

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

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**VOLUME 26**

Containing cases in which opinions were filed and  
orders of dismissal entered, without opinion, between  
January 10, 1967 and June 20, 1969

**SPRINGFIELD, ILLINOIS**

*1972*

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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.

JOHN W. LEWIS,  
*Secretary of State and Ex  
Officio Clerk of the Court  
of Claims*

# OFFICERS OF THE COURT

## JUDGES

MAURICE PERLIN, *Chief Justice*  
Chicago, Illinois  
April 5, 1961—

ALFRED L. PEZMAN, *Judge*  
Quincy, Illinois  
January 29, 1963—May 6, 1969

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

JOHN M. BOOKWALTER, *Judge*  
Dandle, Illinois  
May 7, 1969—

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WILLIAM G. CLARK, *Attorney General*  
January 9, 1961 - January 13, 1969

WILLIAM J. SCOTT, *Attorney General*  
January 13, 1969—

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

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

## RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

Rule 1. *Terms of Court.* 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.* Except as herein otherwise provided, pleadings and practice shall follow the Civil Practice Act of Illinois and the Rules of the Supreme Court of Illinois.

Rule 3. *Pleadings — Form.* Six copies of all pleadings shall be filed with the Clerk at Springfield, Illinois. The pleadings shall be produced on good white paper by a typing, printing, duplicating or copying process that provides a clear image. If carbon copies are used, the original must also be filed. In order that the files of the Clerk's office may be kept under the system commonly known as "flat filing", all papers presented to the Clerk shall be flat and unfolded. Such papers need not have a cover.

Rule 4. *Procedure.*

- A. *Filing.* Cases shall be commenced by the filing of 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 (Sec. 8D, Court of Claims Act) 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. *Attorney of Record.* 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. *Complaint — Form.* The complaint shall be captioned substantially as follows :

IN THE COURT OF CLAIMS OF THE  
STATE OF ILLINOIS

A.B.,	Claimant	}	No. ....
	vs.	}	
STATE OF ILLINOIS, (or the appropriate State Agency)	Respondent	}	\$..... (amount claimed)

**Rule 5.** *Complaint — Required Provisions.*

- A. *General.* A complaint shall set forth fully in the following order :
1. A statement of the nature of the claim (tort, contract, etc.) and the section of the Court of Claims Act under which recovery is sought;
  2. All appropriate allegations required to set forth the claimant's cause of action;
  3. Whether the claim has been *previously* presented to any State Department or officer thereof, and if so presented :
    - (a) claimant shall state when and to whom
    - (b) claimant shall state any action taken on behalf of the State or the appropriate State Agency in connection with said claim;
  4. What persons are owners of the claim or interested

## VII

therein, and when and upon what consideration such persons became so interested;

5. That no assignment or transfer of the claim, or any part thereof or interest therein has been made except as stated in the complaint;
  6. 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;
  7. That claimant believes the facts stated in the complaint to be true;
  8. 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, and, if *so*:
    - (a) 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.)
  9. A bill of particulars, stating in detail each item of damages, and the amount claimed on account thereof;
  10. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal; if so, a duly certified copy of the record of appointment must be filed with the complaint.
- B. *Personal Injuries.* Where a complaint alleges damages **as** a result of personal injuries, claimant shall:
1. Attach to the complaint, *as a separate item*, copies of the notices served as required by Chap. 37, Sec. 439.22-1, 1971 Illinois Revised Statutes, showing how and when such notices were served.
  2. Include with the bill of particulars, as required by Rule 5A9, the names and addresses of all persons providing medical services; if hospitalized, name(s)

## VIII

of hospital(s) and dates of hospitalization; name of claimant's employer, place of employment, and if time lost, dates thereof.

- C. *Contracts.* If the claimant bases the complaint upon a contract, or other instrument in writing, a copy thereof shall be attached thereto for reference.
- D. *Lapsed Appropriations.* All claims for services or materials furnished to the State of Illinois, payment of which has been denied solely because of a lapsed appropriation, shall be filed with the Clerk of the Court of Claims in the following manner:
1. Claims shall be initiated by filing with the Clerk of the Court of Claims in Springfield six copies of a verified lapsed appropriation claim form (available upon request from the Clerk's office) or a facsimile thereof.
  2. Respondent shall confirm or deny that such sum of money or any sum of money is due said claimant.
  3. Claims against no more than one department or State Agency shall be included in each complaint.
  4. Claimant's name and address, or that of his attorney, shall appear at the bottom of the complaint.

Rule 6. *Exhaustion of Remedies.* As required by Sec. 25 of the Court of Claims Act, the claimant shall before seeking final determination of his claim before the Court of Claims exhaust all other remedies, whether administrative, legal or equitable.

- A. *General continuance.* Any complaint filed or pending in the Court of Claims shall be continued generally, subject to the provisions of Rule 7, until the final disposition of all other claims or proceedings arising from the same occurrence or transaction.
- B. *Subsequent action or claim.* If the claimant shall, subsequent to the filing of a complaint in the Court of Claims, commence a proceeding in another tribunal, or present a claim to any other person or corporation

## IX

(e.g., insurance carrier, governmental body, etc.) for damages arising out of the same occurrence or transaction, the claimant shall immediately advise the Court of Claims in writing as to when, where and to whom such claim was presented or proceeding commenced.

- C. *Action against State employees.* Failure to file or pursue suits against State employees acting within the scope of their employment shall not be a defense to the respondent.

Rule 7. *General Continuance — Status Report.* When a cause of action has been continued generally the claimant shall file annually, between April 1 and May 31, a notice, in duplicate, with the Clerk of the Court of Claims, advising the Court of the following :

- A. The status of the action giving rise to the continuance.
- B. If said action has been disposed of, the date and result of said disposition.
- C. Whether the claim in the Court of Claims shall be further continued, placed back on the active calendar or dismissed.

Rule 8. *Death of Claimant.* If the claimant dies pending the suit, the death must be suggested on the record, and the legal representative upon 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 9. *Dismissal.* FAILURE TO COMPLY WITH THE PROVISIONS OF RULES 5, 6, 7, OR 8 SHALL BE GROUNDS FOR DISMISSAL.

Rule 10. *Answer by Respondent.* The respondent shall answer within sixty (60) days after the filing of the complaint, and the claimant may reply within thirty (30) days after the filing of said answer, unless the time for pleading be extended; provided however, if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the com-

plaint shall be considered as filed. Respondent, upon good cause shown, may thereafter, by leave of Court, be permitted to file affirmative pleadings.

**Rule 11. *Hearings — Assignments — Continuances.*** At the next session of the Court after issue is joined, the Court upon the call of the docket, shall assign the case to a commissioner, who, within a reasonable time, shall set the time and place for hearing, and notify opposing counsel in writing. *After two (2) continuances have been granted in any case, no further continuances will be granted except upon good cause shown, supported by affidavit.*

**Rule 12. *Transcript of Evidence.***

- A. *Filing.*** All evidence shall be taken in writing in the manner in which depositions in civil actions are usually taken. When the evidence is taken, and the proofs in a case are closed, the evidence shall be transcribed, and three (3) copies thereof shall be filed by the court reporter with the clerk within thirty (30) days of the completion of the hearing.
- B. *Form.*** 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. Letter or legal size paper shall be used, and margins shall be of suitable size.
- C. *Index-witnesses.*** An index identifying the names of the witnesses shall be included in the transcript of evidence. The index shall further disclose the pages on which the testimony of each witness appears.
- D. *Index-exhibits.*** An index indentifying exhibits and reflecting the pages on which the exhibits are marked for identification shall be included in the transcript of evidence. The index shall further disclose the pages on which the exhibits are admitted into evidence or whereon admission thereof is denied.

**Rule 13. *Costs of Evidence.*** All costs and expenses of taking evidence required by the claimant shall be borne by the claim-

ant, and the costs and expenses of taking evidence required by the respondent shall be borne by the respondent.

**Rule 14. *Departmental Records and Reports — Prima Facie Evidence.*** 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 five (5) copies filed with the Clerk.

**Rule 15. *Medical Examination of Claimant.***

- A. ***Court order.*** In any case in which the physical condition of a claimant or claimants is in controversy, the Court may order claimant(s) 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 to his attorney, and to all other claimants, or to their attorneys, if any. Said notice 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. ***Physician's report.*** 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.

**Rule 16. Abstracts — When Required.** In all cases where the transcript of the evidence, including exhibits, exceeds 150 pages in number, claimant shall furnish, in sextuplicate an abstract of the evidence, or excerpts from the record, prepared in conformity with Rule 342 of the Rules of the Supreme Court of Illinois.

**Rule 17. Briefs.** Each party shall file with the Clerk six 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 18. Abstracts and Briefs — Time for Filing.** 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.

**Rule 19. Extension of Time.** 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, paper, documents, abstracts or briefs. A party

filing such a motion shall submit therewith six (6) copies of the proposed order in the furtherance of said motion.

Rule 20. *Motions.*

- A. **General.** All motions shall be in writing. Six (6) 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.** Objections to motions, and suggestions in support thereof, must be in writing and filed within fifteen (15) days of the filing of the original motion. Six (6) 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. When motions are filed by either the claimant or the respondent, the moving party shall also submit six (6) copies of a proposed order in the furtherance of said motion.
- C. **Rulings by commissioners.** After a cause has been assigned for hearing to a commissioner, all procedural motions during the course of the hearing, except motions to dismiss or motions for summary judgment, may be determined by said commissioner. Motions before commissioners must be in writing together with proof of service upon counsel for the other party. The commissioner shall cause to be filed with the Clerk of the Court any order so issued.

guments on motions or objections to motions, except on motions to dismiss where, in the Court's discretion, oral arguments thereon would be of value to the Court.

Rule 21. **Oral Argument of Case.** Either party desiring to make oral argument shall *so* indicate on the cover of his brief.

- D. **Oral argument on motions.** There shall be **no** oral ar-

Oral argument on a petition for rehearing will be permitted only when ordered by the Court on its own motion.

**Rule 22. *Rehearing — Time to Pile.*** A party desiring a rehearing in any case shall, within thirty (30) days after the filing of the opinion, file with the Clerk six (6) 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 23. *Rehearing — Procedure.*** When a rehearing is granted, the original briefs of the parties, the petition for rehearing, the answer and the reply thereto shall constitute the file in the case on rehearing. The opposite party shall have twenty (20) days from the date of filing of the petition for rehearing to answer the petition; and the petitioner shall have ten (10) days thereafter within which to file a reply. Neither the claimant, nor the respondent, shall be permitted to file more than one application or petition for a rehearing.

**Rule 24. *New Trial.*** Within thirty (30) days after the Court has rendered an opinion in a case, the Court may, for good cause shown, grant a new trial.

**Rule 25. *Records — Calendar.***

**A. *Records.*** The Clerk shall record all orders of the Court, including the final disposition of cases. He shall keep all required dockets in which shall be entered all claims filed, together with their number, dates of filing, the names of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, 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. *Calendar.*** 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 26. *Dismissal for Want of Prosecution.* A case may be dismissed for want of prosecution where the Court determines that the claimant has made no attempt in good faith to proceed.

Rule 27. *Fees and Costs.* The following schedule of fees shall **apply**:

Filing of complaint in which amount of claim is more than \$50.00 and less than \$1,000.00.. . . . \$ 10.00

**Filing of complaint in which amount of claim is \$1,000.00 or more.. . . . \$ 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.

The above and foregoing rules, as amended, were adopted **aa** rules, as amended, of the Court of Claims of the State of Illinois on the *3rd day of March, 1972*, to be in full force and effect from and after the *13th day of March, 1972*.

## COURT OF CLAIMS ACT

As amended by P.A. 77-1777; approved December 10, 1971.  
(Ill. Rev. Stats. 1971, Chap. 37, Courts, §439.1-439.29.)

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, L.1945, p. 660.

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

**Sec. 1. Creation of Court of Claims—Appointment of judges.]** 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 the case of vacancy.

**Sec. 2. Term of office.]** 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. As amended by act approved July 16, 1951. L.1951, p. 1554.

**Sec. 3. Oath of office.]** 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.

<sup>1</sup> Sections 439.1-439.24 of this chapter.

**Sec. 4. Compensation for judges.]** Each judge shall receive a salary of \$9,000 per annum payable in equal monthly installments. Amended by P.A. 77-595, § 1, eff. July 31, 1971.

**Sec. 5 Seal of court.]** The court shall have a seal with such device as it may order.

**Sec. 6. Sessions of court.]** 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.

**Sec. 7. Record of proceedings—Clerk of court—court room, etc.]** 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 suitable court rooms, chambers and such office space as is necessary and proper for the transaction of its business.

**Sec. 8. Jurisdiction.]** The court shall have exclusive 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<sup>1</sup> or the Workmen's Occupational Diseases Act.<sup>2</sup>

(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

<sup>1</sup> Chapter 48, § 138.1, et seq.

<sup>2</sup> Chapter 48, §§ 172.86, et seq.

## XVIII

than \$15,000; for imprisonment of **14** years or less but over **5** years, not more than **\$30,000**; for imprisonment of over **14** years, not more than **\$35,000**; and provided further, the court shall **fix** attorney's fees not to exceed **25%** of the award granted.

(d) All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities, provided that an award for damages in a case sounding in tort shall not exceed the sum of **\$25,000** to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act".<sup>3</sup>

### **Sec. 9. Rules of court—Subpoenas.]** 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 granted in this Section.

B. Issue subpoenas to require the attendance of witnesses for the purposes of testifying before it, or before any

<sup>3</sup> Chapter 48, § 281 et seq.

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 in a civil action 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.

**Sec. 10. Oath and affirmations—Acknowledgments.]**

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.

**Sec. 11. Petition—Requisites of.]** 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 the statements of facts by the affidavit of the claimant, his agent, or attorney.

**Sec. 12. Examination of claimant.]** 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.

**Sec. 13. Place of holding court.]** Any judge or commissioner of the court may sit at any place within the State to take evidence in any case in the court.

**Sec. 14. Fraud against State.]** 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.

**Sec. 16. New trials.]** When a decision is rendered against a claimant, the court may grant a new trial for any reason which, by the law applicable to civil actions between individuals, would furnish sufficient ground for granting a new trial.

**Sec. 16. Concurrence of judges.]** Concurrence of two judges is necessary to the decision of any case.

**Sec. 17. Conclusiveness of determination.]** 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.

**Sec. 18. Opinions—Lapsed appropriations—Small claims—Publication.]** The court shall provide, by rule, for the maintenance of separate records of claims which arise solely due to lapsed appropriations and for claims for which amount of recovery sought is less than \$1,000. In all other cases, 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.

**Sec. 19. Attorney General to appear in interest of State.]** 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 recoument by the State.

**Sec. 20. Statement of Decisions.]** 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 Comptroller, and to such other officers as the court directs.

**Sec. 21. Fees.]** The court is authorized to impose, by uniform rules, a fee of \$10 for the filing of a petition in any case in which the award sought is more than \$50 and less than \$1,000, and \$25 in any case in which the award sought is \$1,000 or more; 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.

**Sec. 22. Limitations.]** Except as provided in subsection F of Section 8 of this Act<sup>1</sup> every claim, other than a claim arising out of a contract or a claim arising under subsection C of Section 8 of this Act,<sup>2</sup> 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. Claims cognizable against the State by vendors of goods or services under "The Illinois Public Aid Code", approved April 11, 1967, as amended,<sup>3</sup> shall have a period of limitation of 1 year after the accrual of the cause of action, as provided in Sections 11—13 of that Code.<sup>4</sup> 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.

**Sec. 22-1. Action for personal injuries—Notice—Contents.]** 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, the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of the State Colleges and Universities, 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, a brief description of how the accident occurred, and the name and address of the attending physician, if any.

In actions for death by wrongful act, neglect or default, the executor of the estate, or in the event there is no will, the administrator or other personal representative of the decedent, shall file within six months of the date of death or the date that the executor or administrator is qualified, whichever occurs later, in the office of the Attorney General and also in the office of the Clerk of the Court of Claims, giving the name of the person to whom the cause of action has accrued, the name and last residence of the decedent, the date of the accident causing death, the date of the decedent's demise, the place or location where the accident causing the death occurred, the date and about the hour of the accident, a brief description of how the accident occurred, and the names and addresses of the attending physician and treating hospital, if any.

**Sec. 22-2. Failure to file notice—Effect.]** If the notice provided for by Section 22-1<sup>1</sup> is not filed as provided in that

section, any such action commenced against the State of Illinois, the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System, or the Board of Governors of State Colleges and Universities, 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.

**Sec. 23. Award as condition precedent to appropriation.]**

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.

**Sec. 24. Court of Claims Fund.]** The General Assembly hereby creates The Court of Claims Fund and shall make annual appropriations thereto from which the Court may direct immediate payment of :

(a) All claims arising solely as a result of the lapsing of an appropriation out of which the obligation could have been paid.

(b) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act."<sup>1</sup>

(c) All other claims wherein the amount of recovery sought is less than \$1,000.00.

**Seco 25. Claimant must exhaust other remedies.]** Any person who files a claim before the court shall, before seeking final determination of his claim, exhaust all other remedies and source of recovery whether administrative, legal or equitable; except that failure to file or pursue suits against State employees, acting within the scope of their employment, shall not be a defense.

**Sec. 26. Awards axe final.]** The granting of an award under this Act shall constitute full accord and satisfaction. There shall be but *one satisfaction* of any claim or cause of action and any recovery awarded by the court shall be subject to the right of set-off of an amount equal to the monies

<sup>1</sup> Chapter 48, § 281, et seq.

received from any other source, whether received in consideration of release or covenant.

**Sec. 27. Severability clause.]** The provisions of this Amendatory Act of 1971 shall be severable, and if any provision of this Amendatory Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of this Amendatory Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

**Sec. 28. Effective date.]** This Amendatory Act of 1971 shall apply only to causes of action accruing on or after January 1, 1972.

**Sec. 29. Short title—Fund.]** This Act shall be known and may be cited as the “Court of Claims Act.”

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RELATED STATUTES

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**STATE GOVERNMENT—STATE OF ILLINOIS MAY  
BE SUED ONLY IN COURT OF CLAIMS**

PUBLIC ACT 77-1776

(Ill. Rev. Stats. 1971, Chap. 127, § 108)

An Act in relation to immunity for the State of Illinois.

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

**Sec. 1. S.H.A. Chap. 127, § 801.]** Except as provided in “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, the State of Illinois shall not be made a defendant or party in any court.

**Sec. 2. S.H.A. Chap. 127, § 801 ~~rote.~~]** This Act shall take effect on January 1, 1972.

Approved December 10, 1971.

Effective January 1, 1972.

## LAW ENFORCEMENT OFFICERS AND FIREMEN COMPENSATION ACT

AN ACT in relation to the payment of compensation on behalf of law enforcement officers and firemen killed in the line of duty and to make appropriations in connection therewith.

P.A. 76-1602, eff. September 30, 1969, as amended by P.A. 77-1778, approved December 10, 1971. (Ill. Rev. Stats., Chap. 48, §281-285)

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

**Sec. 1.** Short title and citation.] This Act shall be known and may be cited as the “Law Enforcement Officers and Firemen Compensation Act”.

**Sec. 2.** Definitions.] As used in this Act, unless the context otherwise requires :

(a) “law enforcement officer” or “officer” means any person employed by the State or a local governmental entity as a policeman, peace officer or in some like position involving the enforcement of the law and protection of the public interest at the risk of that person’s life. This includes supervisors, wardens, superintendents and their assistants, guards and keepers, correctional officers, youth supervisors, parole agents, school teachers and correctional counselors in all facilities of both the Juvenile and Adult Divisions of the Department of Corrections, while within the facilities under the control of the Department of Corrections or in the act of transporting inmates or wards from one location to another or while performing their official duties.

The death of the foregoing employees of the Department of Corrections in order to be included herein must be by the direct or indirect wilful act of an inmate, ward, work-releesee, parolee, parole violator, person under conditional release, or any person sentenced or committed, or otherwise subject to confinement in or to the Department of Corrections.

(b) "fireman" means any person employed by the State or a local governmental entity as a member or officer of a fire department.

(c) "local governmental entity" includes counties, municipalities and municipal corporations.

(d) "State" means the State of Illinois and its departments, divisions, boards, bureaus, commissions, authorities and colleges and universities.

(e) "killed in the line of duty" means losing one's life as a result of injury received in the active performance of duties as a law enforcement officer or fireman if the death occurs within one year from the date the injury was received and if that injury arose from violence or other accidental cause. The term excludes death resulting from the wilful misconduct or intoxication of the officer or fireman; however, the burden of proof of such wilful misconduct for intoxication of the officer or fireman is on the Attorney General.  
Amended by P.A. 77-452, § 1, eff. July 23, 1971.

**Sec. 3. Limitation—Amount of compensation—Designation of beneficiary—Charges for securing compensation.]** If a claim therefor is made within one year of the date of death of the law enforcement officer or fireman, compensation in the amount of \$10,000 shall be paid to the person designated by a law enforcement officer or fireman killed in the line of duty. If no beneficiary is designated or surviving at the death of the law enforcement officer or fireman killed in the line of duty, the compensation in the sum of \$10,000 shall be paid as follows:

(a) when there is a surviving spouse, the entire sum shall be paid to the spouse;

(b) when there is no surviving spouse, but a surviving descendant of the decedent, the entire sum shall be paid to the decedent's descendants per stirpes;

(c) when there is neither a surviving spouse nor a surviving descendant, the entire sum shall be paid to the parents of the decedent in equal parts, allowing to the surviving parent, if one is dead, the entire sum;

(d) when there is no surviving spouse, descendant or parent of the decedent, but there are surviving brothers or sisters, or descendants of a brother or sister, who were receiving their principal support from the decedent at his death, the entire sum shall be paid, in equal parts, to the dependent brothers or sisters or dependent descendant of a brother or sister. Dependency shall be determined by the Court of Claims based upon the investigation and report of the Attorney General.

When there is no beneficiary designated or surviving at the death of the law enforcement officer or fireman killed in the line of duty and no surviving spouse, descendant, parent nor dependent brother or sister, or dependent descendant of a brother or sister, no compensation shall be payable under this Act.

No part of such compensation may be paid to any other person for any efforts in securing such compensation.

**Sec. 4. Claim—Application—Contents—Substantiation** of claim.] Notwithstanding Section 3, no compensation is payable under this Act unless a claim therefor is filed, within the time specified by that Section, with the Court of Claims on an application prescribed and furnished by the Attorney General and setting forth:

(a) the name, address and title or designation of the position in which the officer or fireman was serving at the time of his death;

(b) the names and addresses of person or persons designated by the officer or fireman to receive the compensation and, if more than one, the percentage or share to be paid to each such person, or if there has been no such designation, the name and address of the personal representative of the estate of the officer or fireman;

(c) a full, factual account of the circumstances resulting in or the course of events causing the death of the officer or fireman; and

(d) such other information as the Court of Claims reasonably requires.

When a claim is filed, the Attorney General shall make an investigation for substantiation of matters set forth in such an application.

**Section B. S.H.A.Chap. 48, § 283 note]** This amendment shall take effect on January 1, 1972.

Approved December 10, 1971.

Effective January 1, 1972.

**Sec. 5. Compensation as additional compensation.]** The compensation provided for in this Act is in addition to, and **not** exclusive of, any pension rights, death benefits or other compensation otherwise payable by law.

#### DAMAGES CAUSED BY ESCAPED INMATES OF STATE CONTROLLED INSTITUTIONS

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, Ill. Rev. Stats., 1971)

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

**4041. Claims.] § 1.** Whenever a claim is filed with the Department of Mental Health, the Department of Children and Family Services or the Department of Corrections for damages resulting from personal injuries or damages to property, or both, or for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has escaped from a 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, the Department of Children and Family Services or the Department of Corrections shall conduct an investigation to determine the cause, nature and extent of the damages and if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the Department 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. Amended by P.A. 77-1422, § 1, eff. September 2, 1971.

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## THE ILLINOIS VEHICLE CODE

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Article V Relating to  
Financial Responsibility  
(Chap. 95½, Sec. 7-503, Ill. Rev. Stats. 1971)

**7.503 Unclaimed security deposits.] § 7-503.** During July, annually, the Secretary shall compile a list of all securities on deposit, pursuant to this Article, for more than 3 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 depositor advising him that his deposit will be subject to escheat to the State of Illinois if not claimed within 30 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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## MILITARY AND NAVAL CODE

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### Article XI. Pay and Allowances

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(Chap. 129, Secs. 220.52-220.56, Ill. Rev. Stats. 1971)

**220.62 Disabled personnel — Treatment — Compensation.] § 52.** Officers, warrant officers or enlisted personnel of the Illinois National Guard or Illinois Naval Militia who may be mounded 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, are entitled to be treated by an officer of the medical or dental department detailed by The Adjutant General and, as long as the Illinois National Guard has not been called into federal service, are entitled to all privileges due them as State employees under the “Workmen’s Compensation Act”, approved July 9, 1951, as now or hereafter amended,<sup>1</sup> and the “Workmen’s Occupational Diseases Act”, approved July 9, 1951, as now or hereafter amended.<sup>2</sup>

Amended by P.A. 76-1139, § 1, eff. August 28, 1969.

**220.63 Heirs and dependents of disabled or killed personnel — Claim against State.] § 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.

<sup>1</sup> Chapter 48, § 138.1, et seq.

<sup>2</sup> Chapter 48, § 172.36, et seq.

**220.54. Compensation of medical officers for attending cases.] § 54.** Officers of the medical and dental departments who attend cases of injury or illness incurred in line of duty under Sections **52** and **53** of this Article' shall be entitled to such reasonable compensation in each case as the circumstances may warrant, as approved by The Adjutant General.

**220.55 Hospital charges to be paid by State.**<sup>3</sup> § 55. Necessary hospital charges incurred in cases stated in Sections **52** and **53** hereof,<sup>1</sup> and for beds in open or general wards shall be paid by the State on proper vouchers made out by the attending medical or dental officers and approved by The Adjutant General.

**220.56 Source of funds.] § 56.** All payments under Sections **52, 53, 54** and **55** hereof<sup>1</sup> shall be made from appropriated funds on vouchers and bills approved by The Adjutant General.

<sup>1</sup> Sections 220.62, 220.63 of this chapter.

<sup>1</sup> Sections 220.62, 220.63 of this chapter.

<sup>1</sup> Sections 220.62, 220.63, 220.64, 220.66 of this chapter.

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## INDEX TO

Other Related Statutes — By Reference  
(References are to Chapter and Section)  
Illinois Revised Statutes **1971**

Habeas corpus proceedings, county's claim for expenses incurred in, 65, § **38**.

Illinois National Guard or Illinois Naval Militia, disabled or killed personnel, claim against State, **129**, § **220.53** and **401**, et seq.

Service Recognition Board, consideration of claims on termination of, 126½, § **65**.

State guard, award for disability, jurisdiction transferred, **129**, § **277**.

State Warrant Escheat Law, filing action, **49**, § **24**.

Tort actions :

Board of governors, state colleges and universities, jurisdiction, **144**, § **1007**.

Medical Center District, **91**, § **126**.

Southern Illinois University, jurisdiction, 144, § **657**.

University of Illinois, jurisdiction, **144**, § **22**.

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## TABLE OF CASES REPORTED IN THIS VOLUME

---

### A

	Page
Addressograph Multigraph Corporation .....	356
Allen. Gertrude K.....	488
America Fore Insurance Group. Subrogee. Etc.....	155
American Oil Company. a Maryland Corporation .....	73
American States Insurance Company. a Corporation.....	170
Ancel. Louis .....	483
Anderson. Norris W.....	119
Anken <b>Chemical and Film Corporation</b> .....	487
Antenna Services. Inc., a Corporation .....	313
Arnts. Ollie Lee .....	338
Aurora Skelgas Service .....	440

### B

B & B Electric. Inc.....	491
Bachmeier. Marie .....	219
Bank of Lyons. an Illinois Banking Corporation .....	104
Barker Milling and Grain Company .....	389
Bender. William .....	383
Berry. Ellis Thurlow .....	377
Berry. Guylene. Admr., Etc.....	377
Blackmore and Glunt., Inc.....	447
Blunt. Raymond S., and Company .....	358
Boden Products. Inc.....	491
Borum. Lester R., Et Al .....	328
.Broadway Litho and Printing Corporation .....	430
Bromberg. Josephine .....	491
Broughton. P. H., and Sons. Inc., a Corporation .....	131
Brown. Punch. Garage .....	227
Bryant. Mamie Jo .....	491
Bugle. Berdina .....	173
Burke. Charles Estel .....	9
Burke. Edmund M., and Associates. Ltd.....	483
Burke. Martha Alice, Et Al .....	267

## C

	Page
Callaghan and Company. an Illinois Corporation .....	455
Capital City Paper Company. The .....	324
Carnaghi Oil Company .....	276
Carr. Michael B.....	155
Carr. Michael B., Individually. Etc.....	155
Carr. Michael J.....	155
Casey. Edwin J.....	41
Castoro. Joy Ann .....	468
Castoro. Salvatore. Et Al .....	468
Central Illinois Public Service Company .....	92
Chicago Housing Authority .....	400
Chicago Seating Co., Inc.....	393
Chicago Wesley Memorial Hospital. an Illinois Not-for-Profit Corporation .....	289
Chism. Inc., a Delaware Corporation .....	181
City of Highwood. a Municipal Corporation .....	269
Clark. Madge .....	267
Commercial Light Company. a Corporation .....	443
Commissioners of Drainage District No. 2 in Pleasant View Township. Macon County. and State of Illinois ....	122
Commonwealth Edison Company. a Corporation .....	406
Commonwealth Edison Company. an Illinois Corporation ..	483
Conroy. Robert L.....	303
Cook County Department of Public Aid .....	484
Cook. County of. and Cook County Department of Public Aid .....	484
Country Mutual Insurance Company. a Corporation .....	20
County of Cook .....	484
County of Randolph. The .....	.95, 490
County Treasurer of Piatt County. Illinois .....	441
Crittenton. Florence. Peoria Home. a Not-for-Profit Corporation .....	198

## D

Davidson Division. Fairchild Camera and Instrument Corporation .....	136
Davis. Mary K.....	491

**XXXVII**

	Page
Davis. Russell K., Et Al .....	491
Delnor Hospital. a Not-for-Profit Corporation of the State of Illinois .....	45
Dietzgen. Eugene. Company .....	453
Di Giovanni. Rebecca .....	308
Dorfman. Jeanette .....	491
Drainage District No. 2 in Pleasant View Township. Macon County and State of Illinois .....	122
Dron. R., Electrical Company. a Delaware Corporation ....	397
Dryer. Joel. a Minor. Etc.....	491
Duble. Charles. Sr.....	87

**E**

Edwards. J. F., Construction Company .....	83
Elgin Salvage and Supply Company. Inc., a Corporation ..	278
Elmore, Clifford .....	24
Emmco Insurance Company .....	328
Eveready Manifold Corporation. an Illinois Corporation ...	452

**F**

Fairchild Camera and Instrument Corporation .....	136
Firestone Tire and Rubber Company. The .....	390
Fleischli Medical Group. The .....	202
Florence Crittenton Peoria Home. a Not-for-Profit Corporation .....	198
Foreman. Ruby .....	299
Fraser, Gerald E.....	288
Fruin-Colnon Contracting Company. a Corporation .....	138
Fuller. Jimmie G.....	14

**G**

Gan. Cleta .....	127
Gan, Vernon. Et Al .....	127
Gerber. Max. Inc.....	454
General Telephone Company of Illinois .....	409
Genza. Walter .....	166
Giedraitis. Domininkas, Et Al .....	419
Giedraitis. Elena .....	419

XXXVIII

	Page
Gilfand. Donald. a Mentally Ill Person. Etc.....	308
Goff. Joanne .....	491
Goff. Kenneth. Et Al .....	491
Goldrich. Arthur M.....	391
Goodyear Tire and Rubber Company. The .....	47
Grablowski. Evelyn M.....	53
Graham Rehabilitation Center. The Ray .....	275
Grochowski. Edward .....	149
Grochowski. Frances. Et Al .....	149
Grumley. Dickie. Thorton and Clark .....	483
Gulf Oil Corporation .....	.286, 332
Gunthorp-Warren Printing Company. an Illinois Corporation .....	188

H

Hall. Ann D., Et Al .....	491
Hall. Kenneth .....	491
Hardy Salt Company .....	97
Harris. Leamon. Jr.....	491
Highwood. City of. a Municipal Corporation .....	269
Hinsdale Sanitarium and Hospital 20. a Corporation .....	281
Holy Cross Hospital .....	360
Home Insurance Company. The. as Subrogee. Etc.....	186
Hope School. Inc., The. a Not-for-Profit Corporation .....	-367
Hudson. John .....	178
Hunt. Blanche F.....	267

I

Illinois Bell Telephone Company. an Illinois Corporation .....	110, 483
Inniss, Kyle. a Minor. Etc.....	491
Inniss, Thelma .....	491

J

Jackson Welding School .....	270
Jacobs. Irene .....	231
Jamison. Wilson. for the use of Country Mutual Insurance Company. a Corporation. Etc.....	20
Jewish Hospital of St. Louis. a Missouri Corporation .....	147

**XXXIX**

	Page
Jodłowski, Dana. Admr., Etc.....	66
Jodłowski. Frank. Jr.....	66
Jodłowski, Stanley .....	66
Jones. Jane A., a Minor. Etc.....	163
Johnson. Cheryl. a Minor. Etc.....	231
Justice. Wayne E.....	60

**K**

Kaiser Supply .....	361
Kane County Service Company .....	206, 410
Kase. Jack .....	438
Kaufman, Suzanne .....	491
Kelly, Alice .....	426
Kelly, Leonard, Sheriff of Fayette County .....	115
Kendrick, Frank .....	471
Kenney, Charles M., Admr., Etc.....	226
Keuffel and Esser Company, a Corporation .....	81, 399
King, Joseph T., Et Al .....	396
Kmetz, Kay P.....	491
Korwin, Frank .....	112
Kumiga, Constance .....	77

**L**

Lammert and Mann Company. an Illinois Corporation ....	113
La Salle Extension University .....	362
Lassin. Theodore G.....	396
La Susa. Samuel A.....	483
Lawrence. William S., and Associates. Inc.....	483
Lawyers Co-operative Publishing Company. The .....	75
Leslie. Herman .....	396
Lewinski, Mitchell. Admr., Etc.....	166
Lewis College. Lockport. Illinois .....	369
Limperis. Edward. Trustee. Etc.....	393
Lyons. Bank of. an Illinois Banking Corporation .....	104

**Mc**

Mc Alear Division of White Consolidated Industries. Inc.....	334
---	-----

XXXX

	Page
Mc Connell. Helen Betty .....	163
Mc Graw-Hill Book Company .....	448
Mc Guire Equipment Company .....	186
Mc Mahon. Martin J., Etc.....	476
Mc Mahon Produce Company .....	476

M

Magnuson. Norman. a Minor. Etc.....	98
Magnuson. Orville .....	98
Maimon, A. Currie .....	284
Marts. Alexena .....	256
Marts. Darlene. a Minor. Etc.....	256
Mass Construction Company. a Delaware Corporation ....	412
Martin. Essau .....	371
Marx Industrial Maintenance. Inc., an Illinois Corporation .....	486
Medical Group, The .....	366
Memorial Hospital .....	39
Merchant Service Co-op .....	200
Mercy Hospital. Urbana. Illinois. an Illinois Corporation .....	491
Michael Reese Hospital and Medical Center, an Illinois Not-For-Profit Corporation .....	442
Midstate College of Commerce .....	335
Mobil Oil Company, a New York Corporation, Etc.....	203
Moe. A. S.....	38
Moline Public Hospital .....	491
Moore. Matthew C.....	208
Municipal Tuberculosis Sanitarium .....	403

N

Napue. Henry .....	192
Northwestern Business College .....	411

O

Olsen Window Cleaning Company. Inc.....	48
---	----

XXXXXI

	Page
<b>P</b>	
Painter, Melvin .....	405
Parham, Herman .....	246
Parrott, Marie M. ....	474
Penwell, Elva Jennings .....	.171, 337
Perkins, Thomas, Et Al .....	222
Peterson-Roberts Construction Co., a Delaware Corporation .....	491
Pheasant Run, Inc., a Delaware Corporation .....	357
Piatt County, County Treasurer of .....	441
Pigott, Richard .....	262
Pleasant View Township, Macon County and State of Illinois .....	122
Poskus, Balys .....	107
Price, Seymour S. ....	491
Protestant Hospital Builders' Club, The, Etc. ....	39
Public Aid, Cook County Department of .....	484
Punch Brown Garage .....	227

**Q**

Qualls, Louis .....	208
---------------------	-----

**R**

Randolph, The County of .....	.95, 490
Reese, Michael, Hospital and Medical Center, an Illinois Not-For-Profit Corporation .....	442
Remington Office Systems, Etc. ....	93
Rockford Anesthesiologists Associated .....	285
Rockford Memorial Hospital Association, a Corporation ..	215
Rozmarek, Wanda .....	475
Ryan, Adriana .....	100

**S**

St. Francis, Hospital Sisters of the Third Order of .....	445
St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation .....	445

XXXXII

	Page
St. Joseph's College .....	230
St. Louis Children's Hospital .....	370
St. Louis. Jewish Hospital of. a Missouri Corporation ...	146
St. Louis University Hospitals .....	44
Salvation Army. The. an Illinois Corporation .....	451
Schaab. Lena <b>H</b> .....	343
SCM Corporation .....	450
Scudiero. Elaine. Admx., Etc.....	457
Scudiero. Janice .....	457
Scudiero. Joyce .....	457
Scudiero. Judith .....	457.
Scudiero. Ralph .....	457
Seipel. Jerry Dean .....	226
Shell Oil Company .....	363
Sierra. <b>G</b> .....	282
Simmons. Lester. a Minor. Et Al .....	351
Sinclair Refining Company .....	327, 407
Skelly Oil Company. Etc.....	440
Smith, Andrew .....	231
Smith. Andrew <b>J</b> ., Admr., Etc.....	231
Smith. Joseph .....	290
Spear. Mary .....	32
Sperry Rand Corporation. Division of .....	93
State House News Stand .....	42
States Improvement Company. Inc., an Illinois Corporation .....	1
Steigerwaldt. Alex. as Next Friend and Father. Etc. ....	491
Steigerwaldt. Allan .....	491
Sullivan. William <b>H</b> .....	117

T

Thomas. Mary Frances .....	252
Timmons. Donald S., County Treasurer of Piatt County. Illinois .....	441
Toledo. Peoria and Western Railroad Company .....	51
Tower Communications Company .....	346
Tyler. L. C.....	231
Tyler. William. an Emancipated Male. Etc.....	231

~~XXXXIII~~

	Page
<b>U</b>	
Uher, Alice .....	50

<b>V</b>	
Valerio, Ernest .....	272
Vaughn, Bertha L.....	222
Village of Weston, a Municipal Corporation .....	483

<b>W</b>	
Wagner, Harold M.....	402
Wall, M. H.....	197
Walla, Mary Louise. as Exec., Etc.....	338
Walton School of Commerce .....	205
Webb, Lowell M.....	54
West Chicago State Bank, an Illinois Corporation .....	483
Weston, Village of, a Municipal Corporation, Et Al .....	483
Wheaton Daily Journal .....	483
White Consolidated Industries, Inc.....	334
White, Gwendolyn I.....	325
White, John T.....	231
White, Marguerite .....	431
White, Vernon J.....	190
Whitley, Lizzie .....	351
Witt, Gerald H.....	318
Wurster, Colleen R.....	49

<b>X</b>	
Xerox Corporation .....	229, 280, 364, 395

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

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(No. 6024—Claimant awarded \$209,334.30.)

STATES IMPROVEMENT COMPANY, INC., an Illinois Corporation,  
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

ROTHSCHILD, HART, STEVENS AND BARRY, Attorneys  
for Claimant.

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

**CONTRACTS—*impossibility of performance.*** Where evidence showed that the contract between claimant and respondent was legally impossible to perform, both parties are discharged from their duties thereunder.

**SAME—*damages.*** Where contract is discharged due to impossibility of performance, both parties will be placed in the same condition as they were prior to entering the agreement, and claimant will be disallowed any profit, which it may have realized thereunder.

PEZMAN, J.

This action arises out of a contract entered into between claimant, States Improvement Company, Inc., an Illinois Corporation, and respondent, the State of Illinois, wherein claimant agreed to erect a certain steel I-beam bridge and approaches at a point approximately one quarter of a mile from the City of Decatur, County of Macon, State of Illinois.

Claimant contends that, due to the manner specified in said contract for the installation of piles, and the soil conditions existing at the time the contract was en-

tered into, it was impossible to perform the contract, and that the State of Illinois wrongfully defaulted claimant to the damage of the sum of \$320,810.59. Respondent did not file an answer to the complaint, so a general denial of the facts, as set forth in the complaint, prevailed.

The contract, which is the subject matter of this suit, sets forth specifications to be employed for the construction of concrete piles. Piles, which were manufactured by Raymond International, Inc., met the specifications, and were the piles used. The evidence shows that these were pre-stressed concrete piles. The contract further provided for the method of installation, which method was stated to be as follows:

“(d) Installation.

The piles shall be installed in accordance with one or more of the following procedures.

- “(1.) Driving — The piles shall be driven with a steam hammer, which shall develop not less than forty thousand (40,000) foot-pounds of energy per blow at full stroke. A solid hardwood cushion block at least six (6) inches thick shall be used in the base of the hammer to cushion the blow of the hammer ram on the follower. A laminated ring-shaped cushion block, at least six (6) inches thick, made of one (1) inch hardwood boards and cut to fit the head of the pile shall be used between the follower and the top of the pile. Both cushion blocks shall be inspected periodically during driving, and no driving shall be done with blocks that have been unduly worn and compacted with use. When the point of the pile is passing through soft soil, and there is little or no resistance to penetration, the stroke of the hammer shall be reduced to approximately twenty-four (24) inches. When the point of the pile is being driven in firm ground, the full length of the stroke of the hammer shall be used to develop final resistance, but in no case shall the strokes exceed forty-two (42) inches. Piles shall be driven to the resistance determined by the Engineer.

“(e) Jetting and Driving.

In granular soils, jetting will be permitted in conjunction with driving, except that final penetration shall be attained without the use of jets. After jetting is stopped, the pile shall be driven to the elevation designated by the Engineer. Care shall be exercised during jetting that **no** internal hydrostatic pressure greater than twenty **(20)** psi does not build up within the pile. Internal jetting will not be permitted unless specifically authorized in writing by the Engineer.”

On or about April 5, 1959, claimant commenced work on this project. In the month of August, 1960, claimant was ready to commence the installation of the concrete piles. From August 1 to August 15 of that year attempts were made to drive the piles to the proper elevation, but claimant was unable to do so, even though attempts were made to overdrive the piles. The contract provided that the Resident Engineer would have sole authority to determine the maximum number of hammer strokes per inch, which could be utilized in driving the piles. Despite the prior order of the Resident Engineer that driving should not proceed beyond ten blows per inch, the Resident Engineer directed that the first pile be overdriven. After the use of twenty-eight blows per inch, only one additional inch of penetration was achieved. Claimant then requested permission to use air jets in an effort to assist the driving of the piles to a lower elevation, and such jets were put into operation. With the use of the jets there was still no noticeable improvement in the driving of the piles. Work was finally halted on this project on August 19, 1960.

Subsequent to this work stoppage, claimant requested permission to excavate within the pile, and further stated that, if the new method was more expensive, he would expect additional pay. However, the request was turned down, and finally, on September 20, 1960, the

Director of Public Works and Buildings of the State of Illinois sent claimant a ten day notice to comply or a default would be taken. Claimant obtained an injunction from the Circuit Court of Cook County against the Director restraining him from defaulting the contract. This injunction remained in effect until February 27, 1961, when the injunction was dissolved. The State of Illinois then readvertised the contract, and it was relet to the C. E. Burgett Construction Company.

The new contractor retained the services of Raymond International, Inc., as a subcontractor to install the piles. Raymond International, Inc., then proceeded to install the piles through the use of an airlift device, which is described by claimant as a method of internal excavation, and described by respondent as a method of internal jetting.

Claimant contends that it could not deviate from the contract's specifications without authority from the State, and that, because of the particular soil conditions encountered in driving the piles, the piles could not be installed in accordance with the specifications of the contract. Claimant further contends that respondent, the State of Illinois, subsequently allowed Raymond International, Inc., to use a form of internal excavation in installing the concrete piles. Claimant further contends that, since the State had prepared the specifications for the installation of the piles, it had a duty, when it became apparent that the contract could not be performed in accordance with such specifications, to allow claimant to use other methods of installing the piles. In addition, claimant argues that, when the State refused to change the specifications, it was excused from further performance on the grounds of impossibility.

The pertinent questions in this case are:

1. Did the State have the legal right to terminate claimant's contract?
2. If it did not, what damages, if any, are recoverable by claimant?

The contract in this case set forth the type of piles to be installed, and further provided for the method of installation. The State of Illinois prepared the specifications, and it is clear that claimant was required to install the piles in the manner expressly set forth in the contract. This contract is known in the Industry as the "specified manner and method" contract, rather than as an "end result" contract. From the testimony in this case, it appears that this was an unusual agreement, but nevertheless it existed in this instance.

Mr. Alexander Riff was called as a witness by respondent. Mr. Riff testified that he was an employee of Raymond International, Inc., and was well acquainted with the piles to be installed, inasmuch as his company manufactured this concrete pile. Mr. Riff testified that, in his opinion, there was a possibility of installing the piles by a method of hammering and jetting as specified in the contract, but, while possible and feasible, such a method was not practical. Mr. Riff went on to testify that, after the contract was relet, Raymond International, Inc., used a combination of hammering and air-lift to drive the piles. Mr. Riff testified that from an engineering standpoint the method used by Raymond International, Inc., to install the piles was a form of excavation.

Mr. Carter Jenkins of Springfield, Illinois, was called as a witness by claimant. He testified as to his background, and qualified as an expert witness. Mr.

Jenkins stated that the Director of the Department of Public Works and Buildings of the State of Illinois, W. J. Payes, had on or about June 14, 1961, requested him to make a survey of this project, and make a report of his findings. Mr. Jenkins testified that, in his opinion, the piles could not have been installed, placed or driven by using the methods outlined in the specifications of the contract regarding that particular type of work.

Director W. J. Payes testified in behalf of claimant. His testimony, in substance, was that claimant was not permitted to install the piles by internal excavation, but that, after the contract with claimant was terminated, and another one obtained, the new contractor was permitted to install the piles by internal excavation.

From the testimony in this case, it appears to the Court that the methods set forth in the contract for the installation of these piles could not have been followed, and that by and under the terms of the contract claimant was limited to the methods specified therein, and could not deviate from the provisions thereof without the permission of respondent, the State of Illinois.

The law on the subject of impossibility and the effect of impossibility to perform a contract, as agreed, appears to be clear. *Corbin on Contracts*, Vol. 6, Sec. 1332, states as follows:

“A distinction has been drawn between.. . . . the personal inability of a promisor to do what he promised and the objective impossibility that the promised performance can be rendered by anyone. The two terms call attention to a distinction between two kinds of facts that are very different in their legal operation.

“Objective Impossibility.. . . . may discharge a contractor from his duty.. . . .The duty of a promisor is never discharged, however, by the mere fact that supervening events deprive him of the ability to

perform, if they are not such as to deprive other persons, likewise, of the ability to render such performance.”

Chap. 14, Sec. 454, of *Restatement of Contracts*, states:

“Impossibility means not strict impossibility but impracticable because of extreme and unreasonable difficulty, expense, injury or loss involved.”

Sec. 456 of *Restatement of Contracts* states that:

“... a promise imposes no duty, if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know.”

The definition of impossible, as set forth in the *Restatement of Contracts*, has been upheld by the Illinois courts in *Fisher vs. United States Fidelity and Guaranty Company*, 313 Ill. App. 66, 39 N.E. 2d 67 (1942).

Thus, it appears that under the laws of the State of Illinois the method required by the contract for the installation of the piles in the instant case was legally impossible of performance, and that claimant was thereby excused from its performance thereunder. It, therefore, necessarily follows that the State of Illinois improperly defaulted claimant.

We now turn our attention to the question of damages, if any, recoverable by claimant. The Bill of Particulars pertaining to damages, which was filed in this suit, shows that claimant received cash in the sum of \$192,134.25. There was no dispute as to the amount received.

Claimant, in its Bill of Particulars, sets forth certain items chargeable to this project, the time various items were on the job, the monthly rate, loss of profit, and the total loss of \$320,810.59 after allowing credit for the \$192,134.25 received. Of the items listed in the Bill of Particulars, one is for an office trailer, which allegedly was on the job twenty month's, and charged at

the rate of \$100.00 per month. The evidence does not sustain the burden of proof to show that this was for the benefit of the State, and therefore, this item of \$2,000.00 is disallowed.

Certain other heavy equipment is allegedly on the project for twenty months. However, a portion of that time was for the period during which the injunction obtained by claimant was in effect. In the judgment of this Court, claimant should not benefit for this period of time, and, therefore, the Court reduces those items listed in the Bill of Particulars as having been on the project for twenty months to seventeen months. It is the opinion of this Court that claimant should not benefit for said time period when, through its own action, it prohibited work on the project. This Court, therefore, arrives at the total figures as follows:

ITEM	QUANTITY	TIME	RATE	AMOUNT
Lima 802 Diesel	1	17 Months	4,354.00	74,018.00
HD 21 Dozer	1	17 Months	3,778.00	64,226.00
D-6 Dozer	1	17 Months	1,268.00	21,556.00
977 Loader	1	17 Months	1,743.00	29,631.00
600 CFM Compressors	2	8 Months	897.00	14,352.00
Pump, High Pressure	1	8 Months	360.00	2,880.00
Pump, 8" Centrifical	1	8 Months	328.00	2,624.00
D-7 Dozer	1	17 Months	1,737.00	29,529.00
				<hr/>
				<b>\$238,816.00</b>
				<hr/>
50% of AED Rates				<b>\$119,408.00</b>
White 10 Cy 6 Wheel Trucks	8	11,666 Hours	4.63	54,013.58
Material and labor				207,148.56
Percentage of payroll to cover union dues, insurance and other expenses				20,898.41
				<hr/>
			<b>TOTAL</b>	<b>\$401,468.55</b>
			Prior payment on contract—Less	192,134.25
				<hr/>
			<b>Balance</b>	<b>\$209,334.30</b>

It is the opinion of this Court that the impossibility of performance of this contract, due to the fact that claimant was required to use only those methods specified in the contract for driving piles, discharges claimant from its duty, and, in turn, frees the State from further duty under the contract. It is the further opinion of this Court that in such a situation the law seeks to place the people in the same condition as they were prior to entering into the agreement.

Sec. 468 (d) of *Restatement of the Law of Contracts*, American Law Institute, states as follows :

“Since there is no fault on either side, the loss due to impossibility or frustration must lie where it falls. Neither party can be compelled to pay for the other’s disappointed expectations, but, on the other hand, neither can be allowed to profit from the situation. He must pay for what he has received. The amount he must pay is gauged by the extent that what he has received forwards the object of the contract. If the contract was an unwise one from the standpoint of the one who has received performance, this does not limit his duty to pay. If, on the other hand, the contract was a disadvantageous one from the standpoint of the one rendering the performance, he cannot recover for what he has done on a more profitable basis than the contract affords.”

Thus, claimant is not entitled to any profit from this project, and, therefore, this Court has disallowed claimant’s alleged profit of \$44,101.59, and also the sum of \$31,072.28 representing 15% of the charges for material and labor, which claimant also alleges as part of the profit due on this job.

Claimant is hereby granted an award in the amount of **\$209,334.30**.

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(No. 5118—Claimant awarded \$892.06.)

CHARLES ESTEL BURKE, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed January 10, 1967.*

R. W. DEFFENBAUGH, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL AND LEE D. MARTIN, Assistant Attorneys General, for Respondent.

CIVIL SERVICE ACT — *salary for period of unlawful discharge.* Where claimant was wrongfully discharged, he **is** entitled to back pay for the period of illegal removal, less any earnings he received from other employment during that period.

*SAME—determination of damages by Court of Claims.* Court may independently determine claimant's damages, both with respect to mitigation of damages and set-offs of outside earnings during period of wrongful dismissal.

*SAME—payment of court costs expended in another court.* There is no authority in the Court of Claims Act for payment of court costs expended in another court by claimant.

DOVE, J.

Claimant, Charles Estel Burke, on March 3, 1961 and prior thereto, was employed as a Prison Agricultural Foreman IV at Pontiac State Prison, Pontiac, Illinois, as a Civil Service employee under the rules of the Department of Personnel. There is no disagreement as to the fact that he was wrongfully discharged from said position on March 3, 1961, and was reinstated following a decision of the Appellate Court of Illinois on June 4, 1963. (*Burke vs. Civil Service Commission*, 190 N. E. 2d 841.)

At the time of his discharge, claimant's monthly salary amounted to a gross sum of \$560.00 a month, and under the pay scale in effect this would have increased to \$600.00 per month on July 1, 1961, and to \$615.00 per month on January 1, 1963.

Following the ruling of the Appellate Court above cited, claimant received from the Department of Public Safety the sum of \$14,490.00, representing salary from

July 1, 1961 to June 30, 1963. No payment was made to claimant for salary loss covering the period from March 4, 1961 to June 30, 1961 for the reason that the appropriation for the biennium had lapsed.

During the period of his employment, claimant was furnished the use of a house, which was owned by the State of Illinois. It was located on the prison grounds, but was outside the wall. The uncontradicted testimony shows that the rental value of the house was \$85.00 per month, and that the water and electricity furnished in said house was of the value of \$4.00 and \$10.00 per month, respectively. The heating of the house was also furnished by the State at a value of \$140.00 per year. Claimant was also allowed to purchase items at wholesale prices in the general store of the prison up to a limit of \$35.00 per month.

Claimant now seeks to recover for the loss of his salary for the period of March 4, 1961 to June 30, 1961 in the amount of \$2,185.81, and for the reasonable value of the rent-free house, water, electricity and heat in the sum of \$4,072.00, which would have been furnished him from March 4, 1961 to June 30, 1963, had he not been wrongfully discharged. He further claims reimbursement of the amount of \$235.17, representing various filing fees, abstract expenses, etc., which were incurred by him in his successful attempts to reverse the order of the Civil Service Commission discharging him.

Since the decision of the Supreme Court of Illinois in *Kelly vs. Chicago Park District*, 409 Ill. 91, it has been the rule of the courts of Illinois that one who is wrongfully discharged is entitled to collect his full salary covering the period of wrongful discharge with the exception that any amounts earned by the individual from

other employment during the period of discharge are to be used as a set-off. Claimant urges that this rule has been changed by an amendment to Sec. 63B-111 of Chap. 127, Ill. Rev. Stats. The amendment was added a few months after the decision was announced in the *Kelly* case, and the statute now provides that an officer or employee shall receive "full compensation" for any period during which he was suspended pending the investigation by the Civil Service Commission of charges against him. It is claimant's contention that the words "full compensation" evinces legislative intent to abrogate the rule concerning set-off.

Since the decision in the *Kelly* case, the courts of Illinois have had occasion to reexamine the rule of set-off in cases involving Civil Service employees who were wrongfully discharged. The following cases all reaffirm the rule set forth in the *Kelly* case:

*Murray vs. City of Chicago*, 171 N.E. 2d 492,  
28 Ill. App. 395;

*People ex rel. Krich vs. Hurley*, 169 N.E. 2d  
107, 19 Ill. 2d 548;

*People ex rel. Borne vs. Johnson*, 48 Ill. App.  
2d 307, 199 N.E. 2d 68.

The Court of Claims has consistently followed the rule decided in the *Kelly* case, and it appears conclusive that any award to claimant for salary loss between March 3, 1961 and June 30, 1961 must be offset by any earnings he received from other employment during that period.

Testimony was introduced with regard to claimant's contention that he should be compensated for the loss of use of the State furnished home, water, heat and electricity, since these were "benefits", which attached to

the position he held. Claimant stated that he had no choice about where to live during his employment as farm manager for the prison. It seems a reasonable inference that he was required, by virtue of his duties as farm manager, to live on the prison grounds, and it would further appear that this requirement was imposed for the benefit of the Department of Public Safety in the administration of the prison program. Any "benefits", which would be derived by claimant's use of the rent-free house, inured to the Department of Public Safety, and not to claimant. It would seem obvious that it would be advantageous to the Department to have claimant close at hand and readily available. Since he was required to live in the house as a condition of his employment, it would not seem that his use of the house could be considered as income to him, although he undoubtedly did derive some pecuniary advantage from the arrangement. An award to claimant for the loss of these "benefits" will, therefore, have to be denied.

In regard to the right of claimant to purchase items up to \$35.00 each month at the wholesale prices charged by the prison store, we believe that this would be analgous to the right of a member of the Armed Services to use the Post Exchange where items can be purchased at a substantially lower cost than elsewhere. The only loss to claimant caused by his inability to avail himself of this right of purchase would be the difference between the retail and wholesale value of the items, which he would purchase. There is no way to determine what items claimant might have purchased each month, nor any evidence concerning the wholesale and retail value of such items. This portion of the claim, too, must, therefore, be denied.

There is no authority in the Court of Claims Act

for the payment of monies expended by a claimant in another court. This part of the claim is likewise denied.

Claimant testified that the salary he would have received had his employment at the prison continued was **\$2,185.81**. His earnings, however, during the period of March 3, 1961 to June 30, 1961 from outside employment amounted to **\$1,293.75**, which must be considered as a set-off by this Court in arriving at an award.

**An** award is, therefore, hereby made to claimant, Charles Estel Burke, in the sum of \$892.06.

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(No. 5151—Claimant awarded \$553.26.)

**JIMMIE G. FULLER**, Claimant *vs.* **STATE OF ILLINOIS**, Respondent.

**Opinion filed January 10, 1967.**

**R. COBYDON FINCH**, Attorney for Claimant.

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

**PRISONERS AND INMATES—damage by escaped inmate.** Prior to recovery for damages caused by escaped inmate, claimant must prove that such inmate escaped from an institution over which the State had control, that the inmate caused the damage while at liberty, substantiated from an investigation conducted by the proper State authority, and the nature and extent of such damages.

