months at \$340.00 per month, or \$8,160.00, less credit to the State for supplemental earnings during said period of time in the amount of \$1,410.03, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of \$6,749.97.

John Siegel, now deceased, may seek back pay for 24 months at \$300.00 per month, or \$7,200.00, less credit to the State for supplemental earnings during said period of time in the amount of \$4,588.71, which figure has been

stipulated between the attorney for claimant and the Attorney General, leaving a net amount of **\$2,611.29**.

The record shows that claimant was approximately **56** years of age, in apparent good health at the time of separation, and did not become gainfully employed until **January 16, 1954**. Therefore, his claim will be mitigated further for the period of time he was unemployed, i.e., from **July 1, 1953** to **January 16, 1954**, in the amount of **\$672.00**, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed, leaving a net amount of **\$1,939.29**.

Harold Thompson may seek back pay for **24** months at **\$370.00** per month, or **\$8,880.00**, less credit to the State for supplemental earnings during said period of time in the amount of **\$294.23**, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of **\$8,585.77**.

The record shows that claimant was approximately **55** years of age at the time of his separation, and in apparent good health. Based upon the Commissioner's Report, it appears that claimant was highly uncooperative, and his credibility as a witness was questionable. Therefore, his claim will be mitigated further in the amount of **\$200.00** per month from **July 1, 1953** to **July 1, 1955**, or **\$4,800.00**, leaving a net amount of **\$3,785.77**.

Charles Maey's may seek back pay for **24** months at **\$330.00** per month, or **\$7,920.00**, less credit to the State for supplemental earnings during said period of time in the amount of **\$662.66**, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of **\$7,257.34**.

The record shows that claimant was approximately **64** years of age, in apparent good health, admittedly had

not retired after his discharge, and could have obtained at least additional part-time employment. Therefore, this claim will be mitigated further for the period of time he was unemployed in the amount of \$1,344.00, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed, leaving a net amount of \$5,913.34.

Rosemary Racine, Administrator of the Estate of Walter Racine, may seek back pay for 24 months at \$345.00 per month, or \$8,280.00, less credit to the State for supplemental earnings during said period of time in the amount of \$4,828.03, which figure has been stipulated between the attorney for claimant and the Attorney General, leaving a net amount of \$3,451.97.

The record shows that claimant, Walter Racine, did not become gainfully employed until November 9, 1953. Therefore, his claim will be mitigated further for the period of time he was unemployed, i.e., from July 1, 1953 to November 9, 1953, in the amount of \$292.00, which figure represents a fair standard set by this Court for credit to the State during the time when we feel that claimant should have been gainfully employed, leaving a net amount of \$3,159.97.

It is, therefore, the order of this Court that the following awards be granted: John C. Byrnes, \$2,035.29; Thomas J. Fitzgerald, \$1,310.02; Roman Habrelewicz, no award; Tony Johnson, \$6,096.00; Joseph Onesto, \$1,530.84; George Pestka, \$6,749.97; John Siegel, \$1,939.29; Harold Thompson, \$3,785.77; Charles Maeyes, \$5,913.34; and, Rosemary Racine, Administrator of the Estate of Walter Racine, \$3,159.97.

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- 4740 Geraldine M. Ashley
- 4741 George P. Omott
- 4790 Mary V. Dougherty and James T. Dougherty
- 4842 Victor G. Johnson, Admr., Et Al
- 4859 Ola Mae Pendleton
- 4861 Elmo Dines
- 4873 Loretta F. Coffey and James J. Boyd
- 4874 Virgil Baker
- 4877 Raymond J. Willmann
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- 4880 Koren Company, A Corporation
- 4884 Charles Tanthorey
- 4888 Clarence Hoppe
- 4890 Mildred R. Mette
- 4896 John Sayad
- 4906 Albert G. Dax, Et Al
- 4910 Mumer C. Swanson, d/b/a Lake Forest Cleaners and **Post Tailor**  
and Cleaners
- 4916 188 Randolph Building Corporation
- 4922 Charley Williams, Admr., Etc.
- 4925 Ed Gates
- 4932 Joseph H. Pritchett
- 4933 Ada Mae Mullin
- 4935 James Manos
- 4940 Alex Savas
- 4941 Robert L. Fields, Admr., Etc.
- 4944 Don Meyer Memorial Temple Association
- 4946 Chicago State Hospital Employees Credit Union
- 4948 Juliana Johanna Whitehill
- 4952 Midland Bakeries Company, A Delaware Corporation
- 4954 Matilda V. Jones
- 4956 Frank J. Krahulik, Et Al
- 4958 William B. Robertson
- 4963 City of Chicago, A Municipal Corporation
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- 4965 Malco Sales, Inc.
- 4973 Lillian Stokes
- 4981 Mary S. Crump
- 4984 Robert M. Crowe
- 4985 Imogene Farris
- 4999 Theodore V. Witczak, Jr., A Minor, Etc.

- 5009 Sarah Cox  
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5041 Eli J. Soldo  
5044 Eugene Miller  
5046 Arthur Elkins, d/b/a La Mode Novelty Company  
5055 Marie Skrynski  
5056 Earl M. Shaw  
5064 Maurice A. Can and Della M. Can, His Wife  
5066 Dallas Bowen  
5082 Ben G. Corn  
5090 Robert Shroyer  
5097 Joseph J. Polivka, individually, and as Administrator of the Estate of  
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5101 John H. Wilson, Et Al  
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5110 Charles A. Rannin and Emilie C. Rannin  
5122 Ammie Good  
5129 L. C. Williams  
5134 Thomas L. Wood  
5153 Chicago, Milwaukee, St. Paul and Pacific Railroad Company, A  
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5161 William D. Whyte

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