**CONTRIBUTORY NEGLIGENCE—leaving keys in ignition.** Statutory prohibition against leaving automobile keys in ignition refers only to operation of vehicles on public highways, and not to those parked on a private lot.

**DAMAGES—avoidable consequences.** Claimant must use such means as are reasonable under the circumstances to avoid, mitigate, reduce or minimize the damages, which he has incurred as a result of a wrongful act.

**PERLIN, C.J.**

Claimant, Jimmie G. Fuller, seeks recovery of \$618.95 for damages incurred when an escaped ward of

the Illinois Youth Commission stole and damaged claimant's automobile and personal property, which was stored in the vehicle.

The statute, which was in effect on October 27, 1963 when the incident occurred, provides as follows :

“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 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.*” (Emphasis supplied.) (Chap. 23, Sec. 4041, Ill. Rev. Stats.)

Therefore, the elements, which must be ascertained before a recovery is awarded to claimant, are: (1) that an inmate escaped from an institution over which the State had control; (2) that the inmate caused the damage claimed while he was at liberty after his escape; (3) that the proper State authority establishes upon investigation that the damages were caused by the escapee; and, (4) a determination of the nature and extent of the damages.

Claimant Fuller testified that he worked at the Kimmel Auto Supply Store in Anna, Illinois, which was located at 200 North Main Street. On October 27, 1963 at 8:00 A. M., he parked his 1956 Pontiac in the parking lot, which was owned by the store. The parking area was located in front of the store. He left the keys in the car, and did not lock it. At 11:00 A. M. he discovered that the car was gone, and notified police. The next

he heard concerning the car was when the police called him from Chicago saying they had recovered it. Claimant then went to Chicago to retrieve the automobile. The car was damaged, and a transistor radio and several tools were missing.

The Departmental Report of the Illinois Youth Commission, by John A. Troike, Chairman, states: "An investigation of the facts indicates that it is reasonable to believe that a ward of the Illinois Youth Commission may have caused damages to Mr. Fuller's property; . . ."

In support of this conclusion the following evidence was submitted :

(1) A report of Donald L. Harper, Camp Director, Union Forest State Boys' Camp, Jonesboro, Illinois, which contained the following information: On October 25, 1963 at approximately 8:40 P. M., Thomas Bagnall and John Turner ran away from Union Forest State Boys' Camp. John Turner was working in the laundry room, an honor job. Thomas Bagnall asked for permission to go to the washroom, which was granted. When Thomas Bagnall arrived at the washroom, the two boys bolted through the barracks, and left through the door. They were missed in four or five minutes when Bagnall did not report back from the washroom. A search was immediately organized, but there was no word of the boys.

A car was stolen in Anna at approximately 4:00 A. M. on October 26th. A boy answering the description of Thomas Bagnall was picked up by a man and his wife south of Anna, Illinois just prior to daylight on the 26th. The boy had run out of gas, and was taken to a gas station where he had very little money, and could only purchase a gallon or so of gas. The man took the

boy back to the automobile. This car was later found abandoned just east of Anna.

On the morning of the 26th, a boy answering the description of Thomas Bagnall was seen walking up and down the block on North Main Street in Anna. The boy was dressed in blue jeans torn down the left leg. He was observed walking by the 1956 Pontiac, which was owned by Jimmie Fuller, and parked in front of the Kimmel Auto Supply Store on North Main at about 10:00 A. M.

On October 27th a call was received from the Sheriff of Union County stating that Mr. Fuller's car had been found abandoned in Chicago. Extensive damage had been done to the car, and tools had been taken from the trunk of the automobile. Fuller went to Chicago to claim his car, and returned with a pair of pants, which had been left in the automobile. The pants were very dirty, and torn down the left leg. The pants and belt were of the prison-type used at the camp.

Thomas Bagnall was picked up in Forest Park near Chicago, and returned to the Reception and Diagnostic Center in Joliet.

The report states: "It is our feeling that Thomas Bagnall stole this automobile, and, since the automobile was low on gas, he either sold the tools to purchase gas, or traded them for gas and possibly some clean clothing. During Thomas' and John's stay in camp, they repeatedly planned to run away, and talked about it many times. We feel that both of these boys would not hesitate to run away again, if they were in the same type setting."

(2) A report of the Department of Police, Village of Forest Park, Illinois, included the following information: On October 27, 1963, a radio message was received from the State Police that Thomas Bagnall had escaped from

the Jonesboro Youth Camp. Thomas had been reported seen in the area on several occasions, and, on November 2, 1963, was apprehended with three other youths. The other youths gave the information that Thomas had been arrested in a stolen auto in the past week, had gone to Boys Court under the name of James Oberg, and was placed on one year supervision. A fingerprint check showed that Oberg and Bagnall were the same person.

(3) A report of Arthur E. Wright, Superintendent of the Illinois Industrial School for Boys, Sheridan, Illinois, stated that Thomas Bagnall denied being involved in the auto theft, and gave the story that a truck driver picked him up, and drove him to Chicago. However, it was the opinion of those present at the interview that Thomas was lying, and that the route, which he described, would not come within 100 miles of where he claimed to have been picked up.

It is the opinion of this Court that the investigation and report of the Youth Commission establish that Thomas Bagnall escaped from the Union Forest State Boys' Camp, and, while on escape, stole the automobile belonging to Jimmie G. Fuller.

Respondent contends, however, that claimant violated Sec. 189 of the Uniform Act Regulating Traffic on Highways, Chap. 95½, 1963 Ill. Rev. Stats., which provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. . . ." Respondent further alleges that claimant's violation of this statute amounted to negligence, and was the proximate cause of his loss. We do not accept the pertinency of such an argument in the light of the specific recovery right bestowed by the statute (Chap. 23,

Sec. 4041, 1963 Ill. Rev. Stats.). But, it is noteworthy that, even if the argument could well lie, respondent could not prevail.

In the case of *Childers vs. Franklin*, 46 Ill. App. 2d 344, 197 N. E. 2d 148 (1964), the Court held that Sec. 189 was not applicable where the defendant left his automobile with keys in a school parking lot. It stated that the statute refers only to the operation of vehicles on public highways, and does not apply to automobiles parked on a private lot. The same holding was reached in the cases of *U. S. Fidelity Guaranty Co. vs. State of Illinois*, 23 C.C.R. 188 (1960), where the stolen car was in claimant's driveway, and *Stanko vs. Zilien*, 33 Ill. App. 2d 364, 179 N. E. 2d 437 (1961), where the stolen vehicle was taken from a used car lot. In the instant case, the automobile was not on a public highway, but was parked in a private parking area, which was owned by the store in which claimant worked, thus removing it from the application of Sec. 189.

The expenses, which were allegedly sustained by claimant as a direct result of Bagnall's escape, are as follows: Call to Chicago to check on the car, \$2.00; gasoline, \$30.89; meals and room, \$18.00; storage charges on car in Chicago, \$12.00; wages lost while retrieving car, \$16.80; one transistor radio, \$18.00; tools, \$175.00; and, repairs to car, \$200.00.

This Court has long followed the principle of "avoidable consequences", which holds that a claimant must use such means as are reasonable under the circumstances to avoid, mitigate, reduce or minimize the damages, which he has incurred as a result of a wrongful act. *Schneider vs. State of Illinois*, 22 C.C.R. 453; *Otto vs. State of Illinois*, 24 C.C.R. 72; *Stephanites vs. State*

of Illinois, 24 C.C.R. 340; *Cordes vs. State of Illinois*, 24 C.C.R. 491; *Kelly vs. Chicago Park District*, 409 Ill. 91, 98 N. E. 2d 738. Claimant has not proved that expenditures for wages lost, meals and lodging were necessary or proper. He did not show that it was necessary for him to retrieve his car on a working day, nor did he prove that it was necessary to spend the night in Chicago. Therefore, these items will be disallowed.

Accordingly, claimant is hereby awarded the sum of \$553.26.

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(No. 5154—Claimant's awarded \$825.56.)

WILSON JAMISON, for the use of COUNTRY MUTUAL INSURANCE COMPANY, A Corporation, and WILSON JAMISON, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

MASSEY, ANDERSON AND GIBSON, Attorneys for Claimants.

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

**HIGHWAYS—negligence — Duty to maintain warning devices.** Where respondent had sufficient notice of the defect in the highway, and failed to install barricades or other warning devices, it was guilty of negligence.

**SAME-negligence.** Where evidence disclosed that respondent was negligent in its maintenance of the highway, and claimant was free from contributory negligence, an award will be made.

DOVE, J.

This claim arises from an accident, which occurred approximately two miles south of Paris, Edgar County, Illinois, at 2 :00P.M. on March 26, 1962. Claimant, Wilson Jamison, was traveling south on Route No. 1 in a 1958 Dodge, which he had previously bought as a used truck,

with a load of feed. When about twenty feet from a depression on the west half of Route No. 1 the pavement suddenly collapsed leaving an eight by ten foot hole, which varied in depth from four to seven feet. Claimant was unable to to avoid the cavity. The left side of the truck dropped into, and then bounced out of the hole. The resulting damages amounted to \$825.56, which claimant now seeks to recover in this action.

Illinois Route No. 1 in Edgar County was constructed about 1920 by the State of Illinois, and has been maintained by the State since that time. The evidence discloses that the roadway at the point of the collapse was of concrete, and was covered with blacktop. There were earthen shoulders on each side, and under the roadway at a point about three to six feet south of the collapsed area there was a concrete box culvert, which was utilized to carry water from the west to the east under the roadway. The evidence further shows that there had been a rough spot at the point of the collapse for about two years previously, which would frequently sink down, and then would be built up again by the State.

George Bales, then a maintenance section man for the Highway Department, testified that he had repaired this particular portion of the highway twice in the month prior to the accident. A blacktop fill of about one inch in thickness had been spread over the depressed area a month before the accident, and, on March 22, 1962, four days before the accident, because of the increased sinking of the pavement, a new application of blacktop premix was added to the surface of the highway.

On the date in question, one of the State employees involved in the refill passed over this particular area, and noticed that the place felt like it was sinking. At

noon he called his superior, George Bales, and together they again inspected the site of the depression. They were unable to determine the cause of the sinking, and, after reporting the difficulty to the Highway Maintenance Department, both left the area to go to other sites. No repairs were made, nor were signs or barricades erected to warn the traveling public of the dangerous condition of the pavement in this particular area.

The evidence discloses that following the accident a State crew was called to the scene, and found that the west half of the pavement at this point was completely undermined. After the concrete was removed, the cavity was found to be up to seven or eight feet in depth at various points. Near the bottom was a broken drain tile, which crossed the roadway from west to east. The existence of this tile did not appear on the Highway Department's plat, and apparently antedated the original pavement. Its outlet was located in a ditch or stream down the slope from the highway, and about a hundred feet from the undermined area.

To recover in cases of this kind, it is a prerequisite that claimant prove : (1) freedom from contributory negligence; (2) negligence of respondent, which was the proximate cause of the accident; and, (3) injuries or damages as the result thereof.

Wilson Jamison, claimant, testified that he knew of the bump in the highway, and that, because of this knowledge, he had decided to "take it easy" when he approached the site of the accident, so as not to jar his truck too much. No warning signs or barricades were in evidence, so that claimant was unaware of the further deterioration of the pavement. Claimant stated that he was traveling around thirty-five miles per hour at the

time, and that, when he was about twenty feet from the area, the pavement collapsed. He was unable to stop, and the truck dropped into the hole.

In the case of *Jack M. Visco, Et Al, vs. State of Illinois*, 21 C.C.R. 480, the Court, held:

“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 case, the enormous size of the hole, and the fact that it had existed for at least a week, leads us to the conclusion that the State had constructive knowledge of the dangerous condition, and failed to either repair, or erect warning signs.”

In arriving at an award for injuries sustained in an accident where the Highway Department had removed a portion of the pavement in the case of *Grover C. Henderson vs. Xtate of Illinois*, 24 C.C.R. 35, the Court stated:

“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.”

In the instant case, this Court is of the opinion that, since the State was aware of the problem in maintaining this particular portion of the highway for a period of at least two years prior to this accident, had repaired the road twice in the month prior to the date in question, this was sufficient notice. We are further of the opinion that a reasonable person, under the circumstances, would have concluded that this was not a normal defect in the roadway, and would have taken the necessary steps to determine its cause.

It is further the opinion of this Court that respondent

was negligent in its actions on the day in question. As previously pointed out, only two hours before this occurrence, two employees of the Highway Department visited the site, and were fully aware that the pavement was sinking at that time. Barricades or other warning devices should have been installed by them to warn approaching drivers of the dangerous condition of the pavement. This they failed to do.

It is, therefore, the opinion of this Court that respondent was negligent in its maintenance of this portion of Route No. 1, that claimant was free from contributory negligence, and is entitled to an award.

In arriving at an award, it is to be noted that the Country Mutual Insurance Company was included as a claimant in this action because of its interest by way of subrogation in a portion of the damages to the truck. Claimant's exhibit No. 1 was introduced in evidence. It reflects a total charge of \$794.89 for repairs to the truck, and, in addition, a charge of \$51.12 for replacement of a tire. It was stipulated by the parties, however, that the correct amount for the latter item should be \$30.67.

Claimants are, therefore, hereby awarded the total sum of \$825.56 to be paid as follows:

Wilson Jamison .....	.\$100.00
Country Mutual Insurance Company, A Corporation, as subrogee .....	725.56

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(No. 5163—Claimant awarded \$2,410.80.)

CLIFFORD ELMORE, Claimant, vs. TEACHERS COLLEGE BOARD,  
Respondent.

*Opinion filed January 10, 1967.*

COSTIGAN and WOLLRAB, Attorneys for Claimant.

DUNN, DUNN, BRADY, GOEBEL, ULBRICH and HAYES,  
Attorneys for Respondent.

**NEGLIGENCE—*duty to invitee.*** If a person is upon the premises of the owner by invitation, express or implied, and not by mere permission, he is an invitee, and the owner owes him the duty to exercise ordinary care to keep the premises in a reasonably **safe** condition.

**SAME—*extent of invitation.*** An invitation extends to any portion of the premises, which the owner may reasonably anticipate the invitee to use in connection with the conduct of the business on the premises.

**SAME—*respondeat superior.*** Under the theory of respondeat superior, respondent is charged with the knowledge and acts of its employees acting within the scope of their employment.

**SAME—*breach of duty to invitee.*** Where evidence showed that respondent, through its employees, breached its duty to claimant in failing to maintain its premises in a reasonably safe condition, and claimant did not proximately contribute to his injuries, an award will be granted.

PEZMAN, J.

This is an action brought by claimant, Clifford Elmore, against respondent, Teachers College Board, to recover damages for personal injuries, which he sustained on June 24, 1963, when the end of a packing crate struck him in the legs, as he was lifting open a garage door.

The facts concerning the happening of the accident, as shown by the evidence, are as follows: Claimant, a fifty-seven year old ceramic tile and marble contractor, had a subcontract to tile two swimming pools on the campus of Illinois State University, Normal, Illinois.

Respondent, through its agents and employees, gave claimant permission to store his tile in one stall of a four stall garage building, which was owned by the University, and located on its property approximately one block from one of the jobs. Each stall of this garage

opened onto a street by means of its own individual door, a one piece, solid wooden door without glass. It was of the type, which did not bend or roll, but rather pulled out and up from the bottom. When raised, it was stored overhead. The stalls, each ten feet wide and approximately fifteen to sixteen feet deep, were not partitioned. The building on the inside was open from one end to the other. The University assigned claimant the second stall from the south end of the building. In the southernmost stall was a large crate, approximately six feet high, five or six feet wide, and ten feet deep. It was pushed into the stall just far enough to clear the door by about three feet. The crate was made from rough framing lumber, two by fours framed, and other siding material, which was one inch heavy crating lumber, and was skidded on six by sixes.

There were interior locking devices for the four garage doors, which consisted of horizontal rods placed towards the bottom of each door, and fitted into catches in the door frames. The only exterior locking device was a clasp for a padlock on the outside of the door of the southernmost stall. After claimant unloaded his truckload of tile in the garage he locked the three north doors, which included his own, from the inside, and put a padlock on the clasp on the southernmost door. The padlock had two keys. He gave one to Robert Dietsch, Superintendent of Grounds at the University, and retained the second key.

When claimant or his employees withdrew tiles from their assigned stall for use in the pool construction, their practice was to unlock the padlock on the south door, enter the garage through the south door, walk past the crate to the second stall, open the second stall door from the inside, back their truck up to the door and load up

the material they wanted. When the loading was completed, they would close the second stall door, fasten it from the inside, leave the building by the southernmost stall, and close and padlock the southernmost stall door from the outside. This they did once or twice a week.

The crate in the southernmost stall contained an ozalid machine. Several days before the accident Dr. Charles Porter, Chairman of the Department of Industrial Education at Illinois State University, instructed an employee of the University to pry open the front or west end of the crate, so that the machine's dimensions could be determined. After the crate was opened, Dr. Porter, together with Dr. Talkington and another person, went to the garage and measured the machine.

The record shows that the inside fastening devices used by claimant to lock the three northerly stall doors from the inside were actually ineffective, and had been so for some time. The record further shows that claimant was unaware of this situation. Even when fastened on the inside, the door to claimant's stall could be opened from the outside by giving it a strong jerk. On the occasion when Dr. Porter and Dr. Talkington wanted access to the south stall to examine the crate, they merely jerked open the door of claimant's stall, and entered the garage through claimant's stall. Claimant testified that he was last in the garage prior to the incident in litigation on June 20 or 21, 1963, and that at that time the crate was intact. Dr. Porter testified that he and his men did not nail the crate back together again, and that, when they left, the crate was anywhere from one to two feet from the door.

On Monday, June **24**, 1963, at approximately 3:00 P.M., claimant went to the garage to get some materials.

Claimant testified that, as he opened the southernmost door of the garage, as he had done on numerous occasions before, the end of the crate fell against him injuring his legs and feet. As a result of his injuries, claimant had out of pocket medical expenses of \$80.80, and he was forced to hire a foreman for five weeks at a cost of \$160.00 per week. The only permanent injury sustained by claimant is a numbness and swelling of the left leg when he has been working all day. As a result of the accident, he wears a shoe one size larger on his left foot.

The first question to be decided is the legal status of claimant at the time and place of the accident. If claimant was a licensee and not an invitee, the rule is well settled that respondent owed him no duty except not to wantonly or wilfully injure him. However, if under the facts claimant was an invitee, then respondent owed him the duty to exercise reasonable care and caution in keeping the garage area reasonably safe for use by claimant. The test as to when one is an invitee or licensee is whether one comes by the owner's invitation to transact business in which the parties are mutually interested. *Ellguth us. Blackstone Hotel, Inc.*, 340 Ill. App. 587; 92 N.E. 2d 502 (1950); *Milauskis us. The Terminal Railroad Association of St. Louis*, 286 Ill. 547; 122 N.E. 78 (1919); *Pauckner us. Wakem, et al*, 231 Ill. 276; 83 N.E. 202 (1907).

If a person is upon the premises of the owner by invitation, express or implied, and not by mere permission, then such person is an invitee, and the owner owes him the duty to exercise ordinary care to keep the premises in a reasonably safe condition. *Ellguth us. Blackstone Hotel, Inc.*, 340 Ill. App. 587; 92 N.E. 2d 502 (1950); *Jones us. 20 North Wacker Drive Bldg. Corp., et al*, 332 Ill. App. 382; 75 N.E. 2d 400 (1947).

A licensee is one who enters upon the premises of another by permission for his own purposes. *Kapka vs. Urbaszewski*, 47 Ill. App. 2d 321; 198 N.E. 2d 569 (1964).

When respondent contracted with claimant to tile the two swimming pools, respondent not only invited but contracted for the presence of claimant. The facts in this case clearly support the contention of claimant that he had the status of an invitee at the time and place of the accident. Respondent's contention that claimant had exceeded the bounds of his invitation when he used the southern door of the garage as an entrance way to the area, which he used for storing tile, is rejected by the Court. Whether the invitation can be held to extend to the place where the injury actually occurred depends upon the circumstances in each particular case. *Ellguth vs. Blackstone Hotel, Inc.*, 340 Ill. App. 587; 92 N.E. 2d 502 (1950); *Jones vs. 20 North Wacker Drive Bldg. Corp., et al*, 332 Ill. App. 382; 75 N.E. 2d 400 (1947).

An invitation extends to any portion of the premises, which the owner may reasonably anticipate the invitee to use in connection with the conduct of the business on the premises. The case of *Pauckner 'us. Wakem, Et Al*, 231 Ill. 276; 83 N.E. 202 (1907), held that the invitation of a warehouseman to enter the warehouse to remove goods is broad enough to include all the space occupied by the goods, together with the necessary passways in and out of the warehouse, and covers a passway in front of an unguarded elevator shaft near the goods, even though a person familiar with the premises might get to the goods through another passway, and thereby avoid passing the elevator shaft.

In the instant case, the record indicates that one of respondent's agents instructed claimant to store his

materials in the garage. Therefore, claimant had the right to store his materials in this garage area in the assigned space, and quite naturally had the right to have access to said materials. It is the opinion of this Court that claimant did not exceed the bounds of respondent's invitation to him when he elected to enter the garage through the door adjacent to the stall, which was assigned to him, instead of using the door opening directly into his stall. Testimony divulges that claimant chose to use this particular door as an entrance and exit because there were no exterior locking devices on any other door.

The final question to be decided concerns the negligence of respondent and the freedom from contributory negligence on the part of claimant. With respect to the negligence of respondent, it appears from the record that the crate in question was owned by respondent. The evidence further establishes that certain representatives of respondent entered the garage in question, and pried the crate open so that they could observe the machine inside. The evidence indicates that after respondent's employees looked at the machinery, they did not renail or secure the west end of the crate. When claimant opened the garage door he was injured when the west end of the crate fell against his legs. From the facts, as presented, we presume that the west end of the crate had been leaning against the garage door, and fell on claimant when the door was opened.

It appears from the record that respondent's agents were responsible for the creation of the dangerous condition, which caused the injury. Evidence indicates that this particular crate was in place and properly secured four days before the accident. Some time between June 20, 1963, and June 24, 1963, the date of the accident,

respondent's agents opened the crate, including the west end of the crate, and failed to renail or secure the crate before leaving the garage. To allow the crate to remain in an unsecured condition, knowing that other persons would or could use the garage building, constitutes negligence.

Respondent, under the theory of respondeat superior, is charged with the knowledge of, and the acts of its employees, acting within the scope of their employment. Clearly, respondent's agents were acting within the scope of their employment when they opened the crate. Accordingly, their failure to secure the crate end after the inspection, and allowing it to be in a precarious or dangerous condition immediately prior to the occurrence, was negligence chargeable to respondent. It is equally clear that claimant did nothing that in any way proximately contributed to or caused his injury and damage. The accident occurred when claimant raised the garage door, and the crate end fell out of the door striking him on the legs and feet. Testimony of claimant established the weight of the falling crate at approximately 300 to 400 lbs. Claimant had raised the door in this particular fashion, and walked by the crate housing the printing machine on numerous occasions, and on each occasion the crate was in a solid and substantial state. Claimant had no notice or knowledge that a dangerous condition existed on the other side of the garage door when he opened it. He did only what he had done on previous occasions, and only what might have been expected of a reasonably careful and prudent man.

Claimant is hereby awarded the sum of \$2,410.80.

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(No. 5238—Claimant awarded \$325.50.)

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

*Opinion filed January 10, 1967.*

DUNN and HAYES, Attorneys for Claimant.

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

*PRISONERS AND INMATES—damage by escaped inmate. Where evidence showed that respondent was negligent in allowing inmate to escape, and claimant was free from contributory negligence, an award will be made for damages caused by escaped inmate.*

PEZMAN, J.

Claimant seeks to recover the sum of \$325.50 for **the loss of her 1959 Studebaker automobile, which** was damaged beyond repair on June 2, 1965, while being driven by one Charles Brooks, a ward of the Illinois Youth Commission, who with one Paul Morris, likewise a ward of the Illinois Youth Commission, stole the automobile while it was parked on the grounds of the Morris Country Club, at Morris, Illinois. Claimant seeks the sum of \$290.00 for the automobile; \$7.50 for a pair of men's rubber overshoes, which was present in the car at the time of the accident; and, the sum of \$15.00 for towing charges to remove the automobile from the scene of the accident. Claimant further alleges that said automobile was equipped shortly before with snow tires of a value of \$48.00, and that she received the sum of \$35.00 as salvage for said automobile.

The facts appear to be undisputed. Claimant, on the morning of June 2, 1965, drove her 1959 Studebaker to an implement shed, which was located on the grounds of the Morris Country Club. She and her husband, William Spear, operated the Pro Shop at the Morris Country Club. The automobile was left near the implement shed

for the use of the said husband and the greens keeper in moving golf carts, which were used on the golf course, from the implement shed to the Pro Shop, which was located about one-half mile from the implement shed. Claimant stated that keys were left in the car so that the grounds keeper could move the car, if it became necessary to move other equipment out of the shed in the maintenance of the golf course. From the record it appears that the Morris Country Club is a corporation organized under the laws of the State of Illinois, and, as such, is the legal owner, and holds title to the real estate upon which the golf course and implement shed were located.

On June 2, 1965, Charles Brooks and Paul Morris were wards in the custody of the Illinois Youth Commission in its camp at Channahon, Illinois, and were part of the work detail from the Boys' Camp in Gebhard Woods State Park, near Morris, Illinois. The Departmental Report made by the Camp Director to the Superintendent of Forestry Camps of the Illinois Youth Commission comprises one of the most important elements of evidence in this case, and is, therefore, set forth in detail as follows:

"The above three youths ran from the Gebhard Woods State Park work detail at approximately 10:25 A.M., June 2, 1965. The detail was being supervised by Mr. Arthur Ryder, who noticed the boys' runaway immediately. Mr. Ryder went to a neighbor's house near the park and called me, and I notified the sheriff's office and the State police.

"Ronald Williams, age 16, was apprehended at 10:45 A.M. when two deputies from the sheriff's office happened to be cruising in the area and noticed the three boys together. They apprehended Ronald Williams at this time, but the other two boys were able to elude them across a field and in some heavy underbrush and woods. When the boys departed from the detail, each had a hand sickle in his possession. The three boys were part of an eight boy work detail that started working at 8:00 A.M.

"Paul Morris and Charles Brooks made their way to the Morris

Country Club located on Route No. 6 west of Morris, Illinois, and stole a 1959 Studebaker Lark automobile that had the keys in the ignition. The automobile belonged to Mrs. Leslie Spears. The boys took the automobile, and went to Route No. 80 near the City of Minooka, Illinois, with Charles Brooks driving. The boy lost control of the vehicle, and the car left the right hand side of the road, turned over three times, and was completely destroyed. At this point the Illinois State Police apprehended these boys, but at the time of the wreck they were not being pursued. The driver just lost control.

“Paul Morris suffered a cut arm and some bruises on his body, and Charles Brooks complained of a sore back, but apparently none of these injuries were of a serious nature. The sheriff’s office still has Paul Morris and Charles Brooks in custody, and any medical attention that might be needed is being taken care of there.

“Ronald Williams was returned to the Reception Center on June 2. He had not been a special disciplinary problem while at camp. He had wanted to be transferred to Kankakee Camp where he had been previously, but neither you nor I could see any special reason for this being done.

“Charles Brooks and Paul Morris are both 17 years of age. The State’s Attorney is filing an information petition against them for auto theft, and they are to have a court hearing on Friday, June 4, 1965, at the Grundy County Court House at Morris. Charles Brooks had been in camp just about a month, since May 13, 1965, and his only problems were continuous smoking, and not wanting to work on detail. Charles had spoken of running away on several occasions. Paul Morris had been in camp for three months, and, except for two occasions when he was very defiant to the staff, he had not been in any other difficulty.”

This claim is predicated upon Chap. 23, Sec. 4041, Ill. Rev. Stats., which is as follows:

“Section 1. Whenever a claim is filed with the Department of Mental Health, or the Department of Children and Family Services, 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 Children and Family Services, 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 Commis-

sion 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.”

This Court in *Dixon Fruit Company, a Corporation, et al., vs. State of Illinois*, 22 C.C.R. 271, held that a favorable recommendation by the department or commission concerned is not a condition precedent to recovery under the statute. In the cause at hand no recommendation was made by the Illinois Youth Commission. Claimant alleges that respondent failed to maintain proper surveillance and supervision over its wards, Charles Brooks and Paul Morris, and more particularly over Charles Brooks, who was the driver of the stolen automobile, and who is mentioned in the Departmental Report as having spoken of running away on several occasions. Respondent contends that claimant must prove by a preponderance of the evidence that the State was negligent in allowing the inmates to escape, and further urges that claimant was guilty of contributory negligence in leaving the keys in the ignition of her automobile when she parked it on the property of the Morris Country Club.

These matters have been passed upon by the Court of Claims in previous decisions, and it is the acknowledged position of this Court that every escape case involving the State of Illinois, which results in damage or injury to a third party, must rest upon its own peculiar set of facts and circumstances. We hasten to affirm the position of the Court as set forth in *American States Insurance Company and Union Indemnity Association vs. State of Illinois*, 23 C.C.R. 47. In that case the Court stated on page 55:

“It goes without saying that rehabilitation is the fundamental aim of the Youth Commission program. Decisions as to the placement and progress of these youths must be made by utilizing the best judg-

ment of professional persons trained in administering this program. It is not an exact science, and cannot be administered by a slide rule. It is certain that instances will occur wherein the results of attempted rehabilitation are disappointing. Such instances by no means indicate faulty administration of the program. The duty of the State personnel in exercising the discretion required is not that of an insurer that each boy assigned to the encampment will perform satisfactorily, any more than that the Parole Board should be held to guarantee that a parolee will commit no further crimes. The only duty, which is required, is one of reasonable exercise of discretion.”

In the *American States Insurance Company* case this Court found no negligence on the part of respondent. The finding was based upon evidence and testimony produced on the part of respondent. In the cause at hand, respondent filed a Departmental Report, but called no witnesses. Other than the facts set forth in the Departmental Report, the evidence in this case consists of claimant’s exhibits, her testimony by deposition, and the deposition of her witness with regard to the matter of damages to the automobile. While reaffirming the position of this Court as taken in the *American States Insurance Company* case, we find in the case at hand that respondent had advanced warning that its ward, Charles Brooks, might run away, and could have, therefore, anticipated his subsequent action on June 2, 1965, when he escaped from the work detail of the Youth Commission, and stole the automobile of claimant. This warning can be found in the Departmental Report where it states: “Charles had spoken of running away on several occasions.” Without any other evidence to consider on the part of respondent, and having to rely upon respondent’s Departmental Report, we distinguish the two cases on the basis of fact, and find negligence on the part of respondent.

We must now consider whether claimant was guilty of contributory negligence in leaving her car at the im-

plement shed on the Morris Country Club grounds with the keys in the ignition. It seems reasonable that an automobile owner would anticipate the danger involved in taking such action, and it is common knowledge that an unattended, unlocked car with the keys in the ignition is not safe. This question has been considered by the Court of Claims and Illinois Courts of Review on several occasions. *United States Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188; *Stanko vs. Zlien*, 33 Ill. App. 2d 364; and *Childers vs. Franklin*, 46 Ill. App. 2d 344. In the *United States Fidelity and Guaranty Company* case, respondent relied upon Sec. 189 of Chap. 95½, Ill. Rev. Stats.:

“No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key.”

In that case the automobile of claimant, John Kavanaugh, was parked on private property in the driveway of the Kavanaugh home with the keys lying on the seat at the time the automobile was stolen. On page 195 of 23 C.C.R. the Court held as follows:

“We conclude that the action of the inmate in entering the automobile in the night time, finding the ignition locked, finding the keys on the seat, stealing the car from the front of the residence, and driving it into a post in another part of town, was not reasonably to be foreseen by John Kavanaugh in the exercise of ordinary care for the protection of his property, and constituted the proximate cause of the damage to the Kavanaugh automobile. Consequently, even assuming a violation of the statute, we do not believe that it constitutes contributory negligence, which proximately contributed to the damage in question, so as to bar recovery by this claimant.

“We believe from the evidence in this case that claimant’s insured, John Kavanaugh, was in the exercise of ordinary care for the safety of his automobile, that respondent was negligent in exercising custody over the escaped inmate, and, as a proximate result thereof, the vehicle was stolen and damaged.”

In the case of *Childers vs. Franklin* cited above, statutory

prohibition against motor vehicles standing, unattended with the keys in the ignition lock was not applicable to a situation in which the owner left his automobile on a school parking lot unlocked and with the keys in the ignition.

This Court finds the claimant to be free of contributory negligence, and grants to her an award of \$325.50.

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(No. 5286—Claimant awarded \$25.00.)

A. S. MOE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

A. S. MOE, Claimant, *pro se.*

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

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

PERLIN, C. J.

Claimant seeks to recover payment from respondent based on a Physician's Statement of Services Rendered on behalf of one Cora Ann Bruyn. Claimant alleges that he has made demand for such payment, but was refused on the grounds that the funds appropriated for the Illinois Department of Public Aid had lapsed.

A Departmental Report submitted to the Attorney General states that "Claimant is justly entitled to the payment of \$25.00." A stipulation filed herein states that "Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$25.00."

It appears that the sole reason for nonpayment of the statement rendered was the lapse of the appropriation.

Claimant, A. S. Moe, is, therefore, hereby awarded the sum of \$25.00.

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(No. 5289—Claimant awarded **\$344.03.**)

THE PROTESTANT HOSPITAL BUILDERS' CLUB, d/b/a MEMORIAL HOSPITAL, **4501** NORTH PARK DRIVE, BELLEVILLE, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *January 10, 1967.*

JONES, OTTESEN, AND FLEMING, Attorneys for Claimant.

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

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

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.

PERLIN, C.J.

On May 9, 1965, one Ella Miller was admitted to a hospital in the City of Belleville, Illinois, which was operated by claimant, The Protestant Hospital Builders' Club, d/b/a Memorial Hospital, **4501** North Park Drive, Belleville, Illinois. An application was made to respondent on the same date for aid under the program of Assistance to the Medically Indigent Aged.

Claimant alleges that it furnished room and care,

drugs, medical supplies and laboratory services to said Ella Miller from May 9, 1965 to May 22, 1965, and that the reasonable, usual and customary charges for such services and supplies in Belleville, Illinois and its vicinity is and was **\$344.03**. In its complaint, claimant further alleges that a statement for such services and supplies was presented to the Department of Public Aid, but payment was denied because of the lapse of the appropriation for the biennium in which such supplies and services were rendered.

A stipulation in lieu of evidence was entered into between claimant and respondent in which it is stated: "Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$344.03.**"

A report of the Department of Public Aid, signed by Gershom Hurwitz, Assistant to the Director, is attached to said stipulation. Paragraph 2 thereof states: "Claimant is justly entitled to the amount of **\$344.03**, and the Department has not paid the said amount."

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, Arc Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966; *Centreville Township Hospital vs. State of Illinois*, Case No. 5279, opinion filed

May 10, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, The Protestant Hospital Builders' Club, d/b/a Memorial Hospital, 4501 North Park Drive, Belleville, Illinois, is, therefore, hereby awarded the sum of **\$344.03**.

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(No. 5291 — Claimant awarded \$100.00.)

EDWIN J. CASEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1967.

ST. LOUIS MEDICAL CREDIT BUREAU, for Claimant.

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

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

PERLIN, C.J.

Claimant, Edwin J. Casey, by and through the St. Louis Medical Credit Bureau, has filed a complaint in the Court of Claims in which he seeks payment of the sum of \$100.00 for professional services rendered to one Myrtle Lyons on June 9, 1965.

A written stipulation was entered into by claimant and respondent, which states: "Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$100.00."

Attached to the stipulation is a Report of the Department of Public Aid, dated April 7, 1966, and signed

by Gershom Hurwitz, Assistant to the Director. It states that the amount sought by claimant is proper, and that claimant is entitled to payment of the sum of **\$100.00**.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966; *Centreville Township Hospital vs. State of Illinois*, Case No. 5279, opinion filed May 10, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Edwin J. Casey, is, therefore, hereby awarded the sum of \$100.00.

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(No. 5296—Claimant awarded \$87.62.)

STATE HOUSE NEWS STAND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1967.

NATHAN J. KAPLAN, Attorney for Claimant.

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

**CONTRACTS—lapsed appropriation.** Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim

could and would have been paid had lapsed, an award will be made.

PERLIN, C.J.

During the 1965 session of the Illinois General Assembly, claimant, State House News Stand, furnished newspapers for the use of the office of the Minority Leader, House of Representatives. Claimant now seeks payment in the amount of \$87.62, which represents a balance allegedly due for such services from January 1, 1965 to July 1, 1965.

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

“That claimant sold and delivered newspapers to the office of Rep. Albert W. Hachmeister, Minority Leader, and that the bill in the sum of \$87.62 has not been paid.

“That claimant failed to submit its statement of charges in time to the Speaker’s Office of the General Assembly to be paid from this biennium’s appropriations.

“That the House of Representatives Minority Leader, Albert W. Hachmeister, in a letter dated April 5, 1966, stated that his office received the newspapers from claimant, and that said claimant is entitled to payment of the amount claimed in the sum of \$87.62.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary’s Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, Am Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966; *Centreville Township*

*Hospital vs. State of Illinois*, Case No. 5279, opinion filed May 10, 1966. It appears that all qualifications for an award have been met in the instant case.

An award is, therefore, hereby made to claimant, State House News Stand, in the sum of **\$87.62**.

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(No. 5297—Claimant awarded \$246.98.)

ST. LOUIS UNIVERSITY HOSPITALS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

ST. LOUIS UNIVERSITY HOSPITALS, Claimant, pro se.

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

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

PERLIN, C.J.

Claimant seeks to recover the sum of **\$245.98** for services and supplies rendered one Myrtle Lyons. Claimant alleges that it furnished room and care, drugs, supplies, laboratory services, and use of the operating room from June 8, 1965 to June 15, 1965 for said Myrtle Lyons who had been found eligible for aid under the Illinois Department of Public Aid program of Assistance to the Medically Indigent Aged.

Claimant further alleges that a statement to respondent for services and supplies was denied payment on the basis that the claim was for services rendered prior to July 1, 1965 when the appropriation for the biennium had lapsed.

A letter from the Department of Public Aid indicates that the bill should have been paid, but was received too late to be processed.

A stipulation between the parties states that “Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$245.98.**”

It appears that the sole reason for nonpayment of the bill was the lapse of the appropriation.

An award is, therefore, made to claimant, St. Louis University Hospitals, in the sum of **\$245.98.**

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(No. 5303—Claimant awarded \$660.90.)

DELNOR HOSPITAL, a Not-For-Profit Corporation of the State of Illinois, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

**Opinion filed January 10, 1967.**

REDMAN AND SHEARER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**CONTRACTS—lapsed appropriation.** When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PEZMAN, J.

Claimant seeks to recover the sum of \$660.90 for hospital services, including drugs, laboratory facilities, X-rays, nursing, room and dietary facilities, rendered to one Allan Tye from June 13, 1965 to June 25, 1965.

A stipulation of facts by and between claimant and respondent was filed with this Court on the 9th day of November, 1966, and thereby it was agreed as follows:

“That one Allan Tye was admitted to the Delnor Hospital on June 13, 1965 pursuant to notice of admission issued by the Supt. of Public Aid, Du Page County, State of Illinois, and that claimant supplied drugs and services from June 13, 1965 to June 25, 1965.

“That respondent was billed in the sum of \$660.90, but that said billing was not processed prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of \$660.90.

“That, upon the foregoing agreed case filed here, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

A verified complaint of claimant indicates that the claim was not acted upon within the time allowed. It was subsequently disallowed by the Illinois Public Aid upon the grounds that the funds appropriated for such payments had lapsed.

This Court has held that, when the appropriation for the biennium from which a claim should have been paid had lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$660.90.

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(No. 5307—Claimant awarded \$233.52.)

**THE GOODYEAR TIRE AND RUBBER COMPANY, Claimant, vs.**  
**STATE OF ILLINOIS, Respondent.**

*Opinion filed January 10, 1967.*

**THE GOODYEAR TIRE AND RUBBER COMPANY**, Claimant,  
pro se.

**WILLIAM G. CLARK**, Attorney General, for Respon-  
dent.

*CONTRACTS—lapsed appropriation.* When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

**DOVE, J.**

On May 2, 1966, claimant, The Goodyear Tire and Rubber Company, filed its claim seeking payment for materials furnished to the Department of Public Works and Buildings, Division of Highways.

A stipulation was entered into by and between the parties hereto, which provided as follows :

“1. That materials were delivered to respondent at the special instance and request of the Department of Mental Health and the Highway Department ;

“2. That the statements attached to the complaint as exhibit A in the amount of **\$233.52** are due and owing;

“3. That, as a result of a delay in billing, payment was not made prior to the closing of the biennial appropriations ;

“4. That there is rightfully due claimant the sum of **\$233.52.**”

The Court is of the opinion that the claimant is justly entitled to a refund, since funds appropriated for such payments by the Division of Highways have lapsed.

An award is accordingly made to claimant in the amount of **\$233.52**,

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(No. 5328—Claimant awarded \$333.65.)

OLSEN WINDOW CLEANING COMPANY, INCORPORATED, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

OLSEN WINDOW CLEANING COMPANY, INC., Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**CONTRACTS—lapsed appropriation.** When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PEZMAN, J.

Claimant seeks to recover the sum of **\$333.65** for services rendered to the Division of Highways, Department of Public Works and Buildings, in cleaning windows in the Division Building, which is located at 4051 North Harlem Avenue in the City of Chicago.

A stipulation of facts was made and entered into by and between claimant and respondent, and filed with the Court of Claims on the 1st day of December, 1966.

Said stipulation reads as follows :

“That claimant, Olsen Window Cleaning Co., Inc., had completed the work as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of **\$333.65**.

“That as a result of delay in billing by the claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person in-

terested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This Court has held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the **amount** due claimant.

Claimant is hereby awarded the sum of **\$333.65**.

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(No. 5331—Claimant awarded \$150.00.)

COLLEEN R. WURSTER, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed January 10, 1967.*

COLLEEN R. WURSTER, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

An August 3, 1966, claimant, Colleen R. Wurster, filed a claim seeking refund of the sum of \$150.00, which had been deposited with the Secretary of State of the State of Illinois as required by Sec. 7-204 of the Motor Vehicle Laws of the State of Illinois.

From the stipulation of facts by the parties it appears :

1. That claimant, Colleen R. Wurster, deposited with the office of the Secretary of State of the State of Illinois in accordance with Sec. 7-204 the sum of \$150.00 ;

2. That on July 1, 1963 claimant was entitled to a refund of said sum of \$150.00, and was so notified by the office of the Secretary of State of the State of Illinois;

3. That, as a result of the failure of claimant to file claim for refund, the funds were transferred to the General Revenue Fund on August 20, 1963;

4. That claimant continues to be the sole person interested in this claim; that no assignment thereof has occurred; and, that claimant is the sole owner of such claim.

Sec. 7-503 of Chap. 95 $\frac{1}{2}$ , Ill. Rev. Stats., provides that any person having a legal claim against such deposit may enforce it by proper proceedings in the Court of Claims. The Court is of the opinion that claimant has complied with the statutes, and is justly entitled to a refund.

An award is accordingly made by this Court to claimant, Colleen R. Wurster, in the amount of \$150.00.

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(No. 5344—Claimant awarded \$1,140.00.)

ALICE UHER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

CHARLES J. GALLAGHER, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

MOTOR VEHICLES—*escheat of financial responsibility deposit. Evidence disclosed that claimant was entitled to a refund of monies es-*

cheated to State pursuant to Chap. 95½, Sec. 7-603, Ill. Rev. Stats.

DOVE, J.

Claimant, Alice Uher, seeks to recover from the State of Illinois the sum of \$1,140.00, which was deposited with the office of the Secretary of State as evidence of financial responsibility in accordance with the provisions of Chap. 95½, Ill. Rev. Stats.

A written stipulation relative to the facts in this case was entered into between claimant and respondent, by their respective attorneys, which in **part** is as follows :

“That claimant, Alice Uher, deposited with the office of the Secretary of State of the State of Illinois in accordance with Chap. 95½, Sec. 7-204, Ill. Rev. Stats. (1965), as amended, the sum of \$1,140.00.

“That on July 1, 1963, claimant was entitled to a refund of said sum (Ill. Rev. Stats., Chap. 95½, Sec. 7-503), and was **so** notified by the office of the Secretary of State of the State of Illinois.

“That, as a result of the failure of claimant to file claim for refund, the funds were transferred to the General Revenue Fund on August 30, 1963.”

Sec. 7-503 of Chap. 95½, 1965 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 subject to the limitations prescribed for such Court. It is the opinion of this Court that claimant has complied with the statute, and is justly entitled to a refund.

An award is accordingly made by this Court to claimant, Alice Uher, in the sum of \$1,140.00.

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(No. 5353—Claimant awarded \$180.00.)

**TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY**, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed January 10, 1967.*

JOHN E. CASSIDY, SR., Attorney for Claimant.

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

*CONTRACTS—lapsed appropriation.* When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

DOVE, J.

Claimant seeks to recover the sum of \$180.00 as rent for certain premises occupied by the Department of Public Works and Buildings, Division of Highways, of the State of Illinois.

A Departmental Report has been filed admitting that claimant is entitled to the sum of **\$180.00** as rent for certain premises for the years ending June 30, 1962, June 30, 1963, June 30, 1964 and June 30, 1965. The Departmental Report states that the invoices were received by the Division of Highways, but that said invoices were not paid; that the fund appropriated for such payments had lapsed, and that there were unobligated balances in said funds sufficient to pay for the rental of said premises owned by claimant.

Subsequently a stipulation was entered into by and between claimant and respondent admitting that claimant is entitled to the amount of **\$180.00**, and that said amount is owed by the respondent herein.

This Court has held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$180.00.

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(No. 5354—Claimant awarded \$1,260.00.)

EVELYN M. GRABLOWSKI, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed January 10, 1967.*

PHILIP S. AIMEN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, Evelyn M. Grablowski, has filed her complaint herein seeking to recover from William J. Scott, Treasurer of the State of Illinois, the sum of \$1,260.00, constituting a security deposit as evidence of financial responsibility, which was made by Charles J. Grablowski on August 17, 1961 in accordance with Sec. 42-12 of the Motor Vehicle Law of the State of Illinois. Charles J. Grablowski died on May 30, 1963. Claimant is the sole and only heir, devisee, and legatee of the Estate of Charles J. Grablowski, deceased, and, as well, is the Executor of the Will of said decedent. On November 9, 1965, claimant sought to recover the security deposit from Paul Powell, Secretary of State, but was advised that said moneys had been paid over into the General Revenue Fund of the State Treasury on September 7, 1965, and that said State agency was unable to refund the security deposit because of the transfer.

A stipulation of facts was made and entered into by and between claimant and respondent, and filed with the Court of Claims on the 28th day of November, 1966. From the stipulation of facts by the parties, it appears:

"That one, Charles J. Grablowski, deceased, husband of claimant herein, had deposited with the office of the Secretary of State of the State of Illinois, in accordance with Chap. 95½, §Sec. 7-204, Ill. Rev. Stats. (1965), as amended, the sum of \$1,260.00.

"That Charles J. Grablowski died on May 30, 1963, and that claimant herein is the sole heir and legatee of the Estate of Charles J. Grablowski, deceased, as indicated by Court Order, issued in the Probate Court of Cook County, in Case No. 63P7520, Docket 657, page 622.

"That on December 22, 1965, claimant was entitled to a refund of the sum of \$1,260.00 (Ill. Rev. Stats., Chap. 9544, §Sec. 7-503), and was so notified by the office of the Secretary of State of the State of Illinois.

"That, as a result of the failure of claimant to file claim for refund, the funds were transferred to the General Revenue Fund on September 7, 1965.

"That claimant continues to be the sole person interested in this claim, and that no assignment thereof has occurred.

"That upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue."

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

Claimant is awarded the sum of \$1,260.00.

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(No. 4857—Claim denied.)

LOWELL M. WEBB, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967.*

KRUSEMARK and BERTANI, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S.

GROBMAN, Assistant Attorney General, for Respondent.

**CONTRACIS—**~~lack~~ *of privity of contract.* Where evidence disclosed complete failure of privity of contract between claimant and State, no cause of action was established, and the claim will be denied.

**SAME—***reimbursement to County.* Where State refused to approve appointment of claimant as County Veterinarian, it was not obligated under the statute to reimburse the County for any portion of claimant's salary.

**PEZMAN, J.**

Claimant, Dr. Lowell M. Webb, a veterinarian, seeks to recover \$4,500.00 allegedly due him from the State of Illinois as contributions toward his salary as Will County Veterinarian. He is seeking fifteen monthly payments of \$300.00 each for the period of October, 1956 through December, 1957.

Will County, acting through its Board of Supervisors, had adopted the "County Area Plan" for the suppression, eradication and control of bovine tuberculosis and Bang's disease within Will County pursuant to the provisions of Chap. 8 of the 1955 Ill. Rev. Stats.

The Will County Board of Supervisors had employed Dr. Webb by written contract annually since 1947 as County Veterinarian, and annually since 1948 had petitioned the Department of Agriculture of the State of Illinois for payment of 50% of Dr. Webb's salary, as provided for in Sec. 187a of Chap. 8 of the 1955 Ill. Rev. Stats.

On September 11, 1956, at a regularly convened meeting of the County Board of Supervisors of Will County, Illinois, the County Board duly passed a resolution to adopt the "County Area Plan", and to employ a County Veterinarian beginning October 1, 1956 and ending September 30, 1957 at a salary for the year of \$7,680.00. On

the same date the Board entered into a written contract with Dr. Webb, hiring him for the year in question.

On September 10, 1957, at a regularly convened meeting of the Board of Supervisors of Will County, Illinois, the County Board duly passed a similar resolution to employ a County Veterinarian for the period beginning October 1, 1957 and ending September 30, 1958 at a salary of \$7,680.00. On the same date the Board entered into a written contract with Dr. Webb, hiring him for the year in question.

During the period of October, 1956 through December, 1957, the United States Department of Agriculture conducted an investigation of claimant for suspected irregularities in the Co-operative Animal Disease Eradication Programs in Will County, Illinois, and, because of said investigation, the Department of Agriculture of the State of Illinois, which was advised thereof by the Secretary of Agriculture of the United States, informed claimant that he was to perform no official activity until the investigation had been completed. Claimant was advised by letter, dated January 8, 1957, by the United States Department of Agriculture that his accreditation with them was cancelled.

For the period of October, 1956 through December, 1957, the County of Will paid Dr. Webb their share of his salary, and during this period of time the State of Illinois refused to make any payment of their share of his salary. Claimant alleges that, during the period of October, 1956 through December, 1957, he performed all of his duties as County Veterinarian other than issuing health certificates for animals intended for interstate or export shipment, or the personal testing or vaccination of animals as to tuberculosis and brucellosis, these par-

ticular functions being denied him because of the suspension of his accreditation by the United States Department of Agriculture.

In this cause, claimant is attempting to recover damages **from** the State of Illinois for breach of a contract between the County of Will and the State of Illinois. As a general rule, only a party or a privy to a contract may enforce it, or be held responsible for any alleged breach. Claimant has no contract with the State of Illinois. Claimant under his contract with the County of Will was to receive **\$340.00** from the County of Will, and the balance of his salary, amounting to the sum of **\$300.00**, was to be paid from **sums** allocated by the State of Illinois to said County.

The State of Illinois was never required to make any salary payments directly to claimant. All sums were allocated by respondent solely to the County of Will.

Chap. 8, Sec. 187a of the 1955 Ill. Rev. Stats., provides that:

**“The Department (of Agriculture of the State of Illinois) shall, upon the petition of the County Board or County Boards, make payment of 50% of the salary of the County Veterinarian and his assistants. . . .**

This section clearly indicates that only the County can petition the Department of Agriculture for its share of the County Veterinarian’s salary, and there is nothing in this section granting the County Veterinarian the right to personally petition the Department. Claimant’s total salary was actually paid by the County of Will, and the fact that the State made payments to the County pursuant to a statute should not be construed as making respondent a party to any employment contract between claimant and the County of Will.

Chap. 8, Sec. 187a of the 1955 Ill. Rev. Stats., provides that:

**“Any County or Counties adopting the County Area Plan may employ a County Veterinarian and assistants for the supervision of contagious diseases of livestock within the County, and the suppression, eradication and control of bovine tuberculosis and Bang’s disease. The Veterinarian shall be approved by the Department, and shall work under the direction of and in conjunction with the Department. . . .”**

On September 28, 1956, the State of Illinois Department of Agriculture informed claimant that an investigation was being conducted by the United States Department of Agriculture in which claimant was suspected of certain irregularities in the conduct of the Co-Operative Animal Disease Eradication Programs in Will County; and that, as a result of this investigation, the State Department of Agriculture found it necessary to restrict claimant from performing any official activity in connection with the Co-Operative Animal Disease Eradication Programs in Illinois until the investigation was completed. This restriction was to be effective as of the close of business on September 30, 1956.

This Court construes the letter of the State Department, dated September 28, 1956, as a refusal on the part of the Illinois Department of Agriculture to approve the appointment of claimant as County Veterinarian. Approval of claimant as County Veterinarian by the Illinois Department of Agriculture was a condition precedent to the Department’s obligation to reimburse the County of Will for 50% of the salary of the County Veterinarian.

Claimant alleges in his complaint that during the period in question, October, 1956 through December, 1957, he had duly performed his official duties in Will County, Illinois, as County Veterinarian, with the knowledge and **approval** of the Department of Agriculture of the State

of Illinois, and under the direction of said Department, and in conjunction with the rules and regulations of said Department.

One of Dr. Webb's official duties, which by the letter of September 28, 1956 he was specifically barred from performing, was to submit certain monthly reports concerning the herds and the number of head of cattle subjected to the tuberculin tests and the Bang's disease control program. Claimant filed with the Court copies of the required monthly reports which had allegedly been sent by claimant to the Illinois Department of Agriculture. However, the report of the Illinois Department of Agriculture states categorically that Dr. Webb submitted no reports to the division of the work which he performed during the period of October, 1956 to December, 1957. There were approximately thirty-three pages of official departmental records filed with the Court supporting the Department of Agriculture on this question. In view of the evidence submitted, the Court finds that claimant has failed to prove by a preponderance of the evidence a filing of the required monthly reports.

It is the opinion of this Court that claimant has failed to establish a cause of action against the State of Illinois. There is a complete failure of privity of contract between claimant and the State. This Court further finds that the State of Illinois, because of its refusal to approve the appointment of claimant as County Veterinarian for Will County, Illinois, was not obligated under the statute to reimburse the County of Will for any portion of claimant's salary from the County of Will for the performance of any duties as County Veterinarian.

The claim is hereby denied.

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(No. 5074—Claim denied.)

WAYNE E. JUSTICE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967'.*

STIFLER and SNYDER, and ATCHISON and KOENEMAN, Attorneys for Claimant.

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

**PRISONERS AND INMATES — contributory negligence of inmate.** Where evidence clearly established negligence on the part of respondent, but failed to prove that claimant was free from contributory negligence, the claim will be denied.

**PEZMAN, J.**

Claimant seeks to recover the sum of \$25,000.00 as damages for injuries sustained by him on the 21st day of November, 1960, while an inmate at the Menard Branch, Illinois State Penitentiary, alleging various acts of negligence of respondent.

Paragraph 8 of said complaint is as follows:

“8. That at the time and place aforesaid respondent, the State of Illinois, by and through its agents in that behalf, committed one or more of the following acts or omissions :

- a. Provided a machine for the cutting of tobacco, which machine was unsafe;
- b. Required claimant to work on an unsafe machine;
- c. Added to the tobacco cutting machine a certain foot operating mechanism, which mechanism was unsafe and dangerous ;
- d. Provided a tobacco machine, which was an inherently dangerous instrumentality;

e. Established working conditions for the tobacco cutting machine and the tobacco shop at the Menard Penitentiary, which conditions were unsafe ;

f. Did not give proper instructions as to the proper operation of the tobacco cutting machine ;

g. Did not properly supervise the working conditions at the tobacco shop at the Menard Penitentiary ;

h. Did not provide proper safety switches for said tobacco cutting machine ;

i. Provided a machine, which was defective.”

On the 21st day of November, 1960, claimant, Wayne E. Justice, was serving a sentence imposed upon him by the Circuit Court of Vermilion County, Illinois. He was an inmate of the Menard Branch of the Illinois State Penitentiary, and was assigned to work in the tobacco shop at Menard. On the date of the accident claimant was working as a mechanic in that shop, and had worked there for approximately three and one-half years. His regular duties were to repair the machinery used in the tobacco shop, and he worked at these duties five days per week.

On the above date, at approximately 8:00 in the morning, he arrived at the tobacco shop, put on his work clothes, and proceeded to work on a machine known as a “lumper”. This particular machine is used to mold loose tobacco leaves into a plug. The molding is accomplished by means of hydraulic pressure, and in operation the machine exerts about 8,000 pounds of pressure in order to mold the tobacco. Attached to the ram of the machine is a “shaper”, which is a rectangular piece of steel about four by ten inches. It is turned up on the edges, and fits into the mold at the bottom of the machine.

The shaper is connected to the ram by bolts. This machine was used to pound or ram tobacco leaf into the shape of a plug. It had two hand levers with black knobs at the front, and was normally operated with one hand on each of these black knobs. The method of operating the machine was changed prior to the injuries sustained by claimant. In order to free one of the operator's hands so that production could be increased, the hand lever on the right side was chunked or blocked off, thus allowing the machine to be operated by the use of the left hand only. At a later date another innovation to further speed up the operation of the machine was introduced, which consisted of a wire running from the left hand lever attached to the black knob to a foot pedal on the floor, so that, when the operator pressed his foot on the pedal, the lever with the black knob was pulled down operating the plunger or ram. This was the method of operation on the day of the accident.

On the morning of the accident in question claimant had removed the shaper from the lumper, had cleaned loose tobacco from the same, and was returning it to the machine. Claimant testified that there was no one else around, and that, when he removed the shaper, the foot pedal and wire were not hooked up to the left hand lever. There is testimony that the foot pedal was disconnected each evening after the tobacco shop closed down. Claimant further stated that, when he returned from washing the metal piece or "shaper", he did not notice whether the foot pedal had been connected. He testified that, when he returned, the machine operator had not yet come into the shop, nor was anyone else near the operating mechanism of the machine. He said he placed the shaper against the ram with his left hand, and started to tighten the set screws with his right hand. As he was tightening

these screws, the machine operated and crushed his left hand. Claimant was hospitalized in the prison hospital, and was attended by the prison physician. On the day of the accident the doctor amputated the ring finger at the middle joint, and removed the bone from the tip of the little finger. The index and middle fingers were sutured and wired in an attempt to repair them, but four days later the doctor had claimant taken to the operating room, and at that time the middle and ring fingers were amputated. This amputation was of the "Guillotine type", and the fingers were cut off right next to the hand, or in the proximal phalanx. Some two months later it was necessary to surgically repair one of the stumps, and this revision was performed by the prison physician.

Claimant alleges that respondent was negligent, and in paragraph 8 of his complaint sets forth the purported acts of negligence. All involve the nature of the machine being operated, as well as the working conditions permitted while a potentially dangerous machine was in operation. The machine was purchased by the State from the manufacturer, and the tobacco shop supervisor, Mr. Henson, was on the job in the tobacco shop at the time the machine was installed. When it was received in the tobacco shop at the Menard Branch, it was fitted with two levers, which extended from the front of the machine, and were used to operate the machine, necessarily occupying both the left and the right hands. The operator stood in front of the machine, and dumped loose tobacco into the mold. After this, he would shut a gate on the front of the mold, and then by pressing both of the levers the ram with the shaper on the end of it would come down, and mold the tobacco into a plug. The testimony reveals that in order to speed up production the

tobacco shop instituted two innovations upon the machine prior to the time that claimant was injured. One, the right hand lever was blocked into operating position by the insertion of a chunk of wood or by wiring it down, so that the machine could be operated with one hand, the left. Later, a foot pedal was rigged to connect to the left lever, so that that lever could be activated by the left foot leaving the left hand free, as well as the right. Superintendent Henson, industrial foreman of the tobacco shop, testified that he told the inmates not to use the board.

“Q. Did you ever tell anyone not to use this foot lever?

A. Yes, I told them not to, but I just didn’t stick hard enough, I guess.

Q. Is it still being used?

A. It is still being used, yes.”

The negligence of respondent is sustained by the testimony of the Superintendent of the tobacco shop who readily admits that the purpose of having two hand levers at the front of the machine with the black knobs was to prevent an accident of the nature that occurred to claimant. It is the opinion of the Court that claimant has established adequate negligence on the part of respondent under the issues raised by the allegations, which were set forth in paragraph 8 of the complaint. In *Morris vs. State of Illinois*, 23 C.C.R. 91, this Court stated as follows:

“However, if it appears from the evidence that claimant was assigned to work under unsafe conditions, was not guilty of contributory negligence, and was injured, respondent would be guilty of negligence.”

Claimant testified that he had worked on the ma-

chine before and had taken the shaper off of the ram on other occasions. He stated that he was a mechanic, and knew how the machine operated. On the morning in question, he turned the power on to the machine by flipping a switch on the east wall. He testified that he had the shaper on the ram with his left hand holding it up to the ram with two set screws snugged up, and that he reached around with the right hand, and pushed the button that would start the machine. He also testified that he didn't know whether the foot lever was hooked up to the lever on the left side, but did know it wasn't hooked up when he first arrived at the tobacco shop. Testimony further reveals that the gate on the mold was off of the machine at the time of the accident; that the gate was there for safety protection; and, that it would not be possible to get a hand into the mold when the gate was closed. Hoyt Brewer, a fellow inmate, who had known claimant for some time, and who had worked in the tobacco shop for several years, testified that, when he heard claimant holler, he tried to get his foot off the pedal, and noticed that there was a wire between the hand operating lever and the foot lever, which was connected. Claimant was thoroughly familiar with the operation of the machine even in its changed condition, and the testimony of Hoyt Brewer clearly established that the ram was set in operation by claimant.

This Court finds that claimant has clearly established negligence of respondent, but has failed to prove that he himself was free from contributory negligence. The claim is denied.

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(No. 5174—Claimant awarded \$15,000.00.)

DANA JODLOWSKI, Administrator of the Estate of STANLEY JODLOWSKI, Deceased ; and DANA JODLOWSKI, Administrator of the Estate of FRANK JODLOWSKI, JR., Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967.*

JOSEPH L. BAIME, and KANE and KANE, Attorneys for Claimant.

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

**STATE PARKS—*duty of care owed to invitee.*** State must exercise reasonable care in establishing, maintaining and supervising its parks, and it has the duty to exercise ordinary care to protect invitees from harm.

**SAME—*negligence—duty to warn invitee of dangerous condition.*** State is negligent where it had actual or constructive notice of dangerous and unusual condition of the lake bottom, failed to warn invitees thereof, and protect them from harm.

**NEGLIGENCE—*proximate cause of injury to volunteer.*** The proximate cause of the injury to a volunteer, who interposes to save the life of a person imperiled by the negligence of others, is the negligence which caused the peril.

**DAMAGES—*wrongful death.*** Where a person dies because of the wrongful act of another, and leaves surviving him lineal heirs, there is a presumption of pecuniary loss as to such next of kin, which will sustain an award of substantial damages without proof of actual loss.

PEZMAN, J.

This is an action for wrongful death brought by claimant, Dana Jodlowski, as Administrator of the Estates of Stanley Jodlowski, deceased, and Frank Jodlowski, Jr., deceased, against respondent, State of Illinois, to recover damages for the deaths by drowning of the said Stanley Jodlowski and Frank Jodlowski, Jr., while they were visitors at Wolf Lake State Park.

The Court finds the facts to be as follows:

Wolf Lake State Park is located on the far south-east side of Chicago. It is approximately one and one-half miles long from north to south, and about one-half to one mile wide from east to west. Within the boundaries of this park is a body of water called Wolf Lake. Beginning in the late 1950's and continuing until about 1962, extensive dredging work was performed in Wolf Lake for the purpose of acquiring sand from the lake bottom to be used in the construction of the Calumet Skyway Expressway. This dredging to a depth of twenty-five to thirty-five feet occurred in various parts of the lake, and included some areas near the shoreline. After the dredging had been completed, and the lake filled with water to its normal level, the deep drop-offs or depressions caused by the dredging could no longer be seen. The present custodian of the park, who has held that position since 1960, personally observed the dredging work while in process, and knew of the unusual condition of the lake bottom.

Michael Lalich, a police officer of the City of Chicago, was called as a witness for claimant. He testified concerning the dredging of Wolf Lake approximately seven years ago, and stated that some of the dredging was to a depth of 20 to 25 feet. He also stated that the sand was removed from Wolf Lake to be used for the approaches of the Calumet Skyway being constructed at that time. He said that, "prior to the dredging, this lake was one body of water. It was nothing but a mud hole actually, a mile long and a mile wide, but you could practically walk across the whole lake. Now it is three lakes actually." He further testified that at the time of the drownings there were three signs erected at the lake. One was at the north end of the lake, which stated "Deep Water", and two were located at the south end

of the lake, which stated "No Swimming". He further said that there were no signs at or near the sand bar in question where the boys drowned. He testified that he patrolled the area approximately three times a day while on duty.

On Sunday, August 4, 1963, a party of five drove out to Wolf Lake State Park to do some fishing. This group consisted of Stanley Jodlowski, age 18; his brother, Frank Jodlowski, Jr., age 12; Mrs. Dana Jodlowski, their mother; and two friends, Raymond Borowicz, age 17; and Robert W. Graeber, age 17. The party of five arrived at the park at approximately 8:00 A.M. This was the first time any of the five had ever been to Wolf Lake State Park. Upon their arrival at the lake, the four boys took out their fishing tackle, and began to fish in the lake. At approximately 10:00 A.M., the weather being warm, the boys decided to cool off by wading in the lake by the shore. They removed their shoes and socks, rolled up their pants legs, stepped into the lake, and walked the short distance to the sand bar previously mentioned. The water between the shore and the sand bar was shallow, no deeper than knee high. The boys stayed on the sand bar for a short while, and then walked off of it a few steps to the east. When Frank Jodlowski, Jr., was approximately 10 or 12 feet east of the sand bar, he was suddenly in water over his head and going down. His brother, Stanley Jodlowski, went to his assistance, and was himself dragged down. The other two boys joined hands, and tried to reach out for the Jodlowski brothers, but were not successful. Stanley Jodlowski and Frank Jodlowski, Jr., went down together, and did not come up again. A scuba diver, Jack M. Downey, happened upon the scene, and immediately donned his scuba gear, and dove into the lake at a point

east of the middle of the sand bar. Downey testified at the hearing in this cause that he found the two brothers at the bottom of a drop-off or depression in the lake bottom approximately 20 feet down with one brother lying on top of the other. Downey further stated that the drop-off or precipice went down at an angle of 75 to 80 degrees, and started about 5 feet or so east of the sand bar, and that the precipice was slippery and muddy.

The park custodian, Alfred E. Osborne, testified that during the warm months of the year large numbers of visitors to the park waded and swam in Wolf Lake. He also stated that, during the warm months when visitors to the park were wading and swimming in the lake, there was no supervision by lifeguards, nor were there any life preservers in the park area, or any loud speaker system or other device used to warn visitors of the deep drop-offs and depressions in the lake bottom. He said there were no barriers constructed at any place along the shore of the lake to keep visitors from entering the water, and no markers, ropes or buoys to indicate or warn of the deep drop-offs or depressions.

Custodian Osborne further testified that the only effort made to keep people from swimming and wading in the lake was the erection of certain signs posted at a few places in the park, which bore the legend "No Swimming". The "No Swimming" signs, which were erected, were made and put up by the custodian or one of his helpers. These signs were frequently torn down, and had to be replaced from time to time. At no time was a professional sign making company engaged to erect the type of signs, which would have been permanent in nature, and which could have withstood the abuse of vandals.

He stated that on summer weekends, when the park

was crowded with several thousand visitors of all ages, the only personnel employed by respondent to operate and maintain the park, and to keep it reasonably safe and warn visitors of danger was the park custodian and his two young helpers. Their chief duties consisted of keeping the park clean, cutting the grass, emptying the garbage, and cleaning the toilets. The park custodian further testified that most of the visitors to the park who swam or waded in the lake seemed to congregate in the southwest portion of Wolf Lake around a sand bar close to the shore. There is no evidence in the record that park personnel were ever stationed in this area on Sundays and holidays, or at any other time, to warn people of the dangerous condition of the lake bottom, or to otherwise provide for the safety and protection of park visitors.

The surviving members of the group testified that, from the time they entered the park up to and including the time of the drownings, there were no visible signs of any kind to warn of the dangerous condition of the lake bottom, or to caution visitors about entering the water. This testimony was corroborated by Police Officer Michael Lalich and by Jack M. Downey, both of whom testified that there were no signs posted on Sunday, August 4, 1963, in the area of the drownings. Mrs. Dana A. Jodlowski, Administrator of the decedents' estates and the mother of the decedents, testified that Frank Jodlowski, Jr., age 12, was a 7th grade grammar school student, and could swim slightly. She further stated that Stanley Jodlowski, age 18, was a graduate of St. Leo High School, was employed at the time of his death by the International Harvester Company of Chicago, and was earning approximately \$85.00 per week. She stated that he was going to attend college the following fall, and was a good

swimmer.

This Court is of the opinion that Mrs. Dana Jodlowski, her two sons, Stanley Jodlowski and Frank Jodlowski, Jr., and their two friends, Raymond Borowicz and Robert W. Graeber, were invitees of respondent to Wolf Lake State Park. As invitees, the State had the duty to exercise ordinary care to protect them from harm. It has been held by this Court that 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; *Stedman vs. State of Illinois*, 22 C.C.R. 446. In a later decision this Court went even further when it held that the State had a duty to warn of a danger, which existed along a trail in the White Pines State Park, where the State knew that such trail was used by the public, and where those using the trail would have no knowledge of the existing danger. *Hansen vs. State of Illinois*, 24 C.C.R. 102. In allowing the claim of claimant in the Hansen case for injuries sustained when he fell into a deep gorge near the trail in question, the Court stated 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.

It is the opinion of this Court that respondent was negligent in failing to warn the Jodlowski party and other visitors to Wolf Lake State Park of the dangerous and unusual condition of the lake bottom caused by the dredging. The evidence in the case indicates that respondent had actual or constructive notice of the unusual condition of the lake bottom. Respondent also had actual or constructive notice of the large number of people who came to the park in the warm months of the year, and of their use of the park lake for wading or

swimming. Testimony indicates that, from the time the Jodlowski group entered the park until the occurrence of the drownings, there were no warnings, signs, or other indications given by respondent of the danger of wading or swimming in Wolf Lake. Respondent failed to adopt and provide the requisite safety measures and procedures to warn visitors to the park of the dangerous condition of the lake bottom, and to protect them from it. The drownings of the Jodlowski brothers were the direct and proximate result of this failure. Stanley Jodlowski drowned while attempting to rescue his brother, Frank Jodlowski, Jr. The proximate cause of the injury to one who voluntarily interposes to save the life of a person imperiled by the negligence of others is the negligence, which caused the peril.

There is no testimony in the record to indicate that the Jodlowski brothers or any of the members of the Jodlowski party were guilty of contributory negligence. None of the members of the party had ever been to Wolf Lake State Park prior to August 4, 1963. They came to the park for the purpose of fishing and picnicking. There were no signs in the area of the drownings warning visitors to the park of the dangerous condition of the lake bottom. The evidence indicated that the boys went into the lake not to swim, but merely to wade in water below their knees for the purpose of cooling off. The conduct of the Jodlowski brothers, as well as their two companions, in wading in Wolf Lake was not unreasonable under the circumstances and surroundings. The testimony of the park custodian indicated that the conduct of the boys would appear to be consistent with the conduct of hundreds of visitors to Wolf Lake who during the warm months of the year entered the lake to wade, swim and sun-bathe on the sand bar.

The Wrongful Death Act provides that any amount recovered in any action brought pursuant to the same shall be for the exclusive benefit of the widow and next of kin of such deceased person. The pleadings in the case at bar indicate that the Jodlowski brothers left them surviving as their only next of kin, Frank Jodlowski, their father ; Dana A. Jodlowski, their mother; and Christine Jodlowski, their sister. The law is well established in Illinois that, where a person meets his death because of the wrongful act of another, and leaves surviving him lineal heirs, there is a presumption of pecuniary loss as to the said next of kin, and this presumption is sufficient to sustain an award of substantial damages, even without proof of actual loss. Citations *Howlett vs. Doglio*, 402 Ill. 311 ; 83 N.E. 2d 708 (1949) ; *Ferraro vs. Augustine*, 45 Ill. App. 2d 295; 196 N.E. 2d 16 (1964).

Claimant, Dana Jodlowski, as Administrator of the Estate of Stanley Jodlowski, deceased, is awarded the sum of \$10,000.00. Claimant, Dana Jodlowski, as Administrator of the Estate of Frank Jodlowski, Jr., deceased, is awarded the sum of \$5,000.00.

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(No. 6319—Claimant awarded \$3,516.31.)

AMERICAN OIL COMPANY, A Maryland Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967.*

C. E. ACCOLA, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**CONTRACTS—lapsed appropriation.** Where contract has been properly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the con-

tract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

DOVE, J.

Claimant, American Oil Company, a Maryland Corporation, filed its complaint in the Court of Claims in which it seeks payment of the sum of \$3,616.60 for materials furnished to the Department of Public Works and Buildings of the State of Illinois.

A written stipulation was entered into by claimant and respondent, which states as follows:

“That claimant, at the special instance and request of the Department of Public Works of the State of Illinois, had supplied gasoline, oils, greases, tires, tubes and services during the years of 1963, 1964, and 1965, in accordance with the invoices attached to the complaint, with the exception of the following items noted in the Report of the Division of Highways, heretofore filed with the Court of Claims in this matter :

Invoice No. 091609 in the amount of \$48.09 has been paid, and copies of both sides of the warrant showing the endorsement of claimant are attached to the original Departmental Report creating a credit on amount claimed of \$48.09.

Invoice No. 855 in the amount of \$15.74 is a charge to the Division of Waterways, about which this Division has no information, creating a credit on amount claimed of \$15.74.

A form numbered 3190 received as a claim of non-payment has recently been explained by claimant as a credit memorandum applicable to Invoice No. 24827 reducing the amount of the billing from \$64.07 to \$49.41, creating a credit on amount claimed of \$14.66.

A delivery ticket in the amount of \$52.71 was later reduced by Invoice No. 2037 to \$42.91, creating a credit on amount claimed of \$9.80.

Invoice No. T-1434 was billed at \$54.00 plus a \$12.00 drum deposit. The Division of Highways does not pay drum deposits, therefore, creating a credit on amount claimed of \$12.00. That the total credit thus set forth is \$100.29.

“That there is rightfully due claimant the sum of \$3,516.31.

“That the bills were not presented, scheduled and processed until after September 30, 1965, when the 73rd biennium appropriations had lapsed.

“That no assignment or transfer of the claim has been made.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon, or enter judgment therein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, American Oil Company, is, therefore, hereby awarded the sum of \$3,516.31.

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(No. 5380—Claimant awarded \$1,170.00.)

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967.*

ROBERT H. BRUNSMAN, Attorney for Claimant.

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

**CONTRACTS—lapsed appropriation.** When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

**PRACTICE AND PROCEDURE**—*stipulation in lieu of record.* Court will consider case on Departmental Report where it is stipulated by the parties to constitute the record in the case.

**PEZMAN, J.**

Claimant seeks to recover the sum of \$1,170.00 for certain law books ordered from claimant by the Honorable Samuel O. Smith, Judge of the Appellate Court of Illinois, Fourth District. On the 20th day of January, 1967, a stipulation was filed herein by and between claimant and respondent, which is as follows :

“The report of Honorable Robert L. Conn, Clerk of the Appellate Court, and of Honorable Samuel O. Smith, Judge of the Appellate Court, attached hereto, and by this reference, incorporated herein and made a part hereof, shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned, and the Court may make and file their reports, recommendations, orders, and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$1,170.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

From such record it appears that the appropriations for the 73rd biennium had lapsed when this statement for \$1,170.00 was finally presented to the Clerk of the Fourth District, Illinois Appellate Court, for payment.

This Court has consistently held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$1,170.00.

(No. 5111—Claim denied.)

CONSTANCE KUMIGA, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed November 17, 1966.*

*Petition of Claimant for Rehearing denied March 20, 1967.*

LEWIS L. VISHNY and BENJAMIN J. SCHULTZ, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; KEVIN J. GILLOGLY, Assistant Attorney General, for Respondent.

**NEGLIGENCE—*duty of care owed to invitee.*** Where claimant was an invitee, respondent was only required to use reasonable and ordinary care to maintain its premises in a reasonably safe condition.

**SAME—*burden of proof.*** Before claimant may recover, she has the burden of proving negligence on the part of respondent, as well as her freedom from contributory negligence.

**CONTRIBUTORY NEGLIGENCE—*duty of care for claimant's own safety.*** Where claimant was cognizant of the sidewalk's condition, she should be held to as high a degree of care for her own safety as would be required of respondent.

PEZMAN, J.

Claimant, Constance Kumiga, seeks to recover from respondent, State of Illinois, damages for personal injuries, which she sustained on February 6, 1962, when she fell outside the Illinois Secretary of State's Motor Vehicle Facility, which is located at 5401 Elston Avenue, Chicago, Illinois.

Claimant charges that her fall and resulting injuries were caused by the negligent and careless maintenance of the area way, entrances and approaches to said Facility. She alleges that respondent negligently permitted the accumulation of large amounts of snow, ice and other debris in said area way, entrances and approaches, and permitted the same to remain in such a condition for a

long period of time. Claimant further alleges that, as a result of said negligence, she was caused to slip and fall in the entrance way to said premises breaking her right leg, causing bruises and internal injuries, severe pain and suffering, and permanent injuries to her body.

The facts, as alleged by claimant, and upon which she bases her claim for damages, are as follows:

On February 6, 1962, claimant went to the Illinois Secretary of State's Motor Vehicle Facility, which was located at **5401** Elston Avenue, Chicago, Illinois, to purchase a set of license plates for her automobile. She parked her car in the parking lot at the rear of the Facility, and walked across the parking lot to a sidewalk adjacent to the rear of the building. Claimant proceeded along this sidewalk in a southeasterly direction toward the rear entrance of the building. In order for claimant to reach the entrance of said Facility, it was necessary for her to traverse the entire distance of that walk, step down from said sidewalk to a loading zone crosswalk, cross the loading zone crosswalk, and step up to another sidewalk leading directly to the entrance of the Facility. Claimant alleges that, when she reached the end of the first sidewalk and stepped down to the loading zone crosswalk, she slipped on accumulated snow and ice and fell sustaining an injury to her right leg. Claimant alleges that the sidewalk and crosswalk upon which she was walking and subsequently fell was covered with ice, and that she walked very carefully as though "walking on eggs."

The facts, as alleged by claimant, are disputed by respondent. Adolph S. Bier, an Investigator for the Office of the Secretary of State, was called as a witness on behalf of respondent. He stated that he was **looking**

out of a window of the Secretary of State's Office at 5401 Elston Avenue, approximately ten feet from where claimant fell, and that he saw claimant walking along the sidewalk at the rear of the building. He testified that he saw her step off of the curb, out of the crosswalk, and into an area known as a loading zone, and fall on a piece of ice, which was to the right side of the crosswalk and out of the crosswalk area. Mr. Bier further testified that the sidewalk and crosswalk across the loading zone were dry. He stated that the piece of ice in question was not in the location of the crosswalk across the loading zone, but rather was to the right of that area in the loading zone.

Theodore N. Pladis, an Investigator for the Secretary of State's Office, was also called as a witness by respondent. He testified that, when he was called to the scene of the accident by Investigator Bier, claimant was lying in the loading zone adjacent to the sidewalk at the rear of the Facility. He stated that there was no snow or ice on the sidewalk or crosswalk across the loading zone. He further testified that claimant told him that, upon stepping off the sidewalk into the loading zone, she slipped and fell on a piece of ice.

Alfred E. Schiller, a Lieutenant in the Investigation Department, North Facility, Secretary of State's Office, stated that, when he arrived at the scene, he observed claimant lying in the loading zone alongside the curb. He further testified that the walk and crosswalk were clear of ice and snow.

Our inquiry is first directed to the legal status of Constance Kumiga at the time and place of the accident. The Office of the Secretary of State, by means of advertising, mailings and notices, invited the public to come

to its various facilities, such as the one in question, for the purpose of purchasing license plates for automobiles. Claimant was clearly an invitee, and was, therefore, entitled to reasonable or ordinary care on the part of respondent to maintain its premises in a reasonably safe condition. This degree of care, however, does not impose a liability of an insurer as against any actions that may occur; it only requires that the owners of the premises use reasonable care. *Murray vs. Bedell Company*, 256 Ill. App. 247; *Rudolph Dreikurs and Sadie Dreikurs, vs. State of Illinois*, 23 C.C.R. 85.

It is fundamental that the burden of proof is upon claimant to establish negligence on the part of respondent, as well as her freedom from contributory negligence, before recovery can be had. In our judgment, claimant has not borne the burden of proof. The preponderance of the evidence indicates that the sidewalk and crosswalk area were free from snow and ice, and the respondent had exercised ordinary care in maintaining the sidewalk, crosswalk and approaches to the building. It is further to be noted that there is no evidence of any of the hundreds of other persons using the facility that day slipping or falling on ice or snow, or had had any difficulty in walking upon the sidewalk and crosswalk in question.

Even if we assume for a minute that the sidewalk and crosswalk were covered with ice, as alleged by claimant, it *is* clear from claimant's own testimony that that very condition was apparent to her. She should be held to have assumed whatever risks were involved in going upon the ice covered sidewalk and crosswalk. There was no hidden danger. She was completely cognizant of the condition of the sidewalk and crosswalk. In this

case, claimant was as well apprised of the condition of the sidewalk and crosswalk as respondent, and should be held to as high a degree of care for her own safety as would be required of respondent. *Murray vs. Bedell Company of Chicago*, 256 Ill. App. 247; *Carlson vs. United States*, 90 F. Supp. 159.

Further, this Court held in *Rudolph Dreikurs and Sadie Dreikurs vs. State of Illinois*, 23 C.C.R. 85, as follows :

“It is common knowledge that the northern half of Illinois is subject to miserable and many times dangerous conditions for four or five months of the year. Sleet, ice and snow make walking or driving a genuine hazard. In spite of reasonable efforts made to remove these hazards, many people are injured through no fault of their own. All who elect to live and work in this area, usually because economic conditions are better, assume a risk that does not exist in other parts of our country.”

The claim is denied.

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(No. 5339—Claimant awarded \$2,696.16.)

KEUFFEL and ESSER COMPANY, A Corporation, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 17, 1967.*

WOLFE, KLEIN, BONNER and BEZARK, Attorneys for  
Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Keuffel and Esser Company, a Corporation, filed its complaint in the Court of Claims in which it seeks payment of the sum of \$2,696.16 for materials furnished to the Department of Public Works and Buildings of the State of Illinois.

A written stipulation was entered into by claimant and respondent, which states as follows:

“That the claimant is a New Jersey Corporation, qualified to do business in the State of Illinois, and that at the special instance and request of the Department of Public Works and Buildings of the State of Illinois had supplied respondent with tapes, tape refills, chains, surveying and engineering equipment, as indicated in exhibits Nos. 1 through 10, attached to the complaint filed herein.

“That the customary and usual charge for said merchandise was equivalent to the sum set forth in the invoice, namely, **\$2,696.16.**

“That the vouchers for said merchandise were not presented or processed until after September, 1965, when the 73rd biennium appropriations had lapsed.

“That no assignment or transfer of this claim has been made.

“That there is rightfully due to claimant the sum of **\$2,696.16.**

“That upon the foregoing agreed case filed herein, the **Court** shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, An Illinois Corporation vs. State of Illinois*, Case No. 5261,

opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Keuffel and Esser Company, a Corporation, is, therefore, hereby awarded the sum of **\$2,696.16**.

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(No. 5172—Claim denied.)

J. F. EDWARDS CONSTRUCTION COMPANY, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed March 20, 1967.*

ROBERT H. WHITE, Attorney for Claimant.

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

**CONTRACTS—*compliance with terms and provisions thereunder.*** Where claimant did not prove by a preponderance of the evidence that it had completely complied with the requirements of the contract, and evidence showed that respondent made its payments in accordance with the terms and provisions thereunder, claimant will not be entitled to recover further sums.

PEZMAN, J.

This is an action brought by claimant, J. F. Edwards Construction Company, against respondent, State of Illinois, for three claims arising under a contract entered into by claimant with the Department of Public Works and Buildings, Division of Highways, of the State of Illinois for the removal of trees and stumps along certain State highways.

The amounts claimed and the basis of the claims are as follows:

1. Under the contract in question, claimant has been paid the sum of **\$53,794.72**. The State is withholding the

sum of \$2,980.30 on the grounds that claimant has not completed the contract. Claimant alleges that it has substantially completed the contract, and is entitled to the sum of \$2,980.30, which is being withheld by respondent.

2. Payment to claimant under said contract was to be made at the rate of \$1.44 per diameter inch of the trees removed. It is claimant's contention that the diameter of the trees removed must be measured on a plane having the same slant as the cutting plane rather than on a level plane perpendicular to the tree. On the basis of its contention that the diameter of the tree should be measured on a plane having the same slant as the cutting plane, claimant alleges an underpayment under the contract of \$5,400.00.

3. Claimant alleges that additional time, additional man hours of labor, and additional use of equipment were required to backtrack to recut stumps previously approved, and to cut trees previously deleted from the list to be cut. Claimant alleges that it is entitled to a further payment of \$4,339.29 for this additional work.

The letting of the contract in question was pursuant to a notice to bidders previously issued. The notice to bidders contained, among other matters, special provisions to supplement the Standard Specifications for Road and Bridge Construction, adopted January 2, 1958, and the Supplemental Specifications, effective April 2, 1962. The following are pertinent excerpts from the Standard Specifications for Road and Bridge Construction, adopted January 2, 1958, special provisions to supplement the Standard Specifications for Road and Bridge Construction, adopted January 2, 1958, and the Supplemental Specifications, effective April 2, 1962:

**5.1 AUTHORITY OF ENGINEER.** All work shall be done under the supervision of the engineer and to his satisfaction. He shall decide all questions, which arise as to the quality and acceptability of materials furnished, work performed, manner of performance, rate of progress of the work, interpretation of the plans and specifications, acceptable fulfillment of the contract, compensation, and disputes and mutual rights between contractors under the specifications. He shall determine the amount and quality of work performed and materials furnished. His decision shall be final, and shall be a condition precedent to the right of the contractor to receive money due him under the contract.

**10.4 TREE REMOVAL.** (As modified by special provisions — see page 2 thereof.) All trees, except those designated to be saved, and all stumps shall be cut and disposed of as provided herein. All trees shall be removed flush with the ground. The cutting plane shall be determined by the ground surface along a circumference two feet beyond the tree in every direction. Trees to be removed are painted with a yellow circle facing the pavement.

#### COMPENSATION

**10.9 METHOD MEASUREMENT.** (As modified by special provisions at page 2 thereof.)

(b) Tree Removal.

(1) Inch Diameter. Trees to be removed as a payment item but not measured in acres shall be measured per inch of diameter. The diameter shall be measured at a point two feet above the highest ground level at the tree, and will be determined by dividing the measured circumference of the tree by 3.1416. The accumulated total inches of diameter shall be the pay quantity. The point of measurement shall be two feet above the ground surface, as defined elsewhere herein, even though the trees are to be cut flush with the ground. . . .

The evidence in this case clearly indicates that Mr. Burnham, the District Construction Engineer for District 4, considers that claimant did not fully comply with the terms of the contract with respect to the cutting of the trees flush with the ground. Respondent's evidence indicates that there were approximately eighty-five stumps, which were not cut flush with the ground, and, therefore, did not comply with the terms of the

contract. Claimant has presented conflicting testimony that the eighty-five stumps in question had been previously approved as cut, and, further, that no written list of the eighty-five stumps specifically designating their location was ever given to claimant.

While there is conflicting testimony concerning the eighty-five stumps, which respondent alleges were not cut in conformity with the terms and requirements of the contract, it is the opinion of this Court that claimant has failed to prove by a preponderance of the evidence that it has fully and completely complied with the requirements of the contract that all the trees be cut flush with the ground.

Claimant's second claim for \$5,400.00 additional compensation is based on the measurement of the diameter of the trees cut on a plane having the same slant as the cutting plane rather than on a level plane. Claimant bases its claim on its interpretation of Article 10.9(b) (1) of the Standard Specifications, as modified by special provisions. This Article provides that the point of measurement shall be two feet above the ground surface, as defined elsewhere herein, even though the trees are to be cut flush with the ground. The Specifications provide in Article 10.4 that the term "ground level" shall be defined as being "flush with the ground". It is the opinion of this Court that there is no justification in the record for claimant's interpretation of Section 10.9 of the Standard Specifications, as modified, that the measurement of the diameter of trees cut should be on a plane having the same slant as the cutting plane rather than measurement on a level plane. It is also to be noted that claimant accepted periodic payments under the contract based on measurement of trees cut on a level plane.

Claimant's third claim is for compensation for additional man hours of labor and for use of equipment required to backtrack to recut stumps. It is the opinion of this Court that the alleged additional work performed by claimant for respondent was originally contemplated in the contract. It was the duty of claimant to recut the stumps in conformance with the specifications and special provisions of the contract. While the recutting of stumps may have been more work than claimant expected, it appears that such additional work was within the terms of the contract.

We, therefore, hold that claimant is not entitled to recover for the above and foregoing reasons. The claim is denied.

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(No. 5173—Claim denied.)

CHARLES DUBLE, SR., Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed March 20, 1967.*

SEYMOUR R. GOLDGEHN and ARTHUR L. POLLMAN,  
Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; KEVIN J.  
GILLOGLY, Special Assistant Attorney General for Re-  
spondent.

**NEGLIGENCE—*duty to invitee.*** When a person is an invitee, the owner has the duty to use reasonable care and caution to keep the premises reasonably safe for him.

**SAME—*assumption of risk.*** An invitee assumes all normal, obvious or ordinary risks attendant to the use of the premises.

**SAME—*no liability without fault.*** Where owner has exercised ordinary or due care in maintenance of his premises, and an invitee is injured thereon, the owner is not liable for such injury.

**SAME—*wet condition of floor.*** Where evidence disclosed that respondent exercised ordinary and reasonable care in maintaining its floor, and claimant knew or should have known of the wet condition thereof, no liability attaches to respondent, and the claim will be denied.

PEZMAN, J.

This is an action brought by claimant, Charles Duble, Sr., against respondent, State of Illinois, to recover damages for personal injuries, which claimant sustained on January 30, 1963, when he slipped and fell at the Illinois State License Bureau at 9901 South Park Avenue, Chicago, Illinois.

The facts concerning the happening of the accident appear to be as follows: Claimant, Charles Duble, Sr., on January 30, 1963 at approximately 9:30 A.M. went to the Illinois State License Bureau, which was located at 9901 South Park Avenue, Chicago, Illinois, for the purpose of purchasing license plates for his automobile. He parked his car in the north parking lot, and walked toward the east entrance of the building. Claimant entered the building through the east entrance thereto, and proceeded to walk through a portion thereof. As he approached a checker station, where an employee of the Bureau checks license application forms, Mr. Duble slipped and fell to the floor, as a result of stepping in some water or a wet spot that had accumulated on the floor of the premises. As a result of the fall, claimant sustained injuries to his shoulder and neck areas, headaches, vertigo, and recurrent dizziness. Claimant's injuries required hospitalization resulting in hospital and doctor bills amounting to the sum of \$816.20, and loss of earnings totaling the sum of \$1,300.00.

The exact cause of the fall is the main point of dis-

pute in this case. It is claimant's theory that the State of Illinois carelessly and negligently allowed water or some other slippery foreign substance to be placed on or remain on the floor, and that respondent failed to warn or in any way indicate to persons entering the building that the floors were in a dangerous condition.

Respondent's theory of the case is that claimant slipped and fell upon the floor of the building on some water, which had formed by virtue of the melting of snow brought into said building upon the shoes of people entering the building, and that it had taken all necessary precautions to keep the premises in a safe condition. Evidence in this case clearly indicates that claimant, Charles Duple, Sr., was an invitee of the respondent when he entered the Illinois State License Bureau for the purpose of purchasing his 1963 State automobile license plates. It has been held that the test of whether one is an invitee on the premises of another is whether he is there by the owner's invitation to transact business in which the parties are mutually interested. If so, he is an invitee. *Ellguth vs. Blackstone Hotel*, 340 Ill. App. 587, 92 N.E. 2d 502 (1950). With respect to an invitor's duty to an invitee, it has been held that the owner of premises must use reasonable care and caution to keep the premises reasonably safe for the use of any invitee. *Geraghty vs. Burr Oak Lanes*, 5 Ill. 2d 153, 125 N.E. 2d 47 (1955). However, an invitor is not an insurer of the safety of his customers or other persons entering upon the premises by reason of his express or implied invitation. *Garrett vs. National Tea Company*, 2 Ill. 2d 567, 147 N.E. 2d 367 (1958). It has further been held that an invitee assumes all normal, obvious or ordinary risks attendant to the use of the premises. *Lindburgh vs. State of Illinois*, 22 C.C.R. 29 (1954); *Dargie vs. East*

*End Bolders Club*, 346 Ill. App. 480, 105 N.E. 2d 537 (1952).

Claimant testified that the weather was clear on the date in question. However, several other witnesses testified that it was snowing at the time claimant entered the building, or that it had snowed shortly before that time, and official weather reports, which were entered in evidence, substantiate their testimony. It was also shown that there was snow on the ground, which had previously fallen prior to the day in question. It has been held in a number of cases that, where the invitor has exercised ordinary or due care in maintenance of his premises, and an invitee is nevertheless injured thereon, the invitor may not be held liable for such injury. *Schnelzel vs. Kroger Grocery & Baking Co.*, 342 Ill. App. 501, 96 N.E. 2d 885 (1951); *Clark vs. Carson, Pirie, Scott & Company*, 340 Ill. App. 260; 91 N.E. 2d 452 (1950); *Hartman vs. Goldblatt Bros., Inc.*, 19 Ill. App. 2d 563, 154 N.E. 2d 872 (1959). Liability must be founded upon fault, and, where there is no evidence of negligence on the part of respondent, liability may not be imposed.

It is the opinion of this Court that claimant has failed to show by a preponderance of the evidence that respondent, State of Illinois, was negligent in maintaining the floors in the Illinois State License Bureau at 9901 South Park Avenue, Chicago, Illinois, on January 30, 1963.

It is common knowledge that, when it is snowing, and there is snow on the ground, people entering a building will necessarily carry some moisture on their feet, which will cause the floor inside the building to become damp and possibly more slippery than a dry floor.

The danger, if any, was or should have been apparent to claimant, and claimant was or should have been aware of the condition of the floor. There is no indication in the testimony in this case that the wet or damp condition of the floor was in any way concealed from claimant. Claimant's own testimony indicates that there was an employee of the respondent nearby with a mop and bucket at the time and place where claimant fell. Several of the witnesses indicated that they observed this employee mopping the floor of the building both before and after the accident. Claimant has failed to produce evidence that the wet or damp condition of the floor was due to any cause other than moisture brought into the building from outside on the shoes of persons entering the building prior to claimant's entry.

It is the opinion of this Court that the wet condition of the floor, which claimant alleges caused his fall, was the result of and due to the weather conditions existing at the time, and over which respondent had no control. It is the further opinion of this Court that respondent by delegating to one of its employees the task of mopping the floor exercised every reasonable precaution to keep the floor safe. Because of the wet condition of the floor caused by the weather conditions existing at the time, the possibility that claimant might slip and fall while passing over said floor was a normal, obvious and ordinary risk at the time in question, and claimant, as an invitee, assumed all such risks when he entered the building.

Claim is denied.

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(No. 5337—Claimant awarded \$14,687.57.)

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

Opinion *filed* March 20, 1967.

NAFZIGER and OTTEN, Attorneys for Claimant.

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

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

PEZMAN, J.

Claimant seeks to recover the sum of \$14,687.57 as damages caused by the rescinding of working permit No. 8-1230-62 by the District Engineer of the Division of Highways of the State of Illinois, Department of Public Works and Buildings.

A Departmental Report of the Division of Highways in relation to this cause was filed with the Court on the 21st day of February, 1967, as an attachment to a stipulation between claimant and respondent. It states as follows :

“The Division of Highways, through its District 8 office in East St. Louis, issued a permit to Central Illinois Public Service Company for the installation of an overhead electric powerline within the right-of-way of FA Route No. 155, also known as the Great River Road. Working permit No. 8-1230-62 authorized work on FA Route No. 155, Sections 401-1 and 401-2, from Station 587 + 43 to Station 758 + 38 between Grafton and Elsay in Jersey County.

“Following the issuance of the permit, the utility company entered into a contract for the construction of the overhead electric powerline. Work was begun by the contractor, West Central Utilities Company, but was stopped when District Engineer R. E. Kronst rescinded the working permit on February 24, 1966.

“Land and Right of Way Supervisor Paul F. Grant of Central Illinois Public Service Company invited this Department to make

an audit of the charges of \$14,687.57. An audit has been made by this Department, and Division of Highways' auditors have approved for payment to Central Illinois Public Service Company the total amount of the claim of \$14,687.57.

R. E. Bowermaster  
Controller

By A. R. Tomlinson  
Supervisor of Claims"

The stipulation of facts heretofore mentioned agrees to the admission into evidence of exhibits A, B and C, which clearly establish a good cause of action against respondent as long as the same are not refuted. Damages are fixed by the stipulation at the sum claimed, and there are no objections to the amount.

From the facts and evidence before it, this Court can do no more or no less than find that claimant was damaged in the sum of \$14,687.57 as a result of the negligence of respondent in rescinding on the 24th day of February, 1966, working permit No. 8-1230-62, which said Division of Highways had previously issued on the 3rd day of November, 1965.

Claimant, Central Illinois Public Service Company, is hereby awarded the sum of \$14,687.57.

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(No. 5367—Claimant awarded \$182.29.)

REMINGTON OFFICE SYSTEMS, DIVISION OF SPERRY RAND CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed March 20, 1967.*

REMINGTON OFFICE SYSTEMS, DIVISION OF SPERRY RAND CORPORATION, Claimant, pro se.

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

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

**PEZMAN, J.**

Claimant seeks to recover from respondent the sum of \$182.29 for materials sold to respondent in 1965 for which claimant failed to invoice respondent until November of 1966. The Departmental Report of the Division of Highways of the Department of Public Works and Buildings reads as follows:

“In April and May, 1965, the State of Illinois, through its Department of Public Works and Buildings, Division of Highways, contracted with Remington Office Systems, Division of Sperry Rand Corporation, for certain office materials to be furnished the District 10 office of the Division of Highways in Chicago.

“The materials, consisting of file folders and guides, were ordered by a Division employee with proper authority, the materials were received in good condition, and the charges therefor were reasonable.

“No part of the bill of \$182.29 has been paid, and the only reason it cannot now be paid is that the appropriation therefor has lapsed.

• “As of September 30, 1965, there was an unobligated balance of sufficient amount in the appropriation from which claimant’s invoice could and would have been paid.

R. E. Bowermaster  
Controller

By A. R. Tomlinson  
Supervisor of Claims”

A stipulation of facts by and between claimant and respondent was filed herein on the 15<sup>th</sup> day of February, 1967. It clearly states that the material was received in good condition, and that neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$182.29.

It appears to the Court that this is a contract for

the furnishing of materials where the contract was properly entered into, the services have been satisfactorily performed, or material properly furnished in accordance with the order, and proper charges were made therefor, but that the appropriation for payment of the same had lapsed prior to the presentment of the invoice. Our Court has repeatedly held that it would enter an award for the amount due under such circumstances.

Claimant is hereby awarded the sum of \$182.29.

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(No. 5378—Claimant awarded \$15,747.50.)

THE COUNTY OF RANDOLPH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March 20, 1967.*

HOWARD CLOTFELTER, Attorney for Claimant.

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

COUNTIES—*reimbursement for expenses in habeas corpus cases.*  
 Upon stipulation of facts and expenses, an award was entered pursuant to Chap. 65, Secs. 37-39, 1963 Ill. Rev. Stats.

PEZMAN, J.

Claimant, The County of Randolph, seeks reimbursement of \$15,786.50, representing expenses incurred by claimant and its officials for services performed in connection with court proceedings involving petitions for Writs of Habeas Corpus by the inmates of the Illinois State Penitentiary and the Illinois Security Hospital. These are penal and charitable institutions of the State of Illinois. Both are located within the County of Randolph.

The parties have stipulated as follows:

“That divisions of the Illinois State Penitentiary, a State penal institution of the State of Illinois, are situated in Randolph County, Illinois;

“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;

“That by virtue of certain statutory provisions (Chap. 65, pars. 37, 38 and 39, 1963 Ill. Rev. Stats.) the State of Illinois is required to assume and pay the necessary expenses for such petitions for Writs of Habeas Corpus;

“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 March 12, 1964 and November 29, 1966, inclusive, which list is a true and correct itemization of said petitions filed between said dates; and, further, that in all cases on the said exhibit A, as amended by exhibit B, 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;

“That claimant, County of Randolph, claims in this action all amounts to which it is entitled in the cases listed in exhibit A, as amended by exhibit B, for filing fees, Sheriff’s fees, State’s Attorney’s fees, and law library fees; and, further, that a similar claim based upon similar items of expenses, but arising out of other cases, was presented by the County of Randolph, and determined by this Court in an opinion filed June 24, 1955, volume 22 of the Court of Claims Reports, page 205; and again in an opinion filed July 24, 1958, volume 22 of the Court of Claims Reports, page 733; and again in an opinion filed May 23, 1959, volume 23, Court of Claims Reports, page 136; and again in an opinion filed May 14, 1963;

“That none of the petitioners set forth in exhibit A attached to the complaint herein were residents of or committed from Randolph County, Illinois;

“That no claim has been presented to any State Department other than the filing of the complaint herein, and there has been no assignment of any of the items herein claimed.”

The Commissioner’s Report indicates that the hearing in this matter disclosed that a breakdown of the fees to be paid to claimant totals \$15,747.50.

An award is, therefore, made to claimant, The County of Randolph, in the amount of **\$15,747.50.**

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(No. 5382—Claimant awarded \$165.92.)

HARDY SALT COMPANY, Claimant, OS. STATE OF ILLINOIS,  
Respondent.

Opinion *filed* March 20, 1967.

HARDY SALT COMPANY, Claimant, pro se.

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

CONTRACTS—*lapsed* appropriation. When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

DOVE, J.

Claimant seeks to recover the sum of \$165.92 for salt furnished the Department of Mental Health, Dixon State School, 2600 N. Brinton Avenue, Dixon, Illinois.

A stipulation of facts was made and entered into by and between claimant and respondent, and was filed with the Court of Claims on the 10<sup>th</sup> day of February, 1967. The stipulation reads as follows:

“The Report of the Department of Mental Health to the Attorney General of the State of Illinois, dated January 31, 1967 (a copy of which is attached hereto, marked exhibit “A”, and, by this reference, incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$165.92.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This Court has held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$165.92.

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(No. 4865—Claim denied.)

NORMAN MAGNUSON, a Minor, by ORVILLE MAGNUSON, his father and next friend, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1967.*

SCHEFFRES and HODES, Attorneys for Claimant.

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

**HIGHWAYS—evidence.** To recover, claimant must prove by a preponderance of the evidence that, while in the exercise of due care and caution, he was injured as the proximate result of a defect, which was dangerous and unsafe for ordinary travel, and that the State had notice of such defect and was negligent in allowing it to remain uncorrected.

**SAME—contributory negligence.** Where evidence disclosed that claimant was aware of the condition of the roadway and had knowledge of the defect, he did not exercise the degree of care which was required under the circumstances, and his claim will be denied.

DOVE, J.

The issues that surround this claim arise out of an occurrence on August 15, 1958, at about 11:15 A.M. on a bright sunny day on Illinois Route No. 53 just north of Illinois Route No. 68. Claimant, Norman Magnuson, was nineteen years of age at the time of this occurrence, and was operating a motor scooter on said highway. There was a small bridge over a culvert at the point

of the accident. The road leading to the bridge slopes upward with approximately one-half inch to two inches difference in height between the road and the bridge. As the claimant on his motor scooter approached the point where the highway adjoins the bridge, the front end of the scooter left the ground throwing claimant to the highway. Subsequently claimant was taken to Sherman Hospital in Elgin where he remained for twelve days. Claimant contends that he has suffered permanent disability as a result of this occurrence, and that he is entitled to be reimbursed for his medical expenses.

Claimant was being followed on the highway by Walter E. Schneider and Audrey Mae Schneider who observed the accident, and went immediately to his assistance. Claimant testified that he had passed over this bridge many times, had observed it, and noticed the bounce "You got out of it in a car." Mr. and Mrs. Schneider testified that they had been over the road many times, and noticed the condition of the road, but did not feel that the bump was unusual for a car. Mr. Schneider described the rise as a "slight rise, like what frost would do to cement, would raise it."

The law is clear that, while the State is not an insurer of persons who drive upon its highways, in cases where there is a defect, which is either known or could have been ascertained by a reasonable inspection, the State would become liable for injuries sustained as the result of said defect. However, it is the duty of claimant to establish his claim by a preponderance of the evidence. In this instance he must not only prove the defect and notice by the State, but he must also prove that he was free of any contributory negligence. According to his own testimony, claimant had been over this area of the highway on many occasions, and was well aware

of the condition of the road. In the case of *Dee vs. City of Peru*, 343 Ill. 36, the Court stated: "It has long been the rule in this State that it is the duty of persons about to cross a dangerous place to approach it with care commensurate with the known danger, and, when one on a public highway fails to use ordinary precaution while driving over a known dangerous place, such conduct is by the general knowledge and experience of mankind condemned as negligence."

Claimant was aware of the condition of the roadway, and had knowledge of this defect. We are of the opinion that claimant has not shown by a preponderance of the evidence that he exercised the degree of care, which was required under the circumstances.

"It is well established that the State of Illinois does not act as an insurer in the maintenance of its highways and bridges. Respondent can be held responsible in this case only if it is established by the greater weight of the evidence that claimant, while in the exercise of due care and caution, was injured and damaged as the proximate result of a defect, which was dangerous and unsafe for ordinary travel, and that the State had actual or constructive notice of the defect, and was negligent in allowing such defect to remain uncorrected". (*Leota Anderson, vs. State of Illinois*, 22 C.C.R. 413.)

This claim is denied.

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(No. 5021—Claim denied.)

ADRIANA RYAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 11, 1966.*

*Petition of Claimant for Rehearing denied April 20, 1967.*

CALIENDO and CONNOR, Attorneys for Claimant.

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

*NEGLIGENCE — burden of proof.* Where claimant failed to prove by a preponderance of the evidence that it was respondent's negligence which proximately caused her injuries, and that she was free from any contributory negligence, her claim will be denied.

DOVE, J.

This is an action brought by claimant, Adriana Ryan, against respondent, State of Illinois, to recover \$10,000.00 in damages for personal injuries, which she sustained on March 6, 1960 when she slipped and fell upon the floor in the Administration Building at the Illinois Industrial School for Boys at Sheridan, Illinois, where she was visiting her son, Thomas Ryan, who was an inmate.

Claimant contends that respondent by its agents and servants carelessly, negligently and recklessly permitted the floor of the Administration Building to be and remain in a dangerous, defective, and otherwise unsafe condition, in that the floor was "highly slippery and slick due to the application of a foreign substance to the surface thereof"; that respondent and its agents and servants had notice of the condition of said floor, or, in the exercise of due care and caution, should have had notice.

Claimant testified that on March 6, 1960, which was a regular visiting day at the Illinois Industrial School for Boys at Sheridan, Illinois, she went to visit her son who was an inmate at the school; that Charles Post and his wife, Harriet Post, who also had a son at the school, picked her up near her home in Chicago, and drove her to Sheridan. When she arrived at the school, she requested the key to the ladies' room. As she walked

through the lobby toward the ladies' room, she was wearing low-heel shoes, commonly known as "loafers"; that the floor looked glassy, and smelled strongly from the odor of wax, and she noticed a boy who was applying wax to the floor. She then walked to the ladies' room, and on her way slipped on either a highly polished or damp spot, which caused her to lose her balance, fall, and fracture her leg at the right knee. She experienced a sharp pain in her right knee, and was unable to rise. She was helped to her feet by another lady who was present in the lobby, and proceeded to the wash room. The Posts had gone to get a cup of coffee at the time of the accident. After leaving the wash room she returned the key to the switchboard operator, and informed him that she had fallen, and stated she did not think she would be able to walk to the building where the visiting room was located. When she was called to visit her son, Mr. and Mrs. Post aided her to the visiting area. She visited with her son for approximately two hours, and then left the premises with the Posts who drove her to her apartment in Chicago. The testimony of Mrs. Post corroborated the statements of claimant.

Later, on the same day, claimant was taken to a hospital by ambulance, and was examined by Dr. C. R. Von Solbrig. He gave her pills, and confined her to bed in the hospital where she remained for approximately five days. Her right knee was set in a plaster cast extending from the ankle to the upper part of her right thigh. She was treated at home by Dr. Von Solbrig for approximately two months, and was released from his care in May, 1960.

On cross-examination, claimant stated that her son had been an inmate at Sheridan for approximately nine

months prior to the accident; that she had visited him about every two weeks, or about eighteen times in all; and, that her son, James, had been an inmate at Sheridan, and she had visited him there many times. She had used the wash room a number of times prior to the date of the accident. The floor had been highly polished on those occasions, but she had never fallen.

The witnesses for respondent testified that the floors in the Administration Building were clean and polished, but were not slippery; that they had worked at Sheridan for many years, but no one had slipped and fallen on the floor before.

In the case of *Lindberg vs. State of Illinois*, 22 C.C.R. 29, claimant sought to recover damages for personal injuries, which she sustained when she slipped and fell upon the concrete floor of the women's lavatory located in the Mississippi Palisades State Park. The Court said :

“It is fundamental that respondent is not an insurer of the safety of the patrons of the park, and, at the most, can only be held to that degree of care, which a reasonably prudent individual or organization would use in constructing and maintaining a like structure in a like location, under the same and similar circumstances. It is likewise fundamental that the burden of proof is upon claimant to establish negligence on the part of respondent, as well as her freedom from contributory negligence, before recovery can be had. In our judgment, claimant has not borne this burden of proof.

“It is clear from the evidence, and particularly from claimant's own testimony, that the very condition complained of was as apparent to claimant, as it would have been to any agents or servants of respondent had they been present. She, therefore, should be held to as high a degree of care for her own safety, as would be required of respondent in its conduct toward her. She should also be held to have assumed whatever risks were involved in going upon the wet floor, which were within themselves an incident to such act. There was no hidden danger. She was completely cognizant of the condition of the floor. The case, it seems to us, does not present a different situation in this regard than do those cases wherein a

slippery condition on the floor of a building has been brought about by rainfall. The law of Illinois is well settled in those cases wherein the person injured had as much knowledge of the condition as the owner of the store or building.”

The burden of proof is upon claimant to prove by a preponderance or greater weight of evidence that it was the negligence of respondent, which was the proximate cause of her injuries, that she was free from any negligence whatsoever, and did not in any way contribute to her own injuries. It is our opinion that claimant has failed in this respect.

We, therefore, hold that claimant is not entitled to recover.

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(No. 5031—Claim denied.)

**BANK OF LYONS**, an Illinois Banking Corporation, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed November 17, 1966.*

Petition of Claimant for Rehearing denied April 20, 1967.

**JAMES C. SPANGLER**, Attorney for Claimant.

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

**NEGLIGENCE**—proximate *cause*. Where evidence disclosed that respondent's negligence, if any, was not the proximate cause of the injury suffered, no liability attaches thereto, and claimant will be denied recovery.

**DOVE, J.**

Claimant, Bank of Lyons, an Illinois Banking Corporation, instituted this action to recover damages suffered as a result of the loss of its security interest in a certain motor vehicle.

It appears from the record that on January 25, 1959

claimant received an application for an auto loan from Charles W. Barry. On January 30, 1959, Barry executed a note in the amount of \$2,557.50, secured by a chattel mortgage on the motor vehicle, and surrendered his certificate of title to claimant. The chattel mortgage was recorded on February 9, 1959 in the Office of the Recorder of Deeds of Cook County. On February 3, 1959, claimant transmitted the certificate of title, together with an application for corrected certificate, to the Office of the Secretary of State. The corrected certificate of title, showing claimant's security interest, effective as of February 11, 1959, was thereafter returned to claimant.

Barry made one payment on his note, but it appears that he was in default since the month of March, 1959. In June, 1960, Barry applied to the Secretary of State for a duplicate certificate of title upon the representation that the original had been lost. This was attempted by the means of forged documents, which purportedly contained a release of the lien of claimant. This was done, of course, without the knowledge or consent of claimant.

These documents were received for processing in the Office of the Secretary of State, and, on June 29, 1960, a duplicate certificate of title was issued to Barry for the automobile. However, Barry did not receive the duplicate certificate, and, through the effort of claimant, it was recovered and returned to the Secretary of State. It also appears from the record that, through the effort of claimant, the duplicate certificate was revoked, and the earlier notation of claimant's lien reinstated.

Subsequently, claimant succeeded in having the automobile repossessed by a Constable of the Town of Brook-

field, Illinois. The Constable, upon repossession, placed the automobile in claimant's parking lot, and turned the keys over to an official of claimant. Within a few hours the automobile was removed from the parking lot, and it is assumed by claimant that it was stolen by Barry. However, there is no evidence to this effect. Since that time all efforts to locate Barry or the automobile have been unsuccessful. Upon these facts claimant seeks to impose liability on the State of Illinois for the loss of its security interest, as well as accrued interest and costs of its efforts to recover the automobile.

Assuming, without deciding, that the Office of the Secretary of State was negligent in their issuance of a duplicate certificate of title, claimant still should not be able to recover. The denial can be attributed to either of two reasons. Both of these reasons deal with the causation factor.

First, it has been shown that Barry was never in possession of the duplicate certificate of title. Claimant should not be penalized for its diligence in locating and returning the duplicate certificate to the Secretary of State, but if Barry did not gain possession of the corrected title, his whole plan was spoiled. In other words, even if it is assumed that the Office of the Secretary of State was negligent, the cause of claimant's injury cannot be attributed to the Secretary of State, but must lie with Barry or the person who removed the automobile from claimant's parking lot.

The second basis is that, after claimant had knowledge of the fraud, it gained possession of its security. Regardless of the capacity in which the Constable repossessed the automobile, the evidence shows that the automobile was in possession of claimant when it was stolen.

We are of the opinion that the Secretary of State's office was not the cause of claimant's loss. Although a person may be negligent in the performance of some duty owed to the person damaged, no liability attaches unless such negligence was the proximate cause of the injury suffered. *Walaite vs. Chicago, R.I. and P. Ry. Co.*, 376 Ill. 59, 33 N.E. 2d 119 (1941); *Gray vs. Pflanz*, 341 Ill. App. 527, 94 N.E. 2d 693 (1950).

In the opinion of this Court, claimant has not proved by a preponderance of the evidence the elements necessary to a recovery.

An award to claimant, Bank of Lyons, An Illinois Banking Corporation, is, therefore, denied.

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(No. 5135—Claimant awarded \$1,812.25.)

BALYS POSKUS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1967.*

EDWIN W. SALE, Attorney for Claimant.

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

**CONTRACTS**—*claimant entitled to full amount specified in contract of work.* Where evidence disclosed that sole reason for non-payment of salary provided for in contract was mistake of respondent, an award will be allowed.

PERLIN, C.J.

Claimant, Dr. Balys Poskus, seeks recovery of \$1,812.25 allegedly owed to him by respondent for services rendered as a physician at the Kankakee State Hospital for the period beginning July 1, 1961 and ending June 30, 1963.

Dr. Poskus testified as follows:

That he was employed at the Kankakee State Hospital, Kankakee, Illinois, as a half-time physician, and was classified as a Physician V. His employment commenced on or about July 22, 1957, and he went on 'half-time status about September 1, 1958. The pay scale for a half-time physician was based upon that of a full-time physician, i.e., a half-time physician was to receive one-half of the base pay of a full-time physician. Until July 1, 1961, the base pay for a full-time physician was \$977.00 per month, and on that date it was increased to \$1,015.00 per month. On January 16, 1962, the base pay was again increased to \$1,170.00 per month. Despite the pay increases, Dr. Poskus continued to receive one-half of the base pay of a full-time physician at the rate of \$977.00. He questioned his superiors during this time as to why he was not getting the increased pay, but was told only that half-time doctors were not entitled to the raises. Respondent introduced no testimony.

The Report from the Department of Mental Health, signed by Gabriel Misevic, M.D., Superintendent of the Kankakee State Hospital, reveals the undisputed facts in the following excerpts:

"Dr. Poskus is a physician authorized to practice medicine in the State of Illinois, License No. **31309**. He was re-employed with the Department of Mental Health, State of Illinois, Kankakee State Hospital, on July 24, 1957. On September 1, 1958, he was reassigned as a part-time physician at a salary rate of **\$488.50**.

"The DPW **1108** reflects Dr. Poskus' part-time salary on July 1, 1961 as **\$507.50**. The **\$507.50** rate continued until January 15, 1962. Then, on January 16, 1962, the rate was increased to **\$585.00**.

"Payroll voucher records in this office indicate that Dr. Poskus was paid at the rate of **\$488.50** from July 1, 1961 through June 30, 1963.

"Records in this office indicate that Dr. Poskus was underpaid **\$1,812.25**.

“Records indicate Dr. Poskus has a just claim with the State of Illinois in the amount of **\$1,812.25.**”

Claimant has also submitted a letter, which was received by him from Harold M. Visotsky, M.D., Director of the Department of Mental Health, dated October 11, 1963, which reads in part as follows:

“We regret that we did make an error, and that you are correct in that the total gross salary underpayment for the period of July 1, 1961 to June 30, 1963 is **\$1,812.25.**”

Respondent contends that claimant is barred from asserting his claim when he received and accepted lesser pay. Respondent further alleges that the following constitutional and statutory provisions proscribe the payment to claimant of any amount:

“The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void;” (Illinois Constitution, Article IV, Sec. 19.)

“Amounts paid from appropriations for personal services of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher, and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purpose, or any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed, and for which remuneration had already been made.” (Par. 145 (3), Chap. 127, Ill. Rev. Stats.)

This Court has applied the foregoing provisions in a long line of cases, none of which present the same fact situation as found in the instant case. The rationale running through all the cases on which respondent relies is expressed as follows:

“A claimant cannot accept salary warrants purporting to cover

the full amount due him for services during stated periods, and thereafter, when his active service has ended, obtain an award from the State for an additional amount for those periods for which he had apparently been paid for services in full." (*Agsten, et al vs. State of Illinois*, 13 C.C.R. 8; *Mills vs. State of Illinois*, 9 C.C.R. 69; *Clayton vs. State of Illinois*, 21 C.C.R. 321.)

Nowhere is it contended that claimant is requesting additional compensation for services performed, or that he has performed extra services. He is not asking payment for more than was appropriated, or for more than his contract of employment specifically provided, i.e., half the salary of a full-time physician. Because the contract of work was in a definite amount, and the sum paid to him by respondent was admittedly below this amount, it cannot be contended that he was "apparently paid for services in full". Respondent's agents have clearly established that the sole reason for the nonpayment of the requested amount was a mistake. They have further established that claimant was entitled to the sum of \$1,812.25, which would have been paid to him but for respondent's mistake. Respondent cannot profit from its own errors.

Accordingly, claimant is hereby awarded the sum of \$1,812.25.

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(No. 5351—Claimant awarded \$35,428.72.)

ILLINOIS BELL TELEPHONE COMPANY, A Corporation,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1967.*

ROBERT T. ACHOR, Attorney for Claimant.

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

*CONTRACTS-lapsed appropriation. Where contract has been prop-*

erly entered into, all services satisfactorily performed, proper charges made therefor, adequate funds were available at the time the contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

DOVE, J.

Claimant, Illinois Bell Telephone Company, a Corporation, filed its complaint in the Court of Claims in which it seeks judgment of **\$35,428.72**, representing charges for telephone services rendered up to June 30, 1965 to various departments of the State of Illinois pursuant to tariff rules and regulations of the Illinois Commerce Commission, which form a contract between the Telephone Company and the State of Illinois.

A Departmental Report was filed, which stated: "The debt is fair and just, is due and owing, and should be paid to the Company for the services rendered."

Subsequently a written stipulation was entered into by claimant and respondent, which states as follows:

"The report of the Office of the Secretary of State to the Illinois Attorney General, dated April 7, 1967, (a copy of which is attached hereto, marked exhibit A, and by this reference incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

"No other oral or written evidence will be introduced by either party.

"The Comissioner to whom this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

"Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$35,428.72**.

"Neither party desires to file briefs in this proceeding.

"Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present."

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services

satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of Xt. Francis, an Illinois Corporation vs. State of Illinois*, case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Illinois Bell Telephone Company, a Corporation, is, therefore, hereby awarded the sum of \$35,428.72.

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(No. 5372—Claimant awarded \$500.00.)

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

*Opinion filed April 20, 1967.*

ZELEZINSKI and BRANDENBURG, Attorneys for Claimant.

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

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

DOVE, J.

On December 1, 1966, claimant, Frank Korwin, filed a claim seeking a refund of a Responsibility Security Bond deposited with the Secretary of State of the State

of Illinois, as required by Sec. 7-204 of the Motor Vehicle laws of the State of Illinois.

A written stipulation was entered into by claimant and respondent, which states as follows:

“That claimant, Frank Korwin, deposited with the office of the Secretary of State of the State of Illinois, in accordance with Chap. 95½, Sec. 7-204, Ill. Rev. Stats., (1965) as amended, the sum of \$500.00.

“That on July 6, 1966, claimant was entitled to a refund of said sum (Ill. Rev. Stats., Chap. 95½, Sec. 7-503), and was so notified by the office of the Secretary of State of the State of Illinois.

“That, as a result of the failure of claimant to file claim for refund, the funds were transferred to the General Revenue Fund on September 8, 1966.

“That claimant continues to be the sole person interested in this claim; that no assignment thereof has occurred; and, that claimant is the sole owner of such claim.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

Sec. 7-503 of 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, Frank Korwin, in the amount of \$500.00.

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(No. 5376—Claimant awarded \$554.30.)

LAMMERT and MANN COMPANY, an Illinois Corporation,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1967.*

TENNEY, BENTLEY, GUTHRIE, ASKOW and HOWELL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant seeks to recover from respondent the sum of \$554.30 for installation of two Minneapolis Honeywell R4127 programmers and cabinets furnished to the State of Illinois, Department of Public Works and Buildings, at the State Highway Garage at 159th Street and Crawford Avenue, Harvey, Illinois.

A stipulation of facts by and between claimant and respondent was filed herein on March 20, 1967, which states as follows:

“That claimant, Lammert and Mann Company, had furnished and installed two Minneapolis Honeywell R4127 programmers and cabinets to respondent, State of Illinois, Department of Public Works and Buildings, at the State Highway Garage at 159th Street and Crawford Avenue in Harvey, Illinois.

“That the items so furnished and installed were installed at the request of the State Architects of the State of Illinois, acting under proper authority.

“That the reasonable value of the labor and material furnished was \$554.30.

“That claimant had rendered an invoice on May 20, 1965 to the proper agency of the State of Illinois, but that the invoice so rendered had arrived late, and was not paid out of appropriations of the 73rd biennium, which had expired on September 30, 1965.

“That claimant continues to be the sole organization interested in this claim; that no assignment thereof had occurred; that claimant is the sole owner of the claim.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

It appears to the Court that this is a contract for the furnishing of materials and services; that the contract was properly entered into; that services have been satisfactorily performed; that the programmers were properly installed in accordance with the order of the Department of Public Works and Buildings; and, that proper charges were made therefor.

It further appears that the appropriations for payment of the same had lapsed prior to the presentment of the invoice. Our Court has repeatedly held that it would enter an award for the amount due under such circumstances.

Claimant is hereby awarded the sum of **\$554.30**.

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(No. 5396—Claimant awarded **\$485.20**.)

LEONARD KELLY, Sheriff, Fayette County, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

Opinion filed April 20, 1967.

LEONARD KELLY, Sheriff, Fayette County, Claimant,  
pro se.

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

TRAVEL EXPENSES—lapsed appropriation. Where evidence disclosed that the only reason for not paying claimant was that the appropriation had lapsed, an award will be made.

DOVE, J.

Claimant, Leonard Kelly, Sheriff, Fayette County,

seeks reimbursement in the amount of **\$485.20**, representing fees due for conveying prisoners to the Illinois State Penitentiary. A Departmental Report was filed herein, which stated that the vouchers and other documents submitted herein in the amount of \$485.20 would have been approved for payment by the Department of Public Safety except for the fact that the appropriation had lapsed.

Subsequently the parties entered into a stipulation as follows:

“The report of the Department of Public Safety to the Attorney General of the State of Illinois, dated March 23, 1967, (a copy of which is attached hereto, marked exhibit “A”, and by this reference incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other or written evidence will be introduced by either party.

“The Commissioner to whom this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$485.20**.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

The 1965 Ill. Rev. Stats., Chap. 53, Sec. 37, provides in part as follows:

“For conveying persons to the penitentiary, reformatories, Illinois State Training School for Boys, Illinois State Training School for Girls, Illinois Youth Commission and Reception Center, the following fees payable out of the State Treasury: For each person who is conveyed 20 cents per mile in going only to the penitentiary, reformatory, Illinois State Training School for Boys, Illinois State Training School for Girls, Illinois Youth Commission and Reception Center, from the place of conviction.”

Claimant, Leonard Kelly, Sheriff of Fayette County, Illinois, is hereby awarded the sum of \$485.20.

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(No. 5128—Claimant awarded \$3,200.00.)

WILLIAM H. SULLIVAN, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion* filed May 9, 1967.

MICHAEL F. RYAN and RICHARD F. McPARTLIN, Attorneys for Claimant.

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

CIVIL SERVICE ACT—*salary for* period of illegal removal. Where a Civil Service employee is illegally prevented from performing his duties and is subsequently reinstated to his position, he is entitled to the salary attached to the office for the period of his illegal removal.

SAME—*duty to* mitigate damages. During period of illegal removal from office, claimant must diligently seek employment, and do all in his power to mitigate damages.

**DOVE, J.**

Claimant seeks recovery of **\$3,440.00** in back salary, which is allegedly due and owing to him for a period of eight months, and which has not been paid to him because of lapsed appropriations.

There is no dispute as to the facts in this case. Claimant, William H. Sullivan, was appointed to the position of Institution Fire Chief at the Chicago State Hospital on January 11, 1952. He performed his duties, and received his salary until May 22, 1958, on which date he was suspended from his position. After a hearing before the Civil Service Commission, he was ordered discharged.

Thereafter, claimant initiated Certiorari proceedings for a review of the decision of the Civil Service Commission in the Circuit Court, which culminated in the judgment of the Appellate Court of Illinois, First Dis-

trict, in the cause entitled *William H. Sullivan vs. Maude Myers, et al.*, **32 Ill. App. 2d 454**, reversing the judgment of the trial court, which had upheld the discharge order of said Commission. No further appeal was taken, and, on January **3, 1962**, pursuant to the opinion of the Appellate Court, claimant was reinstated and restored to duty as Institution Fire Chief at the Chicago State Hospital.

From the evidence it appears that claimant was unable to obtain employment for the months of July, August, September and December of 1960, and for the months of January, February, March and April, **1961**. It is the claimant's contention that for these eight months he is entitled to receive back salary from respondent because of his illegal discharge from his position with the State of Illinois. For all other months of his suspension claimant was employed at a monthly salary that equaled or exceeded his monthly rate of pay with the State of Illinois. The evidence also discloses that claimant was diligent in obtaining employment and in mitigating damages.

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**; and *Cordes vs. State of Illinois*, **24 C.C.R. 491**.

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

did obtain employment for thirty-three months, and we are of the opinion that he is entitled to be compensated for salary for the eight months of his illegal suspension at the rate of \$400.00 per month.

Claimant is hereby awarded the sum of \$3,200.00.

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(No. 5178—Claimant awarded \$12,000.00.)

NORRIS W. ANDERSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March 20, 1967.*

Petition of Respondent for Rehearing denied May 9, 1967.

SMITH and PENNIMAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; PHILIP J. ROCK, Assistant Attorney General, for Respondent.

**PRISONERS and INMATES—*wrongful incarceration.*** Where claimant made out a prima facie case proving his innocence of the crime for which he was unjustly imprisoned, and respondent failed to overcome such prima facie case, claimant will be granted an award for his wrongful imprisonment.

**SAME—*same—attorney's fees.*** The legislature intended that attorney's fees be payable from the award granted, and not in addition thereto.

DOVE, J.

Norris W. Anderson filed his claim in this Court on August 31, 1964 pursuant to Chap. 37, Secs. 439.8 and 439.8D, which provides in part as follows:

“The Court shall have jurisdiction to hear and determine the following matters:

“All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts: For imprisonment of five years or less, not more than \$16,000.00; . . .”

It appears from the evidence that claimant was indicted and tried for burglary by a jury in the Circuit Court of Winnebago County. He was found guilty, and was sentenced to the penitentiary for a term of not less than five nor 'more than twenty years.

It further appears that on the night of March 10, 1960 a bakery in Rockford was forcibly entered through the rear door, and approximately \$20.00 in half dollars, quarters, dimes, nickels and pennies were taken from the cash register. No direct evidence was produced linking claimant with the burglary. Circumstantial evidence upon which the conviction was obtained follows :

Claimant, unemployed and'on relief, lived in a hotel near the bakery, and frequented a restaurant 75 feet from the bakery and a tavern some 50 feet away. He spent \$6.00 to \$9.00 in change at the tavern between 9:00 P.M. and 1:00 A.M. on the night of the burglary, and the following morning exchanged \$13.00 in change for paper money at the restaurant. He had two conversations with a friend, Schubbe, who worked at the restaurant, in which claimant asked if he knew where any money was kept, which they could get.

Claimant explained his affluence as a gift of \$10.00 from his father, a loan of \$2.00 from the wife of the restaurant owner, and the winning of \$12.00 in silver during the last pot of a poker game in a hotel. The same explanation of poker winnings was given to three different people, including a police officer. The gift and loan were certified by the donor and lender, respectively. About one month after the incident, claimant was again picked up by two Rockford police officers, and questioned about the poker game. He admitted that it was in a room at the Lawrence Hotel, but refused to divulge

the names of the other participants. Claimant's testimony concerning the poker game as a source of the funds was not contradicted or impeached, nor did the police check claimant's story that the game was the source of the coins. (*People vs. Anderson*, 30 Ill. 2d 413.)

Claimant was thereafter incarcerated in the Illinois State Penitentiary until April 10, 1964. On April 8, 1964, after the opinion of the Illinois Supreme Court had been filed reversing the conviction of claimant, an order was entered in the Circuit Court of Winnebago County recalling the mittimus previously issued, and on April 10, 1964 claimant was released from the penitentiary.

The Supreme Court in its opinion says:

**"It is basic, however, that, if after due consideration, we are of the opinion that defendant's guilt has not been established beyond a reasonable doubt, it is our duty to reverse. (People vs. Jefferson, 24 Ill. 2d 398; People vs. Butler, 28 Ill. 2d 88). This record leaves such a doubt, and the conviction is reversed."**

There were only two witnesses who testified in this case. Claimant, of course, testified on his own behalf, and Mauritz Johnson, one of the investigating police officers, testified for respondent. His testimony did not rebut that of claimant, but corroborated it on several points. The testimony of claimant is clear and unambiguous ; it has not been contradicted; it is probable and logical; and, we are of the opinion that claimant's testimony should not be disregarded. (*Kelly vs. Jones*, 290 Ill. 375.) Claimant's un rebutted testimony cannot be rejected, and constitutes the preponderance of the evidence in the record before this Court. Claimant has shown by all the evidence a prima facie case, proving his innocence of the crime for which he was unjustly imprisoned. Respondent has not presented any evidence

to overcome claimant's prima facie case, and it is our opinion that claimant has proven his innocence by a preponderance of the evidence.

Claimant seeks an allowance for attorney's fees in addition to the award for wrongful imprisonment. Chapter 37, Section 439.8D reads in part as follows:

**"The Court shall fix attorney's fees not to exceed 25% of the award granted."**

This Court is of the opinion that the legislature intended that attorney's fees be payable from the award granted, and not in addition thereto. It is the declared responsibility of this Court to **fix** the amount of attorney's fees not to exceed **25%** of the award granted.

We hereby award claimant the sum of \$12,000.00, and **fix** attorney's fees at **25%** of the award granted.

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(No. 6194—Claim denied.)

COMMISSIONERS OF DRAINAGE DISTRICT No. 2 IN PLEASANT VIEW TOWNSHIP, 'MACON COUNTY AND STATE OF ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 9, 1967.*

VAIL, MILLS, ARMSTRONG, WINTERS and PRINCE, Attorneys for Claimant.

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

**HIGHWAYS—*exempt from special assessments.* In the absence of an appropriation made by the State Government, no property of the State is subject to taxation or special assessment for a local improvement.**

PERLIN, C.J.

This claim arises out of the action of the Commis-

sioners of Drainage District No. 2 in Pleasant View Township, Macon County, Illinois, to collect an assessment of \$200.00, which was levied in 1961 against the right-of-way of Illinois State Bond Issue Route No. 48 located within the boundaries of the Drainage District.

The question presented to this Court for determination is whether State highways are exempt from drainage assessments. Respondent alleges that levy of assessments against State property is precluded by the Revenue Act, (Par. 500.5, Chap. 120, Ill. Rev. Stats.) which provides that "all property of every kind belonging to the State of Illinois" shall be exempt from taxation.

The Supreme Court of Illinois has long held that the exemptions of the Revenue Act have no effect whatsoever on the question of special assessments. In *City of Mt. Vernon vs. People*, 147 Ill. 359, 35 N.E. 533, the City attempted to assess the State for paving a portion of the street upon which the State Supreme Court building was located. The Court specifically rejected the argument that the Revenue Act applied, and stated:

**"We have held that exemption from taxation does not exempt from special assessment or special taxation of contiguous property."** (*County of McLean vs. City of Bloomington*, 106 Ill. 209; *I.C.R.R. Co. vs. City of Decatur*, 126, Ill. 92, 18 N.E. 315; *County of Adams vs. City of Quincy*, 130 Ill. 566.)

However, the Court went on to hold that a special assessment could not be levied against the State, since Sec. 26, Art. IV of the Constitution provides: "The State of Illinois shall never be made a defendant in any court of law or equity", and that the nature of a tax assessment proceeding would necessarily be one in which the State is called into court to defend a proceeding against its property.

In the case of *County of Adams vs. City of Quincy*,

130 Ill. 566, 22 N.E. 624, the court stated that the general rule in Illinois is that special assessments for local improvements are not taxes in the strict sense of the term, and that property held for a public use is not exempt from such assessment, although exempt from taxation for general purposes. In that case, although there was no statute expressly authorizing the City to levy a special assessment on County property, it was nevertheless held that the property owned by the County be assessed its proportionate share of the cost of the proposed improvement.

The Illinois cases are in accord with the majority of jurisdictions, which distinguish taxes from assessments. Taxes are defined as public burdens imposed generally on the inhabitants of the whole State, or some civil division thereof, without reference to particular benefits to particular individuals or property. Assessments have reference to imposition for improvements, which are specially beneficial to particular individuals or property, and are proposed in proportion to the particular benefits supposed to be conferred. (90 A.L.R. 1137.)

The pertinent portions of the Constitution and the Drainage Code include the following :

(Sec. 31, Art. IV, Illinois Constitution.)

“The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purpuss, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by special assessments *upon the property benefited thereby.*” (Emphasis supplied.)

(Sec. 5-2, Drainage Code.)

“Upon the organization of the district, the commissioners shall

proceed to make out their assessment roll of benefits, damages and compensation, and they shall include therein all lands, lots, railroads, *public highways, streets and alleys*, and other property within the district, which, in their opinion, *will be benefited*, taken or damaged by the proposed work." (Emphasis supplied.)

(Sec. 5-3, Drainage Code.)

"..... (2) The commissioners shall also include in their assessment roll (a) *the names of the highway authorities having jurisdiction over the public highways within the district affected by the proposed work*, and the names of the municipal corporations or quasi municipal corporations owning or having jurisdiction over streets and alleys and other municipally owned property or property held for public use within the district and affected by the proposed work; (b) *a general description of all such public highways, streets and alleys*, and municipally owned or controlled property; (c) the amount of benefits, if any, levied against such highways, streets and alleys, and municipally owned or controlled property; (d) the amount of annual benefits, if any, levied against such property; (e) the amount of damages allowed to land not taken, if any, and, (f) the amount of compensation allowed for land taken, if any." (Emphasis supplied.)

(Sec. 3-6, Drainage Code.)

"..... If any public highway or public street or alley is located within the proposed district and may be subject to assessment. ....

(Sec. 4-27, Drainage Code.)

"With respect to the State of Illinois, the Federal Government, or any of their agencies, the commissioners, subject to the approval of the court, shall have the power and authority: (a) To levy and collect assessments, as provided in this Act, when such assessments become necessary to avail the district of financial assistance from any appropriation made by the Government of the United States, the State of Illinois, or any of their agencies."

A general rule in the interpretation of statutes limiting rights and interests is to construe them so as not to embrace the sovereign power or government unless the same is expressly named therein. The intent that the property of the State shall be subject to assessment must be clearly expressed. (Sec. 87, 48 Am. Jur., Special and Local Assessments.)

Whether the provisions in the Drainage Code meet this test may be determined by an examination of cases where a levy of special assessment on a sovereign power was attempted. One of the earliest cases in point is that of *Fagan, et al vs. City of Chicago*, 84 Ill. 227, which was later cited in the *Mt. Vernon* opinion discussed above. The Illinois Supreme Court in *Fagan* held that the City of Chicago had no power to levy a special assessment **for** paving a street upon the block of ground owned by the United States Government, and used with the building thereon for governmental purposes.

The court stated:

“A municipal corporation has no power to assess or exact from the State or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed and not on the governing power, whether State or Federal ..... it is a familiar rule of interpretation that a law, which refers to inferiors, is never applied to superiors. Again, all grants are taken most favorably to the government or the public. Hence, when the power was granted to these municipal governments to make such assessments, it would not be a favorable construction to the government to hold that the assessment might be imposed on government property.”

In the case of *City of Springfield vs. State of Illinois*, 5 C.C.R. 246, the State legislature made an appropriation to pay the principal of the assessment on State property for the paving of streets by the City. The City ordinance for the improvements provided that the assessments be paid in yearly installments, the deferred payments to bear interest. The Court held that, where a municipal corporation under a special assessment ordinance makes an improvement, and the property of State is benefited thereby, the State, if it has made an appropriation, should respond as an individual citizen and property owner and pay interest on the assessments up to the time it offered to pay the principal.

However, in the case of *Indian Refining Company vs. State of Illinois*, 5 C.C.R. 250, which was decided on the same day, the Court flatly stated that the property of the State is not subject to taxation or special assessment for a local improvement: "The Illinois and Michigan canal belongs to the State, and the City had no power to assess any of the canal strip for street improvements."

Although sections of the Drainage Code, cited above, refer to "public highways", property of the State and Federal Governments are clearly distinguished by being set apart in Sec. 4-27, which empowers the drainage commissioners to levy and collect assessments with respect to the State or Federal Governments only when such assessments become necessary to avail the district of financial assistance from *any appropriation made* by the Government of the United States, the State of Illinois, or any of their agencies. It is our opinion that an appropriation must be made before an assessment may be levied against the State of Illinois.

In the instant case an appropriation for such assessment was not made by the State Government. Therefore, the claim is hereby denied.

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(No. 5201—Claimants awarded \$660.00.)

VERNON GAN and CLETA GAN, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 9, 1967.*

CHAPMAN and STRAWN, Attorneys for Claimants.

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

**HIGHWAYS—right-of-way grant.** Where evidence established that

claimants purchased property subject to an existing right-of-way grant in favor of respondent, they are barred from any compensation for depreciation of value as a result of the highway construction.

*SAME—consequential damages by construction of highway.* Claimants are entitled to just compensation for consequential damages actually sustained by the construction of the highway subsequent to the taking of the property under the Eminent Domain Act.

PEZMAN, J.

This is an action brought by Vernon Gan and Cleta Gan, owners of certain property known as **1026-B** Roberts, located in Sunny Dell Acres, a subdivision of Madison County, Illinois. The one story ranch type home with basement and attached garage was built by claimants on the premises in question, and occupied by them on June 28, **1962**. At that time the property was a corner lot, and fronted on Roberts Avenue. It was bounded on the north by Roseann Terrace. There was a ditch approximately **18 x 20** inches deep running along both sides of Roseann Terrace, and these ditches sufficiently carried away drainage and rain water until the time they were removed by the State of Illinois, Division of Highways, in the construction of FAI No. 270. The right-of-way for FAI No. 270 was procured in **1959**, and was adjacent to and just north of the property subsequently purchased by claimants. The right-of-way deed contained the usual release from liability and damages to remaining property caused by the use, construction or opening up of the highway.

Respondent in the summer of **1963**, while constructing FAI No. 270, caused the street known as Roseann Terrace to be plowed up and eliminated, along with the ditches on either side of said street. The area where the street and ditches had formerly been was

left on a grade approximately even with that of claimants' property. Subsequently after the construction of Interstate No. 270, claimants' property was approximately 22 feet 9 inches below the grade of the highway. In August of 1963, the backyard of claimants' property was flooded to a depth of approximately 3 feet with the water coming up to within a few inches of the house, and remaining there for some 15 days. The testimony indicated that the water ran off of the highway right-of-way, and accumulated on claimants' property where it had no way to run off because of the failure of the Division of Highways to provide drainage for the same.

Claimants contend in two counts, as follows: Count I. That, because of the construction of the highway, known as FAI No. 270, they suffered a depreciation of the value of their property in the sum of \$9,000.00; Count II. That, because of the construction of said highway, the personal and property rights of claimants were violated, as follows:

"The light and air coming naturally to their property was obstructed because the highway was constructed about twenty feet higher in elevation.

"When it rains, the water from said highway now drains onto plaintiffs' land, and causes the same to be flooded and washed away from time to time.

"That plaintiffs' property now becomes flooded in times of heavy rain because the drainage ditch, which formerly served the property, was removed by the defendant, and no adequate replacement was installed."

Respondent contends that claimants failed to sustain the burden of proving any negligence on the part of respondent, and further argues that claimants' expenditures to correct the condition that existed could not be allowed because receipted bills were not introduced in evidence as being paid or correct.

The only testimony produced on behalf of claimants was the testimony of Vernon Gan, one of the claimants. No other witnesses were produced for respondent, and the entire matter is before this Court on the sole and only testimony of one of the claimants.

This Court holds against the claimants on Count I denying the right of said individuals to seek redress in this Court for depreciation of value of their property because of the construction of a highway pursuant to a right-of-way grant previously given by the predecessors in title of the claimants. The Court holds that the release contained in respondent's exhibit No. 1 (right-of-way grant) would effectively bar any right of the claimants to compensation for depreciation of value as the result of the construction of the highway. Claimants, as purchasers of said property in 1962, purchased subject to said right-of-way grant, and, therefore, had full and complete knowledge when they were building their home that the State was contemplating the construction of a highway adjacent to their property. If the claimants were not aware of the existence of this grant, then they are charged by this Court with the duty to have been aware of the granting of the right-of-way for the instrument of conveyance to the State of Illinois was dated the 18th day of September, 1959, and also was of record in book No. 1972 at page 587 in the office of the Recorder of Deeds of Madison County, Illinois.

Claimants seek just compensation for the flooding of their property as caused by the negligence of respondent in the construction of the highway. Vernon Gan testified that it was necessary after the flooding to haul 105 loads of dirt, and have the same spread upon his yard in order to have the level of the yard high enough

to avoid future floodings. He also testified that he paid \$35.00 for spreading the dirt, and \$5.00 per load for bringing the dirt to his property, as well as the sum of \$50.00 for cleaning out his septic tank as a result of damages caused by the flooding waters.

The evidence in this matter indicates that Vernon Gan spent five days of his own labor in endeavoring to correct the level of his yard. Respondent made no objections to the testimony of claimant as to those expenses incurred, and the labor performed at the time of the hearing.

This Court holds that claimants are entitled to just compensation for consequential damages actually sustained subsequent to the taking of the property under the Eminent Domain Act, and after the construction of the highway. (*Tenboer vs. State of Illinois*, 21 C.C.R. 359.)

Claimants are, therefore, awarded the sum of \$660.00.

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(No. 5226—Claimant awarded \$17,822.00.)

**P. H. BROUGHTON and SONS, INC.**, A Corporation, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed May 9, 1967.*

**HOWARTH, HOWARTH and WALBAUM**, Attorneys for Claimant.

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

**CONTRACTS—oral authorization.** Evidence established that officials of respondent were aware at all times that work was being performed by claimant, and that such work was orally authorized by them.

**SAME—Illinois Purchasing Act.** Where several separate contracts were entered into in good faith, each for amounts less than \$1,500.00,

the provisions of the Illinois Purchasing Act were not violated, and an award will be made in the aggregate sum of the contracts.

**PEZMAN, J.**

This is a claim by P. H. Broughton & Sons, Inc., a Corporation, against the State of Illinois for **\$17,822.00** allegedly remaining due to claimant from respondent for grading, blacktopping and maintenance work done by claimant at the State Fairgrounds, Springfield, Illinois, during the period of May **18, 1964** through August **10, 1964**.

The grading, blacktopping and maintenance work performed by claimant was performed at twenty-four individual job sites on the State Fairgrounds pursuant to twenty-four individual written proposals prepared by claimant. Each proposal covers a separate job site. Each proposal is for an amount less than **\$1,500.00**. The twenty-four proposals total **\$30,662.00**. Claimant received payment on ten (**10**) of the proposals totaling **\$12,840.00**. Claimant has never received payment on the remaining fourteen (**14**) proposals.

The evidence in this case indicates that each of the twenty-four proposals was prepared by Mrs. Irma Broughton, claimant's bookkeeper, within a few days after claimant's job estimator, William Broughton, had gone to the State Fairgrounds at the request of either Franklin Rust, Director of the State Fair, or his assistant, Louis London, to estimate the cost of a particular job. Rust or London would take William Broughton around to various job sites, and show him the work for which they wished proposals prepared. The necessary data would then be communicated by William Broughton to Irma Broughton, and the proposal prepared. Each proposal was then mailed or delivered to Rust's office.

Thereafter, either Rust or London would advise William Broughton that the quoted price was satisfactory, and direct claimant to commence the work called for by the particular proposal.

Fair Director Rust and Assistant Director London concede that they were authorized to commit respondent for payment for the work performed by claimant. Both Director Rust and Paul Prince, Superintendent of Maintenance, State Fairgrounds, admit that they were aware that claimant was doing the work for which it has not yet been paid. Both Rust and Prince, however, deny that they personally authorized the specific work to be done. Rust claims that he had delegated the authority to London to handle these types of matters. London claims that the unpaid proposals and the work performed pursuant thereto were never discussed with him by either Broughton or Rust, and that he never personally observed any of this work being performed until it was completed. The preponderance of the evidence in this case contradicts London's testimony that he did not authorize the unpaid portion of the work as distinguished from the work for which claimant has been paid, and his testimony that he did not notice claimant's men or machinery performing the work called for by the unpaid proposals.

Respondent raises two defenses: (1) that the unpaid work was not authorized; (2) that it was performed in contravention of statutory requirements. It is the opinion of this Court that the evidence in this case does not support respondent's defense that the unpaid work was not authorized. The evidence clearly establishes that said work was orally authorized by either Rust or London, and that Rust, London and Prince were aware

at all times that the work was being performed by claimant. The offices of these men are at the Fairgrounds, and the work being performed was essential to the orderly and timely opening and operation of the Illinois State Fair for that year. These officials were directly responsible for maintenance of said Fairgrounds, and could not have been present upon the grounds without being conscious of the work being performed by claimant.

The substance of respondent's second defense is that the work performed was in violation of the Illinois Purchasing Act, which requires that contracts for repairs, maintenance, remodeling, renovation, or construction involving an expenditure in excess of \$1,500.00 be advertised for bids, and awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and service-ability. It is the contention of respondent that claimant made many separate agreements, each for less than \$1,500.00, to circumvent the requirements of the Illinois Purchasing Act. Respondent directs the Court's attention to Par. 132.10 of the Act, which declares that any contract entered into for expenditure of State funds, which violates the Act, is void and of no effect.

The evidence in this case indicates that there was a proposal made for each individual project; that each proposal was submitted to respondent before that project was commenced, and that work was not commenced on each project or proposal until claimant was advised by respondent that its proposal had been accepted.

Claimant contends that the case of *F. R. Inskip, et al, vs. The Board of Trustees of the University of Illinois*, 187 N.E. 2d 201, 26 Ill. 2d 501 (1962), is directly

in point, and that said case holds that the General Assembly did not intend to designate in the Illinois Purchasing Act the principle of competitive bidding as the only accepted economical procurement practice. Respondent contends that the Inskip case is not in point, and should have no bearing on this matter.

The Illinois Supreme Court in the Inskip case stated that :

**“We further hold that the Purchasing Act is not violated when a State Agency, in good faith and without intent to evade or avoid the provisions of said act, determines that it is more economical to purchase equipment and materials in individual units of not more than \$1,500.00 in cost, and does so, without regard to the total of such purchases, so long as such purchases are charged to the proper appropriation.”**

It is the opinion of this Court that, while the fact situation in the Inskip case differs from the case at bar, the language used by the Court in the Inskip case and quoted above is sufficiently broad to apply to differing situations including the case at bar.

The Illinois State Fairgrounds is a vast and complex facility, which requires a large amount of maintenance and repair at various times during the year. The evidence indicates that it was the policy of respondent to take care of this maintenance and repair as the need for specific work developed or became apparent, instead of attempting to prepare detailed plans and specifications for an annual competitive letting of the work. A competitive bid letting of a season's work would have been very difficult or impossible, because the work was composed primarily of small jobs of maintenance, black-topping parking spaces, seal-coating and grading roads, which were observed and spot-checked from time to time as winter damage and spring thaws made the need for the work to be done apparent.

Respondent offered no proof whatever that claimant wilfully sought to evade the provisions of the Illinois Purchasing Act. Respondent offered no proof that claimant and Rust or London entered into any contracts with the intention of splitting up a single job or project into several jobs or items of cost in order to fall within the \$1,500.00 limit, and thereby avoid the requirements of the Illinois Purchasing Act. Each of the proposals in question was for work at a separate site at various times within the large complex comprising the State Fairgrounds, and it is our opinion that each proposal properly constituted a separate job, project or contract, and that each proposal did not constitute a portion of one job or project of maintenance and repair as contended by respondent.

In the absence of such proof, it is the opinion of this Court that claimant did not violate the provisions of the Illinois Purchasing Act; that claimant entered into twenty-four separate contracts with respondent; that by reason of the fact that each was for less than \$1,500.00 the Illinois Purchasing Act did not apply to said contracts, and, that claimant is, therefore, entitled to **pay-**ment on the remaining fourteen proposals, which are unpaid, in the sum of \$17,822.00.

Claimant is awarded the sum of \$17,822.00.

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(No. 5384—Claimant awarded \$200.00.)

DAVIDSON DIVISION, FAIRCHILD CAMERA AND INSTRUMENT CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 9, 1967.*

STANLEY WINSTON, Attorney for Claimant.

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

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

**DOVE, J.**

Claimant, Davidson Division, Fairchild Camera and Instrument Corporation, filed its complaint in the Court of Claims on January 26, 1967 in which it seeks the sum of \$200.00 for services and parts furnished to the Office of the Secretary of State.

A Departmental Report was filed, which stated in part “The amount of \$200.00 is correct, and a debt due and owing to claimant for services, and should be paid.”

Subsequently a written stipulation was entered into by claimant and respondent, as follows:

“The report of the Secretary of State to the Attorney General of the State of Illinois, dated April 11, 1967, (a copy of which is attached hereto, marked exhibit A, and by this reference incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the **Court** may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$200.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This Court has repeatedly held that, where a con-

tract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Davidson Division of Fairchild Camera and Instrument Corporation, is, therefore, hereby awarded the sum of \$200.00.

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(No. 5078—Claimant awarded \$36,900.90.)

FRUIN-COLNON CONTRACTING COMPANY, A Corporation,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 23, 1967.*

JOHN E. HOWARTH, NELSON HOWARTH and RAYMOND L. TERRELL, Attorneys for Claimant.

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

CONTRACTS—*delays beyond claimant's control.* Where evidence showed that respondent should have granted reasonable extension of time for delays due to unforeseen causes beyond claimant's control and without his fault or negligence, claimant will be entitled to all retainage held by respondent as liquidated damages.

PEZMAN, J.

This cause of action arises out of two contracts between claimant, Fruin-Colnon Contracting Company, a

Corporation, and respondent, State of Illinois, by and through its Department of Public Works and Buildings, providing for the construction of a storm sewer system and a pumping station within St. Clair County, Illinois. Both contracts provided that "time is of the essence of this contract."

Both contracts provided in part as follows:

"When a delay occurs due to unforeseen causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to acts of God, acts of public enemy, governmental acts, fires, floods, epidemics, strikes (except those caused by improper acts or omissions of the contractor), extraordinary delay in delivery of materials caused by strikes, lockouts, wrecks, freight, embargoes, governmental acts, or acts of God, the time of completion shall be extended in whatever amount is determined by the Department to be equitable.

"Promptly after each unforeseen delay is filed, the Department shall give to the contractor written notice of an extension to contract date . . ."

Each contract provided for liquidated damages in the sum of \$750.00 for each day the completion of the contract extended past the agreed date of completion plus any extensions of time granted by the Department.

On July 14, 1959, respondent awarded the sewer contract to claimant, which was to be completed by claimant within 90 days. After the receipt of the decision of respondent to award the sewer contract, claimant began to mobilize its equipment and personnel to begin work on the project. On May 22, 1959, respondent awarded the pumping station contract to claimant. The pumping station contract contained a completion date of February 15, 1960.

On August 1, 1959, an area-wide strike began preventing any work from being done on the sewer project or the pumping station project. The strike lasted for 48 days, or until September 17, 1959. The evidence shows

that the period during which the strike ensued was ideal weather for construction. Because of the strike, work on the sewer project and pumping station project was pushed into winter and the accompanying bad weather. It was undisputed by respondent that construction work of this nature is slowed down by winter weather because there are fewer working days during the winter months, and also because the worker's efficiency is greatly impaired because of the weather as compared to summer months.

On October 7, 1959, claimant made a written request to respondent for an extension of the completion date on both contracts of 48 days directly attributable to the strike, and 20 additional days as being indirectly attributable to the strike by reason of being pushed into winter weather. Respondent did not reply to this request until December 19, 1959, some 70 days after the request was made. During this period from October 7, 1959 to December 19, 1959, the District Engineer of the State of Illinois, E. W. Riefler, recommended to his superior that time in addition to the 48 days directly attributable to the strike be granted to claimant by reason of the fact that the strike pushed the work into winter weather, and recommended that an additional 10 day extension be granted for that reason. Mr. Norris, the Chief Highway Engineer, agreed with the recommendation of the District Engineer, and, on October 27, 1959, requested C. S. Monier, Division Engineer of the Bureau of Public Roads of the United States, which was involved by reason of federal financing on these projects, to approve the extension of an additional 10 days. Copies of these letters recommending an extension of 48 days directly attributable to the strike and an additional 10 days indirectly attributable to the strike were sent to and re-

ceived by claimant. On November 13, 1959, the Bureau of Public Roads declined to concur with the request for an additional 10 day extension;

On November 15, 1959, claimant wrote to respondent stating that they had not yet received a reply to their request for a 68 day extension, and that the failure of respondent to reply was making it difficult if not impossible to plan and program the work. On December 10, 1959, claimant was notified that an extension of 48 days would be granted on both projects, but that the request for the additional 20 days was refused on both projects. Respondent admits that, if claimant had been notified promptly that its request for an additional 20 days extension would be denied, claimant could have put additional men and equipment on the job in order to finish in time.

The record in this case indicates that there were other extensions of time requested on both projects for various reasons. Some of these were granted, while some were refused. During the month of April, 1960, it was determined that Union Electric Company, the power company providing power for the operation of the pumping station, could not supply the type of meter provided for in the specifications prepared by respondent. Respondent was requested to revise its specifications so that Union Electric Company could use the metering equipment, which they had on hand, and which they insisted must be used. Although the request was made in apt time, respondent delayed in making the decision to revise the specifications so that claimant was delayed 10 days in testing the pumping station equipment. Claimant requested an additional 10 day extension for time lost due to the failure of Union Electric

Company to provide the specified metering devices, and the failure on the part of respondent to promptly revise its specifications when notified of the metering problem.

During the latter part of September, 1959, while claimant was engaged in tunneling in connection with the storm sewer project, claimant requested respondent to notify and cause the Union Electric Company to remove and relocate certain power lines, which were directly in the path of the storm sewers. Other requests had been made by claimant directly to Union Electric Company to relocate these power lines as early as July, 1959. Claimant had suggested to Union Electric Company that it move the power lines during the period of the strike so that claimant could resume work immediately upon termination of the strike. The power lines were not relocated by the Union Electric Company until September 28, 1959, thereby delaying work by claimant on the storm sewer project for some 10 calendar days.

After giving credit for the extensions granted, respondent set May 1, 1960 as the completion date for the pumping station contract, and December 2, 1959 as the completion date for the storm sewer project. The pumping station project was completed and accepted on May 11, 1960, 10 days late, and the storm sewer project was accepted on December 14, 1959, 12 days late. Respondent is withholding from contract payments the sums of \$7,500.00 as liquidated damages on the pumping station project, and \$9,000.00 as liquidated damages on the storm sewer project.

The Court will first consider claimant's contention that it was entitled to an extension of 68 days on both contracts due to the 48 day strike, which halted all work on both projects. The contracts in question provided

that, when a delay occurs due to unforeseen causes beyond control of contractor, and without the fault or negligence of the contractor, including strikes, the time of completion shall be extended in whatever amount is determined by the Department to be equitable. The portion of the requested extension of 68 days, which is disputed, is the request of 20 additional days by claimant for delay of both projects by reason of the fact that work on both projects was pushed into the winter months. Respondent's witnesses, including respondent's project engineer, testified that there would be an additional delay due to the fact that the strike pushed the work on both projects into the winter months. It appears to this Court that the question to be determined is not whether claimant was entitled to an extension in excess of the 48 days of the strike, but rather how much of an extension in excess of the 48 days was claimant entitled to under the provisions of the two contracts. It is the opinion of this Court that respondent's agents, E. W. Riefler, District Engineer, and Mr. Norris, Chief Highway Engineer, have answered this question. Mr. Riefler recommended to his superior, Mr. Norris, an additional extension of 10 days in addition to the 48 day extension. Mr. Norris apparently concurred in this recommendation, and in a letter to C. S. Monier, Division Engineer of the Bureau of Public Roads of the United States, requested the assent of the Bureau of Public Roads to a total extension of 58 days due to the strike. When the Bureau of Public Roads declined to assent to an extension in excess of 48 days, claimant was notified by respondent that an extension of only 48 days would be granted. It is the opinion of this Court that an extension of 58 days due to the strike should have been granted claimant on both projects under the provisions of both contracts.

The Bureau of Public Roads was not a party to the contract between claimant and respondent, and a determination by the Bureau that claimant should not be granted any extension in excess of 48 days should not control the decision of respondent, as it clearly did in this case.

Testimony in this case indicated that claimant made a written request to respondent on October 7, 1959 for an extension of 68 days due to the strike. Respondent did not reply to claimant concerning the extension until December 19, 1959, at which time it granted an extension of only 48 days. During this period claimant received copies of correspondence between respondent's agents that an extension of 58 days should be granted. The contracts in question provided that *promptly* after each unforeseen delay is filed the Department shall give to the contractor written notice of an extension to the contract date. It is the opinion of this Court that a reasonable construction to this provision required respondent to give *prompt* notice of denial of an application for extension. Because of the delay in notifying claimant as to the decision on its request for an extension of 68 days, claimant was put in a quandary as to how to proceed with the projects. If respondent's decision to allow only a 48 day extension had been promptly communicated to claimant, it could have hired additional men and equipment, and finished the job on time. It is the opinion of this Court that delay on the part of respondent in replying to the request of claimant for a 68 day extension was unfair, inequitable and unconscionable, and that respondent is estopped by reason of the delay occasioned by it to deny claimant an extension of 58 days as it was led to believe would be granted. The decision of this Court that claimant was entitled to an additional 10 day extension will extend the date

of completion on the pumping house project to May 11, 1960 so that said project was completed on time, and no liquidated damages are due to respondent from claimant. It is, therefore, unnecessary for the Court to rule on claimant's contention that it was entitled to an additional extension of 10 days due to the failure of the Union Electric Company to provide the proper metering devices for the pumping station project, and the delay on the part of respondent in revising its specifications to allow Union Electric Company to use the equipment it insisted upon using.

The Court will now consider claimant's request for an extension of 10 days on the storm sewer project due to a delay occasioned by Union Electric Company's failure and refusal to relocate certain power lines in the path of the storm sewer lines. The evidence in this case indicates that proper requests were made to Union Electric to relocate the power lines during the period of the strike, but that said power lines were not relocated until September 28, 1959. The strike ended September 17, 1959. As a result of this delay, claimant lost 10 calendar days on the storm sewer project. Under the terms of the contract the only duties imposed upon claimant was to cooperate with and coordinate its activities with Union Electric. It appears that claimant made every possible effort to have the power lines relocated so that they would not interfere with progress on the storm sewer project. Claimant had no control over Union Electric Company under the terms of the contract. It is the opinion of this Court that the delay resulting from Union Electric Company's failure to relocate certain power lines, when requested, was a delay due to unforeseen causes beyond the control and without the fault or negligence of the contractor within the provi-

sions of the storm sewer project contract. The evidence in this case indicates that an extension of only one day was granted by respondent for this delay. It appears to the Court that claimant lost a minimum of 6 working days directly attributable to this delay. Therefore, we hold that claimant was entitled to an extension of at least 6 days. The decision of this Court that the completion date of the storm sewer project should be extended an additional 10 days due to the strike and an additional 6 days due to the delay caused by Union Electric's failure to relocate certain power lines has the effect of extending the completion date on the sewer project to December 17, 1959. The storm sewer project was completed and accepted by respondent on December 14, 1959. The Court, therefore, holds that respondent is not entitled to withhold any of the contract payments due claimant for liquidated damages.

This Court feels that claimant is properly entitled to the amounts withheld by respondent as liquidated damages on both the storm sewer and pumping station projects. The record in this case indicates that certain additional sums of money have been withheld under the two contracts as retainage by reason of the fact that claimant has not provided respondent with certain waivers and affidavits as required by respondent. It is the opinion of this Court that all retainage should now be awarded to claimant despite the fact that claimant has not supplied the waivers and affidavits.

The Court has considered the contentions of claimant in relation to its demands for interest arising out of retainage as set forth in Counts II and IV of the complaint, but the Court finds no basis either in statute law or precedent of this Court for the payment of in-

terest upon the retainage. Claimant's demand for interest, as set forth in Counts II and IV of the complaint, are, therefore, denied.

Under Count I, claimant is hereby awarded the sum of \$9,000.00 as and for liquidated damages withheld by respondent under the sewer project contract, and the further sum of **\$12,824.66**, said sum being the retainage admittedly withheld by respondent under the same said sewer project contract. Under Count 111, claimant is awarded the sum of \$7,500.00, the amount withheld **by** respondent for liquidated damages under the pumping station contract, and the further sum of **\$6,576.24**, said sum being the amount of retainage admittedly withheld by respondent from claimant under the pumping station contract.

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(No. 5373—Claimant awarded \$3,400.60.)

JEWISH HOSPITAL OF ST. LOUIS, A Missouri Corporation,  
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *May 23, 1967.*

LIBRACH AND HELLER and ROBERT L. BROWN, Attorneys for Claimant.

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

**CONTRACTS—lapsed appropriation.** When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PEZMAN, J.

On March 30, 1965, one Toby E. Johnson, a ward of the Department of Children and Family Services, was admitted to the Jewish Hospital of St. Louis for treat-

ment. He was hospitalized from said entrance date to and including May 27, 1965. Following his release, a statement for its services was presented by claimant to the Department, but, because of prolonged discussions between the two parties as to disparity in rates, the appropriation from which payment could have been made had lapsed. Thereafter, on December 1, 1966, claimant, Jewish Hospital of St. Louis, a Missouri Corporation, presented its claim for such services in the sum of **\$4,400.60** to this Court.

At its regular meeting on January 10, 1967, this matter was referred to Commissioner Godfrey for hearing. On the date set for hearing claimant and respondent, by their respective attorneys, appeared before Commissioner Godfrey, and entered into the following stipulation :

“This cause coming on to be heard before Commissioner Robert F. Godfrey, counsel for claimant, Burton A. Librach, and respondent, Lee Martin, Assistant Attorney General, being present, it is hereby stipulated and agreed that the amount of **\$4,400.60** prayed for by claimant be reduced to **\$3,400.60**, and that the Court may in its judgment award this reduced amount in payment of this claim.”

A further stipulation was filed in the Court of Claims on March 2, 1967, which in part is as follows:

“In a hearing held before Commissioner Robert Godfrey on February 15, 1967, counsel for claimant, represented by Burton A. Librach, and Lee D. Martin, Assistant Attorney General, counsel for respondent, stipulated and agreed that the amount of **\$4,400.60** prayed for by claimant be reduced to **\$3,400.60**, the same being a fair and reasonable amount for the services performed by claimant. A copy of such stipulation is attached hereto, marked exhibit A, and by this reference incorporated herein and made a part hereof, and shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$3,400.60**.”

From the record it appears that there were funds available in the appropriation of the Department of Children and Family Services for the purpose of administering the provisions of Sec. 5 of "An Act Creating the Department of Children and Family Services", and that the lapsed balance in that account was sufficient to cover the charge in question.

This Court has consistently held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of **\$3,400.60**.

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(No. 4720—Claimants awarded **\$9,059.65**.)

FRANCES GROCHOWSKI and EDWARD GROCHOWSKI, Claimants, OS. STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1964.*

Opinion on Rehearing filed June 13, 1967.

PHILIP H. CORBOY, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; SAMUEL J. DOY and EDWARD A. WARMAN, Assistant Attorneys General, for Respondent.

*ILLINOIS NATIONAL GUARD—negligence.* Where evidence disclosed that the injuries sustained by claimants were directly caused by National Guard vehicles, and no negligence could be attributed to claimants, an award will be made.

*DAMAGES—credit of sums obtained from private sources.* Payments received by claimant from private sources are considered as analogous to insurance proceeds, and will not affect the damages recoverable in the Court of Claims.

*SAME—additional awards.* Upon rehearing and further proof of injuries, claimants were awarded additional damages.

**DOVE, J.**

This action is a claim by Edward Grochowski and Frances Grochowski against the State of Illinois for injuries and damages incurred by them as a result of a collision with an Illinois National Guard truck, which was operated by a member of the Illinois National Guard.

It appears from the record that, on July 23, 1955, Edward Grochowski and his wife, Frances, residents of Chicago, Illinois, were proceeding in a northerly direction on Route No. 12 near the city of Madison, Wisconsin. Edward Grochowski was the owner and operator of the vehicle. Proceeding in the opposite direction were members of the Illinois National Guard, 33rd Division, 131st Regiment. The convoy was returning from summer maneuvers conducted at Camp Ripley, Minnesota. Gene W. Achterberg and George Hoffman were driving a three-quarter ton truck and a two and one-half ton truck, respectively, in the National Guard convoy, which was en route to Chicago, Illinois. Hoffman was directly behind Achterberg.

At a place near Madison, Wisconsin, while the aforesaid convoy was proceeding in a southerly direction, Achterberg slowed his vehicle for a civilian car ahead. Upon doing so the truck driven by Achterberg was struck from behind by the larger truck driven by Hoffman. This sudden bump from behind caused Achterberg to lose control of his vehicle, and consequently pushed his truck into the left lane. Unfortunately, at this moment the Grochowski vehicle was immediately ahead of the two National Guard trucks in the oncoming lane. As a result of Achterberg's vehicle being pushed into the oncoming lane, a collision occurred between the Grochowski automobile and the National Guard truck driven by

Achterberg. Due to the collision, both Mr. and Mrs. Grochowski received multiple physical injuries, as well as property damage to their automobile. There is ample evidence in the record that shows that Edward Grochowski was proceeding in a safe manner, and that no negligence can be attributed to him.

From the above facts, it can hardly be said that the injuries sustained by the Grochowskis were not directly caused by the two National Guard vehicles driven by Achterberg and Hoffman. It is irrelevant to which of the two National Guard drivers the primary negligence is attributed. This is generally the position taken by respondent, State of Illinois. However, respondent is primarily concerned with the damages, more particularly, the evidence concerning actual damages, and also the justification of the credit against claimants' alleged damages in an amount equal to the sum, which claimants have obtained from other sources.

As far as actual damages are concerned, both Mr. and Mrs. Grochowski were gainfully employed, and they have adequately proved their loss of earnings. The evidence also sufficiently sets out the medical expenses incurred by both claimants.

<i>Edward Grochowski</i>	
Loss of earnings .....	\$2,400.00
Medical expenses .....	114.80
Damages to car .....	800.00
	<hr/>
Total .....	\$3,314.80

<i>Frances Grochowski</i>	
Loss of earnings .....	\$ 840.00
Medical expenses .....	904.86
	<hr/>
Total .....	\$1,744.85

Respondent's plea for a credit against claimants'

damages in an amount equal to any sums that claimants may have obtained from private sources is without merit. Although it was shown that Edward Grochowski received payments from the Upholsterers' Union for a period of ten weeks, this should in no way affect the damages recoverable by him. Such payments should be considered as analogous to insurance proceeds, which have been held to be irrelevant to the consideration of damages. *Hudson vs. Leverenz*, 9 Ill. App. 2d 96, 107 (1956).

It is the conclusion of this Court that Edward Grochowski sustained injuries of some permanence, but which have not disabled him from pursuing his usual occupation. Including loss of earnings, medical care, and damage to vehicle, we believe that an amount of \$3,314.80 is a fair award.

We, therefore, allow the claim presented in this case in the following amounts:

To claimant, Edward Grochowski .....	\$3,314.80
To claimant, Frances Grochowski .....	\$1,744.85

#### *Opinion on Rehearing*

This action is a claim by Edward Grochowski and Frances Grochowski against the State of Illinois for injuries and damages incurred by them as a result of a collision with an Illinois National Guard truck, which was operated by a member of the Illinois National Guard.

It appears from the record that, on July 23, 1955, Edward Grochowski and his wife, Frances, residents of Chicago, Illinois, were proceeding in a northerly direction on Route No. 12, near the City of Madison, Wisconsin. Edward Grochowski was the owner and operator of the vehicle. Proceeding in the opposite direction were members of the Illinois National Guard, 33rd Di-

vision, 131st Regiment. The convoy was returning from summer maneuvers conducted at Camp Ripley, Minnesota. Gene W. Achterberg and George Hoffman were driving, respectively, a three-quarter ton truck and a two and one-half ton truck in the National Guard convoy, which was en route to Chicago, Illinois. Hoffman was directly behind Achterberg.

At a place near Madison, Wisconsin, while the convoy was proceeding in a southerly direction, Achterberg slowed his vehicle for a civilian car ahead. Upon doing so the truck driven by Achterberg was struck from behind by the larger truck driven by Hoffman. **This** sudden bump from behind caused Achterberg to lose control of his vehicle, and pushed his truck into the left traffic lane. Unfortunately at this moment the Grochowski vehicle was immediately ahead of the two National Guard trucks in the oncoming lane. As a result of Achterberg's vehicle being pushed into the oncoming lane, a collision occurred between the Grochowski automobile and the National Guard truck driven by Achterberg. Due to the collision, both Mr. and Mrs. Grochowski received multiple physical injuries, as well as property damage to their automobile. There is ample evidence in the record, which shows that Edward Grochowski was proceeding in a safe manner, and that no negligence can be attributed to him.

From the above facts, it appears that the injuries sustained by the Grochowskis were directly caused by the two National Guard vehicles driven by Achterberg and Hoffman.

As far as actual damages are concerned, both Mr. and Mrs. Grochowski were gainfully employed, and they have adequately proved their loss of earnings. The evi-

dence also sufficiently sets out the medical expenses incurred by both claimants :

<i>Edward Grochowski</i>	
Loss of earnings .....	\$2,400.00
Medical expenses .....	114.80
Damages to car .....	800.00
	<hr/>
Total .....	\$3,314.80
 <i>Frances Grochowski</i>	
Loss of earnings .....	\$ 840.00
Medical expenses .....	904.85
	<hr/>
Total .....	\$1,744.85

Respondent's plea for a credit against claimants' damages in an amount equal to any sums that claimants may have obtained from private sources is without merit. Although it was shown that Edward Grochowski received payments from the Upholsterers' Union for a period of ten weeks, this should in no way affect the damages recoverable by him. Such payments should be considered as analogous to insurance proceeds, which have been held to be irrelevant to the consideration of damages. *Hudson vs. Leverenz*, 9 Ill. App. 2d 96, 107 (1956).

Direct unrefuted testimony establishes that Frances Grochowski sustained the following injuries : lacerations inside her mouth, above the left eye, on the face and nose, and through the eyebrow. Some of these scars were four inches in length, and have left deep cosmetic scarring. She also sustained a wrenched right wrist, a bruised right knee, and multiple contusions. The evidence further discloses that Edward Grochowski suffered the following injuries : multiple bruises about the face and lower extremities, particularly the right knee and right arm, and that he was unable to pick up his arm higher than his head.

It is the opinion of this Court that claimants are entitled to awards in the following amounts:

To claimant, Edward Grochowski, the sum of \$6,314.80

To claimant, Frances Grochowski, the sum of \$3,744.85

It is, therefore, ordered that the claim of claimants in the above amounts, be allowed.

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(Nos. 4901 and 4902—Consolidated—Claimants awarded \$16,970.00.)

MICHAEL B. CARR, Individually, and as Administrator of the Estate of MICHAEL J. CARR, Deceased; AMERICA FORE INSURANCE GROUP, Subrogee of MICHAEL B. CARR, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed January 10, 1967.*

*Opinion on Rehearing filed June 13, 1967.*

JOHN J. SULLIVAN and WILLIAM J. HARTE, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; SHELDON K. RACHMAN, Special Assistant Attorney General, for Respondent.

**HIGHWAYS—negligence—accumulation of ice.** Where evidence disclosed that respondent had actual notice of dangerous icy condition, did not remedy it or give adequate warning of the danger, and claimants were free from contributory negligence, an award will be made.

**COURT OF CLAIMS ACT—statutory construction—conflicting statutes.** Where acts containing conflicting provisions are passed at the same legislative session, each must set forth the whole section as it previously appeared, and the interpretation thereof depends upon legislative intent.

**SAME—legislative intent.** At the time of claimants' accident, the Court of Claims Act had been effectively amended to include a statutory limitation of \$25,000.00.

**DAMAGES—wrongful death action survives.** An action for wrongful death does not abate upon the death of the beneficiary, but may be maintained for the benefit of the beneficiary's estate.

PERLIN, C.J.

Claimants seek recovery for damages arising out of an automobile accident on February 23, 1958, when the motor vehicle, which was owned and operated by Michael B. Carr, one of the claimants in this action, went off the highway, and struck a tree on Route No. 34 about one-half mile east of Oswego in Kendall County, Illinois. Michael J. Carr who was riding as a passenger was killed, and Michael B. Carr, his son, was injured. The America Fore Insurance Company sues as subrogee of Michael B. Carr for the amount paid for damages to the automobile. Michael B. Carr requests the sum of \$25,000.00 in his own behalf, and \$25,000.00 as Administrator of the Estate of Michael J. Carr.

From the testimony it appears that claimants were traveling westbound on Route No. 34 about one-half mile east of Oswego in Kendall County, Illinois. The weather was clear, but snow was on the ground, and the temperature was about 30 degrees. The highway was generally dry and free of ice and snow. As the vehicle approached a curve in the highway, just east of Waubansie Creek, the highway was covered with a patch of ice approximately 75 feet long, which extended into both lanes of the road.

Michael B. Carr testified that on the day in question he had left his home in Chicago, Illinois around 6:00 A.M. with his father in order to travel to Princeton, Illinois. He was traveling about 50 to 55 miles per hour about 1,000 yards from the point of the accident. He saw no warning signs, and came upon the curve without warning. As soon as he hit the curve he saw that ice was covering the road, applied his brakes, and then took his foot off the brakes as soon as he reached the ice. He then

went off the left side of the road, through a fence, down an embankment, and struck a tree.

He further stated that he had never previously driven on Route No. **34**, that there were no other dips or rises in the highway, and that the roadway was dry. The curve in question was below the level of the road, and there was ice covering the entire highway at that point.

Edward and Norman Strobe who lived in the farmhouse, which was located in the center of the curve, testified that before the occurrence a sign warned west-bound motorists of the approach of the curve, and was normally situated east of the curve. However, according to Norman Strobe, a week before the accident the sign had been knocked down by a "snowplow from the State Highway Maintenance Division pushing the snow off to the side of the road."

Byford Goldman, Jr., testified that on the morning of February 22, 1958 he also had an accident on the curve in question, and that, prior to entering the curve, he did not see a warning sign. He stated that there were no cinders on the ice at that time.

Frank Willman, the Deputy Sheriff who investigated the Goldman accident, described the curve as having a patch of ice about 75 feet in length covering both lanes. He observed no cinders or salt on the ice, and reported the condition to the office of the Sheriff.

On the morning of the following day, February **23**, 1958, Willman investigated the accident, which involved claimants. He again observed the ice, and noted that there were no cinders or salt on the curve. According to Willman, the curve sign was down at the time of both

accidents, although for many years there had been a "curve ahead" sign about 200 feet east of the curve.

Willman further testified that the portion of the highway in question had a tendency to ice up for at least 4 to 5 years before the accident. He stated that he had traveled Route No. 34 for 10 to 15 years, and that, when the curve is approached from the east going west, the pavement on the curve is not in view because the road turns and drops down. He also said that the curve had a tendency to freeze when there was no other ice on Route No. 34, because it was lower than the surrounding land, and the snow, which was deposited by the Highway Department, would melt during the day, and run across the highway. It would then freeze at night.

Paul Dwyer, a Deputy Sheriff, testified that in February, 1958, he investigated an accident involving one Phillip Stein. This occurred on the curve approximately three and one-half hours before the Carr accident. He, too, observed the icy condition of the highway.

There was also testimony of several other minor accidents, which occurred on the curve immediately before the Carr accident.

William A. Maier, Sheriff of Kendall County in February, 1958, testified that, immediately after receiving the report of the Goldman accident, and about 24 hours prior to that of the Carrs, he reported the icy condition of the highway, the location, and the fact that an accident had occurred because of the condition to Bill Wheeler, District Supervisor of the State Highway Maintenance Department.

Wheeler testified that he could not say when cinders were last spread on the curve prior to February 23, 1958.

He was not sure whether or not the curve sign was standing on February 23, 1958, and stated that the "snow-plow could have clipped (the sign)." He further stated that it was part of the duties of the road patrol men to spread sand and cinders over the highway.

Claimants submit that the State of Illinois was negligent in that it failed to replace the warning sign, which was knocked down by the maintenance truck of the State a week before the occurrence; it failed to erect a sign warning the traveling public of the icy pavement where the condition had been prevalent at the curve for at least 5 years before the accident in question; it failed to remove the cause of the ice, or to remove the danger by spreading sand, salt and cinders; and, that the State is liable for the maintenance of a nuisance.

Before recovery may be granted claimants must prove by a preponderance of the evidence: (1) freedom from contributory negligence; (2) the negligence of respondent; and, (3) the negligence of respondent was the proximate cause of the damage for which recovery is sought.

The State has a duty to exercise ordinary care in maintaining the State highways in a reasonably safe condition. In *Bovey vs. State of Illinois*, 22 C.C.R. 95, the State was held liable for an accident caused by the icy condition of a bridge flooring where from the evidence it clearly appeared that respondent had knowledge of its tendency to ice more rapidly than other bridges and roadways in the area. The Court stated:

**"It was not just the mere existence of ice, which brought about the accident in question, but it was primarily due to the nature of the bridge being subject to a quick freeze at a time when there was no evidence of ice, snow, or extremely cold weather in the general**

area surrounding the bridge, and even other bridges in the same area were not slippery, thus creating a trap for the unwary traveler.”

The State was also held liable for an accident, which was caused by an unusual accumulation of ice on the highway in the case of *Burgener vs. State of Illinois*, No. 5061, opinion handed down on September 25, 1964, although cinders and salt had been spread, since it did not remedy the situation, and there were no warning signs. The Court held:

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

The instant case presents the fact of an unusual accumulation of ice while the surrounding area was dry. Claimant has proved that respondent was negligent in that it knocked over the only sign warning of the curve, and failed to replace it, although the curve was not visible to oncoming traffic; that respondent had actual notice of a dangerous condition, which had, in fact, existed for at least 4 or 5 years ; and, that it had actual notice of the dangerous icy conditions existing on the curve within the 24 hours immediately preceding the accident in question, and failed to remedy the danger by spreading cinders or by placing warning signs in the proper place. There is no evidence that Michael B. Carr, one of the claimants in this matter, was in any way contributorily negligent.

Michael B. Carr has incurred special damages in the amount of \$4,747.27, including \$1,197.27 for medical expenses, \$3,500.00 for loss of income, and \$50.00 for charges against him by his insurance carrier for “deductible”.

Claimant sustained fractures of the leg and ankle, and as a result had to undergo surgery. The ankle frac-

ture required the insertion of a metallic screw, which was later removed. He also received a cut on his head, which required suturing. As a result of his ankle injury he still suffers pain, and is limited in doing work, which entails standing or walking for a long period of time. He claims that the accident in question caused an increase in the degree of limp, which he has had in his left leg since childhood as a result of cerebral palsy. He was unable to work for approximately three and one-half months, and could work only part time for an additional two months. His automobile was damaged in the amount of \$1,445.00.

The maximum amount allowable "to or for the benefit of any claimant" under the statute in effect in February, 1958 was \$7,500.00. Therefore, Michael B. Carr, claimant, and the America Fore Insurance Group, as subrogee for property damage to the automobile owned by Michael B. Carr, may receive awards, the total of which cannot exceed \$7,500.00. Accordingly, Michael B. Carr is awarded the sum of \$6,055.00, and America Fore Insurance Group is awarded the sum of \$1,445.00.

Burial expenses for Michael J. Carr amounted to \$1,027.00. Under the Wrongful Death Act, Chap. 70, Par. 2, Ill. Rev. Stats., only pecuniary damages may be recovered for the next of kin. Damage for loss of support is not applicable in the instant case, since the death of Michael J. Carr's only dependent, Mrs. Michael J. Carr, his wife, occurred before the hearing. Therefore, Michael B. Carr, as Administrator of the Estate of Michael J. Carr, is awarded the sum of \$1,027.00.

OPINION ON REHEARING

PERLIN, C.J.

Claimants have requested that the Court reconsider the damages heretofore awarded in relation to the claims of Michael B. Carr, and Michael J. Carr, deceased, in the above entitled consolidated cases. In its opinion, the Court stated that the maximum statutory amount allowable under the Court of Claims Act "to or for the benefit of any claimant" was \$7,500.00 in February, 1958, the date of the accident in question.

It appears that during the Seventieth General Assembly in 1957, three amendments to the Court of Claims Act were passed, the second being an amendment to raise the statutory limitation to \$25,000.00, which was approved on July 9, 1957. The third amendment, approved July 11, 1957, restates the prior limitation of \$7,500.00. However, it is the rule that different amendments approved at the same session of the legislature should each be given effect unless clearly inconsistent. (*S. Buchsbaum and Compamy vs. Gordon*, 389 Ill. 493, 59 N. E. 832.) It is a further rule that, when different amendments are introduced, each must set forth the whole section as it previously appeared, and that interpretation depends upon legislative intent. We must conclude, therefore, that the Court of Claims Act at the time of this accident in 1958 had been effectively amended to include a statutory limitation of \$25,000.00.

Claimants further contend that an award should have been made in favor of the widow of Michael J. Carr, deceased, for loss of support although she herself was deceased at the time of the hearing. It is undisputed that she would have been entitled to the sum of \$54.00 per month had she lived.

In the recent case of *McDaniel vs. Bullard*, 34 Ill. 2d 487,216 N. E. 2d 140, the Supreme Court held that an

action for wrongful death did not abate upon the death of the beneficiary, but could be maintained for the benefit of the estate of the beneficiary. In so holding the Court stated :

“Today, damages for most torts are recognized as compensatory rather than punitive, and there is no reason why an estate that has been injured or depleted by the wrong of another should not be compensated whether the injured party is living or not.”

*McDaniel* specifically overruled *Wilcox vs. Bierd*, 330 Ill. 571, 162 N.E. 170, which held that common law actions founded on tort did not survive.

Accordingly, Michael B. Carr is hereby awarded the sum of \$12,500.00, and \$1,998.00 is awarded for the benefit of the widow of Michael J. Carr, deceased. The awards of \$1,445.00 to the America Fore Insurance Group and \$1,027.00 to Michael B. Carr, as administrator of the Estate of Michael J. Carr, for burial expenses remain as set forth in the original opinion.

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(No. 5141 — Claimant awarded \$500.00.)

JANE A. JONES, a Minor, by HELEN BETTY McCONNELL, her Mother and Next Friend, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 13, 1967.*

WILLIAM R. GUNNER, Attorney for Claimant.

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

**PRISONERS AND INMATES—damages by escapees.** Where evidence showed that inmates had known propensities for incendiarism, and had previously escaped, respondent was negligent in allowing them to escape, and was liable for the damage caused thereby.

DOVE, J.

This is an action brought by Jane A. Jones, a Minor, by Helen Betty McConnell, her Mother and Next Friend, to recover damages for items of personal property, which were destroyed by vandalism and burning by three inmates of the Dixon State School.

In July, 1963, claimant was living with her husband in a farm house located near the Dixon State School. The farm was known as the Ortgiesen place, and claimant and her husband were the only occupants. Upon returning from a drive-in movie on the night of July 8, 1963, claimant found the house vandalized. Claimant and her husband then moved in with claimant's mother, Helen Betty McConnell, and, on August 4, 1963, while claimant and her husband were so residing with claimant's mother, three inmates from the Dixon State School, Stanley Pastewski, Robert Coker and George Horn came on to the Ortgiesen place and set fire to the house, completely destroying the house and its contents.

A Departmental Report was filed herein, which stated :

**"On August 4, 1963, Stanley Pastewski, Robert Coker and George Horn, all three patients of the Dixon State School, while on unauthorized absence from the institution set afire a farm home, which was the property of Clinton Ortgiesen, and as the result of such fire certain personal property belonging to James and Jane Jones, tenants, was damaged and destroyed. An inventory of the items damaged or destroyed was submitted to the Dixon State 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 from 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 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 of Illinois*, 18 C.C.R. 137.”

The records of the institution and the testimony of the officials show that the inmates, Pastewski, Coker and Horn, had histories of delinquency prior to their commitment to the Dixon State School, and that Pastewski had previously set fire to his mattress while an inmate, and had also set fire to a house in 1951. *Curran vs. State of Illinois*, 21 C.C.R. 278. We conclude that respondent was negligent in allowing the inmates to escape.

The Commissioner found that the damage to the contents of the house amounted to \$500.00.

It is, therefore, the judgment of this Court that claimant be awarded the sum of \$500.00.

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(No. 5270—Claimant awarded \$7,500.00.)

MITCHELL LEWINSKI, ADMINISTRATOR OF THE ESTATE OF WALTER GENZA, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 13, 1967.

GEORGE J. LEWIS and LAWRENCE W. BLICKHAN, Attorneys for Claimant.

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

PRISONERS AND INMATES—*negligence—duty* to protect patients. Where evidence showed that respondent was negligent in its care of the deceased, and that deceased was not contributorily negligent, an award will be made to the surviving wife.

DAMAGES—wrongful death. If a wrongful death action is brought for the benefit of a surviving wife, the law presumes substantial damages from the fact of death alone.

PERLIN, C.J.

Claimant seeks recovery of \$25,000.00 as Administrator of the Estate of Walter Genza who died as a result of injuries, which were suffered on December 7, 1965 while he was a patient at the Soldiers' and Sailors' Home, which was operated by respondent. Claimant alleges several acts of negligence on the part of respondent, which he claims caused decedent's death, including the following:

Walter Genza was a resident and patient in the infirmary at the Illinois Soldiers' and Sailors' Home when on December 7, 1965 he was taken by agents and employees of respondent to the shower room and left unattended, and, while taking a shower, he was severely burned and scalded; that respondent provided the deceased with a shower without a proper water and temperature regulator; maintained its water temperature at

a dangerous and unsafe level; failed to warn the deceased of the dangerous and unsafe temperature of the water; and, failed to provide the proper protection to the deceased when it knew, or in the exercise of reasonable care should have known, that the facilities were unsafe and dangerous.

The record shows that on the date of the accident Genza had been a patient at the institution for about four months, and that as a result of a stroke, which left him paralyzed on the right side, he was unable to walk or talk, and could stand only with difficulty. He was fifty-one years old at the time of his death.

On December 7, 1965 the deceased was taken to the shower room in his wheel chair by attendant Robert Cook, who undressed him, and placed him under running water in the shower on a chair. Cook claims to have tested the water. The shower room was under the supervision of Sally Schanz, a registered nurse. Cook and George Hardy, both of whom had worked at the Home for many years, were present at the time of the incident. Sally Schanz testified that the rules and regulations required that an attendant be present at all times while a paralyzed patient was receiving a shower. Cook stated that after placing Genza under the shower he washed his back and head, and then went to attend another patient about five or six feet from the shower with a tub between the attendant and the deceased. Cook had asked the deceased if he wanted to get out, and he had indicated he did not. Two minutes later, as Cook was getting another man out of the tub, he heard Genza shout, and saw from the indicator on the shower handle that the hot water had been turned on from its original setting. Cook stated that the same shower had been there

at least seventeen years. Hardy testified that at the time of the accident three patients were being bathed by the two attendants. It is undisputed that Genza died two days later from burns resulting from the scalding suffered by him on December 7, 1965.

The Chief Engineer of plant maintenance, Perry Mann, testified that he was in charge of plumbing and steamfitting at the institution, and that the power plant located in the building in which the decedent was burned had its own hot water source with a water heater, which controlled all the water facilities in the infirmary. On the day of the accident the gauge on the hot water heater read 171 degrees F., but actually tested at 158 to 159 degrees F. The gauge had not been regulated for at least two and one-half years. Mann testified that the temperature was kept at a high rate because it also regulated the water used for washing dishes, which required about 180 degrees F. Around the time of the accident or shortly thereafter the dishwashing facilities were abandoned because the food was being served from another kitchen, and the dishes were washed there.

No notice of the temperature of the water used in the shower in which the deceased was scalded was given by Mann or any of the employees under his supervision to any of the attendants at the infirmary. The witness stated that 110 degrees degrees F. is hot enough for use in a shower room.

The witness further testified that no booster was used to raise the temperature in the dishwasher, although this would have allowed the same facilities to service both shower room and kitchen safely. There was no Powers regulator on the shower used by Genza, although this piece of equipment, which controls the water coming

through the shower at a desired temperature, would have prevented anyone from being scalded.

Mann stated frankly: "Any time we are putting out water hot enough that someone can be scalded we are at fault."

Respondent's contention that the deceased was contributorily negligent is without merit. The deceased was paralyzed, and unable to walk or talk. Nurse Shanz stated that his mental condition was poor. Reasonable care would require constant supervision in the shower room, since he obviously could not be responsible for his own actions.

Respondent was grossly negligent in the instant case in not only failing to provide the type of supervision required for one so helpless, but in providing water facilities, which it knew, or should have known, were inherently dangerous, and a threat to the lives of anyone using them. Respondent could not explain its failure to utilize the devices of a dishwasher booster and a Powers regulator, which would have served all purposes.

Mrs. Genza, the widow of the deceased, testified that they were married on October 8, 1953, and had no children. The deceased had suffered a stroke approximately two and one-half years after they were married, leaving him unable to walk or talk. He had been in and out of the hospital during the ten years after he had the stroke, and the majority of time was spent at home with Mrs. Genza. The decedent received \$78.00 per month from Social Security benefits, and **\$135.40** from the Veterans Administration, which payments were discontinued after his death. The funeral bill was **\$546.24**, and the widow received \$500.00 in insurance money.

It appears that the benefits, which were received from Social Security and the Veterans Administration during the lifetime of the decedent, were largely used for his maintenance. There was no evidence with regard to decedent's future prospects, although it may be inferred that they were poor. However, if an action for death is brought for the benefit of a surviving wife, the law presumes substantial damages from the fact of death alone. (I.L.P., Death, Sec. 30)

Therefore, claimant is awarded the sum of \$7,500.00.

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(No. 5352—Claimant awarded \$2,582.00.)

AMERICAN STATES INSURANCE COMPANY, A Corporation,  
Claimant, OS. STATE OF ILLINOIS, Respondent.

*Opinion filed June 13, 1967.*

LUCAS and LUCAS, Attorneys for Claimant.

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

**STATE OFFICERS AND AGENTS—mutual mistake of fact.** Where money is paid under a mutual mistake of fact as to the existence of an obligation under bond purportedly issued by claimant, an award will be allowed.

PERLIN, C.J.

American States Insurance Company has filed a claim for the sum of \$2,582.00 as a result of payment made by it to the State of Illinois based upon its erroneous assumption that a "remittance agent's bond" was in effect. The bond was transmitted to the Department of Financial Institutions of the State of Illinois by the applicant, Edna J. Maloney and James E. Maloney, Jr., doing business as E. and J. Confectionery Store. Be-

lieving its bond to be duly issued, claimant paid to the Secretary of State the sum of **\$2,582.00** to cover checks returned by a bank for insufficient funds.

The Attorney General, representing the State of Illinois, has entered into a stipulation with claimant acknowledging that the sum in question was paid to the State of Illinois on the basis of a mistake of fact, and has agreed to the entry of an order in favor of claimant.

In view of the stipulation of the parties hereto, this Court hereby awards to claimant, American States Insurance Company, A corporation, the sum of **\$2,582.00**.

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(No. 3025—Claimant awarded \$3,912.47.)

**ELVA JENNINGS PENWELL**, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed August 16, 1967.*

**GOSNELL** and **BENECKI**, Attorneys for Claimant.

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

**WORKMEN'S COMPENSATION ACT**—*supplemental award*. Under the authority of *Penwell vs. State of Illinois*, 11 C. C. R. 365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period January 1, 1966 to January 1, 1967.

**PEZMAN, J.**

On March 2, 1967, claimant filed her petition for reimbursement for monies expended for nursing care and help, medical services and expenses from January 1, 1966 to January 1, 1967. Claimant seeks reimbursement in the sum of **\$3,912.47**.

Claimant was injured on February 2, 1936 in an accident arising out of and in the course of her employ-

ment as Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the original case of *Penwell vs. State of Illinois*, 11 C.C.R. 365, in which an initial award was made, and at which time jurisdiction was retained to make successive awards in the future.

- Claimant has attached to her petition as exhibit No. 1 a bill of particulars, which discloses the amounts expended from January 1, 1966 to January 1, 1967, to be as follows:

1. Nursing and practical help .....	\$ 1,204.40
2. Room and board for nurses and practical help	730.00
3. Drugs, supplies and miscellaneous .....	524.57
4. Physicians, hospital and professional services	1,453.50
	<hr/>
Total expenses to January 1, 1967.....	\$ 3,912.47

A joint motion of claimant and respondent was filed herein on May 7, 1967 asking the Court for leave to waive the filing of briefs and arguments therein. On that date an order was entered granting the prayer of said motion.

Claimant's petition clearly alleges that there has been no improvement in her physical condition since the last award, and that her condition requires constant care by physicians and practical nurses. Exhibit No. 2 attached to said petition contains receipts and vouchers for the monies detailed as having been spent in exhibit No. 1. From an examination of the petition and the exhibits, as well as the file in this cause, the Court is of the opinion that the expenditure of such sums of money were necessary for the care of claimant,.

An award is, therefore, made to claimant in the amount of \$3,912.47 for the period of time from January 1, 1966 to January 1, 1967. The Court reserves

jurisdiction of this matter for further determination of claimant's need for additional care.

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(No. 5107—Claimant awarded \$5,000.00.)

BERDINA BUGLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 16, 1967.*

RYAN AND HELLER, Attorneys for Claimant.

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

*STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—duty to maintain buildings located on State Fairgrounds.* Evidence showed that respondent was negligent in failing to adequately light a restroom, and in permitting the floor of the rest room to become wet and slippery, thereby causing claimant to fall and injure herself.

*EVIDENCE—constructive notice of a dangerous condition.* There is no hard and 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.

DOVE, J.

This is an action brought by claimant, Berdina Bugle, against respondent, State of Illinois, to recover damages for personal injuries, which claimant sustained on August 18, 1962 when she slipped and fell in a ladies restroom at the Illinois State Fairgrounds, Springfield, Illinois.

The facts concerning the happening of the accident, as shown by the evidence, are as follows: On August 18, 1962, claimant attended the Illinois State Fair at Springfield, Illinois with her sister, Mrs. Ann Huckaba, and her sister's two young children. The group arrived at the Fairgrounds at about 11:30 A.M. This was a

clear, warm summer day, and claimant was wearing a light summer dress and flat-heeled shoes.

Upon arrival at the Fairgrounds, claimant and her sister entered the restroom where claimant fell later the same day. While in the restroom they noticed that the first or second stool from the door was running over, and that a small puddle of water was forming in the area of the stool. The remainder of the restroom floor was dry at that time, and the restroom was well lighted by sunlight.

At approximately 8:00 P.M. the same day, claimant, her sister, and the children started back to their car. On the way back to their car claimant again entered the same restroom she had visited earlier that day. No lights had been turned on in the restroom, and claimant described the restroom as "dark". Claimant took three or four steps into the restroom when her feet slipped, and she fell on her left elbow. While lying on the floor, claimant noticed that the floor surrounding her was wet, causing her clothes and arm to become wet. No one was in the restroom other than claimant at the time of the accident, and claimant testified that she heard a stool running over.

Claimant became nauseated, and was unable to get up on her feet. She pulled herself over to the door of the restroom where two girls helped her outside. At this point Mrs. Huckaba arrived on the scene, and took claimant to a Red Cross station on the Fairgrounds where she was treated, and given a pain pill. Claimant, her sister, and the children then returned home in Mrs. Huckaba's car.

Claimant was examined on August 19, 1962 by Dr. Joseph R. Mallory in Mattoon, Illinois. On August 20,

1962, her left arm was x-rayed revealing a fractured radius head with displacement. Dr. Edward N. Zinschlag surgically excised the head of the left radius at the Mattoon Memorial Hospital. The injury and subsequent operation left claimant with a permanent disability in the function of her left arm. Claimant brings this action against the State of Illinois for the injury and disability suffered by her as a result of the fall.

It is clear from the evidence and circumstances in this case that claimant, while attending the Illinois State Fair at Springfield, Illinois, was an invitee of respondent. A person who is on the premises of another by invitation, express or implied, of the owner, has the legal status of an invitee. A business owner's duty toward a customer as an invitee is to exercise reasonable care to discover defects or dangerous conditions on the premises, and a business owner is liable for injuries resulting from a condition, which he could have discovered in the exercise of reasonable care. *McGourty vs. Chiapetti*, 38 Ill. App. 2d 165, 186 N.E. 2d 102 (1962); *Ellguth vs. Blackstone Hotel, Inc.*, 340 Ill. App. 587, 92 N.E. 2d 502 (1950); *Jones vs. 20 N. Wacker Drive Bldg. Corp., et al*, 332 Ill. App. 382, 75 N.E. 2d 400 (1947). Claimant went upon the Fairgrounds to attend the Illinois State Fair at the express invitation of respondent.

An invitation to transact business extends to any portion of the premises, which the owner may reasonably anticipate the invitee to use in connection with the conduct of the business on the premises. *McGourty vs. Chiapetti*, 38 Ill. App. 2d 165, 186 N.E. 2d 102 (1962); *Ellguth vs. Blackstone Hotel, Inc.*, 340 Ill. App. 587, 92 N.E. 2d 502 (1950). Clearly the use of the public restroom in question, located on the Fairgrounds, by claim-

ant was within the scope of the invitation extended to claimant by respondent.

Respondent argues that claimant has failed to show that respondent had actual or constructive notice of the wet condition of the restroom floor, which caused such floor to become slippery. Respondent contends that in the absence of notice it cannot be held liable for claimant's injuries citing *Arnett vs. City of Roodhouse*, 330 Ill. App. 524, 71 N.E. 2d 849 (1947), and *Weygandt vs. State of Illinois*, 22 C.C.R. 478 (1957). Respondent contends that claimant has failed to show that the water on the floor of the restroom where claimant fell was from the same toilet, which claimant had observed overflowing at 11:30 A.M. that same day, and that, therefore, there is no showing that respondent should be charged with constructive notice of the dangerous condition of the floor by reason of the duration of the dangerous condition.

There is no hard and 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. *Brown vs. State of Illinois*, 22 C.C.R. 231 (1956). Respondent has failed to present any proof that the wet slippery condition of the floor in the restroom did not result from the overflowing toilet observed by claimant earlier in the day. Respondent failed to present any proof that the restroom had been inspected by an employee of respondent at any time during the day in question.

It is the opinion of this Court that, from the evidence of claimant that a toilet was overflowing at 11:30 A.M., that a toilet was overflowing again at 8:00 P.M., and that the floor of the restroom was wet and slippery at 8:00 P.M., a reasonable inference can and must be

drawn that the toilet overflowed continually, or at least a substantial period of time from 11:30 A.M. to 8:00 P.M., causing the condition of the floor to be dangerous. It is the further opinion of this Court that such a condition existed for a sufficient period of time that respondent should, in the ordinary exercise of care, have been aware of the dangerous condition of the floor, and should, therefore, be charged with constructive notice of the dangerous condition of the floor in the restroom existing at the time claimant fell.

Claimant cannot be held to have assumed the risk of a wet slippery floor in the restroom at 8:00 P.M. because she was aware of an overflowing toilet in the same restroom at 11:30 A.M. the same day. The evidence indicates that at 11:30 A.M. only a small portion of the floor immediately surrounding the overflowing toilet was wet. Respondent's failure to adequately light the restroom was an important factor contributing to claimant's unawareness of the dangerous condition of the restroom floor. Claimant cannot be said to have assumed a risk of which she had no knowledge. Claimant was not negligent in assuming that respondent would perform the duty owed claimant to maintain the restroom in a safe condition.

It is the opinion of this Court that respondent was negligent in failing to adequately light the restroom, and in permitting the floor in the restroom to become wet and slippery, thereby causing claimant to fall and injure herself. Respondent, in the exercise of reasonable care, should have discovered the dangerous condition of the floor in the restroom. The evidence in this case indicates that respondent has failed to comply with its duty to exercise reasonable care to discover the dangerous

condition of the floor existing in the restroom in question. It is the opinion of this Court that claimant is entitled to an award in the amount of \$5,000.00.

Based upon the medical findings submitted, the nature and extent of the injuries of claimant, an award is hereby made in the sum of \$5,000.00.

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(No. 5164—Claim denied.)

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

*Opinion filed August 16, 1967.*

WARREN J. CAREY, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; PHILIP J. ROCK, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES — *wrongful incarceration*. Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

*SAME-legislative intent*. The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the "fact" of the crime for which he was imprisoned.

DOVE, J.

This is a cause of action brought by claimant against respondent, State of Illinois, for damages under Section 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine :

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 \$15,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00; and provided further, the Court shall fix attorney's fees not to exceed 25% of the award granted.

It appears from the evidence in this case that on December 23, 1960 at about 1:00 A.M., claimant, John Hudson, his common-law wife, Myrtle Bennett, and one Lee Berry were in claimant's apartment located at 4624 South Independence Avenue, Chicago, Illinois. Claimant and Myrtle Bennett were in bed, and Lee Berry was sleeping in a chair in the same room. Claimant testified that Myrtle Bennett got out of bed, and went into the kitchen, which was adjacent to the bedroom. Claimant further testified that shortly before Myrtle Bennett got out of bed he had reached into a closet near the bed and taken out a bolt action rifle, which had been inoperable for some time. Claimant further testified that, while sitting on the edge of the bed working the bolt action mechanism of the rifle back and forth, a cartridge in the chamber of the rifle discharged. The bullet struck Myrtle Bennett, who had returned from the kitchen and was standing in the bedroom doorway, in the chest and killed her.

Claimant and Lee Berry placed the dead woman on the bed in the apartment, and both fled the apartment. Claimant took the rifle with him, and later disposed of it by throwing it in the snow in an alley near the apartment. Claimant returned to his apartment at about noon the next day. The police were called, and claimant was taken into custody.

Subsequent to his arrest claimant was indicted, and tried for the crime of murder. Lee Berry was indicted as an accessory. Upon trial by jury, claimant was found

guilty of murder, and sentenced to 14 years in the State Penitentiary. Subsequently an appeal was filed. The State's Attorney of Cook County filed a confession of error wherein it was confessed that there was error in the case, which warranted a reversal and remandment for a new trial. The Appellate Court reversed the conviction, and granted claimant a new trial. Upon the second trial, which was a bench trial, claimant was found to be not guilty of the charge of murder, and was discharged by the court.

It was stipulated by the parties hereto that claimant had been confined in the Illinois State Penitentiary from April 6, 1961 to April 1, 1964. Claimant now brings this action against respondent for damages for time unjustly served in the Illinois State Penitentiary.

There is no dispute in the evidence that claimant committed the act of firing the rifle, which caused the death of Myrtle Bennett. In his second trial, a bench trial, claimant was found to be not guilty of the charge of murder, presumably on the grounds that claimant was not proven guilty of murder beyond a reasonable doubt.

In two previously decided cases, *Munroe vs. State of Illinois*, Case No. 4913, and *Jonnia Dirkans vs. State of Illinois*, Case No. 4904, this Court held that one of the primary issues to determine in a case brought under Section 8C of the Court of Claims Act was whether the claimant was innocent of the crime for which he was imprisoned. The burden is on claimant to prove by a preponderance of the evidence that the act for which he was wrongfully imprisoned was not committed by him. Claimant must prove his innocence of the "fact" of the crime.

In this case claimant seeks to prove his innocence

of the crime for which he was imprisoned by his own uncorroborated testimony to the effect that the shooting was accidental. Contradicting the uncorroborated testimony of the claimant is the testimony of Lee Berry who was called as a witness by the respondent that claimant and Myrtle Bennett had had a disagreement over money immediately prior to the shooting. The evidence further shows that claimant did not report the alleged accident to the proper authorities, but instead fled the scene of the shooting, and disposed of the weapon.

The quantum of proof, which claimant must present to this Court to prove his innocence of the crime for which he was imprisoned, and thereby entitle himself to an award of damages from the State of Illinois for time unjustly spent in prison, is greater than the proof required to convince a judge that there was reasonable doubt as to his guilt of the crime of murder. In the first instance he must prove his innocence of the "fact" of the crime by a preponderance of the evidence, while in the second instance he must only present sufficient evidence to raise a reasonable doubt of his guilt of the crime charged.

It is the opinion of this Court that claimant has failed to prove by a preponderance of the evidence that he is innocent of the fact of the crime for which he was imprisoned.

For the foregoing reasons, claimant's claim is hereby denied.

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(No. 6313—Claimant awarded \$31,750.00.)

CHISM, INC., A DELAWARE CORPORATION, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed August 16, 1967.*

DRACH, TERRELL and DEFFENBAUGH, Attorneys for Claimant.

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

**CONTRACTS**—*extra compensation allowed under.* Where contract was one based on unit price specifications, contractor is to be paid for actual amounts used whether it be more or less than total estimated by State on the Schedule of Prices.

**SAME**—*ambiguity.* Ambiguous contract will be construed most strongly against the party who prepared it, since such party is responsible for the ambiguity.

PEZMAN, J.

This claim arises out of a contract, dated October 1, 1964, between claimant and respondent, by and through the Director of the Department of Public Works and Buildings, for repairs to a bridge over the Illinois River.

The bid sheet or contract schedule of prices, which was the last page of the specifications, sets forth the items to be bid upon, and also the quantities as specified by the State of Illinois. One of the items was a steel grid floor, which was to be bid upon at a unit price per square foot. Claimant bid a unit price of \$7.15 per square foot, and, using the quantity of 7,110 square feet, as specified in the contract, arrived at a total bid for that item of \$50,836.50.

Another item on the bid sheet was lightweight concrete, which was to be bid at a unit price per cubic yard. Claimant bid a unit price of \$500.00 per cubic yard, and, using the quantity of 11.30 cubic yards, as specified in the contract arrived at a total bid of \$5,650.00 for this item.

The following special provisions of the contract are pertinent to the question presented by this case:

**“Steel Grid Floor 3”:** This item consists of furnishing, fabricating, transporting and erecting in place the concrete filled steel grid floor, including trim bars, galvanized form pans, and shop and field welding.

“The steel floor shall be a Gruelich, 3-inch concrete filled “Arma-Deck” type, or equal. The floor shall be as shown on the plans, and shall meet the requirements for design of steel grid floors as specified in Division I of the American Association of State Highway Officials Standard Specifications for Highway Bridges, Eighth Edition.

“The concrete used in filling the steel grid floor shall be a lightweight structural concrete as specified elsewhere in these special provisions.

“Payment for steel grid floor shall include the furnishing of all materials, equipment, tools, and labor necessary for the satisfactory completion of the work. Payment will be made at the contract unit price per square foot of Steel Grid Floor 3” complete in place.

**“Lightweight Structural Concrete:** This work consists of the furnishing, transporting, mixing, placing, curing and finishing of lightweight structural concrete in accordance with the applicable portions of Section 52 of the Standard Specifications and the following Special Provisions.

“Basis of Payment: This work will be paid for at the contract unit price per cubic yard, measured as above specified, for lightweight structural concrete.”

The completion of the project required the use of 63.50 cubic yards of lightweight structural concrete in addition to the 11.30 cubic yards specified in the contract. Claimant brings this action to recover \$31,750.00 for the additional 63.50 cubic yards of lightweight structural concrete used to fill the 3” steel grid floor at the contract bid price of \$500.00 per cubic yard.

Respondent contends that claimant is limited to the amount specified by the contract, and that the Constitution of the State of Illinois prohibits granting extra compensation to any contractor after service has been ren-

dered or a contract made. Respondent contends that the lightweight structural concrete necessary to the satisfactory completion of the steel grid floor is embraced within the term "all materials" appearing in that provision of the contract, which recites that:

**"Payment for steel grid floor shall include the furnishing of all materials, equipment, tools and labor necessary for the satisfactory completion of the work."**

Two witnesses appeared for claimant. The first witness was Harry J. Alton, Sr., an employee of the State of Illinois, Division of Highways for forty years, and who, from 1965 to his retirement on October 19, 1966, was the Engineer of Design for the Illinois Division of Highways. Mr. Alton testified that in his opinion claimant should be paid for the lightweight concrete. In his opinion the concrete was to be paid for separately, and was not to be considered part of the steel grid floor or incidental to the steel grid floor. Mr. Alton stated that the term "concrete filled steel grid floor" refers to a particular type of steel grid floor, there also being a type of flooring referred to as "open deck steel grid floor". Mr. Alton also testified that it would have been impossible to fill the grid deck with concrete, and then put it in position.

The other witness for claimant was Don M. Chism, President of Chism, Inc. Mr. Chism testified that it was not possible to prefabricate a steel grid floor, fill it with concrete, and install it in place. He testified that the steel grid floor must first be installed in place, and then filled with concrete. He testified that he could not alter the quantity of lightweight structural concrete specified in the contract, and that it frequently occurs that the quantities set by the State are at variance with the quantities necessary to complete the job.

Section 2.2 of the Standard Specifications for Road and Bridge Construction, commonly known as the Blue Book, recites that the quantities are only placed in the schedule of prices for comparison of bids, and are not necessarily the actual quantities to be used. Section 9.3 of the Blue Book provides that, if unit price bids are requested by the State, the contractor is to be paid for actual amounts used whether it be more or less than the total estimated by the State on the schedule of prices.

The testimony of Mr. Alton and Mr. Chism has not been refuted or contradicted by the State. It is evident that the terms of the contract are ambiguous with regard to the provisions relating to the “concrete filled steel grid flooring”. It is a settled law of construction that a contract, which is ambiguous, will be construed most strongly against the party who prepared the contract, as such party is responsible for the ambiguity. *Ekstrand vs. Severin*, 32 Ill. App. 693, and *Finch vs. McIntosh*, 171 Ill. App. 120. In this case respondent was entirely responsible for the preparation of the contract. /

It appears to the Court that the provisions in regard to the steel grid deck and the lightweight concrete are completely separate provisions in the special provisions section of the contract.

It is the opinion of this Court, based upon the unrefuted and uncontradicted testimony of Mr. Alton and Mr. Chism, the provisions of the contract, and the applicable sections of the Blue Book, that the additional **63.50** cubic yards of lightweight concrete necessary for the satisfactory completion of the contract were not incidental to the steel grid deck, and that claimant is entitled to be paid for the additional **63.50** cubic yards of lightweight concrete used at the unit price of **\$500.00**

per cubic yard, or a total of \$31,750.00. Respondent's contention that the contract was for a sum certain and that to pay claimant additional compensation would violate the Constitution of the State of Illinois is not supported by the evidence in this case. An examination of the contract and particularly the bid sheet or contract schedule indicates that the contract was one based on unit price specifications and not one for a sum certain. As stated above, the Blue Book provides that, if unit prices are requested, as they were in this contract, the contractor is to be paid for actual amounts used whether it be more or less than the total estimated by the State on the schedule of prices. Claimant used an additional **63.50** cubic yards of lightweight concrete, and should accordingly be compensated therefor.

Claimant's claim is hereby allowed in the sum of \$31,750.00.

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(No. 5338—Claimant awarded \$564.45.)

THE HOME INSURANCE COMPANY, AS SUBROGEE OF MCGUIRE EQUIPMENT COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed August 16, 1967.*

CLAUSEN, HIRSH, MILLER AND GORMAN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**LEASE—damages to leased equipment.** Where equipment was leased to respondent and evidence showed that it was returned to claimant in a damaged condition, claimant entitled to recover for necessary repairs.

PEZMAN, J.

Claimant, as subrogee of McGuire Equipment Company, seeks to recover the sum of **\$564.45**, the cost of repairing certain equipment leased by the State of Illinois Department of Public Works and Buildings, Division of Highways, from the McGuire Equipment Company. Claimant charges that said leased equipment was in the possession of the State of Illinois, and, while in the possession of the State of Illinois, was damaged on August 2, 1965 to the extent of \$564.45. Claimant alleges in clause **4** of its complaint as follows:

“4. Among the terms and conditions of said Lease Agreement is the following language, which is relevant to the present controversy: “Lessee acknowledges that the above equipment is the property of McGuire Equipment Company, Lessor herein ; that Lessee has received the equipment in good condition, and will return it in the same condition . . . . In the event the equipment is lost or damaged, Lessee agrees to pay Lessor the value thereof or the cost of repairing same, and, if Lessee is in default in rental or in any terms hereunder, Lessor may take possession of said equipment wherever located, remove the same, and Lessee shall be liable for all costs and attorney fees connected therewith.”

Subsequently claimant obtained leave to amend its complaint to add Count II alleging that a bailment existed between claimant and respondent.

On June 21, 1967, claimant and respondent, by their respective attorneys, filed with this Court a stipulation of facts, which reads as follows :

“Claimant, The Home Insurance Company, as Subrogee of McGuire Equipment Company, by its attorneys, Clausen, Hirsh, Miller and Gorman, and the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, its attorney, hereby stipulate and agree to the following facts:

“That equipment was delivered to respondent at the special instance and request of the Department of Public Works and Buildings.

“That the statements attached to the complaint as exhibit A are due and owing in the sum of **\$564.45**.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of **\$564.46**.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

From the aforesaid stipulation of facts, the record, and other matters before this Court it appears that McGuire Equipment Company did lease to the State of Illinois Department of Public Works and Buildings, Division of Highways, a piece of equipment. It further appears that said equipment was returned to the said McGuire Equipment Company in a damaged condition after it had been in the exclusive possession of the Division of Highways. It further appears that claimant, The Home Insurance Company, as insurer of certain risks on behalf of McGuire Equipment Company, was called upon, and did pay the sum of \$564.45 for repair of the aforementioned damaged equipment, and was necessarily subrogated to any right of McGuire Equipment Company to recover from respondent for such repairs.

Claimant is hereby awarded the sum of \$564.45.

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(No. 6388—Claimant awarded \$718.00.)

GUNTHERP-WARREN PRINTING COMPANY, An Illinois Corporation, Claimant, **m.** STATE OF ILLINOIS; Respondent.

*Opinion filed August 16, 1967.*

HERMAN B. GOLDSTEIN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, ~~€~~or Respondent.

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

**PEZMAN, J.**

Claimant, Gunthorp-Warren Printing Company, seeks to recover the sum of \$718.00 as payment for services rendered in the printing of 5,100 copies of "Goals", a newsletter of the Illinois Governor's Committee on Employment of the Handicapped, a Committee functioning under the Board of Vocational Education and Rehabilitation of the State of Illinois. Attached to the complaint is a copy of an invoice-voucher of the State of Illinois, marked exhibit A, and a letter from the Deputy Director of the Division of Vocational Rehabilitation, dated December 8, 1966, marked as exhibit B. The letter states in part:

"I have your letter along with the voucher in the amount of \$718.00 presented by the Gunthorp-Warren Printing Company for the printing of "Goals" in May and June, 1965. You will recall that I informed you at the time of last contact that this was a charge made in the last biennium, and could not legally be paid. I instructed you at that time to submit your bill to the Court of Claims showing the printing order number, along with other information that you might have in order to determine whether or not it will be allowed by the Court of Claims."

On June 21, 1967, a Stipulation of Facts was entered into by and between claimant and respondent, which reads as follows:

"Claimant, Gunthorp-Warren Printing Company, by its corporate officer, and the State of Illinois, by its attorney, hereby stipulate and agree to the following facts:

"That materials were delivered to respondent at the special instance and request of the Illinois Governor's Committee on Unemployment of Handicapped.

"That the statements attached to the complaint as exhibit A are due and owing, namely, \$718.00.

“That, as a result of delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of \$718.00.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

From the Departmental Report and stipulation it appears that the reason for non-payment was that the appropriation had lapsed before the statement for services rendered was presented. There is no question but that the services were rendered, and were satisfactory.

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

Claimant is hereby awarded the sum of \$718.00.

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(No. 6398—Claimant awarded \$310.00.)

VERNON J. WHITE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 16, 1967.*

VERNON J. WHITE, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**MOTOR VEHICLES—escheat of safety responsibility deposit.** Evidence disclosed that claimant was entitled to a refund of monies escheated to State pursuant to Chap. 9636, Sec. 7-603, 1965 Ill. Rev. Stats.

**DOVE, J.**

On March 23, 1967, claimant, Vernon J. White, filed a claim seeking a refund of a responsibility security bond deposited with the Secretary of State of the State of Illinois, as required by Sec. 7-204 of the Motor Vehicle Laws of the State of Illinois.

A written stipulation was entered into by claimant and respondent, which states as follows:

“That claimant, Vernon J. White, deposited with the office of the Secretary of State of the State of Illinois in accordance with Chap. 95½, Sec. 7-204, 1966 Ill. Rev. Stats., as amended, the sum of **\$310.00.**

“That on February 24, 1956 claimant was entitled to a refund of said sum, (Ill. Rev. Stats., Chap. 95½, Sec. 7-503), and was so notified by the office of the Secretary of State of the State of Illinois.

“That, as a result of the failure of claimant to file claim for refund, the funds were transferred to the General Revenue Fund on August 1, 1962.

“That claimant continues to be the sole person interested in this claim; that no assignment thereof has occurred; and that claimant is the sole owner of such claim.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

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

An award is accordingly made by this Court to claimant, Vernon J. White, in the amount of **\$310.00.**

(No. 4912—Claim denied.)

HENRY NAPUE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed October 18, 1967.*

McCoy and MINQ, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; DANIEL KADJAN and PHILIP J. ROCK, Assistant Attorneys General, for Respondent.

\* *PRISONERS AND INMATES—wrongful incarceration.* Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

*SAME—legislative intent.* The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

**DOVE, J.**

This is a cause of action brought by claimant against respondent, State of Illinois, for damages under Sec. 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine :

“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 \$15,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00; and provided further, the Court shall fix attorney’s fees not to exceed 25% of the award granted.”

On August 21, 1938, at approximately 3:00 A.M., in a Chicago cocktail lounge, a Chicago Police Officer was fatally wounded during an attempt to prevent an armed

robbery of the lounge and its patrons by four gunmen. In the melee, one of the robbers, Trussie Townsend, was killed and another robber, George Hamer, seriously wounded. In due course, Hamer was apprehended, charged with the murder of the policeman, convicted on a plea of guilty, and sentenced to 199 years in prison.

Several months later, Howard Poe was apprehended, tried and convicted of the murder of the same policeman, sentenced to death and executed. Subsequently claimant, Henry Napue, was arrested for the murder of the policeman, and on June 18, 1940, was indicted by a **Cook** County Grand Jury. Claimant entered a plea of not guilty. On August 22, 1940, claimant was found guilty of the murder of the policeman, and was sentenced to the Illinois State Penitentiary for a term of 199 years. The State's principal witness against Napue was George Hamer, who had previously pled guilty to a charge of murder of the same policeman, and who had been sentenced to the Illinois State Penitentiary for 199 years. Hamer testified at the trial that he had not been promised a reward or consideration for his testimony. Subsequent events proved that this denial was false, and that the Assistant State's Attorney who prosecuted Napue knew such denial to be false.

Thereafter, Henry Napue filed a post-conviction petition for release from prison on the ground that his conviction had been obtained by the known use of false testimony. The trial court denied Napue's petition. On appeal, the Illinois Supreme Court affirmed the decision of the trial court. On petition for certiorari, the United States Supreme Court reversed the denial of post-conviction relief, holding that the failure of the prosecutor to correct Hamer's false testimony, known to be so, de-

nied Napue due process of law, in violation of the 14th Amendment. Napue's conviction was set aside by the trial court, and the State's Attorney subsequently elected to dismiss the indictment. On March 7, 1960, Napue was released from custody, having been imprisoned since August 22, 1940.

Claimant thereafter filed this claim for compensation from the State of Illinois for "unjust imprisonment" during the period of 20 years from the date of his incarceration to the date of his release.

In order that claimant be entitled to an award from the State of Illinois for time unjustly served in prison, it is well settled that claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully in prison was not committed by him; and (3) the amount of damages to which he is entitled. *Jonnia Dirkans vs. State of Illinois*, Case No. 4904; *Munroe vs. State of Illinois*, Case No. 4913.

In the Dirkans case the Court held that a claimant attempting to recover an award for unjust imprisonment must prove his innocence of the "fact" of the crime for which he was imprisoned. The Court went on to state that in its opinion it was not the intention of the Illinois General Assembly to open the Treasury of the State of Illinois to inmates of its penal institutions by the establishment of their technical or Legal innocence of the crimes for which they were imprisoned.

Claimant called three witnesses to testify in his behalf. Stella Dowery, the mother-in-law of claimant, testified that at the time of the robbery, claimant, his wife and two children lived in the apartment house where

she was the manager. She testified that on August 20, 1938 she went to bed about 11:00 P.M., and that at that time claimant, Henry Napue, was on the premises. She stated that she was awakened at about 3:00 A.M. by one Howard Poe, and that claimant left the house with Poe.

Lenwood Dowery, a brother-in-law of claimant, testified that on August 20, 1938 he lived in the same rooming house as claimant. He stated that on August 20, 1938 he was with claimant in front of the rooming house from 11:00 P.M. until about 12:30 A.M. on August 21, at which time he went to bed. He further testified that at about 3:30 or 4:00 A.M. he was awakened by Poe who was looking for claimant. He told Poe he thought claimant was upstairs. Fifteen or twenty minutes later he said he heard someone running down the stairs.

Joseph Dowery, a brother-in-law of claimant, testified that on August 20, 1938 he lived in the same rooming house with claimant. That on August 20, 1938 he got home about 11:00 P.M., and that claimant got home about 12:00 M. or 12:30 A.M. on August 21, 1938. He stated that he played cards with claimant, claimant's wife and another girl until about 2:00 A.M., when claimant and his wife went to their apartment.

Henry Napue testified that on the night in question he played cards with his wife, Joe Dowery and another girl. That he went up to his apartment to see if he could get one of his children who had been crying to go to sleep. He stated that he fell asleep himself, and that the next thing he remembers is being awakened by Howard Poe who wanted him to help him get George Hamer to a doctor, because Hamer had been shot in a crap game. He testified that he went with Poe to take Hamer to a

doctor, and that it was not until the next morning that he learned of the robbery. The next evening claimant left Chicago, and went to Newark, New Jersey, where he remained until he was apprehended. He stated that he did not know where his wife was living at the present time, and that he had made an effort to find her, but that neither her mother nor brothers knew where she lived.

George Hamer testified on behalf of respondent. He stated that at the criminal trial of Henry Napue he had testified that Napue was an accomplice in the robbery. He further testified that at the present time he had no recollection of being at the robbery or being involved in the robbery himself, and that he had no recollection of Napue being involved in the robbery.

It must be noted by the Court that the three witnesses presented by claimant, and to which claimant is related by marriage, were not with, and did not see claimant after 2:00 A.M. on the night of the robbery. The one person who presumably could have testified as to claimant's whereabouts at the time of the robbery, claimant's wife, was not called to testify by claimant who stated that he was unable to locate his wife. The testimony of George Hamer lends no support to claimant's testimony that he was not involved in the robbery, inasmuch as Hamer testified that at this time he had no recollection that he was even involved in the robbery.

The denial of due process, which is the basis of the Supreme Court's reversal of the original criminal case, does not conclusively establish the claimant's innocence in fact of the crime for which he was imprisoned. The right of a claimant in this Court to an award under Sec. 8C of the Court of Claims Act is predicated on such in-

nocence. It is the opinion of this Court that claimant has failed to prove by a preponderance of the evidence that he is innocent of the fact of the crime for which he was imprisoned.

The claim is hereby denied.

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(No. 6432—Claimant awarded \$47.00.)

M. H. WALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1968.

M. H. WALL, Claimant, pro se.

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

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

PERLIN, C.J.

Claimant, Dr. M. H. Wall, seeks the sum of \$47.00 for dental services contracted for by the Quincy District Office of the Division of Child Welfare, Department of Children and Family Services.

The parties have stipulated that neither party objects to the entry of an order in favor of claimant and against respondent in the sum requested. It appears from the record that the sole reason for nonpayment of the bill is that funds appropriated for such payment had lapsed, and that the lapsed balance was sufficient to cover the charge in question.

Where a contract with the State has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such con-

tract; (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 ; *Gilbert-Hodgman, Inc. vs. State of Illinois*, 24 C.C.R. 509. It appears that all qualifications for an award have been met in the instant case.

Claimant is hereby awarded the sum of \$47.00.

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(No. 5434—Claimant awarded \$320.00.)

FLORENCE CRITTENTON PEORIA HOME, A Not-For-Profit Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1968.*

HEYL, ROYSTER, VOELKER and ALLEN, Attorneys for Claimant.

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

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

PEZMAN, J.

Claimant seeks to recover for maintenance and medical services rendered to Linda Jo Clark, a resident of the State of Illinois, living at Olney, Illinois, who was referred to claimant for services by the office of the Illinois Department of Children and Family Services at Olney, Illinois. The services for which the claim is filed were rendered to the subject from April 27, 1967 through June 30, 1967 at the established and agreed rate of \$5.00

per diem, and the total now claimed is \$320.00 for that period. The same remains unpaid by virtue of the fact that the appropriation had lapsed from which the statement for these services would have been paid.

A statement of facts by the Director of the Department of Children and Family Services constitutes the Departmental Report, and is the prima facie evidence in this cause. Subsequently, on the 4th day of March, 1968 a written stipulation, entered into by claimant and respondent, was filed herein whereby it was agreed that no further oral or written evidence would be introduced by either party, and that, in fact, the Departmental Report or statement of facts would be admitted into evidence in this proceedings without objection by either party.

The aforementioned statement of facts reads as follows :

“Claimant’s statement in paragraph 1 of the complaint that claimant is a not-for-profit corporation duly licensed by the State of Illinois engaged in the operation of a home to provide nursing care, maintenance and education for pregnant unmarried females in the City of Peoria, County of Peoria, State of Illinois, is correct.

“Regarding paragraph 2, maintenance and medical services for Linda Jo Clark were contracted for through our Olney District Office of the Division of Child Welfare, Department of Children and Family Services, and that these services were to be provided by claimant.

“Services were rendered to Linda Jo Clark by the Florence Crittenton Peoria Home from April 27, 1967 through June 30, 1967 at the established rate of Five Dollars (\$5.00) per diem; the total of said services rendered is in the sum of Three Hundred Twenty Dollars (\$320.00), which is now due and unpaid.

“With regard to paragraph 4 of claimant’s complaint, to the best of our knowledge this statement is true.

“The Olney District Office Supervisor, B. Michael Bequette, has stated that records in their office indicate that the bill for the above mentioned services for Linda Jo Clark was not received until September 29, 1967; whereas bills for services rendered prior to July 1, 1967, must

be presented no later than September 15, 1967, as per exhibit "A" attached to the complaint.

"As to paragraph 6 of the complaint in which claimant states that no assignment or transfer of any part or interest therein of the claim has been made, we can only state that we have no knowledge of any such assignment or transfer.

"Our investigation indicates that the charge of Three Hundred Twenty Dollars (\$320.00) appearing in this claim is legitimate, and, therefore, the claimant is justly entitled to payment of this sum.

"The statements made in paragraphs 8 and 9 of the complaint appear to be correct to the best of our knowledge.

"Funds for payment of this charge were available in the appropriation to the Department of Children and Family Services contained in Section 5 of House Bill 1394, 74th General Assembly, approved July 17, 1965. The lapsed balance was sufficient to cover the charge in question."

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Continental Oil Company vs. State of Illinois*, 23 C.C.R. 70, and *M. J. Holleran, Inc. vs. State of Illinois*, 23 C.C.R. 17.

Claimant, Florence Crittenton Peoria Home, is hereby awarded the sum of **\$320.00**.

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(No. 6437—Claimant awarded \$6034.)

MERCHANT SERVICE CO-OP, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1968.*

MERCHANT SERVICE CO-OP, Claimant, pro se.

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

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

DOVE, J.

Claimant, Merchant Service Co-op, filed its complaint in the Court of Claims on November 30, 1967 in which it seeks the sum of \$60.94 for materials furnished the Secretary of State, Drivers License Division.

A Departmental Report was filed, which stated in part: “Our records indicate that parts were received and installed. The invoice was not submitted until after the appropriation for the 74th biennium had lapsed.”

Subsequently a written stipulation was entered into by claimant and respondent, which reads as follows:

“The report of the Secretary of State (Drivers License Division) dated January 3, 1968, (a copy of which is attached hereto, marked Exhibit “A”, and, by this reference, incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the

pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$60.94**.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered. without either party being present.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. **5261**, opinion filed February **24, 1966**. It appears that all qualifications for an award have been met in the instant case.

Claimant, Merchant Service Co-op, is, therefore, hereby awarded the sum of **\$60.94**.

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(No. 6443—Claimant awarded \$102.00.)

THE FLEISCHLI MEDICAL GROUP, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 24, 1968.*

THE FLEISCHLI MEDICAL GROUP, Claimant, pro se.

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

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

PEZMAN, J.

Claimant, The Fleischli Medical Group, seeks to recover from respondent the sum of \$102.00 for services rendered upon request of the Office of the Secretary of State.

A Departmental Report of the Secretary of State, dated February 19, 1968, was filed with the Court of Claims as exhibit A, and admitted into evidence without objection by virtue of the stipulation by and between claimant and respondent filed herein on the 29th day of February, 1968.

It is clear that this is a matter of a lapsed appropriation for the statement of services of claimant was not received until the funds in the Office of the Secretary of State for the biennium when the services were rendered had lapsed. By virtue of the Departmental Report and stipulation between claimant and respondent, we find there is no question of law or fact in controversy, and claimant, The Fleischli Medical Group, is hereby awarded the sum of \$102.00.

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(No. 6466—Claimant awarded \$134.19.)

MOBIL OIL CORPORATION, A New York Corporation, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1968.*

EDWARD J. PAUL, Attorney for Claimant.

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

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

DOVE, J.

Claimant, Mobil Oil Corporation, a New York Corporation, filed its complaint in the Court of Claims on January 12, 1968, in which it seeks the sum of \$134.19 for materials furnished the Department of Conservation.

A Departmental Report was filed, which stated in part:

“I wish to certify at this time that invoice No. 12577, dated June 17, 1967, in the amount of \$134.19 was never paid by this Department, due to the failure of Mobil Oil Corporation to submit a billing in time to be processed out of 74th biennial funds.”

Subsequently a written stipulation was entered into by claimant and respondent, as follows:

“The report of the Department of Conservation, dated January 19, 1968, (a copy of which is attached hereto, marked exhibit “A” and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$134.19.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing and agree that the aforesaid order may be entered without either party being present.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials, furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Mobil Oil Corporation, a New York Corporation, is, therefore, hereby awarded the sum of **\$134.19**.

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(No. 5544—Claimant awarded \$580.00.)

WALTON SCHOOL OF COMMERCE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1968.

WALTON SCHOOL OF COMMERCE, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Walton School of Commerce, seeks to recover the sum of \$580.00 for tuition furnished to one Clayton E. Stepp, 16219 Homan, Markham, Illinois.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Walton School of Commerce, had rendered services and materials as alleged in claimant’s statement of claim.

“That there is lawfully due the claimant the sum of Five Hundred Eighty Dollars (\$580.00).

“That, as a result of delay in billing by the claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Walton School of Commerce, is, therefore, awarded the sum of \$580.00.

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(No. 5561 — Claimant awarded \$300.05.)

KANE COUNTY SERVICE COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

KANE COUNTY SERVICE COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,,  
Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Kane County Service Company, seeks to recover the sum of \$309.05 for soybean oil meal furnished to the Illinois State Training School for Boys at St. Charles, Illinois.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Kane County Service Company, had furnished soybean oil meal as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Three Hundred Nine Dollars and Five Cents **(\$309.05)**.

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Kane County Service Company, is, therefore, award the sum of \$309.05.

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(No. 4987 and 4988—Consolidated—Claims denied.)

LOUIS QUALLS and MATTHEW C. MOORE, Claimants, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed October 10, 1968.*

H. ERNEST LAFONTANT, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; DANIEL KADJAN, Assistant Attorney General, for Respondent.

**PRISONERS AND INMATES — wrongful incarceration.** Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

**SAME—legislative intent.** The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats, intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

DOVE, J.

This is a cause of action brought by claimants against respondent, State of Illinois, for damages under Sec. 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine :

All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned; provided, the Court shall make no award in excess of the following amounts: For imprisonment of five years or less, not more than **\$15,000.00**; for imprisonment of fourteen years or less but over five years, not more than **\$30,000.00**; for imprisonment of over fourteen years, not more than **\$36,000.00**, and provided further, the Court shall fix attorney’s fees not to exceed **26%** of the award granted.

Claimants, Louis Qualls and Matthew C. Moore, were jointly indicted for the crime of forcible rape of Isabel Preusser by the April Term of the Cook County Grand Jury. Both claimants entered a plea of not guilty to the charge. Claimants were tried on the charge before a jury during the month of July, 1959, and found guilty. Both claimants were sentenced to imprisonment in the Illinois State Penitentiary for a term of 25 years. Claimants subsequently filed their Writ of Error with the Supreme Court of Illinois, and, on January 20, 1961, the Supreme Court of Illinois reversed the Criminal Court of Cook County, and found:

- A. That there was no proof that the prosecuting witness was paralyzed by fear, or that she was overcome by superior strength.
- B. That there was no proof that she offered any resistance.
- C. That there was no proof of any force exerted on prosecutrix.
- D. That there was no proof that prosecutrix was afraid.

Claimants were subsequently released from the Illinois State Penitentiary having been imprisoned from July 1, 1959 to January 20, 1961.

Claimant, Louis Qualls, testified in this cause that, on April 25, 1959, at about 1:00 A.M. he went into Al's Celebrity Lounge, where Isabel Preusser was sitting with a white man at the bar. Claimant bought them both a drink. The white man introduced Mrs. Preusser as his cousin. The woman then asked claimant if he wanted some companionship, and he told her, "I told you I am in a dull mood." Claimant testified that she asked

him for \$7.00 for the man who was with her whose name was Raymond. Qualls then gave the \$7.00 to Raymond, and they left the lounge and went to Raymond's vehicle, which was parked near the corner. As Raymond started to get in the car and sit down, he saw two men that he had been talking to in the tavern. Raymond jumped out of the car, a couple of words were said, and he fled. After that the woman got out of the car, and said to Qualls "Don't leave me, I don't want you to leave me." Qualls and the woman then walked across Cottage Grove Avenue from east to west. He testified that the woman walked with him voluntarily from Cottage Grove Avenue to South **Park** Avenue, which was approximately four **blocks**. At South Park Avenue he and the woman got into a cab. In the cab claimant said to the driver, "I have been a hero, and I want you to see what I had to be hero with, what I had to defend myself with." Then he stated that he showed the cab driver a little pen knife, and at that the driver and the woman laughed. Claimant testified that they left the cab, and walked up to his apartment, rang the bell, and the other claimant, Matthew C. Moore, opened the door. The three of them then went into the kitchen. In the kitchen all three had coffee with some Scotch mixed with it. In about an hour the woman excused herself, and went into the living room-bedroom combination for about **10** or 15 minutes, and then called Qualls and said, "Well it is getting late, you had better get something started." She undressed, and got on the bed saying, "Well, I can't be here too long." Qualls then testified that he got undressed, got into bed, and had sexual intercourse with her. He stated that at no time did he threaten her, and that she undressed herself voluntarily. Later Qualls put on his trousers, and came into the kitchen. The woman followed

a few minutes later, and said, "Where's my coffee?" At that time she was completely nude. Qualls testified that the woman later left telling them that she could catch a bus home.

Claimant, Matthew C. Moore, testified that during the time the woman was in their apartment he asked her if she wanted to phone her home, and she said that she didn't. He further testified that, when Qualls went to the bathroom, she suggested to him that they go into the other room together, which they did. She kept requesting him to go to bed with her, which finally he did. He stated that he had sexual intercourse with the woman once, but that he never threatened her, struck her, or used any type of force towards her. At one time during the period in question, Moore testified that the woman came into the kitchen, and asked him if he had a cigarette, and he said, "No." He then testified that he went out to purchase some cigarettes, leaving the door unlocked. When he returned, the door was still unlocked.

Edward Day testified on behalf of claimants that he was employed at Al's Celebrity Lounge located at 823 East 39th Street, Chicago, Illinois, as a bartender and manager. He testified that at about 2:30 in the morning on April 25, 1959, a white man and a white woman came into the place and sat down. He made it a point to watch them because they were the only white people in the Lounge, everyone else being colored. Claimant Qualls came in about 15 minutes later, and joined them at the bar. The white man ordered a round of drinks, and paid for them. They sat there for about 10 minutes, then all three left. Edward Day identified Isabel Preusser as the white woman who was in Al's Celebrity Lounge on April 25, 1959.

Controverting the testimony of claimants was the testimony of Isabel Preusser who testified on behalf of respondent that on the morning of April 25, 1959, at about 2:00 A.M. she went with her husband in their automobile to 39th and Cottage Grove Avenue, Chicago, Illinois, to purchase some barbeque ribs. When they arrived at the establishment they got out of their car, and found that the place was closed. When they returned to their car two men came up to her husband's side of the vehicle, pulled him out, and said something. He pulled himself away and ran. At that time he said, "Lock the door." She then testified that Qualls came up to her side of the vehicle, and said, "I'll take you to your husband." He took her out of the car, and walked her toward a gas station where her husband had gone to call the police. He grabbed her arm while he was walking with her. She stated that she did not walk with him of her own free will. At South Park Avenue Qualls hailed a cab, which stopped. He opened the door, took her hand, and put her in the cab. When asked why she didn't speak to the cab driver about her predicament, she gave as a reason, that he was colored also, the same as Qualls. They left the cab and went to Qualls' apartment. The door was opened by claimant Moore. Inside the apartment they took her into the kitchen. They asked her to sit down, and gave her a cup of coffee, which she took because she was frightened and nervous. She told them she would like to go home, Qualls told her to go into the other room, and take her clothes off. When he arrived in the bedroom he laid the open knife on the dresser, and stood by it as she took off her clothes. He then ordered her to lie down on the bed, and he took off his clothes, and had sexual relations with her. When he finished he laid on

the bed beside her, and then claimant Moore had sexual relations with her. When he was through, Qualls again had sexual intercourse with her. Both men alternated in having sexual intercourse with her over a period of two or three hours. She testified that she did not willingly permit these acts, and that at one time Qualls hit her in the face, and threatened her that "she could easily be found cut up in an alley." She said that she was afraid to use the telephone in the apartment because there was always somebody standing near it. Also there were two knives lying in front of the telephone, a white handled one and another. She made no attempt to leave the apartment because someone was always near her. She said that she never told claimants that she did not want to have intercourse with them, but did tell them that she wanted to go home to her children, but Qualls would not listen. She said she begged claimant Moore to let her go home, and finally he agreed. She told him that she didn't have any car fare, and he gave her fifty cents. She further testified that Moore did not leave the apartment at any time while she was there, and she never asked Moore to purchase cigarettes for her. She took a bus home and found that the babysitter had taken her children to her mother-in-law. She then went to her mother-in-law's home, which was a block away, and told her what happened. She was then taken to the police station where she reported the incident.

She testified further that, when she was walking down the street with claimant Qualls, he threatened her with an open knife, which was approximately four or five inches in length.

Officer Raymond Krall, who was called to testify on behalf of respondent, stated that, on April 25, 1959, at

about 8:00 A.M., Isabel Preusser came into the Prairie Avenue Station, and reported that she had been kidnaped and raped. He and several other officers went to the house where the incident occurred, and saw claimant Moore coming down the stairs. Mrs. Preusser identified him as one of her assailants. The officers then went into the apartment, where they found claimant Qualls asleep, and arrested him. In the apartment they found a pearl handled knife, which had a blade about four inches in length.

In two previously decided cases, *Monroe vs. State of Illinois*, opinion No. 4913, and *Jonnia Dirkans vs. State of Illinois*, opinion No. 4904, this Court has held that one of the primary issues to be determined in a case brought under Section 8C of the Court of Claims Act is whether the claimant was innocent of the crime for which he was imprisoned. The burden is on the claimant to prove by a preponderance of the evidence that the act for which he was wrongfully imprisoned was not committed by him. Claimant must prove his innocence of the "fact" of the crime.

In this case claimants seek to prove their innocence of the crime for which they were imprisoned by their own uncorroborated testimony to the effect that Isabel Preusser voluntarily submitted to the acts of sexual intercourse with them, and that there was no force or threats of force exerted on Isabel Preusser.

The quantum of proof, which claimants must present to this Court to prove their innocence of the crime for which they were imprisoned thereby entitling them to an award of damages from the State of Illinois for time unjustly spent in prison, is greater than the proof required to convince a Court that there was a reason-

able doubt as to their guilt of the crime. In the first instance they must prove their innocence of the "fact" of the crime by a preponderance of the evidence, while in the second instance they must only present sufficient evidence to raise a reasonable doubt of their guilt of the crime charged.

It is the opinion of this Court that claimants have failed to prove by a preponderance of the evidence that they are innocent of the "fact" of the **crime** for which they were imprisoned. It is the further opinion of this Court that the Legislature of the State of Illinois **did** not intend, when it enacted Sec. 8C of the Court of Claims Act, that this Court make awards to claimants whose only proof of their innocence of the "fact" of the crime is their own uncorroborated testimony.

The claims of Louis Qualls and Matthew C. Moore are hereby denied.

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(No. 6299—Claim denied.)

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

*Opinion filed October 10, 1968.*

PEDDERSON, MENZIMER, CONDE AND STONER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY and ARTHUR L. BERMAN, Assistant Attorneys General, for Respondent.

**JURISDICTION—no concurrent jurisdiction.** Where claimant has an adequate remedy in a court of general jurisdiction, the Court of Claims has no jurisdiction.

PERLIN, C.J.

Claimant seeks recovery of **\$1,225.40**, which it claims is owed to it by the Illinois Public Aid Commission under its program of Assistance to the Medically Indigent Aged, on behalf of Vera Stroup, deceased.

The facts show that on March 8, **1963**, Vera Stroup, aged 77, was admitted to claimant's hospital where claimant furnished room, food, nursing, drugs, medical supplies, laboratory services, and other services until March **19, 1963** when Mrs. Stroup died. A balance of **\$1,225.40** remains unpaid for these services.

The parties stipulated that application was made by claimant to respondent for the amount claimed herein under the program of Assistance to the Medically Indigent Aged. On August **10, 1965**, notification was received by claimant from the Winnebago County Department of Public Aid that said Vera Stroup had been found not to be eligible for assistance. The notification consisted of a letter to Attorney Dale Conde, which stated:

**"Dear Mr. Conde:**

**We received your letter of August 2, 1965. According to our findings there were adequate resources to meet Mrs. Stroup's medical expenses at that time, assistance was denied.**

**Yours very truly,  
(Mrs.) Alice M. Gleason,  
Superintendent**

**Winnebago County Department  
of Public Aid"**

The complaint filed in the instant case on April **6, 1966** appears to be the next action taken by claimant.

Respondent alleges that the Court of Claims does not have jurisdiction to hear this action since the proceeding is in the nature of a claim under the program of Assistance to the Medically Indigent Aged. Respond-

ent claims that proceedings of this nature are governed by Article V of the Public Assistance Code, (Chap. 23, Sec. 561, et seq., Ill. Rev. Stats.) and the Administrative Review Act.

The procedure for obtaining assistance granted to or in behalf of a medically indigent aged person is clearly set forth in the Illinois Public Assistance Code, Chap. 23, 1965 Ill. Rev. Stats.

The pertinent provisions of this Act are as follows:

Sec. 564 states that the "amount and nature of the assistance granted to or in behalf of a medically indigent aged person under this Article shall be determined by the County Department in accordance with the standards, rules and regulations of the State Department. . ."

Secs. 802 through 805 provide that an application for assistance shall be filed with the County Department of the County in which the applicant resides, and that the County Department shall decide whether the applicant is eligible for assistance. The County Department must notify the applicant of its decision within ten days after it is rendered. In the event the assistance is denied, the County Department shall also notify the applicant of his right to appeal to the State Department within sixty days after the decision. The State Department shall review the case upon receipt of the application, and shall permit the applicant or recipient to appear in person and to be represented by counsel. A fair hearing must be held. The appeal is heard in the County where the applicant or recipient resides. The decision shall be rendered within 60 days from the date of the filing of the appeal.

Sec. 816 states that "The provisions of the 'Ad-

ministrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof . . . shall apply to and govern all proceedings for the judicial review of final administrative decisions of the State Department under this Article."

The Administrative Review Act, 1965 Ill. Rev. Stats., Chap. 110, Sec. 268, provides that jurisdiction to review final administrative decisions is vested in the Circuit Courts, and that the action may be "commenced in the Circuit Court of any county in which (1) any part of the hearing or proceeding culminating in the decision of the administrative agency was held, or (2) any part of the subject matter involved is situated, or (3) any **part of the transaction, which gave rise to the proceedings** before the agency occurred. The court first acquiring jurisdiction of any action to review a final administrative decision shall have and retain jurisdiction of the action until final disposition thereof . . ."

There is no evidence that the remedies set out in the above statutory provisions were ever pursued. Not only has claimant failed to exhaust its administrative remedies, but the Act specifically provides for final review by the Circuit Court. It has been an established rule of this Court that, where the claimant has an adequate remedy in a court of general jurisdiction, the Court of Claims has no jurisdiction. (*B & F Hi-Line Construction Corporation vs. State of Illinois*, 21 C.C.R. 189; *Denton vs. State of Illinois*, 22 C.C.R. 83).

In *Barrett vs. State of Illinois*, 13 C.C.R. 13, 17, the Court stated :

"The Legislature in creating the Court of Claims did not intend that it should usurp the powers of, contradict, or compete with courts of general jurisdiction. *Moline Plow Company vs. State of Illinois*, 5 C.C.R. 277."

Since the question of the Court's jurisdiction may be raised at any time (*Atkinson vs. State of Illinois*, 21 C.C.R. 429), the claim is hereby denied.

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(No. 6335—Claimant awarded \$2,400.00.)

MARIE B. BACHMEIER. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed October 10, 1968.*

HOWARD R. WEISS, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY and ETTA J. COLE, Assistant Attorneys General, for Respondent.

**HIGHWAYS—maintenance of parkway.** Where evidence showed that respondent negligently maintained parkway where claimant fell, in that it permitted or constructed a deep, narrow hole or sewer on the premises, and allowed it to remain for a considerable period of time without barricades or warning signs, and the hole was practically invisible in the night time when the accident occurred, recovery will be allowed.

PERLIN, C.J.

Claimant, Marie Bachmeier, seeks judgment in the sum of \$7,500.00 for injuries suffered on August 16, 1964, when she stepped into a hole in a parkway, which was owned, controlled and maintained by respondent, fracturing her foot and injuring her leg.

Claimant contends that respondent so negligently, carelessly and unlawfully maintained the area or parkway where she fell that it permitted or constructed a deep, narrow hole or sewer to be on the premises for a considerable time without any barricade or warning, and that the hole was for all practical purposes invisible in the night time when the accident occurred.

Before claimant may recover, she must prove (1) her freedom from contributory negligence, (2) respondent's negligence, and (3) that respondent's negligence was proximate cause of the injuries suffered.

Claimant testified as follows: that at the time of the occurrence she was 51 years old, and that she worked then as she had for 16 years as a bakery saleslady at a salary of \$65.00 per week; that on the evening in question, at about 9:30 P.M., after it was dark, she and her husband arrived in the vicinity of the occurrence to attend a Schwaben picnic, an annual affair in the local German community; that the picnic was held in a private picnic grove, known as Erhart's Grove, then located several blocks west on Talcott Road, from where her car was parked on Dee Road, just south of Talcott. There was no closer parking place, according to the claimant, since there were between 10,000 and 15,000 people attending the picnic.

There was no sidewalk at the place where the car was parked. Claimant testified that pedestrians had to walk on the parkway. When claimant returned to her car about 12:30 A.M., she walked in the parkway, and her leg went into a deep hole about up to her knee causing the injury in the instant case. Claimant testified that it was dark, and there was no artificial lighting in the area, the only light being a traffic light. She stated that she had never seen the hole before. The next morning she was taken to Illinois Masonic Hospital. Her right leg was put into a cast for four weeks, and she was unable to work for nine weeks.

George Penge, a witness called in behalf of claimant, testified that he was familiar with the conditions at the spot in question, having visited the Park Ridge Animal

Hospital at the corner of the intersection. He testified that many pedestrians used the area in question, including people going to the animal hospital and the picnic grove, and people living in the area. He stated that the pedestrians must use the parkway, or else they would have to walk on the road and take a chance of getting hit. Mr. Penge identified photographs of the hole submitted by claimant, and he further testified that the hole had been in the parkway for a least a year prior to August 16, 1964. He described the hole as being about seven to nine inches in diameter and about one to two feet deep. Mr. Penge further testified that he had never reported the existence of the hole to the authorities. He had driven by the parkway in the evening, and had observed people walking there late at night especially when the picnic grove was open.

Respondent presented no witnesses, and submitted no exhibits or Departmental Report to rebut claimant's testimony. Respondent's failure to offer any evidence in rebuttal to claimant's proof, including respondent's failure to offer even the Departmental Report referred to by respondent in its brief, leaves the Court no alternative but to conclude that respondent has, in fact, no such rebutting evidence. The Court must conclude, therefore, that claimant has proved the negligence of respondent by a preponderance of evidence.

Respondent has not shown that it exercised reasonable care in maintaining its property. Photographs of the area submitted by claimant reveal that the hole was located in a grassy area, which had to be regularly mowed by respondent's employees. The existence of the hole for at least a year prior to the accident in an area, which is regularly covered by employees of respond-

ent in their maintenance duties, establishes that respondent knew or should have known of the dangerous condition, which threatened pedestrians who regularly walked on the parkway in question.

Claimant's injury was diagnosed as a fracture of the right foot, and she has not yet been discharged from medical care. As above stated, she was unable to work for a period of nine weeks, and still suffers pain and discomfort.

Claimant is hereby awarded the sum of \$2,400.00.

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(No. 5347—Claim denied.)

THOMAS PERKINS and BERTHA VAUGHN, Claimants, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed October 10, 1968.*

MEYER AND MEYER, Attorneys for Claimants.

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

**HIGHWAYS—*duty to warn motoring public.*** The State of Illinois is not an insurer of the safety of all persons using its highways; it is required only to maintain adequate signs warning of a particular danger.

**SAME—*evidence.*** Where evidence clearly indicated that accident resulted solely from negligence of claimant, an award will be denied.

DOVE, J.

This cause of action arises out of a single-car accident on August 9, 1966 on U. S. Route No. 460 near the Cahokia Downs Race Track in St. Clair County, Illinois. The complaint consists of two counts, one on behalf of Thomas Perkins, the driver of the car, and one on behalf of his passenger, Bertha Vaughn. The negligence

alleged consists of failure to give proper and adequate warning of the presence of barricades at the construction site. Each count seeks Ten Thousand Dollars (\$10,000.00) for personal injuries, medical and hospital expenses.

Both claimants were employees of Jefferson Barracks Veterans Administration Hospital in St. Louis, Missouri, and at 8:30 A.M. on the morning of August 9, 1966 had gone to Centralia, Illinois, taking an automobile owned by Bertha Vaughn there to be repaired. Centralia was also the home of the mother of claimant, Thomas Perkins. They stayed in his mother's home visiting her until around 8:00 P.M. when they left Centralia.

At the time of the accident there was repair work being carried out on Route No. 460. The point at issue is whether or not there was proper and sufficient warning of the presence of the barricades to the traveling public. Both claimants testified that there were no signs flashing. Claimant, Thomas Perkins, testified that he came upon them suddenly, and there were "a lot of barricades", but he didn't have any idea how many. He did not strike the barricade, but was forced to turn off the highway to avoid striking it, rolling his car over. The force of the impact dazed him, rendering him temporarily unconscious, and he testified further that a Volkswagen is hard to handle once control is lost, and when he swerved to avoid hitting the barricade it started to roll over and he tried to bring it back straight. This happened at 10:30 P.M. in the evening, and claimant Perkins had his headlights on. Bertha Vaughn supported Mr. Perkins in his testimony. They both sustained injuries, and were treated by Dr. Weeks who also testified as to the injuries.

The first witness testifying for respondent was Charles Reynolds, a highway construction foreman for the day labor employed by respondent, having been employed by respondent for fourteen years. He testified that construction on Route No. 460 had been taking place about five weeks prior to August 9, 1966, and consisted of repair work of expansion joints at each end of a bridge, that there were barricades all along the area, which would have been all along the lane nearest the center median at the east end of the bridge. There were nine barricades before the bridge was reached, and on the bridge itself five barricades. These were fence barricades made of two by sixes, twelve feet long, with flasher lights fastened on the two by **six** timbers. The flasher lights along the top of the barricade and the end barricade had eleven flasher lights, the one after that three, the third one two, and the next one three, following that sequence. In diameter the flasher lights were eight inches with a six and one-half volt battery. He testified further that these were the regular standard flashing lights used for construction work, and that, as a driver approached the construction area, he would have encountered a sign advising of the road construction ahead about 1200 feet from the barricaded area. This is a four by four sign, white with black two-inch lettering with a flashing signal. The next sign claimant would have encountered was one advising that the left lane, the one nearest the center median, was closed. This was a four by four sign, yellow with black letters and with a flashing signal. Reynolds stated further that a third sign would have been encountered by claimant advising of a single lane ahead. This sign was the same size, not reflectorized, but with a flashing light on it. There was a "35 m.p.h." sign under each of the three

signs described. The signs were 400 feet apart, and the barricades were eighty feet apart. Route No. 460 consisted of four lanes, two lanes each for east and west-bound traffic. Reynolds further stated that, when he left the construction site at 5:30 P.M. on August 9, 1966, the signs and barricades were in place, and the flashing lights were working. Reynolds' testimony was supported by Lowell Hewlett, a maintenance laborer for respondent. He also left the construction site at approximately 5:30 P.M.

At the time of the accident James Sinnet was employed as a filling station attendant on Route No. 157, which is a highway running generally north and south under the bridge, and was able to see from the filling station the construction area and the scene of the accident. He testified that on the night of the accident and at the time of the accident the lights in the barricades were clearly visible from his station. He was on his way back into the station when he heard the crash, and he looked in the direction of the construction area, and the lights were clearly visible to him. He did not see any cars after he heard the crash, but someone came to the station looking for flares who thought there was a car over the embankment. He did not go to the scene of the accident.

Respondent, State of Illinois, is not an insurer of the safety of persons using its highways. It is only required to maintain adequate signs warning of the particular danger, *Grant vs. State of Illinois*, 21 C.C.R. 563; *Williams vs. State of Illinois*, 21 C.C.R. 597; *Bloom vs. State of Illinois*, 22 C.C.R. 582. In the case of *Williams vs. State of Illinois*, 21 C.C.R. 603, the Court in denying the claim said:

“It is difficult for us to understand why they did not see any signs of the construction work being done in and around the approach to the bridge for a reasonable distance, which should have been visible to them in time to bring their car under control, and *thus enabled them to avoid striking the hole in the pavement*. Furthermore, in deciding the question of contributory negligence, whether one of law or fact, we cannot ignore the Departmental Report as to the extensiveness of the construction of said highway and approaches to the bridges; \* \* \*” (Emphasis added)

“It is, therefore, our opinion that if claimants ignored the signs of warning, did not follow the detour as posted, and drove on the pavement, which had not cured, and in the vicinity where the approach to the bridge was being repaired, they did so at their peril, and assumed all the risks and hazards incident thereto. The record is silent as to anything being said, or any warning or protest being offered by Inez Williams who was riding as a passenger with her husband. Furthermore, we are of the opinion that, as to her injuries, and the injuries and property damage suffered by her husband, Erwin Williams, it was his negligence, which was the proximate cause of their personal injuries and property damage.”

From the evidence it is clear that the accident resulted solely from the negligence of claimant, Thomas Perkins. There is nothing in the record that would indicate that the passenger, Bertha Vaughn, said anything or offered any protest in the way the car was being driven.

The claims of Thomas Perkins and Bertha Vaughn are, therefore, denied.

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(No. 5521—Claimant awarded **\$340.64.**)

CHARLES M. KENNEY, ADMINISTRATOR OF THE ESTATE OF JERRY DEAN SEIPEL, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed October 10, 1968.*

CHARLES M. KENNY, ADMINISTRATOR OF THE ESTATE OF JERRY DEAN SEIPEL, Claimant, pro se.

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

PERSONAL SERVICES—lapsed appropriation. Where evidence showed that the sole reason for nonpayment of claim relative to services rendered by deceased employee was due to the fact that the appropriation had lapsed, an award will be allowed.

PERLIN, C.J.

Claimant seeks payment of the sum of \$340.64 for services rendered the Department of Public Health.

The parties have stipulated that the report of the Department of Public Health be admitted into evidence in the proceeding without objection by either party. It includes the following statements :

“Jerry Dean Seipel, deceased, was employed by the Department of Public Health at the time of his death on October 11, 1966. He had 11½ days of accumulated vacation, which calculated on ~~the~~ basis of his monthly salary entitles his estate to the sum of \$340.64. Payment for this accumulated vacation has not been made, since no one furnished this Department with a properly executed small estates affidavit, letters of administration, or letters testamentary prior to May 16, 1968.

“The files of the Department do not contain any information relating to an assignment of this claim or any portion thereof, or any instance therein, to any person. It appears from the files of this Department that claimant is entitled to payment as set forth in his complaint.”

The stipulation further states that neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$340.64.

It appears that the sole reason for nonpayment of the claim herein is because of a lapsed appropriation.

Claimant is hereby awarded the sum of \$340.64.

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(No. 5537—Claimant awarded \$65.31.)

PUNCH BROWN GARAGE, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed October 10, 1968.*

PUNCH BROWN GARAGE, Claimant, pro se.

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

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

DOVE, J.

Punch Brown Garage, claimant, seeks judgment in the sum of \$71.94 for materials furnished to the Department of Public Works and Buildings, State Highway Building, Paris, Illinois.

A stipulation was entered into by claimant and respondent as follows :

“The report of the Department of Public Works and Buildings, dated August **19, 1968**, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof), shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$65.31**.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services are satisfactorily

performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contract was entered into; and (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Punch Brown Garage, is, therefore, awarded the sum of \$65.31.

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(No. 5546—Claimant awarded \$1,800.00.)

XEROX CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1968.

XEROX CORPORATION, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Xerox Corporation, filed its complaint against respondent for the sum of \$1,800.00 for services rendered the Division of Highways.

A stipulation was subsequently entered into by claimant and respondent as follows:

“That claimant, Xerox Corporation, had completed the services as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of One Thousand Eight Hundred Dollars (\$1,800.00).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Xerox Corporation, is, therefore, awarded the sum of \$1,800.00.

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(No. 5556—Claimant awarded \$300.00.)

ST. JOSEPH’S COLLEGE, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

*Opinion filed October 10, 1968.*

ST. JOSEPH’S COLLEGE, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,  
Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks payment of \$300.00 from respondent

for tuition owed on behalf of Robert S. Berkowicz. The request for the funds was made from the Board of Vocational Education and Rehabilitation, Division of Vocational Rehabilitation, and was refused on the grounds that funds appropriated for such payments had 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. *Gilbert-Hodgrnan, Inc. vs. State of Illinois*, 24 C.C.R. 509. It appears that all of the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$300.00.

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(Nos. 5085-5089, Consolidated—Claimants awarded \$37,300.00.)

WILLIAM TYLER, an emancipated male of the age of nineteen years, and WILLIAM TYLER, a minor, by ANDREW SMITH, his Father and Next Friend; JOHN T. WHITE.; IRENE JACOBS; CHERYL JOHNSON, a minor, by IRENE JACOBS, her Mother and Next Friend; ANDREW J. SMITH, Administrator of the Estate of L. C. TYLER, Deceased; Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

R. W. HARRIS and WHAM AND WHAM, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; C. ARTHUR NEBEL and LEE D. MARTIN, Assistant Attorneys General, for Respondent.

**HIGHWAYS—*duty to warn public.*** The State of Illinois has a duty to the traveling public to maintain adequate and proper warning signs or devices alerting the public to unusual and dangerous conditions ahead.

**SAME—*notice.*** Evidence disclosed that respondent had ample notice that posted signs were inadequate to apprise motoring public of particular danger of rock wall.

**EVIDENCE—*burden of proof.*** In order to recover, a claimant must prove by a preponderance of the evidence: (1) his or her freedom from contributory negligence; (2) the negligence of respondent; and (3) that the negligence of respondent was the proximate cause of the injuries complained of.

**SAME—*contributory negligence.*** Contributory negligence of driver not imputed to injured, innocent passengers.

PERLIN, C.J.

Five claimants seek recovery of money damages arising out of an automobile accident on December 3, 1961. They allege that respondent was negligent in the maintenance of a public highway, and failed properly to warn the traveling public of a rock wall at the end of a "T" intersection of Routes Nos. 37 and 57 in Williamson County, Illinois, a few miles south of Marion, Illinois.

Claimants, William Tyler, John T. White, Irene Jacobs, and Cheryl Johnson, sustained personal injuries, and L. C. Tyler, the wife of William Tyler, was killed while riding in an automobile driven by John T. White. They had been traveling in a southerly direction along Route No. 37 at approximately 6:00 A.M. in foggy weather, when the car crashed into a rock wall.

The complaints in the consolidated cases charge that during the year of 1960 a new highway, designated Interstate Route No. 57, was constructed, which ran generally parallel and to the west of State Route No. 37 in Williamson County. At a point about eight miles south of

Marion, Illinois, an access highway to Interstate Route No. 57 was constructed, which ran in a southeasterly direction connecting State Route No. 37 and Interstate Route No. 57. After the construction of the access road the course of Route No. 37 was changed so that it intersected the access route at a right angle, or in a "T" intersection.

The new portion of State Route No. 37 and the access road at the "T" intersection were cut through a hill. The complaints charge this left high banks on either side, and a bank of solid rock at the end of the "T" intersection directly facing the southbound traffic on State Route No. 37. As a result of the new construction, according to claimants, State Route No. 37 was changed to make a sharp turn to the right a short distance before it came to the dead end bank of solid rock.

Claimants contend that, on December 3, 1961 at approximately 6:30 A.M. and before daylight, John T. White was driving his 1959 Ford vehicle in a southerly direction along State Route No. 37 at a reasonable rate of speed unknowingly approaching the "T" intersection, and that by reason of the sharp turn, lack of proper warning devices, fog, and nearness of the dead end intersection, he was unable to stop prior to crashing into the rock wall at the "T" intersection.

Claimants further contend that prior to this collision respondent had had actual notice of the hazardous condition created by the construction and maintenance of the highway without adequate warning devices by reason of occurrence of at least 35 accidents from the date the highway opened for public use in November, 1960 until the date of the accident involved in the instant case. The previous accidents at this location resulted

in injury to numerous persons and property, and the death of three other persons, according to claimants.

Specific acts of negligence alleged are that respondent failed to give sufficient warning of the sharp right turn, and the fact that the road came to a dead end only **300** feet beyond said curve ; that it permitted said curve and dead end road to exist and remain in such condition when it knew of the many accidents causing injury and death to the users prior to December 3, 1961; that it failed to establish and maintain adequate and proper warning signs or devices at a sufficient distance north of the sharp curve and dead end intersection to provide advance warning to southbound traffic of its approach; that it negligently and carelessly constructed said highway and the Route No. 57 approach when it knew, or should have known in the exercise of ordinary care, that the highway, as constructed, created an undue hazard for the traffic, which had to use it.

The damages sought are as follows: Case No. 5085, William Tyler, for personal injuries, loss of earnings and medical expenses, \$20,000.00; Case No. 5086, John T. White, for personal injuries, medical expenses and loss of earnings, \$10,000.00 ; Case No. 5087, Irene Jacobs, personal injuries and medical expenses, \$20,000.00 ; Case No. 5088, Cheryl Johnson, a Minor, by Irene Jacobs her Mother and Next Friend, personal injuries and medical expenses, \$20,000.00; and, Case No. 5089, Andrew J. Smith, Administrator of the Estate of L. C. Tyler, deceased, and for wrongful death on behalf of her husband and minor daughter, \$25,000.00.

In order to recover, each claimant must prove by a preponderance of the evidence (1) his or her freedom from contributory negligence; (2) the negligence of

respondent ; and, (3) that respondent's negligence was the proximate cause of the injuries claimed herein.

The evidence established that the "T" intersection was backed by a rock wall, approximately 10 to 15 feet high, which faced traffic traveling southbound on Route No. 37. The wall was located approximately 21 feet from the edge of the pavement. At the approach to the intersection was a "Stop Ahead" sign with "1,000 feet" beneath it, a flashing yellow light mounted on top of another "Stop Ahead" sign on the left side of the road, a "37" sign backed by a directional arrow, and "Stop" signs on each side of the road at the intersection itself, all controlling southbound traffic. Immediately in front of the rock wall was a guard rail, and a rectangular sign with directional arrow and the number "37" on a backing of black and white stripes. An overhead red signal, which was supposed to flash at the intersection for southbound traffic, was also installed.

The driver of the car, John T. White, testified that he was enroute from Benton Harbor, Michigan to Arkansas. He had been over Route No. 37 about a year before the accident, but the intersection had not been in existence at that time. The weather was foggy and wet, He was driving at a speed of 40 or 45 miles per hour. His headlights were on dim, White stated, because that way the light was on the ground. When they were on bright, according to White, he could not see because of the fog. As he approached the scene of the accident, he saw no signs, but did see a blinking yellow light as he started around the curve. He stated that he expected to find a crossroad. When he saw the blinking light he slowed down, but he saw nothing as he rounded the curve, and went back to his normal speed. Suddenly he saw

the embankment across the road, but could not stop. He applied his brakes, and skidded into the wall. He was able to get help at a nearby house, and returned to the scene of the accident. White testified that at no time did he see a red light flashing overhead.

William Tyler testified that he was riding in the rear seat of the car with his wife, L.C., and daughter, 18 months old. Because of the waist-high fog he saw no signs until they reached the sign, w'hich said "37", after the brakes were applied. The fog was not thick close to the pavement, and they could see the road.

The other two passengers, Irene Jacobs and her daughter, were riding in the front seat.

Larry Marvin Kimmel, a farmer who lived near the intersection, testified that one of the occupants of the car called at his house for help immediately after the accident. He went to the car, and described the scene as right after daylight and foggy. He did not remember whether the red light was flashing. He estimated that about 39 to 40 cars had driven into the wall since the opening of the intersection in November, 1960. According to Kimmel, the curve leading to the intersection is gradual, but it still "comes **up** on you awful fast." He further testified that, since the installation of rumble strips (corrugated gravel in the road) subsequent to the accident in the instant case, there have been no more similar accidents. The strips were placed about 1,000 feet from the stop sign.

William Carlton, Jr., a Marion city policeman, testified that he went to the scene of the accident just as the last ambulance was leaving, and noticed that the red flasher light at the intersection was not operating. He

recalled making a statement to a boy standing there that “It is a damn shame this light isn’t working. This might have been avoided.” He described the light as red facing the southbound traffic, and amber in the other two directions. None of the lights were working.

James Wilson, who operated a Funeral Home in Marion, testified that his ambulance picked up the occupants of the car in the instant case, and later prepared L. C. Tyler’s body for burial in Arkansas. He further testified that his funeral home had been called to prior collisions on several occasions where drivers had gone into the rock wall.

The evidence further revealed that three deaths had occurred at the intersection prior to the accident in the instant case, one in February, 1961, and two on July 21, 1961. Although evidence of prior accidents is not competent to show negligence, it is admissible to establish that respondent had actual or constructive notice of the dangerous conditions, which existed. (*Budek vs. Chicago*, 279 Ill. App. 410; *Sheppard vs. City of Aurora*, 5 Ill. App. 2d 12; *Wells vs. Kenilworth*, 228 Ill. App. 332.)

Testimony concerning the inquest into the accident on July 21, 1961 revealed that the red light was not flashing at the intersection when that accident occurred, yet started working as an operator of a wrecker, Robert J. Parks, was retrieving the car. At that time witnesses called the attention of the State Patrolman to the fact that the light was not working. Parks and his companion, O. L. Norris, testified that the light flashed for about 20 to 25 minutes, but, as they left, they noticed it had stopped working again. Witnesses Park, Norris, and State Trooper Gardner also testified at the July inquest that the light was not working at the time of the accident.

Williamson County Coroner, Paul Litton, stated that on July 25, 1961 he conducted an inquest on the bodies of the two people killed in the accident on said date. The verdict of the Coroner's Jury admitted in evidence reads as follows :

"In the matter of the Inquisition of the body of W. J. Pryor and Nora Kemp, deceased, held at Marion, Illinois on the 25th day of July, 1961.

We the undersigned jurors sworn to inquire into the deaths of W. J. Pryor and Nora Kemp, on oath do find that they came to their death by injuries received in an automobile wreck at the intersection of State Routes Nos. 37 and 57. *The jury recommends that the proper authorities check the lighting system to see that it is in working order, and that this hazard be eliminated immediately.*" (Emphasis supplied.)

The Coroner then notified Paul Powell, Speaker of the Illinois House of Representatives of the verdict. Speaker Powell then sent a letter, dated October 31, 1961, to Mr. Ralph Bartlesmeyer, Chief Highway Engineer of the Division of Highways, which stated :

"Dear Ralph :

I am enclosing a copy of a Coroner's Inquest mailed to me by Paul C. Litton, Coroner of Williamson County. You will note that W. J. Pryor and Nora Kemp came to their death by injuries received in an automobile wreck at the intersection of State Routes Nos. 37 and 57. I am sure you will not want this to happen again, and will check the lighting system, if this has not already been done.

Sincerely yours,  
Paul Powell"

A letter, dated November 9, 1961, addressed to Paul Powell, states as follows:

"My dear Mr. Speaker:

This will acknowledge receipt of your letter of October 31 to which was attached a copy of Williamson County Coroner Paul C. Litton's report on a fatal accident, which occurred at the intersection of Illinois Route No. 37 with Interstate Route No. 57 on July 21.

A complete investigation was made at this location by representatives of our Carbondale District Highway Office. They have informed me that, to the best of their knowledge, the overhead flashing signal

was in operation at the time of the accident. They have based this statement on a report made by a State Trooper who investigated the accident in which he indicated that the red flashing light was operating, and that the unit on Route No. 37 drove past the stop signs and flashing red signal, striking a rock embankment with the front end of his vehicle. My report states that representatives of our Carbondale District are constantly on the alert checking traffic control devices. The District Office and State Highway Police are immediately notified when either a stop sign or other control is knocked down, or a traffic signal is out of operation, and replacements are made at once.

I wish to thank you for calling this situation to my attention.

Very truly yours,  
**R. R. Bartelsmeyer**  
 Chief Highway Engineer”

Mr. Vernon Kupel, Engineer in charge of traffic operations for the district where the accident occurred, testified that he had received a copy of the letter from Paul Powell to Mr. Bartelsmeyer, and made an investigation. His investigation consisted solely of looking at the police accident report of the July 21st accident. The policeman’s statement in the report noted: “Unit 1 drove past stop signs and flashing red signal, and struck rock embankment with right front end.” The State Trooper who wrote the report was not called to testify in the instant case.

Kupel further testified that, prior to the accident in the instant case, his division was concerned with accidents involving vehicles going into the wall, and that they had given consideration to additional warning devices at the intersection approach. He stated that his department had received complaints by persons concerning the frequency of accidents at that location, and that he had reports of nine accidents involving running into the wall or the ditch in his files from the State Highway Police.

According to Kupel, before construction of this in-

tersection, Route No. 37 extended straight south where it would have intersected with Route No. 57 in the form of a "Y". He testified that the Manual of Uniform Traffic Control Devices for Streets and Highways, published by the Department of Public Works and Buildings, Division of Highways, and placed in the hands of the Districts for use in erecting signs, did not call for the use of a "T" road intersection sign. He stated that they were bound to follow the manual for all general instances, but that signs have been designed to meet special conditions with the approval of the Springfield office. At the intersection in question, according to Kupel, they considered only standard signs. His testimony established that pavement markings would have been permissible.

Keith Mahan, Engineering Technician for the Division of Highways, testified that in August, 1961 he was sent by Mr. Kupel to draw a sketch of the signs approaching the intersection. He further testified that the signs approaching the wall were changed after the accident, because they could possibly lose their reflectorization.

Carol Sorgen, who made photographs of the scene of the accident for claimants, testified that, on December 5, 1961, two days after the accident, he took pictures of the scene, and did not think that the "Stop Ahead" signs were reflectorized. Sorgen also noticed that the "Stop Ahead" signs had "10/58" on them, which he thought were dates. The numbers were never explained by respondent.

Louis Von Behren, Traffic Field Engineer for the Division of Highways, testified that no individual was responsible for the operation of the red light flashing

signal, but that all of the technical employees were collectively responsible. He further stated that he was once called when the overhead light was out, and went to fix it. It had needed a new bulb. According to Von Behren, the Department requires reflectorization of all "Stop Ahead" signs, but that reflectorization deteriorates over a period of time. He remembers discussing the fact that "35 accidents" had occurred at the wall, although he did not think there was evidence of that many. He also stated that, since the installation of rumble strips, they have noticed a decrease in accidents.

Assistant District Engineer, Thomas O. Cromeenes, stated that the location in question was the only place in the District, which had a rock wall at the end of a "T" intersection.

Jessie W. Childers, Group Superintendent of the Central Illinois Public Service Company, testified that his company furnished electricity to the State of Illinois for the red flasher signal. He further stated that an examination of his records on December 3, 1961 showed no interruption of service. There was no record of interruption of operation of electrical energy during July 20, 21 and 22, 1961. Respondent failed to offer any testimony as to whether or not the light was in fact working at the time of either the accident in question or the one in July. It was not established that the sole criterion of whether the light was operating was one of electrical energy. In fact, respondent's own witness testified that on one occasion the bulb was burned out. There was no rebuttal to claimants' witnesses who testified that the light was not working.

Respondent cites the case of *Shirar, Admr., Etc. vs. State of Illinois*, Case No. 5124, to the effect that a

red light was not required by statute at the intersection. The question is not whether a specific sign is required, but whether respondent exercised reasonable care in warning the public of the danger on the highway. It is the conclusion of the Court that reasonable care was not exercised in this instance.

The evidence adduced is, in the Court's opinion, insufficient to rebut the direct testimony establishing the fact that the overhanging red light was not, in fact, operating at the time of the accident, and that it had had a history of sporadic inoperation.

Respondent contends that the sole proximate cause of the accident was that the driver proceeded past six signs warning him of his duty to stop at the intersection, and that his failure to heed the signs caused the accident and resulting injuries to himself and his passengers.

The State of Illinois owes a duty to the traveling public to maintain adequate and proper warning signs or devices alerting the public to the unusual and dangerous conditions ahead. (*Mammen vs. State of Illinois*, 23 C.C.R. 130; *Bovey vs. State of Illinois*, 22 C.C.R. 95). There is no question but that respondent had ample notice that the signs, which were posted, were woefully inadequate in apprising the motoring public that a "T" intersection, backed by a lethal 10 foot high rock wall, stood beyond the curve, which was marked only by "Stop Ahead" and the usual curve signs. Although claimant's photographer testified that the "Stop Ahead" signs were not reflectorized two days after the accident, respondent never established that the signs were, in fact, adequately reflectorized to be visible to the motorist traveling in darkness or fog. In fact, respondent's witnesses testified that signs do tend to lose their reflectorization

after a period of time, and that from all indications these signs might have been standing since October, 1958.

In *Mammnen vs. State of Illinois*, 23 C.C.R. 130, recovery was granted because the State did not give adequate warning of a discontinued roadway. The Court stated at page 135:

“From all the evidence in this case, we find that respondent was negligent in failing to properly inform the motoring public of the barricade’s existence and the dead end of the road. Regardless of whether Mr. Mammen saw the ‘No Outlet’ sign or whether he did not, that sign was clearly inadequate as a warning that he would be confronted with a low barricade, which blended into the landscape, and could not be readily seen in time to avoid colliding with it. The evidence clearly reflects that no warning of any kind was given by respondent as to the existence of this barricade.

“This situation comes within the purview of *Bovey vs. State of Illinois*, 22 C.C.R. 95, wherein we allowed a recovery based upon the insufficiency of the signs to warn the motoring public of a particularly dangerous condition. The rule there announced is that, although the State is not an insurer of the safety of persons in the lawful use of its highways, it is nevertheless under a duty to give warning by the erection of proper and adequate signs at a reasonable distance of a dangerous condition of which the State had notice either actual or constructive. We hold that, under the conditions involved in this case, a sign stating “No Outlet” is wholly insufficient to advise the motoring public of the barricade involved and the abrupt ending of a State highway. 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.”

In the instant case, it was established that there were no signs to warn the motorist of the particular danger of the rock wall. The only sign, which might have warned a motorist traveling in darkness or heavy fog that he must stop, a flashing red light, was not in operation at the time of the accident. The failure of the red light to operate at all times had been forcefully brought to the attention of respondent’s agents as early as July, 1961, over four months before the accident in question, yet no action was taken by respondent. Even

personal intervention of the Speaker of the Illinois House of Representatives requesting a check of the lighting system and a specific recommendation by a Coroner's Jury to this effect brought no reasonable attempt to remedy the undisputed fact of the erratic operations of the flashing red light. Not one investigator was dispatched to examine the light. Not one employee was specifically assigned to keep the light in operation, and, after "35 accidents and three deaths" in less than a year, not one step was taken to change the obviously inadequate warning system, or the obviously dangerous rock wall intersection. Reasonable care was in no way exercised by respondent.

Although the rumble strips, which have now decreased the accident rate at the intersection, may not have been available, there were many alternative precautions such as flares, operating red lights, luminous pavement markings, and warnings of the specific danger, which should have been utilized as a result of respondent's actual notice of the dangerous trap it had created.

It is the conclusion of the Court that claimant, John T. White, has not adequately proved his freedom from contributory negligence in that the speed of 40 to 45 miles per hour under the visibility conditions described by the witnesses herein would appear excessive. Although he expected to find a crossroad after seeing the yellow light, he did not decrease his speed for any appreciable time. This fact, however, does not detract from respondent's negligence, which also contributed to the accident. Therefore, recovery by the innocent injured passengers shall be allowed. (*Hargrave vs. State of Illinois*, Case No. 4992). In such a situation, liability

is joint and several, and recovery may be had against either negligent party.

L. C. Tyler, 23 years old, died from injuries suffered in the accident 37 hours after she was admitted at the Marion Memorial Hospital. She was pregnant at the time. Her surviving husband, William Tyler, was 18 years old at the time of the accident, and her daughter, Sandra Marie Tyler, was 18 months old. L. C. Tyler did not work for wages, but kept house for her husband and child. Claimant for the benefit of the survivors of L. C. Tyler is Andrew J. Smith, the Administrator of her Estate. Since substantial damages must be presumed where the surviving spouse and lineal kindred survive, Andrew J. Smith, as Administrator of the Estate of L. C. Tyler is awarded the sum of \$20,000.00.

Claimant, Irene Jacobs, suffered a fracture of the acetabulum without displacement, and the latest x-ray showed a complete healing of this fracture with full normal range of motion. She had aching in the hip after walking four or five blocks. She also suffered a fracture of the left forearm involving both bones with displacement, and open reduction had to be performed. An intramedullary nail was passed through the ulna and a radius plate was used for fixation. The fixation devices were removed, and x-rays taken in September, 1963 showed good alignment. Her doctor concluded that there was full range of motion with no muscle atrophy in both the wrist and arm. She also suffered a laceration resulting in a disfiguring scar running across both eyelids and over the bridge of her nose, described as "moderately severe" by the doctor. She had a fractured rib, which caused her difficulty in breathing during treatment. There is no question but that she had extensive pain and suffering while recovering from the

injuries, that she had to use crutches, that she was bed-fast in the hospital for three weeks and at home for a month and a half, and that her residual permanent condition consists of the disfiguring scar and pain after walking a long distance. The sum of \$7,000.00 is hereby awarded to Irene Jacobs.

Claimant, Cheryl Johnson, 18 months old at the time of the accident, had a dislocation fracture of her left ankle from which she fully recovered. She was in a cast, and also had lacerations, which resulted in disfiguring scars still visible in September, 1963. There was a scar on the upper lip near the angle of the mouth, one-half inch long extending diagonally toward the cheek. Cheryl Johnson is hereby awarded \$3,300.00.

Claimant, William Tyler, had a skull fracture and swelling over the right eye, although he was conscious when first seen by the doctor. There was no injury to the brain. There was a fracture to the ends of the radius and ulna. It was reduced, and a plaster cast applied. In September, 1963, he had a 15" limitation of flexion in his wrist, and a small amount of loss of rotation of the forearm. The pronation, which is with the palm down, was diminished by 15°, and the supination, which is with the palm up, was diminished by about 30". The doctor described these injuries as permanent. William Tyler is hereby awarded the sum of \$7,000.00.

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(No. 6182—Claimant awarded \$10,000.00.)

HERMAN PARHAM, Claimant, OS. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

NORMAN NELSON, JR., Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; PHILIP J. ROCK, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES — wrongful incarceration. Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

SAME—legislative intent. The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

**PEZMAN, J.**

Claimant seeks to recover from the respondent, State of Illinois, for damages under Sec. 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine:

All claims against the State for time unjustly served in prisons of this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned ; provided, the Court shall make no award in excess of the following amounts: For imprisonment of five years or less, not more than \$15,000.00; for imprisonment of 14 years or less but over five years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00; and provided further, the Court shall fix attorney’s fees not to exceed 25% of the award granted.

Claimant, Herman Parham, was arrested on February 6, 1959, and indicted on March 13, 1959 on the charge of armed robbery. Claimant was tried for this crime on October 20, 1959, and a jury found him guilty, and sentenced him to serve from twenty to forty years in the Illinois State Penitentiary. Claimant subsequently prosecuted a timely writ of error to the Supreme Court of Illinois, and the Attorney General of the State of Illinois, on his motion, confessed error of the Criminal Court of Cook County.

On May 28, 1964, Parham was retried on the origi-

nal indictment, and, on June 1, 1964, a jury, after hearing all the evidence, found him not guilty. It was stipulated by the parties hereto that the time claimant served in the Penitentiary of the State of Illinois was from November 20, 1959 until October 8, 1963.

Otto Rossner, the victim of the crime for which claimant was tried and found not guilty, testified that Parham robbed him of money on February 5, 1959 at about 4:15 P.M., while keeping him captive in his home, and that, when he saw his assailant for the first time, he had four pieces of tape on different parts of his face. Mr. Rossner testified that his assailant remained in his house and kept him captive until about 6:30 P.M., and that during the period of his captivity he saw the face of his assailant without the tape on one occasion for a very short space of time.

Otto Rossner further testified that he identified claimant as his assailant from a lineup in the Robbins Police Station the following day. He further stated that he testified at both of claimant's criminal trials, and at both trials identified Parham as his assailant. At the hearing before the Commissioner of this Court, Otto Rossner positively identified claimant as the man who assaulted and robbed him.

Claimant, Herman Parham, denied his guilt of this crime of armed robbery at both trials, at a preliminary hearing, and also at the hearing before the Commissioner for the Court of Claims. Claimant testified that he was at a club in the earlier hours of the day in question in the company of other persons. He left this club in the company of a William Moore and an Aaron Stout at about 5:30 P.M., and went home. He left home between 5:30 and 6:00 P.M. after seeing and talking to his land-

lady, and then he went back to the club where he again saw Mr. Moore. He left the club in the company of Mr. Moore at about 7:00 P.M., and was with Mr. Moore until about midnight in various villages in Illinois and Indiana.

Claimant's landlady, Bessie Moran, testified that she talked to Parham on the day of the crime at about 5:00 P.M., and that she saw him leave his apartment at about 5:30 or 6:00 P.M. Bessie Moran further stated that she testified at both of claimant's criminal trials.

Charles Drake appeared as a witness for claimant, and testified that on the day of the crime he was across the street from the home of the victim, and at about 4:00 P.M., or thereafter, he saw a man, known to him to be named Trotter, coming out of the victim's house. Mr. Drake further testified that he did not see claimant at the house. Drake testified that he later talked to Lieutenant Pennix, informed him of this incident, and named Trotter.

William Hargrave was called as a witness by claimant, and he testified that he was in the police line-up with the claimant on February 6, 1959. Hargrave testified that, when the victim was asked if he could identify anyone in the line-up, he answered, "No." He further testified that claimant was then singled out by the police, and, when Rossner was asked if he could recognize claimant as his assailant, he answered that he could not identify claimant as his assailant, and stated that the man who committed the crime was taller and had a scar. Hargrave also testified at both trials.

William Moore, who did not testify at the first criminal trial in 1959, but who did testify in the second crimi-

nal trial in 1964, was called as a witness by claimant. Moore testified that he was at a card club with claimant and a Mr. Stout in the afternoon hours of the day in question, and left the club at about 4:35 P.M. with claimant and Stout in Moore's car. Moore testified that Stout was let out of the car first, and claimant was let out at or near his house. Moore testified that he saw claimant again at the club at about 5:50 P.M., and that they remained together until approximately 1:30 A.M. the next morning. Claimant was out of Moore's sight for approximately 50 minutes. Moore stated that he testified at claimant's second criminal trial.

Claimant, Herman Parham, testified as a witness in his own behalf, and stated that he did not commit a robbery and an assault against Otto Rossner on February 5, 1959, the crime for which he was arrested, tried, and convicted, and for which he was later retried and found to be innocent of. He testified that at the time of the robbery he was in his room at 13820 Central Park Avenue, Robbins, Illinois, which is some distance from where the robbery and assault is alleged to have occurred. He further testified that, prior to his imprisonment, he was a construction worker earning approximately \$20.00 a day. He was imprisoned in the State Penitentiary for approximately four years as a result of the conviction for which he has filed this claim.

In order that claimant be entitled to an award from the State of Illinois for time unjustly served in prison, it is well settled that claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed by him; and (3) the amount of damages to which he is entitled. *Jonnia*

*Dirkans vs. State of Illinois*, Case No. 4904; *Munroe vs. State of Illinois*, Case No. 4913; *Henry Napue vs. State of Illinois*, Case No. 4912.

In the Dirkans case, this Court held that a claimant attempting to recover an award for unjust imprisonment must prove his innocence of the "fact" of the crime for which he was imprisoned.

Otto Rossner testified that his assailant was in his house from about 4:15 until 6:30 P.M. William Moore testified on behalf of claimant that he drove claimant to or near his rooming house at about 4:35 P.M. on the day in question, that he later saw claimant at the card club at about 6:00 P.M., and, that they remained together until about 1:30 A.M. the following morning. Claimant's landlady, Bessie Moran, testified that she talked to claimant at about 5:00 P.M., and that she saw him leave his apartment at about 5:30 P.M. on the day in question. William Hargrave, who testified on behalf of claimant, stated that Otto Rossner could not identify claimant in the police line-up, and that when claimant was singled out by the police Rossner stated that he could not identify claimant as the man who committed the crime, and that his assailant had been taller and had a scar. Charles Drake testified that on the day in question he saw a man, known to him to be named Trotter, coming out of the victim's house at about 4:00 P.M., but that he did not see claimant with whom he was acquainted at the house of the victim.

To rebut the testimony of claimant and his witnesses, respondent relies on the testimony of the victim of the crime, namely, Otto Rossner. Otto Rossner admits that when he saw his assailant for the first time he had pieces of tape on his-face, and that he caught only a

very quick glance of his assailant's face without the tape on. There is no substantiation of Rossner's testimony that he identified claimant as his assailant from the police line-up.

It is the opinion of the Court that claimant has satisfied his burden of proof, and has proved by a preponderance of the evidence that he is innocent of the "fact" of the crime for which he was imprisoned. Claimant has proved by a preponderance of the evidence that the time served in prison was unjust, that the act for which he was wrongfully imprisoned was not committed by him, and the amount of damages to which he is entitled.

It is the opinion of this Court that claimant be granted an award pursuant to Sec. 8C of the Act creating the Court of Claims in the sum of \$10,000.00.

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(No. 5217—Claim denied.)

MARY FRANCES THOMAS, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

**Opinion filed November 12, 1968.**

JOSEPH M. TAUSSIG, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN and MORTON L. ZASLAVSKY, Assistant Attorneys General, for Respondent.

**STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—doctrine of implied contract to pay for services rendered—not applicable to State.** While it is true that, when one furnishes material or labor for another, and there are no circumstances showing a different intent on the part of the parties to the transaction, the law will raise an implied contract that the recipient of the labor or material will pay the fair and reasonable value of the same, this doctrine is not applicable to a sovereign State, the respondent herein.

SERVICES RENDERED—*inmate* cannot recover for services. An inmate of a State charitable institution cannot recover for services rendered during the period of confinement in such institution. ✓

DOVE, J.

Mary Frances Thomas, claimant, is seeking judgment against the State of Illinois in the amount of \$8,470.00 for services allegedly performed by her as a clerk-typist, while she was a patient at the Chicago State Hospital.

The Departmental Report, which was filed in this case, gives a short history of claimant as follows:

“According to our records, the patient was first admitted to the Chicago State Hospital on October **31, 1953**. She was committed as mentally ill on October **29, 1953** to the Psychopathic Hospital of Cook County. Her diagnosis upon admission at the Chicago State Hospital was Schizophrenic Reaction, Chronic Undifferentiated Type with Paranoid Tendencies.

“On August **20, 1956**, patient worked in the Public Health Officer’s Office as an Industrial Assignment.

“On May **23, 1958**, patient was transferred to the Tinley Park State Hospital. Records from the Tinley Park State Hospital state that on April **21, 1959** patient worked in the office of the Volunteer Service as a clerk-typist, an Industrial Assignment, part of patient’s treatment.

“On April **22, 1959**, patient was transferred back to the Chicago State Hospital. Records dated January **23, 1962** stated that Miss Thomas has worked in ‘the Chaplain’s office for about six months.’ The kind of work performed included ‘typing, filing, taking messages, and miscellaneous work around the office.’ On the same date John H. Reynolds, Chaplain Coordinator of Protestant Services, wrote to Miss Ruth Espe, Industrial Therapist, recommending that Miss Thomas be hired as an ‘Institutional Helper’ in a secretarial capacity for the Chaplain’s office. This recommendation was considered and discussed. However, it is not customary for Chicago State Hospital to employ former patients, but rather encourage, help, and support them toward finding a place in the community once they have gained enough stability within the hospital setting. This was the case with Miss Thomas, so exploratory steps were initiated toward this aim.

“In March, **1963**, Miss Thomas was referred to the Rehabilitation Department. ‘It was felt that she could benefit from an inter-

mediate work situation, i.e., as a period for increasing her self-confidence, and as a test of her stability to work outside.' Thus she was referred to Civil Defense for a period of approximately four months. In September, 1963, an evaluation of Miss Thomas' performance at Civil Defense was made. It was stated that the patient 'did quite well working in clerical skills. She terminated at Civil Defense on this date, a discharge planning was pending.' On September 16, 1963, Miss Thomas was granted a Conditional Discharge to Self, as Improved. On January 15, 1964, Miss Thomas' Conditional Discharge was changed to Absolute Discharge as Recovered."

The issues in this case are framed by three paragraphs in claimant's complaint, which are denied by respondent:

"Between to-wit the first day of August, 1961, and to-wit the first day of June, 1963, inclusive, and while claimant was a patient at the Chicago State Hospital, the claimant at the instance and request of the Department of Mental Health of the State of Illinois performed certain services.

"The value of the services performed for and at the request of the Department of Mental Health of the State of Illinois is \$385.00 per month, or a total of \$8,470.00, as detailed in the attached Bill of Particulars.

"Claimant is justly entitled to the amount herein claimed from the State of Illinois or the appropriate State Agency after allowing all just credits."

Dr. Albert Kunschner, the physician in claimant's ward, testified that he went on various occasions to the personnel office of the hospital to see about putting Miss Thomas on the payroll. On numerous occasions he talked to Mr. Hurd, the Director of Personnel, and recommended employment as a part of her treatment, but that Mr. Hurd advised him that there were no funds available for such employment. Chaplain Paul N. Munson at the hospital also testified that claimant was very depressed and despondent because she was not being paid for her work; that he had discussed the matter of claimant's employment with Dr. Kunschner and Mr. Hurd, and that Mr. Hurd advised him that claimant

would have to receive an Unconditional Discharge before she could be put on the payroll.

Claimant contends that in Illinois there are statutory provisions, which indicate a legislative intent and history that the Director of the Department of Mental Health had the power to employ claimant or other persons in a similar status, and thereby become liable for payment for such services rendered. "Each department is empowered to obtain necessary employees, and, if the rate of compensation is not otherwise fixed by law, to fix their compensation subject prior to July 1, 1956 to Civil Service Laws in force at such time, and on or after July 1, 1956 subject to the provisions of the 'Personnel Code', enacted by the 69th General Assembly." (Chap. 127, Sec. 20, Ill. Rev. Stats.)

The record is clear that, in spite of repeated efforts made by the doctors and the chaplain on claimant's behalf, she was not put on the payroll either as a patronage or a merit system employee. The record further discloses that claimant worked as a clerk-typist in the chaplain's office during the period from August 1, 1961 through June 1, 1963.

In the case of *Maibauer vs. State of Illinois*, 4 C.C.R. 115, the Court, in denying a former patient of a State institution any compensation for services rendered during the period of confinement, said:

"We do not think there is any force to the argument that claimant is entitled to recover for services he claims to have rendered while an inmate of the State Hospital. There is no authority in law for payment for such employment."

And in the case of *Kough vs. Hoehler*, 413 Ill. 409, the court stated:

"The Mental Health Code makes no provisions for allowing any

credit for the labor of patients against the charges assessed. It has been generally held that, where a statute requires that the patient, his estate or his relatives pay the cost of his maintenance in the State Hospital, and there is no express statutory provision for deducting the value of any labor performed by the patient, no deduction can be allowed.”

The claimant further contends that she may be entitled to recover in quantum meruit, for the reasonable value of services rendered by her to the chaplain. This contention was considered in the case of *Dutton vs. State of Illinois*, 16 C.C.R. 64, and the Court there held that, where claimant furnished services and labor for an agency of the State, and admitted he ‘was not an employee of the State, the Court recognizes that the law will raise an implied contract, that the recipient of labor or materials will pay the fair reasonable value of the same, but where the defendant is the sovereign State, this doctrine does not apply.

We are of the opinion that claimant’s services should be considered as incidental to her commitment to the hospital, and not as a basis for compensation.

It is, therefore, the order of the Court that claimant’s claim be denied.

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(No. 6221—Claimant awarded \$12,000.00.)

DARLENE MARTS, a Minor, by Alexena Marts, her Mother and Next Friend, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

DAVIDSON, PAVALON AND SCHULTZ, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN and SHELDON RACHMAN, Assistant Attorneys General, for Respondent.

STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—*duty* to public. The State owes a duty to the public to exercise reasonable care in maintaining and supervising its parks.

**SAME-negligence.** Evidence showed that respondent was negligent in failure to take precautions to prevent minor from falling into a pit of burning leaves.

PERLIN, C.J.

Claimant Darlene Marts, a Minor, represented by Alexena Marts, her mother, seeks recovery of \$25,000.00 for injuries suffered when the claimant fell into a pit of burning leaves at the Stephen A. Douglas Memorial Park at 35th and Leif Erickson Drive in Chicago, Illinois.

The evidence presented establishes the following facts:

On Sunday, October 13, 1963, at about 3:00 P.M., claimant, Darlene Marts, aged 6½ years, went with her uncle, Gordon Widlund, her sister, Marie, aged 8 years, and her brother, Jerry, aged 10 years, to the Stephen A. Douglas Memorial Park. While the children were playing in the park Darlene slipped into a hole of hot ashes, and was seriously burned on her legs.

Darlene, who was 9 years old at the time of the hearing, testified that she saw ashes in the hole but no flames. There was nothing around the hole, no barricades or logs, and the custodian, Herman Williams, employed by the State of Illinois Department of Conservation said nothing to them while they were in the park. Darlene further testified that there was water coming from a hose near the hole, which made the grass near

the hole slippery, and caused her to slip into the hole. She was pulled out of the hole by her uncle who poured water on her, and she was subsequently taken to Michael Reese and Children's Memorial Hospitals. She stayed in Children's Memorial Hospital for five weeks. She was in first grade at the time of the accident, and had to repeat the first grade. She further stated that she had been to the park three or four times before the day she was hurt, and had never seen the hole before, although she had played in the area where the hole was located.

Interrogatories established that the hole in question was dug by Herman Williams around October 10th or 11th, and a fire was lit in the hole on October 12, 1963.

Herman Williams testified as follows: His duties were to take care of the park grounds, and assist and lecture the visitors. The park is open from 9:00 A.M. to 5:00 P.M., and during that time he does not do maintenance work. Maintenance work performed after working hours includes the raking and burning of leaves. He dug the hole in question after 5:00 P.M. on October 10, 1963. Williams described the hole as five feet in diameter, and about six or seven inches deep. He put up a barrier around the hole, which consisted of dead logs about two feet high with six baskets around the hole, and a sign, which read, "Leaves Burning, Keep Away." The sign had a green background with orange letters, was about two feet high, and was nailed to a plank about five feet high. The sign was not removed between October 10 and October 13. After burning leaves on October 12, 1963, he raked the hole to see that there were no leaves burning or smoking. He further stated that George Harper, the man who installed the sprinkler sys-

tem, helped him put up the barrier. The day of the accident he had reprimanded the children for jumping in the flowers, and had told the man accompanying them that there was a trash hole where leaves were burned. On cross examination, Williams stated that the park is open to the public, and, when people are in the park, they are allowed to wander around the grounds. After he raked the leaves on October 12, 1963 he did not put any water into the hole, but there was water running from a hose, which was placed 50 feet from the hole. The circle of logs were two and a half feet from the edge of the hole, and the baskets were up against the logs. He did not have to move the baskets to put leaves in the hole, but just threw the leaves over the baskets and logs. He further testified that, after the child was burned, the logs were in the same position.

His deposition stated that he knew that there were smoldering hot ashes in the hole on the morning of Sunday, October 13, 1963, when he checked the fire. The report filled out by Mr. Williams the day of the occurrence did not mention a warning sign or a verbal warning.

George Harper testified that he assisted Mr. Williams in erecting a barricade around the hole in question on October 10, 1963, but that on Sunday, October 13, 1963, he did not notice the sign or the logs, and did not have occasion to observe the hole. He further stated that the baskets did not completely surround the hole, and the logs were only in front of the hole.

Gordon Widlund testified that he had driven claimant, claimant's mother, sister and brother to the park, and that claimant's mother went to visit her oldest son at St. Joseph's Home for the Friendless across from the park while he took the children to the park. He made

paper airplanes for the children, which they were sailing. He was about **25** feet from Darlene when he saw her go into the hole. He described the hole as about **4** or **5** feet in diameter, and about three or four feet deep. Widlund further testified that there was nothing around the hole but a bush and a tree. There was a wastebasket further away from the hole, but no barricades or signs. He stated that he did not converse with the caretaker at any time prior to seeing Darlene in the hole, except that he warned him to keep off the flowers, and that no one in the park told him about the hole, the ashes, or fire in the hole. The wet area around the hole extended to the hole from about twenty feet away.

Claimant charges that respondent breached its duty to exercise ordinary care for the safety of claimant by negligently creating a dangerous condition upon its premises, which foreseeably exposed children of tender years to serious injury. Claimant further contends that a minor under the age of seven years cannot, under law, be found to be contributorily negligent.

In the opinion of this Court, claimant has proved by a preponderance of the evidence that respondent's negligence caused the injuries suffered in the instant case. The State owes a duty to the public to exercise reasonable care in maintaining and supervising its parks. *Murray vs. State of Illinois*, **24 C.C.R. 399**; *Kamin vs. State of Illinois*, **21 C.C.R. 467**; *Stedman vs. State of Illinois*, **22 C.C.R. 446**.

Respondent did not dispute that the accident occurred in an area of the park open to the public during the hours the public was invited. That the precautions allegedly taken to prevent a child from falling into the trap of smoldering leaves were insufficient was proved

by the fact that a child did indeed fall into the hole. The verbal warning, which the caretaker testified he gave, was uncorroborated by the facts of the case, and was contradicted by the other witnesses. He did not mention a warning in the report of the accident, which was written on the day of the occurrence.

The remaining question concerns the extent of damages suffered by claimant as a result of her injuries. Dr. B. Harold Griffith, a plastic and reconstructive surgeon, testified that he treated claimant, and first examined her after her admission to Children's Memorial Hospital in October, 1963. She had "burns of the hands, legs and the left foot, which appeared at the time to be deep second-degree areas of third-degree." The hands had a superficial second degree burn. The doctor explained that a third degree burn is a full-thickness destruction of the skin, and, in some instances, tissue beneath the skin. Fifteen days after her admission to the hospital the dead tissue was cut away, and subsequently a skin grafting operation was performed on both legs whereby "under general anesthesia the full thickness burns of the lower extremities were covered with skin grafts taken from the left thigh." Dr. Griffith further testified that he last examined claimant on December 4, 1965, and at that time she had scars on both lower extremities, which were permanent. The doctor also explained that injury to scar tissue may cause difficulty because a wound would heal slowly and be an ulcer. He testified that a child may at times outgrow the scars resulting in a limitation of the growth of the subcutaneous tissue and muscle bone. Claimant was examined on behalf of respondent by Dr. John A. Boswick of the Cook County Hospital. His report, admitted into evidence as respondent's exhibit, stated that "the cosmetic or func-

tional results could not be improved by further surgery at this time.”

The evidence further shows that claimant was released after five weeks at Children’s Memorial Hospital, but remained an out-patient of the Plastic Surgery Clinic until September 9, 1964. The ‘hospital bill was \$1,923.61, and was paid by the County of Cook, Department of Public Aid, of which \$1,907.47 has been paid. Photographs admitted into evidence show claimant’s legs as covered with extensive scar tissue. The prognosis is that there is little which can be done to relieve this condition. The child was also set back one year in school as a result of the accident.

Claimant, Darlene Marts, is hereby awarded the sum of \$12,000.00.

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(No. 5283—Claim denied.)

RICHARD PIGOTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

DUSENBURY and LUCAS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY and ETTA J. COLE, Assistant Attorneys General, for Respondent.

**HIGHWAYS—*duty of State.*** The State of Illinois is not an insurer of every accident that occurs on its public highways, but does have the duty to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

**SAME—*notice.*** Before the State can be held liable for injuries caused by a defective condition, it is necessary that there be evidence showing that the State had actual or constructive notice of the alleged unsafe condition.

**SAME—SAME—evidence.** Where evidence showed that the lapse of time between discovery of defect and the accident itself was only a matter of from  $\frac{1}{2}$  to 1 hour in duration, it was held that respondent did not have sufficient actual or constructive notice of the defect so as to be held responsible for failing to correct the same.

PEZMAN, J.

Claimant is seeking recovery for property damage and personal injuries suffered by him resulting from negligence on the part of respondent, State of Illinois.

Claimant alleges that the State negligently allowed and permitted a certain portion of U. S. Route No. 45, approximately four to six miles north of Kankakee, Illinois, to remain in such a state of disrepair as to create a hazard, and further alleges that this hazardous condition remained uncorrected after the State had actual notice of the existence of the hazardous condition. Claimant further alleges that the hazardous condition in question was the proximate cause of an accident in which he was involved, resulting in personal injury to himself and damage to his property.

The transcript of evidence discloses that on April 12, 1965, at approximately 3:30 A.M., Trooper William James, while on duty as an Illinois State Policeman, was patrolling U. S. Route No. 45 when he observed a large piece of concrete, broken and jutting slightly upwards, at a location about one and three-fourths miles south of the Manteno Road on Route No. 45, approximately four to six miles north of Kankakee, Illinois. Trooper James called the Kankakee Sheriff's office, and advised them to contact the State Highway Maintenance Department. The Sheriff's office subsequently advised Trooper James that they had contacted one of the highway foremen, and the highway condition would be repaired immediately.

On the same date at approximately 4:00 A.M., claimant, a resident of Bourbonnais, Illinois, in the County of Kankakee, State of Illinois, was traveling north on U. S. Route No. 45 at a speed of 45 m.p.h. with his headlights on. At a point four to six miles north of Kankakee, or one and three-fourths miles south of the Manteno Road on said U. S. Route No. 45, claimant saw a semitrailer truck approaching in the opposite lane heading south on U. S. Route No. 45. Claimant dimmed his headlights because of the oncoming truck, and suddenly, without warning, he noticed something loose on the highway, and then observed a large hole in the pavement. Claimant hit the hole in the road while going at approximately 45 m.p.h., which caused him to lose control of his vehicle. Claimant's car finally came to rest in a plowed field, approximately fifty feet north of the hole, with the rear end of the car against a utility pole, and his car facing south. As a result of the accident, claimant's car was damaged, and claimant suffered injury to his person.

The testimony herein showed that claimant had been traveling this portion of U. S. Route No. 45 five days a week for about a period of five years going to and from work, the last time being on April 9, 1965, three days before the accident, at which time he observed no defects in the highway.

After the accident, claimant went over to look at the hole in the highway, and observed a loose slab of concrete about six to eight inches in width lying on top of the highway near where it previously had been lodged, and he saw a hole at that point about eight to ten inches deep from which the concrete slab had been dislodged.

At approximately 5:03 A.M. on the date of the ac-

cident, Trooper William James received a call of an accident at the location one and three-fourths miles south of the Manteno Road on U. S. Route No. 45, and observed a large piece of concrete that had been knocked out of the hole. Trooper James indicated that the broken piece of concrete measured about two feet by two feet by six inches in width.

Claimant contends that the State of Illinois was negligent in allowing the hazard, which was created by a piece of the concrete roadway erupting, and thereby causing a hole in the highway, to exist, and by failing to warn of such hazard. Claimant further contends that the State of Illinois had actual knowledge of the hazard.

The State of Illinois is not an insurer of every accident that occurs on its public highways. *Riggins vs. State of Illinois*, 21 C.C.R. 434; *Gray vs. State of Illinois*, 21 C.C.R. 521; *Terracino vs. State of Illinois*, 21 C.C.R. 177. Respondent, State of Illinois, does have the duty to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highway shall not exist. *Couchot vs. State of Illinois*, 21 C.C.R. 157; *Thompson, et al, vs. State of Illinois*, 24 C.C.R. 219.

In *Di Orio, et al, vs. State of Illinois*, 20 C.C.R. 53, this Court applied the same rules of law pertaining to notice in suits against the State involving defects in the highways as pertained to suits against municipalities involving injuries caused by defective conditions in sidewalks. The law in Illinois is clear that, before a municipality can be held liable for injuries caused by the defective condition of a sidewalk, it is necessary that there be evidence showing that the city had *actual* or *construc-*



occurred at approximately 4:00 A.M. the same morning, or about one-half hour later. It appears from the evidence that, at the time Trooper James observed the defect in the highway, it was not a dangerous hole in the highway eight to ten inches deep, but rather was a broken portion of concrete jutting slightly upwards.

It is the opinion of this Court that the lapse of time between the actual discovery of the defect and the accident itself was only one-half to one hour. Therefore, respondent did not have sufficient actual or constructive notice of the defect so as to be held responsible for failing to correct the same. To hold the State of Illinois responsible for accidents resulting from defects in the highways of which it had such short actual or constructive notice would have the effect of making the State of Illinois an insurer of all those using its highways, and this clearly is not the law in the State of Illinois. The lapse of time between the discovery of the defect and the accident did not afford respondent adequate time to reach the site and commence repairs, or erect proper warning signs in order to prevent the accident in question.

Claimant's claim is hereby denied.

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(No. 5467—Claimants awarded \$377.93.)

**MARTHA ALICE BURKE** and **BLANCHE F. HUNT**, surviving heirs of **MADGE CLARK**, Deceased, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed November 12, 1968.*

**GEORGE B. LEE** and **W. CLIFTON BANTA**, Attorneys for Claimants.

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

*PERSONAL SERVICES—lapsed appropriation.* Evidence showed that claimants were entitled to an award for vacation and work days accumulated at the time of the death of State employee.

DOVE, J.

Claimants, Martha Alice Burke and Blanche F. Hunt surviving heirs of Madge Clark, deceased, filed their claim against respondent for the sum of \$377.93.

A Departmental Report was filed herein, which provides in substance that Madge Clark was employed as a Cottage Parent I at the Illinois State Training School for Girls at Geneva, Illinois on the day of her death, June 13, 1966, at a salary of \$425.00 per month. Time keeping records at the Training School show that Mrs. Clark had 16½ work days of vacation time due and 10½ work days of accumulated time due at the time of her death. This computes to the following amounts of calendar payroll time and salary according to the method used in June and July, 1966:

$$\begin{array}{r} 17/30 \text{ of } \$425.00 = \$240.83 \\ 10/31 \text{ of } \$425.00 = \$137.10 \\ \hline \$377.93 \end{array}$$

A stipulation was entered into by claimants and respondent as follows :

“The report of the Youth Commission, dated March 4, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimants and against respondent in the sum of **\$377.93.**”

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

We are of the opinion that the claimants are justly entitled to the amount claimed from the Youth Commission.

Claimants, Martha Alice Burke and Blanche F. Hunt, surviving heirs of Madge Clark, deceased, are awarded the sum of \$377.93.

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(No. 5502—Claimant awarded **\$234.75.**)

CITY OF HIGHWOOD, A MUNICIPAL CORPORATION, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

THEODORE A. PASQUESI, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, 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, City of Highwood, seeks payment of \$234.75 for services rendered under a contract with the State of Illinois, Department of Public Works and Buildings, Division of Highways. The agreement in which respondent undertook to pay to claimant for maintenance of city streets provided for repairs, snow removal, and all other items of maintenance expense except street

cleaning. Pursuant to said agreement, claimant presented statements of account in the sum requested, but was refused because of the closing of the Biennium Appropriation. The parties have stipulated that the sum requested is lawfully due claimant.

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. *Gilbert-Hodgman, Inc., a Corporation, vs. Xtate of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$234.75.

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(No. 5519—Claimant awarded \$630.00.)

JACKSON WELDING SCHOOL, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1968.*

JACKSON WELDING SCHOOL, Claimant, pro se.

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

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

DOVE, J.

Claimant, Jackson Welding School, seeks to recover

the sum of \$630.00 for tuition furnished to one Leonard Herbert Bess, 1630 Watch, Springfield, Illinois.

A stipulation was entered into by claimant and respondent as follows :

“The report of the Board of Vocational Education and Rehabilitation, Division of Vocational Rehabilitation, dated August 13, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$630.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Jackson Welding School, is, therefore, awarded the sum of **\$630.00.**

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(No. 5350—Claimant awarded \$565.00.)

ERNEST VALERIO, Claimant *us.* STATE OF ILLINOIS, Respondent.

*Opinion filed December 17, 1968.*

S. J. HOLDERMAN, Attorney of Claimant.

WILLIAM G. CLARK, Attorney General ; ETTA J. COLE, Assistant Attorney General, for Respondent.

**NEGLIGENCE — *Effective maintenance of Illinois and Michigan Canal bank.*** Where evidence showed canal bank was negligently maintained, water in canal kept at a dangerous high level, and rainfall not unprecedented, State could have anticipated washout of defective bank with resultant injuries to adjacent properties.

**PEZMAN, J.**

This cause of action is brought by claimant, Ernest Valerio, a dealer in bait fish, against respondent, State of Illinois, for damages occasioned by the escape of water from the Illinois and Michigan Canal on May 12, 1966. The complaint charges that respondent negligently failed to maintain the banks of the Illinois and Michigan Canal in a good state of repair; and that, as a result of the improperly kept banks, they broke, and allowed the water from the Illinois and Michigan Canal, which was contaminated and polluted with various items of pollution, to flow into the pond rented by claimant for storage of his bait fish, washing out the northwest wall of said pond, and allowing all of claimant's bait fish to escape. Claimant also charges that the resulting pollution of the pond prevented him from continuing his business as a bait fish dealer.

The evidence indicates that claimant rented a spring-fed pond from one Arthur Steffes in Aux Sable Township, Grundy County, Illinois. The pond in question is located approximately **300** to 400 feet south of the Illi-

nois and Michigan Canal, which is owned and maintained by the State of Illinois. The pond is approximately one-half mile north of the Illinois River. On the date in question, claimant was engaged in the business of supplying bait fish to fishermen and other bait dealers. Claimant testified that at the time of the flooding of the pond he had approximately 1,320 pounds of bait fish in the pond.

On May 11 and 12, 1966, there was a rainfall of 3.41 inches, which caused the Illinois and Michigan Canal to overflow, break the south bank of the canal, and wash out the northwest bank of the pond rented by claimant, with the resulting destruction and loss of all the bait fish of claimant, and the depositing of slime, mud and oily matter in the pond, which made it unfit for further use as a storage pond for bait fish.

Arthur Steffes testified that on May 12, 1966 the south bank of the Illinois and Michigan Canal broke in three separate places, flooding the pond, and causing the northwest wall of said pond to wash out; that when the water finally receded, the pond was slimy and oily, and was unfit for the storage of bait fish; and, that at no time did the Illinois River back up to a sufficient height to flood the pond rented by claimant.

Arthur Steffes further testified that, during the last two years immediately preceding the incident in question, he had observed a great many trees lying along the canal bank. He also saw muskrat holes, as well as woodchuck holes, all along the canal banks, and stated that nothing had been done in the way of maintenance during that time.

Phillip M. Zink testified that on May 12, 1966 he

witnessed the flooding of the fish pond by water from the Illinois and Michigan Canal flowing from a break in the south bank of the canal, and that the river water from the Illinois River did not reach the fish pond.

James W. Hughes also testified that the pond was about four feet higher than the Illinois River water, which never approached closer than 150 feet to the pond.

Claimant testified that the retail value of the bait fish in the pond at the time of the flooding was \$2,110.00, and that the cost of the fish was approximately \$565.00. He testified that, as a result of the flooding, all of his bait fish were destroyed, and the pond was rendered unfit for future use as a storage pond for bait fish, thereby forcing him to discontinue his business as a supplier of bait fish. This resulted in an additional loss of \$200.00 a week income from May 13, 1966 to September, 1966.

The only evidence submitted by respondent in this cause was an engineering report of investigation prepared by the Department of Public Works and Buildings, Division of Waterways, State of Illinois. This report states that it is the opinion of the Division of Waterways that the Illinois and Michigan Canal was maintained in a reasonable condition prior to the alleged canal breaks. The report also states that the damage suffered by claimant was caused by flood waters of the Illinois River, and that the damage to the ponds caused by the water from the Illinois and Michigan Canal was negligible. The same report admitted that this reach of the canal had been plagued by breaks in the canal banks caused by flashflooding, seepage, and by animal activity, especially muskrats, since the canal was constructed. It indicated that there had not been any inspection of the canal or its banks at the location in

question from November, 1965 until after the break in May, 1966, or for some six months.

It is the opinion of this Court that there is sufficient testimony in the record to find that the bank of the Illinois and Michigan Canal was negligently maintained; that the water in the canal was kept at a dangerously high level; that the rainfall was not unprecedented; and, that the State could and should have anticipated that the defective bank of the Illinois and Michigan Canal would wash out and give away and that damage would result to adjacent properties, including claimant's fish pond. This Court feels that claimant is entitled to compensation for the loss of his bait fish. The measure of damages to which claimant is entitled is his cost of the fish, or the sum of \$565.00.

It is the further opinion of this Court that claimant's testimony as to his loss of future profits by reason of the fact that the pond was rendered unfit for the future storage of bait fish was too vague and uncertain to entitle him to any award for loss of future profits.

Claimant is hereby awarded the sum of \$565.00.

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(No. 5508—Claimant awarded \$280.00.)

THE RAY GRAHAM REHABILITATION CENTER, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed December 17, 1968.*

THE RAY GRAHAM REHABILITATION CENTER, Claimant,  
pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,  
Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks payment of **\$280.00** for services rendered to the Division of Vocational Rehabilitation from November **21, 1966** through January **13, 1967**. Both parties have stipulated that, as a result of delay in billing, payment was not made prior to the closing of the Biennium Appropriation, and that the requested sum is lawfully due the claimant.

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. *Gilbert-Hodgman, Inc. vs. State of Illinois*, **24 C.C.R. 509**. It appears that all the requirements have been met in the instant case.

Claimant, Ray Graham Rehabilitation Center, is hereby awarded the sum of \$280.00.

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(No. 5571—Claimant awarded \$62.15.)

CARNAGHI OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed December 17, 1968.*

CARNAGHI OIL COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Carnaghi Oil Company, filed its complaint against respondent for the sum of \$62.15 for materials furnished the Department of Conservation of the State of Illinois.

A stipulation was subsequently entered into by claimant and respondent, which in part is as follows:

“That claimant, Carnaghi Oil Company, had furnished material as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Sixty Two Dollars and Fifteen Cents (\$62.15).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the Biennium Appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Carnaghi Oil Company, is, therefore, awarded the sum of \$62.15.

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(No. 5271—Claimant awarded \$149.44.)

ELGIN SALVAGE AND SUPPLY COMPANY, INC., a Corporation,  
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1969.

JOHN P. CALLAHAN, JR., Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY, Assistant Attorney General, for Respondent.

**PRISONERS AND INMATES—*negligence.*** The State of Illinois is not an insurer, and is liable for damages caused by an escaped inmate of a State institution only if negligent in allowing inmate to escape.

**EVIDENCE—*burden of proof.*** To recover for damages caused by an escaped inmate, it is necessary that negligence of respondent be alleged and proven.

PEZMAN, J.

On September 19, 1965, Paul Berdine, a patient at the Elgin State Hospital, Elgin, Illinois, escaped from that hospital, and broke into a retail store operated by claimant at 115 Kimball Street, Elgin, Illinois. Berdine removed from claimant's store three radios having a total value of **\$139.65**. In gaining entrance to claimant's store Berdine broke a glass window in the store causing further damage in the amount of **\$9.79**. Claimant seeks to recover from the State of Illinois the sum of **\$149.44**.

The transcript of evidence in this case includes exhibits offered by claimant, and admitted from the files of the Elgin State Hospital showing that this particular patient had escaped on prior occasions, and on one or two occasions had been suspected of stealing property in the city of Elgin. These records also indicate that the patient, Berdine, escaped on the night in question by pushing out a screen window.

Claims filed for damages caused by an escaped inmate of a State institution in prior decisions of this Court indicate that the State is not an insurer, and is only liable for such damages if the State is negligent in allowing the inmate to escape. *Malloy vs. State of Illinois*, 18 C.C.R. 137; *Fern L. Huffs vs. State of Illinois*, 22 C.C.R. 361.

In the instant case evidence was admitted, and testimony heard before Commissioner Simpson on April 20, 1967. Respondent, State of Illinois, did not attend the hearing before the Commissioner, nor did it provide any additional evidence, although the Commissioner granted respondent leave to do so. Respondent contends in its brief that the State was not negligent in exercising its custody over the inmate, Berdine, and was, therefore, not liable for damages.

It is the opinion of this Court that the evidence offered by claimant is sufficient to establish a prima facie case of negligence on the part of respondent. Berdine, in view of his past record, should have been kept under greater surveillance than the ordinary inmate. The evidence does not indicate that respondent took any special steps to prevent his escape, even though his record indicated prior escapes.

Respondent offered no testimony on the point. The facts pertaining to the surveillance and escape of the inmate were in the exclusive control of respondent, and leave the implication that said evidence would have been presented had the same been favorable to respondent.

In *U. S. Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, the Court held that it was incumbent upon the State to come for-

ward with evidence to show that they were not negligent in a situation such as this. Without such showing it will be presumed that the State was negligent based upon the inferences to be drawn from the fact of the escape.

Claimant has borne the burden of proving that respondent was negligent in allowing the inmate to escape.

Claimant's claim in the sum of \$1149.44 is hereby allowed.

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(No. 6485 — Claimant awarded \$700.00.)

**XEROX CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.**

Opinion filed January 14, 1969.

**XEROX CORPORATION, Claimant, pro se.**

**WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.**

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

**PEZMAN, J.**

Claimant, Xerox Corporation, filed its complaint against respondent for the sum of \$700.00 for materials and services rendered the Department of Mental Health, State of Illinois.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Xerox Corporation, had completed the work as alleged in claimant's statement of claim.

“That there is lawfully due claimant the sum of \$700.00.

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Xerox Corporation, is hereby awarded the sum of \$700.00.

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(No. 5493—Claimant awarded \$1,543.74.)

HINSDALE SANITARIUM AND HOSPITAL **20**, A Corporation,  
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January **14**, 1969.

M. C. ELDEN, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, Hinsdale Sanitarium and Hospital 20, a Corporation, filed its complaint against respondent for the sum of **\$1,543.74** for services rendered the State of Illinois.

A stipulation was entered into by claimant and respondent as follows :

“That services were rendered to respondent at the special instance and request of the Department of Public Aid.

“That the statements attached to the complaint as exhibit A are due and owing in the sum of **\$1,643.74**.

“That no assignment or transfer of the claim has been made.

**“That there is rightfully due to claimant the sum of \$1,543.74.**

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Hinsdale Sanitarium and Hospital 20, a Corporation, is hereby awarded the sum of **\$1,543.74**.

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(No. 5505—Claimant awarded \$1,000.00.)

G. SIERRA, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion *filed* January 14, 1969.

G. SIERRA, Claimant, pro se.

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

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

PEZMAN, J.

Claimant seeks to recover the sum of \$1,000.00 for services rendered as a physician in performing certain autopsies at the direction of the Warren G. Murray Children's Center.

On or about the 7th day of June, 1968, claimant and respondent entered into a stipulation, which reads as follows :

“The report of the Department of Mental Health, dated May 3, 1968 (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof), shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$1,000.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

It appears that the reason for non-payment was the lapse of an appropriation. This Court has repeatedly

held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, G. Sierra, is hereby awarded the sum of \$1,000.00.

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(No. 5506—Claimant awarded \$121.00.)

A. CURRIE MAIMON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1969.

A. CURRIE MAIMON, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks from respondent payment of the sum of \$121.00 for services rendered to the Department of Children and Family Services of the State of Illinois. The complaint alleges that such demand was refused on the grounds that funds appropriated for such payment had lapsed. The parties have stipulated that claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not made prior to the closing of the biennial 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$121.00.

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(No. 5510—Claimant awarded \$35.00.)

ROCKFORD ANESTHESIOLOGISTS ASSOCIATED, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1969.

ROCKFORD ANESTHESIOLOGISTS ASSOCIATED, Claimant,  
pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,  
Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks from respondent payment of the sum of \$35.00 for anesthesia services rendered to the Department of Children and Family Services of the State of Illinois. The complaint alleges that such demand was refused on the grounds that funds appropriated for such payment had lapsed. The parties have stipulated that

claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not made prior to the closing of the biennial appropriation.

This Court has repeatedly held that, 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, it would enter an award for the amount due. *Gilbert Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$35.00.**

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(No. 6516—Claimant awarded \$2,188.71.)

GULF OIL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1969.

GULF OIL CORPORATION, Claimant, *pro se.*

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

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

PEZMAN, J.

Claimant, Gulf Oil Corporation, filed its complaint in the Court of Claims on May'8, 1968, in which it seeks

the sum of \$2,388.14, for materials furnished various departments, as follows : Department of Public Works and Buildings — \$1,642.72; Department of Public Safety — \$545.99; and Department of Conservation — \$199.43.

Subsequently, a written stipulation was entered into by claimant and respondent, as follows :

“The reports of the Department of Public Works and Buildings and the Department of Public Safety (copies of which are attached hereto, marked exhibits A, B and C, respectively, and, by this reference, incorporated herein and made a part hereof), the report of the Department of Public Works and Buildings being dated August 5, 1968; the report of the Department of Public Safety dated August 28, 1968; and the report of the Department of Conservation being dated August 16, 1968, shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$1,642.72, the amount owing by the Department of Public Works and Buildings and \$545.99, the amount owing by the Department of Public Safety.

“The Department of Conservation denies the claim against it in the amount of \$199.43.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

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

been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Gulf Oil Corporation, is, therefore, hereby awarded the sum of \$2,188.71.

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(No. 5523—Claimant awarded \$20.00.)

GERALD E. FRASER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* January 14, 1969.

GERALD E. FRASER, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks from respondent payment of the sum of \$20.00 for services rendered to the Board of Vocational Education and Rehabilitation of the State of Illinois. The complaint alleges that such demand was refused on the grounds that funds appropriated for such payment had lapsed. The parties have stipulated that claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not

made prior to the closing of the biennial 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$20.00.

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(No. 6526—Claimant awarded \$3,000.00.)

CHICAGO WESLEY MEMORIAL HOSPITAL, An Illinois Not-For-Profit Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed January 14, 1969.*

TENNEY, BENTLEY, GUTHRIE, ASKOW AND HOWELL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, Chicago Wesley Memorial Hospital, an Illinois Not-For-Profit Corporation, filed its complaint against respondent for the sum of \$3,000.00 for professional and technical services rendered the Department of Public Health of the State of Illinois.

A stipulation was entered into by claimant and respondent, as follows :

“That claimant, Chicago Wesley Memorial Hospital, an Ill. Corp., had completed the services as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of \$3,000.00.

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof has occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Chicago Wesley Memorial Hospital, an Illinois Not-For-Profit Corporation, is hereby awarded the sum of \$3,000.00.

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(No. 4970—Claimant awarded \$4,500.00.)

JOSEPH SMITH, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

ROGERS, STRAYHORN AND HARTH, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; DANIEL N. KADJAN and PHILIP J. ROCK, Assistant Attorneys General, for Respondent.

PRISONERS AND INMATES — wrongful incarceration. Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

SAME—*legislative* intent. The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

SAME—*legislative* intent. The word “crime” as used in the statute encompasses any offense for which a person is illegally imprisoned.

PERLIN, C.J.

Claimant, Joseph C. Smith, seeks recovery of the sum of \$15,000.00 for respondent’s deprivation of his liberty by his alleged unlawful incarceration for two years, eight months and twenty-seven days in the Illinois State Penitentiary, Menard, Illinois. The alleged wrongful deprivation of liberty extended from June 22, 1956 until March 19, 1959 when claimant was discharged from the Menard State Penitentiary on a Writ of Habeas Corpus.

Claimant’s action is brought under the provisions of the Illinois Court of Claims Act, Sec. 8C, which reads in part as follows:

“The Court shall have jurisdiction to hear and determine the following matters. . . All claims against the State for time unjustly served in prisons in this State where the persons imprisoned prove their innocence of the crime for which they were imprisoned. . . For imprisonment of 5 years or less, not more than \$15,000.00.”

The record reveals the following sequence of events :

1. On October 5, 1934, claimant was convicted of the crime of burglary in the District Court of Mil-

waukee, Wisconsin, and placed on probation. He left the State of Wisconsin.

2. On January 18, 1940, claimant was convicted of unarmed robbery in the Criminal Court of Cook County, and sentenced to a term of from one to twenty years to be served in the Illinois State prison located at Joliet, Illinois.
3. A warrant filed for claimant by the Chief of Police of Milwaukee, Wisconsin was dated April 1, 1940.
4. After claimant served five years of this sentence, the Illinois Pardon and Parole Board met in June, 1945, and ordered that claimant be released to Wisconsin authorities effective July 16, 1945.
5. A Parole Agreement, dated June 12, 1945, with the notation "Effective July 16, 1945. Wisconsin authorities to be notified before release" was signed by claimant. The Parole Agreement thus signed incorporated "Rules Governing Prisoners on Parole", and a statement that read:

"I, Joseph Smith, an inmate of the above named Division of the Illinois State Penitentiary, hereby declare that I have carefully read or have had read to me, and do clearly understand the contents and conditions of the above rules regulating the parole of prisoners and the above parole agreement, and I hereby accept the same, and do hereby pledge myself to comply honestly with all said conditions, and further agree that, should I be arrested in another state and charged with a violation of my Illinois parole, I will waive extradition, and will not resist being returned to the Illinois State Penitentiary."

The Parole Agreement further stated that Joseph Smith would be permitted to go outside the enclosure of the Penitentiary for the period of his maximum "temporarily and conditional-

ly," in accordance with the rules or until he had been discharged in pursuance of law.

6. A Waiver of Extradition, dated July 5, 1945, and signed by claimant, stated that Joseph Smith "freely and voluntarily" agreed to accompany Milwaukee, Wisconsin authorities as a prisoner from the Illinois State Penitentiary, Joliet, Illinois.
7. On July 16, 1945, claimant was released to the custody of Wisconsin authorities. Claimant testified that he observed papers of extradition signed by the Governor of Illinois at that time.
8. Claimant was found guilty of violation of probation under the original Wisconsin burglary conviction, but the court issued a two year stay of execution upon condition that claimant leave the State of Wisconsin for that period. Claimant then moved to California.
9. On October 13, 1947, the Illinois Pardon and Parole Board issued an order, which declared that claimant was declared a defaulter on out-of-state parole.
10. In January, 1951, claimant was arrested and convicted in Denver, Colorado of a misdemeanor, and upon completion of service of his sentence was notified by the Denver authorities of the outstanding Illinois warrant and held for its execution. The Denver authorities notified Illinois authorities that claimant was being held. Illinois, acting through its Pardon and Parole Board, cabled the Denver police authorities that claimant Smith was no longer wanted by Illinois au-

thorities, and he was then released from custody of the Denver authorities.

11. On April 9, 1953, claimant was sentenced by the Federal District Court of Detroit, Michigan to four years in the United States Penitentiary at Leavenworth, Kansas for violation of the National Motor Vehicle Theft Act. The warrant for violation of parole from the State of Illinois was filed against claimant at that institution on April 29, 1953.
12. After serving thirty-five months of a four year sentence claimant was released from Leavenworth, and told that Illinois had lodged a detainer for warrant of parole violation. He was then transferred to Illinois. He signed a waiver of extradition on June 20, 1956, and was returned to Illinois to the Menard Division of the Illinois State Penitentiary on June 22, 1956.
13. Claimant was given a hearing on the question of parole violation in August, 1956, and under date of September 12, 1956 the following order was entered by the Parole Board: "Declared a violator as of September 22, 1947. Maximum 'X'."
14. On March 19, 1959, a Writ of Habeas Corpus was signed by Judge Harold O'Connell of the Criminal Court of Cook County, and claimant was ordered discharged from the custody of respondent.

Before claimant can recover under the provisions of the Illinois Court of Claims Act, Sec. 8C, he must prove the following elements by a preponderance of the evidence; (1) time unjustly served in prisons in the State of Illinois; and, (2) innocence of the crime for which he was imprisoned.

The first issue to be decided is whether claimant was illegally imprisoned from June 22, 1956 until March 19, 1959 at the Menard State Penitentiary.

If claimant was on parole at the time of release to Wisconsin authorities, it would appear that Illinois would have retained jurisdiction over claimant, and would have been able to imprison claimant at any time before the twenty year maximum sentence was served, in absence of final discharge from parole. (*People ex; rel Richardson vs. Ragen*, 400 Ill. 191, 79 N.E. 2d 479 ; *People ex rel Palmer vs. Ragen*, 159 F 2d 356.)

In *People vs. Bartley*, 383 Ill. 437, 50 N.E. 2d 517, an almost identical fact situation was presented to the Supreme Court. As in the instant case, an Illinois prisoner, McLaughlin, was paroled in an ex parte proceeding for the period of his maximum sentence, but before the effective date of his parole he was delivered to an agent of the State of Wisconsin pursuant to a requisition of the State of Wisconsin. In Wisconsin, McLaughlin was tried, convicted upon the charge for which he was extradited, and served a term in the Wisconsin State prison. He later went to Ohio where he served a term in the Ohio State Penitentiary from which he was extradited to Illinois for an alleged violation of his parole agreement. McLaughlin was returned to Stateville Prison in Illinois where he was released on a Habeas Corpus petition.

In reviewing the above facts, the Supreme Court held that it was clear that McLaughlin was not released from Stateville on parole. The Court further held that the warrant of extradition issued by the Governor of Illinois, which resulted in the delivery of McLaughlin to Wisconsin authorities, constituted a waiver of jurisdic-

tion by the State of Illinois over the person of McLaughlin, and operated as a pardon or commutation of the sentence, and relieved him from serving the balance of the sentence imposed upon him by the Winnebago, Illinois, County Court. The Court based its conclusions on the Habeas Corpus Act, which provides "Where, though the original imprisonment was lawful, yet, by some act, omission or event, which has subsequently taken place, the party has become entitled to his discharge." The court stated:

"While the Board of Pardons and Paroles did enter an order on April 20, 1936, directing the release of McLaughlin on parole effective May 16, 1936, and, while McLaughlin did sign the statement (to comply with conditions of parole agreement) above quoted on the latter date, the circumstances do not seem to warrant the conclusion that his parole was ever completed. The order admitting him to parole was a conditional one, and the conditions were never complied with. There was no sponsor suggested or provided for him, and, when the release came through the warden, there was no mention of parole. He was released solely on the demand made by the State of Wisconsin and the Governor's requisition warrant issued in obedience thereto. We believe the record shows that McLaughlin was never released at any time, but custody was simply transferred from the warden at the Illinois penitentiary to the authorities from the State of Wisconsin. Had McLaughlin been extradited while absent from prison and while on parole, it would have created a different situation." (50 N.E., 2d 519, 520)

The Court further held that, in absence of agreement between the two Governors to return the prisoner, the waiver is effective. It reasoned that, when a fugitive is in the custody of the courts of the asylum state, the executive of the asylum state is not required to surrender the fugitive until after the judgment of the court of that state is satisfied. However, the executive of the asylum state may relinquish the prisoner by waiving jurisdiction, and when the requisition of the demanding state has been honored and the fugitive surrendered, such surrender will operate as a waiver of jurisdiction of the asylum state.

As in the Bartley case, the conditions of parole requiring sponsors and employment were never complied with in the instant case, as set forth in the following paragraphs of the parole agreement :

“Rules Governing Prisoners on Parole

1. The prisoner shall proceed at once to his place of employment and report to his employer whose name is given above.” (no name was given)

.....

3. The prisoner must not change employment, nor leave employment, nor change his home address, unless granted permission by the State Superintendent of Supervision or his duly authorized agent. In the event of sickness or loss of position, the prisoner shall immediately report the fact to his Parole Agent.. .... The prisoner shall not leave the State of Illinois without a Division of Correction order and notice of the same shall be given the prisoner by the Superintendent of Supervision or his duly authorized agent. In the event the prisoner is granted an out-of-state parole, he shall not leave the State to which he is paroled without an order of the Division of Correction. Notice of the transfer shall be given by the Parole Officer at the Division of the, Illinois State Penitentiary from which the prisoner was paroled.”

The June, 1945 document from the Department of Public Safety, Parole and Pardon Board, entitled “Action of the Parole and Pardon Board Property of the Inmate” stated: “At a meeting of the Parole and Pardon Board held this month, the following action was taken in your case: *Paroled: To be turned over to Wisconsin authorities.* Effective July 16, 1945.” The waiver of extradition was signed July 5, 1945 before the effective date of parole, leading to the conclusion that Smith was extradited before he was paroled.

A distinction between the fact situation in the instant case where the prisoner was released directly to authorities of the demanding state and in a case where the prisoner was actually out on parole was made in *United States ex rel Hunke vs. Ragen*, 158 F 2d 644. In that case the Governor of Illinois honored the applica-

tion for extradition when the prisoner had been out on parole for more than two years, and, although the Illinois authorities relinquished him to Wisconsin, it was held that he was still subject to rearrest and imprisonment for completion of his sentence in Illinois for parole violation.

Therefore, the conclusion in the instant case must be that Smith was never released on parole, but that he was extradited to the state of Wisconsin. The rule, as summarized in *United States ex rel Hunke vs. Ragelz*, is as follows: "Where a prisoner is actually confined in the penitentiary, the Governor's relinquishment of the prisoner to another state operates as a pardon." (158 F' 2d 645)

While claimant Smith's imprisonment for parole violation was not technically an imprisonment for a "crime", as stated in the Court of Claims Act, it must be assumed that the word "crime" as used in the statute encompasses any offense for which a person is illegally imprisoned. Therefore, claimant has proved by a preponderance of the evidence that he was innocent of the parole violation offense for which he was illegally imprisoned, because he had never been on parole from the State of Illinois.

The following evidence was introduced on the question of damages incurred by claimant during his illegal imprisonment of two years from June 22, 1956 until March 19, 1959. At the time of the hearing in May, 1963, he had been unemployed since January, 1962. Upon his discharge in 1959, he worked at a funeral home for room and board and \$30.00 per week until August, 1959. He then obtained a job as a bartender and earned \$50.00 per week, and tips averaging from \$3.00 to \$5.00 per night.

In October, 1961, he earned \$100.00 per week at the Twelfth Liberty Loan Corporation until January, 1962, at which time he resigned. His United States Federal tax return was submitted as evidence, and showed a gross earning of \$1,019.19 for the year of 1961. Using this figure as a base, claimant apparently earned an average of \$85.00 per month.

Claimant is hereby awarded the sum of \$4,500.00.

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(No. 5230—Claim denied.)

RUBY FOREMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

HARRIS, HOLBROOK, and LAMBERT, Attorneys for Claimant.

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

**NEGLIGENCE—burden of proof.** Where accident occurred when claimant stepped off of the sidewalk, which was provided for pedestrian travel, and stepped into one of the draining holes in the roadway of a bridge, it was held that claimant failed to sustain the burden of proof that the State was negligent, and claim was disallowed.

**SAME—contributory negligence.** To approach a place of known danger without care commensurate with such danger is contributory negligence.

PEZMAN, J.

On November 9, 1964, at about 1:00 P.M., claimant, Ruby Foreman, was walking across the Lusk Creek bridge going to the town of Golconda, Illinois. The weather was fair, and the pavement was dry. Claimant was walking on the left or east side of the bridge where there was a raised concrete sidewalk, which ran parallel with the

roadway. The sidewalk was elevated approximately 9 inches above the roadway, and was  $22\frac{3}{4}$  inches wide. On the outside edge of this sidewalk there was a retaining wall, which was  $18\frac{1}{2}$  inches high. Above the retaining wall there was a single pipe hand rail, which was 4 inches in diameter, and which was 11 inches above the retaining wall. Parallel with the sidewalk and in the east edge of the roadway were drain holes or weep holes. These holes were approximately  $11\frac{1}{2}$  inches long and  $3\frac{3}{4}$  inches wide. They were for draining water off the bridge into the creek below. At the time of the accident the weep holes were open, and were lined with aluminum.

On the date of this occurrence vehicular traffic and pedestrian traffic were both using the bridge. There were no signs of any kind on either end of the bridge warning pedestrians of the open weep holes in the roadway or the danger thereof.

Claimant was wearing low-heeled cloth shoes, and was carrying only a letter at the time of the accident. Claimant testified that, as she walked along the sidewalk on the east side of the bridge, she looked down at some workmen on the bank of the creek, and became somewhat dizzy. She then stepped off the sidewalk with her right foot to the right side of one of these weep holes. She had not seen the hole, as it was immediately beneath her. She then stepped with her left foot into one of the weep holes. Her foot went completely into the weep hole, and dropped down to a point where the aluminum siding struck her knee. As a result of the accident, claimant was treated by a doctor for contusions and abrasions to the leg, a hematoma and scarring. Claimant testified that she was unable to walk on her leg for some time.

As a result of this accident, claimant now seeks to recover for personal injuries sustained by her in the sum of \$10,000.00.

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, *Bloom, et al, vs. State of Illinois*, 22 C.C.R. 582, 585. It is also a well-known proposition of law that the State is not an insurer against accidents occurring on its streets and highways. *Manus vs. State of Illinois*, 22 C.C.R. 335; *McNary vs. State of Illinois*, 22 C.C.R. 328.

In this case, claimant is contending that the State was negligent in allowing the drain holes to be unguarded and open at and in close proximity to the east sidewalk, and that the State failed to give any warning to pedestrians of the existence of the drain holes in the floor of the bridge roadway. There is, however, a serious question as to the liability of respondent to maintain the roadway of the bridge in such a condition that it would be safe for pedestrians. The State is not obligated to maintain all public highways under its jurisdiction in the same manner as sidewalks and crosswalks should be maintained. To so require would place an impossible burden upon the State. *Callen vs. State of Illinois*, 23 C.C.R. 172.

Claimant did not fall as a result of any defect in the sidewalk, which ran parallel with the roadway. The accident occurred when claimant stepped off of the sidewalk,

which was provided for pedestrian travel, and stepped into one of the drain holes in the roadway of the bridge.

The burden of proof is upon claimant to prove freedom from contributory negligence. In the cases of *Doolittle, et al*, vs. *State of Illinois*, 21 C.C.R. 112, and *Mounce vs. State of Illinois*, 20 C.C.R. 268, this 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 indicate that claimant walked approximately  $\frac{3}{4}$  of the way across the bridge before she stepped off the sidewalk and into one of the drain holes. In walking  $\frac{3}{4}$  of the way across the bridge, she passed a number of these open drain holes, and must have been aware of their existence. It was the duty of claimant in this case to use due care and caution for her own safety. From the record it is clear that the negligence of claimant in stepping off of the sidewalk area, which was provided for pedestrian travel, and onto the bridge roadway, which was provided for vehicular travel, and into one of the drain holes was the proximate cause of the accident.

It is the opinion of this Court that claimant has failed to sustain her burden of proof that the State was negligent, and that claimant was in the exercise of due care for her own safety at the time of the accident.

The claim is denied.

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(No. 5293—Claim denied.)

ROBERT L. CONROY, Claimant, *vs* STATE OF ILLINOIS, Respondent.

*Opinion* filed February 24, 1969.

ARVEY, HODES AND MANTYNBAND, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; SHELDON K. RACHMAN, Special Assistant Attorney General, and MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

PRISONERS AND INMATES — wrongful incarceration. Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

**SAME—legislative** intent. The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

DOVE, J.

This is a cause of action against the State of Illinois for damages under Sec. 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine :

“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 \$15,000.00; for imprisonment for 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00; and provided further, the Court shall fix attorney’s fees not to exceed 25% of the award granted.”

Claimant, Robert L. Conroy, was convicted in October of 1937 in the Criminal Court of Cook County, Illinois

after a jury trial for the crime of rape, and was sentenced to the Illinois State Penitentiary for a period of 199 years.

Claimant was thereafter confined in the Illinois State Penitentiary from October 23, 1937 until June 7, 1965. Claimant filed a petition for a Writ of Habeas Corpus in the United States District Court setting forth that he had been denied due process of law at the time of his arrest; that the Chicago police held him prisoner for 36 hours in an abandoned police station before he confessed to the alleged crime; and, that his confession was procured by physical abuse. The petition for Habeas Corpus further stated that there was a 15 day delay after his confession before he was brought before a magistrate or before he was examined by a doctor.

After a long and lengthy hearing on the petition for a Writ of Habeas Corpus, the Federal District Court ordered a new trial for claimant, but the State's Attorney of Cook County, Illinois decided not to retry claimant, and he was released from custody.

Claimant called Anna Brasy, victim of the rape, as an adverse witness under Sec. 60 of the Illinois Civil Practice Act to testify on his behalf. She testified that on the morning of November 20, 1936, at approximately 3:00 o'clock, she was awakened when she heard the door to her bedroom open, and saw a man bend over her. She screamed. The man put a knife at her throat, and said, "If you scream, I'll kill you." He then took the bed covers off, made her take off her pajamas, and raped her. At the time he entered the bedroom the light in the room was not on.

In addition to raping her, her assailant committed other acts of sexual assault upon the person of Anna

Brasy, and also tortured her by cutting her on her arms and legs with the knife. The sexual attacks and the torturing lasted for about an hour. Anna Brasy testified that during this hour she remained conscious, but did not scream because she was paralyzed with fear.

Before her assailant left, he demanded money. Anna Brasy testified that she went into a closet where she had hidden a few dollars, and gave them to him. At that time she turned on the light in her bedroom, and for the first time saw her assailant. She further testified that her assailant spoke with a lisp, as if he were tonguetied. After she gave her assailant the money, he struck her on the cheek with his fist, which rendered her unconscious.

Anna Brasy testified that, when she regained consciousness, she woke her mother and brother. Her brother called the police, and they took her to Ravenswood Hospital where she stayed for six weeks. During her stay in the hospital ten suspects were brought in for identification, but she did not identify any of them. She further testified that none of them looked like her assailant, and none spoke with a lisp.

On September 14, 1937, the police took Anna Brasy to the State's Attorney's office in the County Building where she met claimant. As soon as she saw him, she recognized him as her assailant. Later she identified him in a line-up. She also identified him at the time of his trial. On each occasion that she identified him she had no doubt that claimant was the man who had tortured and raped her on November 20, 1936.

Robert L. Conroy, claimant, testified in his own behalf that between September, 1936 and April, 1937 he was not present in the State of Illinois. He testified

that during this time he was working in the floral business of his wife's uncle in Washington, and that on August 14, 1937 he was arrested by the police in his mother's apartment on a theft charge. He was taken to the Canalport Police Station from which he escaped when he found his cell door unlocked, and noticed nobody around.

Four weeks later, on September 12, 1937, he was arrested again by the police, taken to the Irving Park Police Station, and booked. From there he was taken to the Canalport Police Station where claimant was questioned concerning the rape of Anna Brasy. He stayed at the Canalport Station for two days, and then was taken to the Criminal Court Building, and questioned further. Claimant then testified that the police beat him with their fists while he was handcuffed, and that to stop the beating he promised to sign a confession.

Subsequently he was taken to the State's Attorney's Office in the County Building. Anna Brasy was present when he arrived, and identified claimant as her assailant. At this time a statement containing his confession to the rape of Anna Brasy was read to claimant. The statement was transcribed, and claimant signed it. Claimant was then returned to the scene of the crime where he participated in the re-enactment of the crime.

At his criminal trial in 1937, and at the hearing in the instant case, claimant produced no alibi witnesses to support his contention that he was in Washington at the time of the crime. He never requested his wife's uncle, Philip Caruso, for whom claimant allegedly worked between September, 1936 and April, 1937, to testify on his behalf, although he considered him a good alibi witness. His wife was present at the criminal trial, but was not called to testify for him.

In two previously decided cases, *Monroe vs. State of Illinois*, Case No. 4913, and *Jonnia Dirkalzs vs. State of Illinois*, Case No. 4904, this Court held that one of the primary issues to be determined in a case brought under Section 8C of the Court of Claims Act is whether claimant was innocent of the crime for which he was imprisoned. The burden is on claimant to prove by a preponderance of the evidence that the act for which he was wrongfully imprisoned was not committed by him. Claimant must prove his innocence of the “fact” of the crime.

In this case claimant seeks to prove his innocence of the crime for which he was imprisoned by his own uncorroborated testimony that at the time the crime was committed he was not in the State of Illinois, but was in Washington working for his wife’s uncle. Claimant introduced no evidence at the original criminal trial, or in the hearings in the instant claim to support his alibi. Contradicting the testimony of claimant that he is innocent of the crime is the testimony of Anna Brasy, who was called as an adverse witness by claimant. Anna Brasy testified in detail as to the various acts committed upon her by claimant herein. At the conclusion of her testimony in the instant case claimant was brought into the hearing room with his brother, and the victim, Anna Brasy, positively and without hesitation identified claimant as her attacker.

It is the opinion of this Court that claimant has failed to prove by a preponderance of the evidence that he is innocent of the “fact” of the crime for which he was imprisoned.

It is the further opinion of this Court that the legislature of the State of Illinois did not intend, when it enacted Sec. 8C of the Court of Claims Act, that this

Court make awards to claimants whose only proof of innocence of the "fact" of the crime is their own uncorroborated testimony. This is especially so in this case where there is testimony, which tends to incriminate claimant in the commission of the crime charged.

Claimant's claim is hereby denied.

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(No. 5298—Claim denied.)

DONALD GILFAND, A Mentally ill person, by REBECCA DI GIOVANNI, his Grandmother and next friend, and REBECCA DI GIOVANNI, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

LOUIS M. MARCH, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY AND ETTA J. COLE, Assistant Attorneys General, for Respondent.

*PRISONERS AND INMATES—duty to safeguard patients.* State owes duty of reasonable care to patients at its State hospitals.

*SAME—negligence.* Before claimants may recover for damages they must prove by a preponderance of the evidence (1) injury proximately caused by the negligence of respondent, and, (2) damages.

PERLIN, C. J.

Donald Gilfand, a mentally ill person, is represented by Rebecca Di Giovanni, his grandmother and next friend, in this proceeding. Rebecca Di Giovanni was the mother of Donald Gilfand's mother who died in 1962. Claimants seek recovery of \$25,000.00 for personal injuries alleged to have been sustained by Donald Gilfand on August 20, 1965, while he was a patient at the Dixon State Hospital. Claimants further allege that Donald Gilfand was without provocation physically assaulted by a Mr. Alan

Sparks who was employed by respondent, and sustained permanent personal injuries with change in both his physical and mental state.

Claimants allege that respondent was negligent in the care, maintenance and control of Donald Gilfand, because it failed to provide a safe place for the patient; failed to properly interview and hire personnel charged with the care and attention of patients; failed to render proper medical care when Donald Gilfand was physically assaulted on August 20, 1965; and, failed to use due care and caution under the circumstances.

Rebecca Di Giovanni also claims the sum of \$25,000.00 in her own behalf alleging that she has suffered permanent damages from mental anguish in seeing Donald Gilfand in the condition in which he has been subsequent to August 20, 1965, and that she has had to make numerous trips to see Donald Gilfand at said hospital and to confer with the physicians, officials, and the State of Illinois in order to obtain medical and other care required by the condition of Donald Gilfand.

Mrs. Di Giovanni testified that, when she visited Donald on August 23rd or 24th, 1965, the left side of his head was full of blood, black and blue marks and cuts were on his throat and knee, and his arm was injured. When she asked Donald who did it, he replied "Mr. Sparks." She stated that she brought Donald to see Dr. Tillman on or about the 23rd or 24th of August, and that he looked at his head. She stated that the head at that time was full of blood. Pictures, which Mrs. Di Giovanni stated she had taken of Donald at that time, were admitted into evidence. Claimants presented no medical testimony to explain the significance of the pictures. Neither the photographer nor the State employee

who allegedly saw the injury were called to testify. No conclusion of injury or of respondent's negligence can be drawn from the pictures themselves.

Mrs. Di Giovanni testified that she had seen Alan Sparks several times in 1965, and that he himself told her he was an employee from cottage **A-3**.

She knew of no medical attention given to Donald Gilfand after she saw him on or about August **24**, 1965. Donald told her that the date of the injury was August **20**, and she stated that she came to visit him about August 23rd or 24th.

Institutional records of visits, which were presented on cross-examination, showed that Mrs. Di Giovanni had visited Donald on September 2, 1965, and that the prior visit was August 17, 1965. Mrs. Di Giovanni agreed that the records were "undoubtedly correct." She also stated that September 2 could have been the date on which she advised the authorities of the alleged incident.

Respondent's witnesses established that there was no employee named Alan Sparks, but produced one Donald Spotts who was an employee at the time of the alleged injury. Mrs. DiGiovanni then said that he was the employee who assaulted Donald. Spotts denied that he had ever struck Donald Gilfand, and stated with regard to Donald's conduct that: "He was into something all the time. He was always cracking other kids on the head, sodomy with the other residents, soiled on himself."

Donald Gilfand was called as a witness by claimant, but was excused from testifying by the commissioner who described him as "an extremely mentally incompetent person of about 20 years of age", and "unable to testify lucidly as to the alleged occurrence or assault."

Samuel Gilfand, Donald Gilfand's father, testified that he was divorced from claimant's mother in 1950, and that he was awarded sole custody of claimant herein, which he retained at the time of the hearing. He and his wife Rosalie, stepmother of claimant Donald Gilfand, testified that they visited Donald on September 12, 1965; that there was nothing unusual in his appearance; and, that his son never made any complaints of injuries by or of any improper treatment by any of the employees of the Dixon State Hospital. He further testified that the 2½ inch scar on Donald's head was the result of a brain operation, which had been performed at the Michael Reese Hospital when he was two years old. Mr. Gilfand and his wife stated that they visited Donald every two months.

Dr. Paul Tillman, assistant medical superintendent at the Dixon State Hospital, testified that Mrs. Di Giovanni complained to him several times about employees, and that on August 1, 1965 his records showed that a long distance call was received from Mrs. Di Giovanni during which she accused an employee of hitting Donald two weeks previously. The grandmother subsequently brought Donald into Dr. Tillman's office, and showed him a scar, which was 2½ inches long, saying it was a recent injury. When Dr. Tillman said that in two weeks you cannot have this kind of scar tissue, she replied: "Yes, but he hit him anyway."

Dr. Tillman testified that two weeks prior to August 1, 1965 the grandmother came into his office. Dr. Tillman told her he would investigate the complaint. He then talked to the supervisor who reported to him that Donald had not been struck by any employee. Dr. Tillman did have reports of injuries to Donald's head, dated 1962,

1964 and 1966, on which occasions he was apparently injured by other inmates. Dr. Tillman testified there was no record of an employee named Alan Sparks.

Dr. Hatzipanagiotis, a staff physician at the Dixon State Hospital, testified that, when Rebecca Di Giovanni claimed Donald Gilfand had suffered an injury from an employee named Alan Sparks in cottage 3 on August 20, 1965, he investigated, and found no employee with that name. Upon checking his records he found no injury on that special date.

Admitted into evidence were letters reflecting complaints on several occasions, dated June 18, 1959, August 25, 1961, and February 14, 1962, wherein claimant Rebecca Di Giovanni had charged staff members with assaulting Donald Gilfand. A letter, dated September 21, 1965, from Lawrence A. Bussard, Assistant Director, Division of Mental Retardation Services, to Mrs. Di Giovanni stated that he had checked with Dr. Tillman, and that Donald had not been injured. The letter stated that Dr. Tillman could find no injury of recent origin to the head.

Before claimants may recover for damages they must prove by a preponderance of the evidence (1) injury proximately caused by the negligence of respondent; and, (2) damages.

The testimony of Rebecca Di Giovanni with regard to injury or damages was not corroborated by any other witness. It was rebutted by several witnesses including claimant Gilfand's own father.

It is the opinion of the Court that claimants have failed to sustain the burden of proving their case by a preponderance of the evidence. *Halloway vs. State of Illinois*, 23 C.C.R. 195; *Haynes vs. State of Illinois*, 22

C.C.R. 288; *Ackley vs. State of Illinois*, 22 C.C.R. 41; *Daly vs. State of Illinois*, 21 C.C.R. 610; *Klimek vs. State of Illinois*, 21 C.C.R. 145; *Flint vs. State of Illinois*, 21 C.C.R. 80; *Houghton vs. State of Illinois*, 18 C.C.R. 90.

The claims of Rebecca Di Giovanni and Donald Gilfand must hereby be denied.

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(No. 5310—Claim denied.)

ANTENNA SERVICES, INC., A CORPORATION, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

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

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

*RELEASE-mistake as to legal effect.* A mistake relating to the legal consequences of a release as to the effect of a release of one joint obligor upon the liability of his co-obligors is ordinarily immaterial.

*SAME—Burden of proof in avoidance.* One seeking to avoid release must prove that it was obtained by fraud or that it was without consideration.

*SAME—SAME—unilateral mistake of fact.* Unilateral mistake of fact will not operate to set aside a clear and unequivocal release.

PERLIN, C. J.

Claimant, Antenna Services, Inc., seeks recovery of \$3,450.00 for damages to its antenna tower and other property, as well as lease monies alleged to have been lost from tenants when a dump truck belonging to the Department of Public Works and Buildings of respondent snapped off a set of wires to the antenna tower causing it to fall.

The evidence reveals the following undisputed facts :

On November 5, 1965, claimant owned a communications radio tower, 220 feet tall, in DuPage County, Illinois. Transmission lines were installed on the tower with electrical wiring, and a distribution service was located in the transmitter building adjacent to the tower at its base. The tower was triangular in shape, 24 inches on each side, with guy wires supporting it every forty feet. The base of the tower was on a concrete pad. The guy wires extended from the tower in three directions, each 120° apart with steel anchors to the guy wires in the concrete. Claimant had eight customers, who subscribed to the tower at the time of the accident. -.

On the day of the accident, respondent's agents had been working on a highway approximately one mile from the tower. A truck owned by respondent drove onto claimant's property without permission. It dumped its load, and in going out the body of the truck caught the lower set of guy wires at the thirty foot level and snapped them. The truck then lowered the dump body with the guy wires still between the chassis and the dump body and accelerated its speed pulling down the tower, which also struck a car on the adjacent property of a Chevrolet dealer.

Respondent was insured by the United States Fidelity and Guaranty Company in the amount of \$10,000.00, of which \$9,148.58 went to claimant and the remainder to the Chevrolet dealer.

Claimant alleges that it has sustained damages in the amount of \$12,596.50, or \$3,450.00 more than it was paid by respondent's insurer.

A release, dated December 15, 1965, which was signed by claimant's agent, provides the following :

“That We Antenna Services Inc., by N. A. Philips, Secretary, for the sole consideration of Nine Thousand One Hundred and Forty-Eight Dollars and Fifty-Eight Cents (\$9,148.58) to us in hand paid by Virden E. Staff, Payer, the receipt whereof is hereby acknowledged, *have released and discharged*, and by these presents do for ourselves, our heirs, executors, administrators, and assigns *release and forever discharge* the said Payer and *all other persons, firms, and corporations, both known and unknown, of and from any and all claims, demands, damages, actions, causes of action, or suits at law or in equity, of whatsoever kind or nature*, for or because of any matter or thing done, omitted, or suffered to be done by anyone prior to and including the date hereof *on account of all injuries both to person or property resulting, or to result*, from an accident, which occurred on or about the 2nd day of November, 1965, at Chicago, Illinois.

“We understand said Payer, by reason of agreeing to this compromise payment, neither admits nor denies liability of any sort, and said Payer has made no agreement or promise to do or omit to do any act or thing not herein set forth, and *we further understand that this release is made as a compromise to avoid expense and to terminate all controversy and/or claims for injuries or damages of whatsoever nature, known or unknown, including future developments thereof, in any way growing out of or connected with said accident.*

“We admit that no representation of fact or opinion has been made by the said Payer or anyone on her, his, or their behalf to induce this compromise with respect to the extent, nature or permanency of said injuries, or as to the likelihood of future complications or recovery therefrom, and that the sum paid is solely by way of compromise of a disputed claim, and that in determining said sum there has been taken into consideration the fact that serious or unexpected consequences might result from the present injuries, known or unknown, from said accident, and *it is, therefore, specifically agreed that this release shall be a complete bar to all claims or suits for injuries or damages of whatsoever nature resulting or to result from said accident.*

**CAUTION: READ BEFORE SIGNING”**

(Emphasis supplied.)

The sole question in the instant case is what was the legal effect of the execution of the release by claimant. Claimant contends that the release was signed only by mistake, and that, despite the signing of the release, Mr. Allen Tomlinson, Claims Supervisor of the Department of Public Works and Buildings, still continued to negotiate with claimant for the balance of claimant’s damages. Claimant further alleges that claimant’s officer

who signed the release did not believe he was releasing the State of Illinois, but only the insurance company. Claimant alleges that, at the time its agent, Nicholas Philips, executed the release, he was mistaken as to the legal effect of his act. Mr. Philips testified that he was told by the United States Fidelity and Guaranty Company that, unless the release was signed, he would receive no proceeds to compensate him for any of his out-of-pocket losses. He further stated that he was without sufficient funds at the time of the loss to replace the damaged equipment without resorting to the insurance proceeds. Claimant alleges that Mr. Tomlinson was also mistaken as to the effect of the release, because he sent a letter to claimant, dated February 4, 1966, wherein he requested that Mr. Philips send him a full description of the damaged equipment, make, model, size, when it was installed, by whom, and when it was painted. It is this letter, which claimant contends apparently vitiates enforcement of the release.

Mr. Philips testified that he read the release before he signed it, and that it did not say anything about the State of Illinois, but merely mentions Virden E. Staff whom Philips assumed was a person employed by the insurance company. The release was signed only by Mr. Philips for the "sole consideration of \$9,148.58 paid by Virden E. Staff, Payer." Nowhere is it contended that Mr. Tomlinson was a party to the release, or that he was present at the execution thereof. Neither party in the instant case called Mr. Tomlinson as a witness.

Respondent argues that a unilateral mistake of fact will not operate to set aside a clear and unequivocal release. In the case of *Welsh vs. Centa*, 75 Ill. App. 2d 305, 221 N.E. 2d 106, the court held that the burden of

proving that a release should be set aside rests with the party urging invalidity of the release, and the evidence must be clear and convincing. The court further held that the parties must be mutually mistaken, and a unilateral or self-induced mistake of fact will be insufficient to void a release.

The court in *Inter Insurance Exchange of Chicago Motor Club vs. Andersen and Kunta*, 331 Ill. App. 250, 73 N.E. 2d 12, held that a release acknowledging payment in full settlement of all claims on account of an automobile accident causing personal injury and property damage was a "general release", and was not ambiguous, and, therefore, testimony, which tended to show the intention of the parties to effect a limited release, was inadmissible.

In *Williams vs. East Xt. Louis Junction Railroad Co.*, 349 Ill. App. 296, 110 N.E. 2d 700, 702, the court stated:

"Inasmuch as the evidence showed that plaintiff could read and understand the English language and had opportunity to read the release before signing it, without any misrepresentations being made to him, to then set aside the effect of the release on the testimony of plaintiff that he actually did not read it would constitute an undesirable innovation in law so apparent that it seems to us to need no further discussion."

The general rule as set forth in 45 *Am. Jur.*, p. 685, is as follows:

"A mistake relating to the legal consequences of a release as to the effect of the release of one joint obligor upon the liability of his co-obligors is ordinarily immaterial."

In *Davis vs. Weatherly*, 119 Ill. App. 238, 241, the court stated :

"Having signed, executed and delivered the release, appellee is presumed to have done so with knowledge of its contents and import, and may not even be heard to say that she did not understand it. It is a contract in writing, and in an action at law parol testimony is not permissible to vary its terms or meaning. The writing must speak for itself, and its legal effect as a release and a complete bar can be

avoided in an action at law in only one way, and that is to prove that appellee's signature to it was obtained by fraud or that it was without consideration. **As** already stated, the burden of such proof is upon the appellee."

It is the opinion of the Court that claimant has not sustained the burden of proving that the release is invalid in an action against respondent. Claimant's agent had opportunity to read the clear and unambiguous terms of the release, and, in fact, testified that he did so. Although claimant was not represented by counsel at the time its agent signed the release, nothing would have prevented its hiring of an attorney to explain the legal effect of signing the release and receiving consideration therefor.

Therefore, claimant's request for additional funds must be denied.

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(No. 5341 — Claim denied.)

GERALD H. WITT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

GOEHL AND ADAMS, Attorneys for Claimant.

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

**HIGHWAYS—negligence.** Before claimant is entitled to recovery he must prove by a preponderance of the evidence that he was free from contributory negligence, and that respondent's negligence was the proximate cause of the damages suffered.

**SAME—evidence.** Where evidence showed that claimant drove into dense smoke, which was clearly visible from a distance, and then proceeded at a speed of from 25 to 30 miles per hour without being able to see what was in front of him, it was held that claimant did not prove freedom from contributory negligence, and recovery was denied.

PERLIN, C.J.

Claimant seeks recovery for damages to his auto-

mobile in the sum of \$669.13 incurred in an accident on November 30, 1965 on State Route No. 61. Claimant alleges that employees of respondent created a fire, which blanketed the highway on Route No. 61, and impaired the vision of the drivers of motor vehicles, and caused him to run into the rear of a truck, which was stopped on the highway, thus causing the alleged damages.

Claimant Witt testified that he was traveling on Route No. 61 at about 2:30 in the afternoon. The weather was clear, and the highway was dry. As he approached the site of the accident, he saw smoke on the highway. Witt stated: "Well, I seen the smoke there, and the highway men was right on this end of the smoke, and they didn't appear to flag me down or anything like that, and I thought, well, it was just a little patch of smoke, and so I slowed up, and the farther in I got the worse it got."

Claimant Witt identified three highway men : Junior Cantrell who was on the north side of the road, Harry Califf on the other side of the road, and Joe Schlipman on a tractor. They were near the road before he entered the smoke. Witt said that a "regular highway truck" was on the scene with no flasher running. Claimant entered the smoke and slowed down to 25 to 30 miles per hour. The shoulder on the right side of the road was "ablaze". After he got into the smoke about two blocks he hit the back end of a truck. A State patrolman was called, and claimant received a ticket. Claimant stated that he never saw the truck, and was afraid to stop after he got into the smoke because someone might have hit him. Claimant testified that he had no personal knowledge of who started the fire.

Otis Miller testified that he had occasion to be on

Route No. 61 on the day of the accident at about 3:00 P.M. He saw smoke and the highway truck parked off the road with Junior Cantrell, Joe Schlipman and Harry Califf "sitting on the bank watching the fire." When he drove into the smoke he could not see, put on his brakes, and then saw claimant Witt running across the road. The smoke lifted right before Mr. Miller saw claimant. He stated that the fire came right, up to the road, He had no conversation with the highway men, and did not see how the fire started.

Robert Shields testified that he was traveling on Route No. 61 on the day in question. The weather was clear, and the sun was shining. As he travelled along Route No. 61 he approached an area of heavy smoke, which got heavier as he proceeded. He slowed down, turned his lights on, and continued to drive west on the highway. He entered the smoke, and continued about a quarter of a mile until he noticed a vehicle stopped in front of him. He then stopped within twenty feet of the vehicle in front of him. The fire was burning within three to four feet of the right shoulder. Immediately before Mr. Shields was hit by the car, later identified as that belonging to claimant, Mr. Shields described the following :

“ . . . I looked in the rear glass, and I noted a dim pair of headlights — I couldn't tell how far or how fast — and I looked back, and noticed that the car was moving forward in front of me, and I was in low gear following this car in front of me when this impact hit.”

Mr. Shields further testified that, when he observed the vehicle in front of him, he began to pump the brake, and flash both rear flash lamps. After the impact, Shields stated, the officer on the scene observed that the lamps

were still intact, and still operating. As Shields approached the smoke he saw some State Highway trucks with a crew of men working at a slight curve in the highway: "Apparently they were cleaning a highway or a ditch . . ." The crew was about a quarter of a mile from where the smoke began. In Mr. Shield's opinion the visibility could not have been "completely zero, or I wouldn't have seen the tail lamps of the car in front of me." Mr. Shield's truck was described as being  $\frac{3}{4}$  ton in size.

Sherman Bragg testified that he was traveling on Highway No. 61 about 2:00 in the afternoon on the day in question. Mr. Bragg said that he saw a Highway Department road tractor on the south side of the highway. Mr. Bragg further testified that he saw a man get off the tractor, and light two or three fires. He did not know who the man was, but he did see Junior Cantrell sitting in a Highway Department truck. He described the fires as very small, "like that you could put out with your hands", and he did not drive through any smoke.

Before claimant makes a recovery, it must be proved by a preponderance of evidence that he was free from contributory negligence, and that respondent's negligence was the proximate cause of the damages suffered.

It should be noted that no Departmental Report was submitted, and that neither party called the men who were allegedly working on the highway crew to appear as witnesses.

Respondent contends that, although claimant could clearly see dense smoke enveloping the highway at a considerable distance, he proceeded through it at a speed of **25** to **30** miles when he "could not see the hood of his car" by his own testimony. Respondent further

contends that, because he was aware of the condition, and the complete lack of visibility, claimant did not drive with the care and caution of an ordinarily prudent person under similar circumstances, and that the proximate cause of the accident was claimant's failure to proceed with caution.

In the case of *Ames vs. Terminal R. Assn.*, 332 Ill. App. 187, the plaintiffs, passengers in a vehicle driven by Adams, brought suit for injuries sustained when Adams drove into dense smoke caused by a locomotive engine, and struck the rear end of a bus, which had stopped in the smoke. In holding the passenger plaintiffs guilty of contributory negligence, and denying their claim, the court said at pages 193-194:

"Persons approaching a place of danger have a duty to do so cautiously and with a proper degree of care for their own safety, the degree of care required being determined by the danger to which they are knowingly exposed. (*Little vs. Illinois Terminal R. Co.*, 320 Ill. App. 163; *Moore vs. Illinois Power & Light Corp.*, 286 Ill. App. 445.) A person has no right to knowingly expose himself to danger, and then recover damages for an injury, which he might have avoided by the use of care for his own safety. (*Dee vs. City of Peru*, 343 Ill. 36; *Illinois Cent. R. Co. vs. Oswald*, 338 Ill. 270; *Little vs. Illinois Terminal R. Co.*, 320 Ill. App. 163.)

"The evidence presented on behalf of the plaintiffs shows that they first saw the smoke when their car was about 80 or 90 feet east of the place where the bus was stopped; that their car traveled about 40 feet in the first smoke that they came to which obstructed their view so that they could not see too well; that the driver of the car took his foot off of the accelerator, which automatically reduced the speed of the car, but at no time did he apply his brakes; that the car was driven a distance of 30 or 40 feet in the dense smoke, which was so dense that the driver could not see beyond the hood of the automobile, before it ran into the rear end of the bus. The automobile could have been stopped at the speed at which it was traveling within a distance of 30 feet. Yet the driver made no attempt to stop the automobile upon becoming apprehensive of the danger involved in driving in the dense smoke where he could not see beyond the hood of his car, nor did either of the plaintiffs warn the driver of the danger or request him to avoid the danger. . . .

“The question of contributory negligence is ordinarily a question of fact for the jury, yet when there is no conflict in the evidence, and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. (*Illinois Cent. R. Co. vs. Oswald*, 338 Ill. 270; *Dee vs. City of Peru*, 343 Ill. 36; *Wilson vs. Illinois Cent. R. Co.*, 210 Ill. 603; *Beidler vs. Branshaw*, 200 Ill. 425.)

“Upon consideration of the evidence produced by plaintiffs together with all reasonable inferences to be drawn therefrom in its aspect most favorable to plaintiffs, we find that plaintiffs, . . . were not in the exercise of due care and caution for their safety at the time and before the accident, and were guilty of contributory negligence.

“The judgment of the trial court of St. Clair County directing a verdict for the defendants is hereby affirmed.”

In *Jones vs. State*, 8 N.Y.S. 774, the Court of Claims of New York State denied a claim in a similar case. In that case the State was repairing a highway, and one of the State employees was burning a quantity of leaves, which had accumulated at the work site, with the result that the smoke drifted across the highway, and enveloped a tar tank and an automobile being used in the work. Claimant was driving on the highway in a truck, and saw the smoke about 500 feet away. He reduced his speed, and drove into the smoke until he collided with the tar tank. The Court of Claims held that the claimant was guilty of contributory negligence.

It does not appear that claimant acted with due care and caution in driving into dense smoke, which was clearly visible from a distance, and then proceeding at **25-30** miles per hour without being able to see what was in front of him.

Where the highway is of such condition that one can see nothing ahead, it is not reasonable to proceed at 25 to **30** miles per hour, if at all. The driver of the truck, which claimant struck, could see the tail lights of the car ahead of him, as well as claimant's headlights,

and did, in fact, have his blinking red lights on at the rear of his truck.

Claimant did not prove his freedom from contributory negligence, and recovery is hereby denied.

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(No. 5408—Claimant awarded \$549.50.)

THE CAPITAL CITY PAPER COMPANY, An Illinois Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

THE CAPITAL CITY PAPER COMPANY, An Illinois Corporation, Claimant, *pro se.*

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

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

**DOVE, J.**

Claimant, The Capital City Paper Company, an Illinois Corporation, filed its complaint against respondent for the sum of \$626.73 for materials furnished to various departments of government of the State of Illinois.

Thereafter, a stipulation was entered into by claimant and respondent as follows:

“The report of the office of the Secretary of State, dated December 9, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“It is agreed between the parties hereto that claimant’s claim will be reduced from the amount of \$626.73 to \$549.50, pursuant to the evidence presented by the departmental report hereto attached and marked exhibit A.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$549.50.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, The Capital City Paper Company, an Illinois Corporation, is, therefore, awarded the sum of \$549.50.

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(No. 5515—Claimant awarded \$107.00.)

GWENDOLYN I. WHITE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

GWENDOLYN I. WHITE, Claimant, *pro se.*

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

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

**DOVE, J.**

Claimant, Gwendolyn I. White, filed her complaint against respondent for the sum of \$110.00 for medical services rendered to the Department of Children and Family Services of the State of Illinois.

A stipulation was subsequently entered into by claimant and respondent as follows:

“The report of the Department of Children and Family Services, dated July 2, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$107.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for

the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Gwendolyn I. White, is therefore, awarded the sum of \$107.00.

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(No. 5554—Claimant awarded \$748.59.)

SINCLAIR REFINING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February 24, 1969.*

SINCLAIR REFINING COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Sinclair Refining Company, filed its complaint against respondent for the sum of \$908.81 for materials furnished the Department of Conservation of the State of Illinois.

A stipulation was subsequently entered into by claimant and respondent as follows:

“That claimant, Sinclair Refining Company, had furnished materials as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Seven Hundred Forty Eight Dollars and Fifty Nine Cents (\$748.59).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Sinclair Refining Company, is, therefore, awarded the sum of \$748.59.

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(No. 5225—Claimants awarded \$19,923.04.)

LESTER R. BORUM and EMMCO INSURANCE COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

BERMAN and NEWMAN, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, and JOHN O. TOUHT, Special Assistant Attorney General, for Respondent.

**HIGHWAYS—duty of State.** The State of Illinois is not an insurer of every accident that occurs on its public highways, but does have the duty to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

**SAME—negligence.** Evidence indicated that respondent was negligent in the maintenance of an overpass by posting a warning sign indicating a clearance of 13'7" when in fact the clearance was only

12'10", and this negligence<sup>⊙</sup> was the proximate cause of personal injuries and property damage sustained by claimants.

DOVE, J.

This cause of action is brought by claimant, Lester R. Borum, seeking recovery for property damage and personal injuries suffered by him in an accident in Northlake, Illinois, at the North Avenue and Lake Street overpass. On May 21, 1964, at approximately 7:00 p.m., Claimant was riding as a passenger in a 1963 Mack tractor-trailer, which was owned by him, and driven by his employee, Buford Carter. Claimant testified that, as the truck in which he was riding as a passenger, which was traveling westbound on North Avenue, approached the Lake Street overpass, he saw a sign, which stated "Clearance 13' 7", and that the height of his trailer was 13' 1". As the truck was proceeding under the overpass, the trailer struck the top of the bridge, the truck tipped over on claimant's side, and slid forward about 20 feet.

The evidence shows that the actual height of the overpass over a portion of the westbound traffic lane was only 12' 10", and that respondent had notice of 'the difference between the warning sign, which indicated an overpass clearance of 13' 7", and the actual overpass clearance of 12' 10".

After the truck tipped over, claimant was pulled from the tractor, and was taken by the police to Memorial Hospital where he remained for four days, during which time he suffered severe back pains. He was not able to urinate without medical assistance, and could not eat without vomiting. At the end of the four days claimant was placed in a brace, and allowed to return to his home in Colorado. He was advised to see his doctor immediately.

After returning home, claimant consulted Dr. Parkinson, his family physician, who ordered x-rays, and referred him to Dr. Starks. Claimant was then placed in The Rocky Mountain Hospital, where he remained for six days. Dr. Starks placed claimant in a plaster cast, which extended around his body from his chin to his tailbone. He remained in the cast for two months.

Claimant testified that prior to the accident he had no back trouble; that his general health was good; that since 1952 he had been employed as a tuckpointer; and, that prior to 1952 he worked as a scaffold painter. Claimant testified further that he had been unable to work as a painter or tuckpointer since the accident; that he was unable to lift a scaffold; and that he did make two attempts to work, but had not been employed since the accident.

Claimant's special medical damages amounted to \$583.44, and the total damage to the tractor and trailer amounted to \$2,173.04, of which \$1,923.04 was paid by Emmco Insurance Company.

Dr. Frank D. McGlone and Dr. C. Robert Starks testified in an evidence deposition that as a result of the accident claimant received a compression fracture of the second lumbar vertebra.

Claimant was examined on behalf of respondent by Dr. John Gleason whose report states that there was a compression fracture of the second lumbar vertebra. Dr. Gleason concludes that, in determining whether claimant could return to work, much would depend upon the degree of pain he still has.

Claimant contends that the State of Illinois was negligent in placing a sign indicating clearance of 13' 7"

at a point near the overpass, when in fact the actual clearance was 12' 10", and in allowing this condition to exist for some time prior to the accident in question. Claimant also contends that the State of Illinois had knowledge of the hazard at least five weeks prior to the accident in question.

The State of Illinois is not an insurer of every accident that occurs upon its public highways. *Link vs. State of Illinois*, 24 C. C. R. 69; *Bloom vs. State of Illinois*, 22 C. C. R. 582. 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. *Link vs. State of Illinois*, 24 C. C. R. 69; *McNary vs. State of Illinois*, 22 C. C. R. 328; *Bloom vs. State of Illinois*, 22 C. C. R. 582. The State has a duty to exercise ordinary care to maintain its highways in a reasonably safe condition for public travel. *Garrett vs. State of Illinois*, 22 C. C. R. 343.

Contrary to respondent's contention, the Court finds from the evidence that there was no indication of contributory negligence on the part of claimant or his employee, who was driving the truck. It is the opinion of this Court that respondent was negligent in the maintenance of the overpass, and in the posting of a warning sign indicating a clearance of 13' 7" when in fact the clearance was only 12' 10", and that this negligence was the proximate cause of the personal injuries and property damage herein complained of. This Court is further of the opinion that claimant herein had a right to rely upon the warning sign indicating an overpass clearance of 13' 7".

It appears from the evidence in this case that claimant has sustained a serious and permanent injury to his back, and that such injury has prevented claimant from being able to work at his customary trade.

For the foregoing reasons the Court finds that claimant, Lester R. Borum, is entitled to an award of \$18,000.00, said award being for medical expenses, loss of earnings, permanent disability and property damage. A further award is made to claimant, Emmco Insurance Company, subrogee of Lester R. Borum, the sum of **\$1,923.04** for property damage to claimant's trailer.

It is, therefore, ordered that claimant, Lester R. Borum, recover the sum of \$18,000.00, and that claimant, Emmco Insurance Company, recover the sum of **\$1,923.04**.

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(No. 5456—Claimant awarded \$63.30.)

GULF OIL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

**Opinion filed May 14, 1968.**

GULF OIL CORPORATION, Claimant, pro se.

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

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

DOVE, J.

Claimant, Gulf Oil Corporation, filed its complaint in the Court of Claims on January 19, 1968, in which it seeks the sum of **\$63.30** for materials furnished to the

Department of Public Works and Buildings, Division of Highways.

A Departmental Report was filed, which stated in part:

“During the month of February, 1967, Gulf Oil Corporation supplied lubricating oils to the State of Illinois, Department of Public Works and Buildings, Division of Highways, at the Division’s request. The material had been contracted for by persons properly authorized, and it was received in good condition.

“The only reason that the bill of Gulf Oil Corporation in the amount of \$63.30 cannot now be paid is that the appropriation therefor has lapsed.”

Subsequently a written stipulation was entered into by claimant and respondent as follows:

“The report of the Department of Public Works and Buildings, dated February 9, 1968, (a copy of which is attached hereto, marked exhibit A and, by this reference, incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$63.30.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

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

been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. 5261, opinion filed February 24, 1966. It appears that all qualifications for an award have been met in the instant case.

Claimant, Gulf Oil Corporation, is, therefore, hereby awarded the sum of \$63.30.

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(No. 5459—Claimant awarded \$115.16.)

McALEAR DIVISION OF WHITE CONSOLIDATED INDUSTRIES, INCORPORATED, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1968.*

McALEAR DIVISION OF WHITE CONSOLIDATED INDUSTRIES, INCORPORATED, Claimant, pro se.

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

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

PEZMAN, J.

Claimant seeks payment of the sum of \$115.16 for materials furnished the Secretary of State, Superintendent of Buildings and Grounds.

Exhibit A attached as a Departmental Report, and later admitted into evidence by virtue of a stipulation between claimant and respondent, states as follows :

“We acknowledge receipt of your letter, dated January 30, 1968, in which additional information is requested regarding the above transaction.

Our files fail to disclose wherein payment was made. However, the merchandise itemized on your enclosure was received, and we are, therefore, indebted for same.

Failure of the vendor to submit invoice vouchers covering these transactions within the appropriate biennium necessitates filing in the Court of Claims for payment.”

Subsequently, on February 28, 1968, a stipulation was entered into between claimant and respondent admitting said exhibit A into evidence, and agreeing that no further oral or written evidence would be introduced by either party; that no briefs would be filed, or other pleadings; and, that the cause could be assigned in the same manner as if all hearings and pleadings had been closed.

This Court has held numerous times that, where the evidence shows the only reason the claim was not paid was because the appropriation for the biennium in which the service was performed had lapsed, this Court would make an award. *Continental Oil Company vs. State of Illinois*, 23 C.C.R. 70, and *M. J. Holleran, Inc. vs. State of Illinois*, 23 C.C.R. 17.

Claimant, McAlear Division of White Consolidated Industries, Inc., is hereby awarded the sum of \$115.16.

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(No. 5478—Claimant awarded \$67.43.

MIDSTATE COLLEGE OF COMMERCE, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 14, 1968.*

MIDSTATE COLLEGE OF COMMERCE, Claimant, pro se.

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

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

**PEZMAN, J.**

Claimant, Arline H. Bunch, d/b/a Midstate College of Commerce, filed her complaint against respondent for the sum of \$67.43 for services and materials rendered the Board of Vocational Education and Rehabilitation.

A Departmental Report was filed by the Division of Vocational Education and Rehabilitation by Robert O. Byerly, Deputy Director, which stated as follows:

“The claim entered by the above listed school is a legal claim as an encumbrance was made for training student, Gloris Buley. Monthly payments were made to the school. However, the student withdrew June 28, 1967. No payment was made for June 26 through June 28 until after the grace period of September 30, 1967 had ended. The billing received carried the two days, plus books and supplies, which amounted to \$67.43. This is a legal claim. The encumbrance was set up, and no payment for this period has been made by the Division.”

Subsequent to the Departmental Report, a stipulation was entered into by claimant and respondent agreeing that no further oral or written evidence would be introduced, and that the case would be assigned on the basis of the Departmental Report. This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered

into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Midstate College of Commerce, is thereby awarded the sum of \$67.43.

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(No. 3025—Claimant awarded \$6,938.42.)

ELVA JENNINGS PENWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

GOSNELL, BENECKI and QUINDRY, Attorneys for Claimant.

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

**WORKMEN'S COMPENSATION ACT—supplemental award.** Under the authority of *Penwell vs. State of Illinois*, 11 C. C. R. 365, claimant awarded expenses incurred for nursing care, drugs, etc., for the period January 1, 1967 to February 1, 1968.

PEZMAN, J.

Claimant filed her petition for reimbursement for monies expended for nursing care and help, medical services and expenses from January 1, 1967 to February 1, 1968 on the 12th day of March, 1968, praying for an award in the sum of \$7,680.42.

Claimant was seriously injured in an accident on the 2nd day of February, 1936, while employed as a Supervisor at the Illinois Soldiers' and Sailors' Children's School, at Normal, Illinois. The complete details on this injury can be found in the original cause of action, *Penwell vs. State of Illinois*, 11 C.C.R. 365.

A joint motion of claimant and respondent was filed herein requesting leave to waive the filing of briefs and the making of arguments. This Court granted the motion for waiver. Thereafter, on the 10th day of May, 1968, a stipulation between claimant and respondent was filed with the Clerk of the Court of Claims, which reads as follows:

“The amended petition filed by claimant seeking an award in the sum of \$6,938.42 reflects a reduction of \$742.00 from the original amount claimed in accordance with exhibit A, which is hereto attached, and which shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to whom this **case** has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$6,938.42.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

An award is made to claimant for the sum of **\$6,938.42** for the period of time from the 1st day of January, 1967, to the 1st day of February, 1968.

The matter of claimant’s need for additional care is reserved by this Court for future determination.

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(No. 5002—Claimant awarded \$16,000.00.)

MARY LOUISE WALLA, as Executor of the Estate of **OLLIE LEE ARNTS**, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

KAHN, ADSIT and ARNSTEIN and PARKER, BAUER and PARKER, Attorneys for Claimant.

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

**HIGHWAYS—*duty of State.*** The State of Illinois is not an insurer of every accident that occurs on its public highways, but does have the duty to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

**SAME—*notice.*** Where evidence disclosed a number of serious accidents, involving southbound motorists at night, had occurred along a gravel connecting road during the forty-five day period preceding the accident in question, respondent charged with actual notice of dangerous condition existing at this point.

**SAME—SAME—*warning signs.*** Posted signs must give adequate warning of the particular hazard which exists.

**EVIDENCE—*contributory negligence.*** Testimony as to careful driving habits of decedent held to sufficiently substantiate allegation that decedent was not guilty of contributory negligence.

DOVE, J.

This is a cause of action for wrongful death brought pursuant to the provisions of the Wrongful Death Act, Chap. 70, Secs. 1 and 2, Ill. Rev. Stats., by claimant, Mary Louise Walla, as Executor of the Estate of Ollie Lee Arnts, deceased, against respondent, State of Illinois, to recover damages for the death of Ollie Lee Arnts resulting from a single car accident on November 12, 1960 at about 5:30 A.M.

In the spring of 1960, the Department of Public Works and Buildings, Division of Highways of the State of Illinois, undertook the reconstruction and relocation of State Route No. 1 about one and one-half miles south of Norris City, White County, Illinois. As part of this project, U.S. Route No. 45, which intersects Illinois Route No. 1 at a point just south of a railroad viaduct

south of Norris City, was reconstructed and relocated approximately 1,000 feet to the south of its original location. Work on the project commenced on May 12, 1960, and was completed on October 14, 1960.

In altering the location of U. S. Route No. 45, a paved portion of the old road, approximately 1,000 feet long, was removed, and the direction of the old road altered by the construction of a road connecting old U. S. Route No. 45 with new U. S. Route No. 45. The composition of the connecting road was gravel and crushed rock. The gravel connecting road made a sharp 65 degree turn to the left from the end of the pavement of old U. S. Route No. 45. This turn was regarded as a "relatively sharp curve at high speed driving" by State District Construction Engineer Gamble. Due to a difference in the grade level of the old and new roads, there was a sharp drop-off along the southwest side of the connecting road where the State had constructed a ditch.

The decedent, Ollie Lee Arnts, was driving from Chicago to Harrisburg, Illinois on U. S. Route No. 45 to visit her mother. The decedent had driven this route numerous times, but her last occasion to use this particular route prior to the accident had been in April, 1960, prior to the reconstruction and relocation of U. S. Route No. 45. The accident occurred in the dark, early morning hours of November 12, 1960 when decedent's automobile ran off the gravel connecting road and over an embankment, and crashed into a bridge abutment.

There is conflicting evidence regarding the number and types of warning signs and devices erected by the State to warn motorists of the construction area and the gravel connecting road. It appears from the evi-

dence, however, that there was a movable horse-type barricade across the north or right half of the old road approximately 2,100 feet from the beginning of the gravel connecting road. Attached to the barricade was a sign which read: "Closed - Open for Residents and Contractors Only". There were no flares placed around the barricade for illumination at night. Between the barricade and the beginning of the gravel connecting road was a sign with an arrow indicating a left turn ahead with a small "15 M.P.H." sign posted below it.

It appears from the evidence that this gravel connecting road, which had originally been constructed to enable traffic to move through the construction area during construction of the new road, continued to be used by the public after construction had been completed. It is clear from the evidence that the State of Illinois was aware of this continued use of the gravel connecting road by the public. There was documentary evidence, as well as testimony, that a number of similar accidents had occurred along this gravel connecting road during the 45 day period preceding the accident in question.

There were apparently no eye witnesses to the accident, and both Mary Louise Walla, Executor of decedent's estate, and decedent's mother testified that decedent's driving habits were good. Evidence was introduced that decedent had served in the Army during World War II as an ambulance operator, and had received a citation for good driving.

The decedent was a widow, 48 years of age, with no children. She left surviving her a dependent mother, 70 years of age, whose life expectancy was 12.6 years

at the time of the accident, and who had been supported by decedent for many years. Evidence was introduced without objection that the loss of support and expenses incurred as a result of this accident amounted to more than \$16,000.00.

The law is well settled in this State that the State is not an insurer of the public on its highways. However, when the State is in the process of repairing or constructing a highway it is duty bound to use reasonable care in warning the traveling public of the hazard, which it has voluntarily created. *Riggins vs. State of Illinois*, 21 C.C.R. 434. Respondent in the construction, maintenance and repair of its highways has a duty to use reasonable care and caution to prevent injury or destruction of life and property. *Pomprowits vs. State of Illinois*, 16 C.C.R. 230; *Hansen vs. State of Illinois*, 21 C.C.R. 5.

Evidence to the effect that a number of serious accidents had occurred along this gravel connecting road during the 45 day period preceding the accident in question involving southbound motorists at night is sufficient to indicate that respondent had actual notice of the dangerous condition existing at this point.

There is sufficient evidence to enable this Court to find that the State failed to discharge its duty to protect the traveling public from a hazardous condition created by the State, and concerning which the State had notice, and that the State's negligence was the proximate cause of the accident, which claimed the life of Ollie Lee Arnts.

The State's failure to light or illuminate the small barricade it had erected constituted negligence. *Pomprowits vs. State of Illinois*, 16 C.C.R. 230; *Hansen vs. State of Illinois*, 21 C.C.R. 5; *Cruger vs. State of Illinois*, 20

C.C.R. 138. The posting of a sign indicating a left turn, and a small “15 MPH” sign is not sufficient to constitute performance of the State’s duty to adequately warn of the hazardous condition of the gravel connecting road. Warning signs must give adequate warning of the particular hazard which exists. *Bovey vs. State of Illinois*, 22 C.C.R. 95; *Mammen vs. State of Illinois*, 23 C.C.R. 130.

The evidence further discloses that there was no “stop” sign posted at the end of the pavement and the beginning of the gravel connecting road. There was no warning sign to indicate that a gravel road was ahead, or that the road was under repair, or to proceed with caution. The State did nothing to warn motorists of the particular danger about to be encountered. The State erected no restraining posts or fence along the southwest side of the gravel connecting road. The only barricade erected was a small movable horse-type barricade, which extended across one-half of the road, and around which a motorist could easily drive his automobile.

We are further of the opinion that the testimony as to the careful driving habits of the decedent sufficiently substantiates claimant’s allegation that decedent was not guilty of contributory negligence.

An award is, therefore, made to claimant in the amount of \$16,000.00.

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(No. 5175—Claim denied.)

LENA H. SCHAAB, Claimant, vs. TEACHERS COLLEGE BOARD,  
Respondent.

*Opinion filed June 28, 1968.*

LAUDEMAN AND ROLLEY, Attorneys for Claimant.

DUNN, DUNN, BRADY, GOEBEL, ULBRICH AND HAYES,  
Attorneys for Teachers College Board.

STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTION & *negligence*. Where claimant, an invitee, fell while walking up a flight of steps while attending graduation ceremony at a State University, evidence disclosed no duty on part of respondent to place railings on steps.

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.

DOVE, J.

Claimant, Lena H. Schaab, seeks to recover for personal injuries sustained by claimant resulting from a fall on August 9, 1963 about 2:00 P.M. while walking up a flight of steps at the Horton Field House on the campus of Illinois State University at Normal where claimant had gone with her daughter-in-law and two grandchildren to attend the graduation ceremony for her son. Claimant was 75 years of age, and by reason of her fall sustained permanent injuries to her right arm.

Claimant testified as follows: "I went there that afternoon with my daughter-in-law because her husband, my son, was going to graduate for his Masters. The steps were cement with little pebbles laying on them. I was up to the last one. My son's wife and her two children were ahead of me. When I reached the last step I fell. I just remember that I was falling forward onto the steps. I did not roll off the steps, but stayed there until they picked me up. I was about in the center of the steps, not on the edge. There were no rail-

ings. They put them up later. There were little pebbles there, that is all I remember. The pebbles were on all of the steps. I didn't collide with anyone else on the steps. The weather was clear, and the steps were dry. I had never been at the Field House or on those steps before. I have fallen a few times before. I have fallen on other occasions in my life time, but there was always something that made me fall. The doctor told me I fell this last time because I didn't get sufficient blood in my head. He said that the reason I fall once in awhile like that is because the blood doesn't circulate right. One evening I walked out in the driveway and fell. I don't know what made me fall. On this particular occasion at the University I didn't trip on the steps. I didn't trip over anything.''

Claimant contends, as part of providing safe passage on sidewalks and up and down the steps, railings should have been installed. The evidence discloses that railings were subsequently installed by respondent, but we are of the opinion that there was no duty on the part of respondent to place railings on the steps. We are further of the opinion that the answer to claimant's fall is evident from her own testimony, as above stated. Claimant testified that she had fallen on other occasions for no apparent reason, and that her doctor had told her that the fall in question occurred "because she did not get sufficient blood to her head."

For claimant to recover she must prove:

1. That she 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.

3. That the negligence of the State of Illinois was the proximate cause of her injuries.

It is well settled that one who owns or is in control of property is not an insurer of the safety of an invitee, and that this particular rule applies to premises to which the public is invited. *Thoele vs. Mazel*, 8 Ill. App. 2d 237; *Dietz vs. Belleville Co-op Grain. Co.*, 273 Ill. App. 164.

Claimant has failed to sustain the burden of proof: and an award is, therefore, denied.

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(No. 5241—Claimant awarded \$3,977.11.)

TOWER COMMUNICATIONS COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

A. H. BARON AND FRED LANE, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; ARTHUR L. BERMAN, Special Assistant Attorney General, for Respondent.

**CONTRACTS—*extra compensation allowed.*** Where claimant was required to provide electrical energy for warning lights on towers during the period of delay for which respondent was responsible, an award was allowed for increased cost necessitated thereby.

DOVE, J.

This cause of action arises out of a contract, dated March 16, 1961, between Tower Communication Company **and** the State of Illinois for the construction of eighteen radio towers at a cost of \$99,987.00. Fourteen of the eighteen towers were of such a height as to require warn-

ing lights on the top to meet FCC and CAA requirements. In addition to the warning lights, the contract provided that these fourteen towers be equipped with a photo-electric device, which would automatically turn the warning lights on at night and off in the morning.

The dispute in this case centers around the act of the respondent in withholding the sum of \$4,890.98 from the contract price for electricity paid for by respondent to operate the warning lights on the fourteen towers during the construction period, October, 1961 to September, 1963. It is claimant's contention that it was not obligated under the contract to provide the electricity to operate the warning lights during the period in question.

Federal regulations require that, when a tower of the type being constructed pursuant to this contract exceeds a height of one hundred forty-nine feet, it must be equipped with warning lights for the protection of airplanes flying overhead. As the towers in question were erected, proper warning lights were installed, and respondent made arrangements with local utility companies to supply electrical power to operate the warning lights.

The contract provided that all work be completed within one hundred days from the date of the contract. It was not, however, until June, 1962, that work on the towers had progressed to the point where the photo-electric control units could be installed on a permanent basis. At this point the engineer for respondent insisted that the photo-electric device be modified so that the photo-electric cell could be mounted approximately twelve to fifteen feet above the device's control panel. Claimant immediately advised respondent that the photo-electric unit called for by the contract specifications could

not be modified in this manner. Claimant then requested a change order from respondent authorizing claimant to purchase a more expensive photo-electric unit, which could be installed as requested. Though claimant repeated its request for a change order several times, it was not until September 10, 1963 that respondent agreed and authorized claimant to purchase the more expensive unit.

Pertinent provisions of the contract, in question relating to the duties and obligations of the parties are as follows :

“1. General Conditions of the Contract.

“ARTICLE 2:

Execution, Correlation and Intent of Documents :

It is not intended, however, that materials or work not covered by, or properly inferable from, any heading, branch, class or trade of the specifications shall be supplied, unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

“ARTICLE 11:

Material, Appliances, Employees :

Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light and power necessary for the execution of the work.

“ARTICLE 43:

Protection :

The contractor shall provide and erect all necessary barricades and other protection required by Owner and/or by local laws and ordinances, or local authorities having jurisdiction over same, and shall also protect all walks, curbs, lamp posts, underground conduits, overhead wires, water, sewer, gas mains, etc., until such time as they are taken care of by the respective public service corporations or by the Owner. He shall also provide and maintain all necessary warning lights from twilight to sunrise.

“ARTICLE 47 :

Electrical Energy and Lighting:

The general contractor shall make the necessary application, pay for fees and charges, take out all permits and provide and maintain electrical energy from sources other than the building for power and

light for all electricity using devices on machinery or lights required for carrying on the work.

Whenever electric light for illumination purposes is found necessary in the progress of the work, this contractor shall provide such lights as may be required to properly execute the work.

“II SUPPLEMENTARY SPECIFICATIONS:

Protection :

**1005.** This contractor, as a part of this contract, shall provide and erect all planking, fences, bracing, shoring, sheet piling, lights and warning signs necessary for the protection of adjacent property and the public.

“III EQUIPMENT

Towers :

**2046.** Obstruction lighting shall be as specified, for each tower, in Section 5000.

“IV GENERAL WORK — TOWERS

Protection :

3007. The contractor, as part of this contract, shall provide and erect all planking, fences, bracing, shoring, sheet piling, lights and warning signs necessary for the protection of adjacent property and the public.

“V. HIGHWAY RADIO ELECTRICAL WORK

Tower Lighting:

**5266.** All towers are to be lighted as designated by the latest requirements of the FCC and CAA.”

Claimant’s right to recover depends upon the interpretation and construction of the foregoing contract provisions. Article 47 of the specifications requires claimant to “provide and maintain electrical energy . . . for power and light for all electricity using devices on machinery or lights required for carrying on the work.” Article 43 states that the contractor “shall also provide and maintain all necessary warning lights from twilight to sunrise.” Section 5266 states that “all towers are to be lighted as designated by the latest requirements of the FCC and the CAA.” Section 1005 states that the contractor “shall provide and erect all planking, fences, bracing, shoring, sheet piling, lights and warning signs necessary for the protection of adjacent property and the public.”

The purpose of this contract was the construction of eighteen radio towers. The parties to the contract were aware of the fact that, once a tower was constructed to a certain height, electrical energy would have to be supplied to operate the warning lights required by FCC and CAA regulations. Viewing all of the pertinent sections of the contract as a whole, it is the opinion of this Court that the supplying of electrical energy for the operation of the warning lights, which were required by FCC and CAA regulations, was the responsibility of the contractor until the work on the towers was completed.

The evidence in this case indicates that the delay in the final completion of the towers from June, 1962 until September, 1963 was due to the refusal of respondent to authorize claimant to purchase a more expensive photo-electric unit, which could be installed as requested by respondent, while at the same time refusing to allow claimant to install the photo-electric unit called for by the contract specifications. By such action, respondent effectively prevented claimant from completing the towers until September, 1963, when authorization was finally granted claimant to purchase the more expensive photo-electric unit.

It is the opinion of this Court that respondent's actions in connection with the installation of the photo-electric units terminated claimant's responsibility under the contract to provide electrical energy for the warning lights as of June, 1962. The evidence further indicates that \$3,977.11 was paid for electrical energy supplied for the warning lights from June, 1962 to September, 1963.

Claimant is hereby awarded the sum of \$3,977.11.

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(No. 5261—Claim denied.)

LESTER SIMMONS, a Minor, by LIZZIE WHITLEY, his Mother and Next Friend, and LIZZIE WHITLEY, Individually, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 28, 1968.

BARISH AND McHUGH, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY and SHELDON RACHMAN, Assistant Attorneys General, for Respondent.

PRISONERS AND INMATES—*negligence*. In order for claimant in a tort action to recover damages against the State of Illinois he must prove that the State of Illinois 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.

NEGLIGENCE—burden of proof. Evidence failed to show that claimant, injured while engaged in high jumping, established by a preponderance of the evidence any negligence on the part of respondent.

SAME—*minors*. Illinois law requires a minor over the age of seven years to exercise that degree of care, which a reasonably cautious person of the same age, capacity, intelligence and experience would exercise under the same or similar circumstances.

PEZMAN, J.

This is a cause of action brought by claimants against respondent, State of Illinois, for injuries suffered by one Lester Simmons, a Minor, while high jumping at the Fort Massac State Boys' Camp at Metropolis, Illinois. Lester Simmons who was seventeen years old at the time of the accident was a ward of the Chairman, Illinois Youth Commission, and was sent to the Fort Massac State Boys' Camp in April, 1965.

An average day for the boys at the camp consisted of a work detail, lunch, more work detail, and evening meal about 5:00 P.M. After the evening meal the boys were free to pursue whatever recreational activities they

desired so long as they remained within the limits of the camp. One of the recreational facilities at the camp was a high jump area. The high jump consisted of two standards with a bamboo crossbar and a landing area. The landing area was composed of 25 or 30 burlap bags filled with sawdust and woodchips. The bags were placed in a square formation, and lapped to provide a landing area for the jumpers.

On May 18, 1965, at about 7:00 P.M., claimant, Lester Simmons, went to the high jump area, where he and several other boys engaged in high jumping. Franklin D. Williams, Illinois Youth Commission Counselor, and Lawrence Quint, a Supervisor at the camp, were near the high jump area, and watching the boys high jumping. On his third jump Lester Simmons injured his leg. Subsequent x-rays revealed a fractured tibia and fibula of the right leg.

Claimant testified that there was a space between the bags comprising the landing area, and that, when he landed after his third jump, his foot slipped between two bags causing him to fall and break his leg.

The high jump area had been constructed by Ronald Upchurch, Recreation Co-ordinator for the Illinois Youth Commission of the State of Illinois. Mr. Upchurch testified that he had jumped in the high jump area, and found the sawdust bags to be a decent landing place. Franklin Williams, a Counselor, testified that he had jumped the high jump also, and found that the bags were neither too soft nor too hard.

Subject to the objection of respondent, a portion of the Handbook of the Amateur Athletic Union of the United States setting forth specifications for landing

areas for a high jump, and a copy of a portion of the National Federation of State High Schools Athletic Associations' specifications for a landing pit for a high jump were admitted into evidence. Ronald Upchurch testified that the Illinois Youth Commission was not bound to follow the recommendations of the Amateur Athletic Union or the National Federation of State High Schools Athletic Associations because the Commission was not a member of either organization.

Joshua Johnson, Administrative Assistant to the Chairman of the Illinois Youth Commission and Superintendent of Forestry Camps, was called as an expert witness by respondent. Johnson's qualifications included long experience in professional baseball, semi-professional football and basketball. He testified that the Illinois Youth Commission was free to make its own rules, and set its own standards regarding the construction of athletic facilities. Johnson also testified that the high jump landing area constructed by Ronald Upchurch was reasonably safe.

At the time of the accident claimant, Lester Simmons, Was five feet eleven inches tall and weighed 215 pounds. Arthur Benner who had charge of the camp at the time of the accident testified that two days before the accident he advised claimant not to jump. He testified he told claimant he was too heavy for high jumping, and that claimant was liable to break a leg. He testified that claimant replied that he hoped to break a leg so that he could sue the State and get some money, and not have to work for it. Claimant denied having made such a statement. Lawrence Quint, an employee of the camp, testified that he also had told the claimant he was too heavy for high jumping.

At the time of the accident no employee of the camp was directing the high jumping. Quint and Williams were nearby, but their purpose was to insure discipline rather than direction of the high jumping.

Claimant contends that respondent was negligent in constructing the landing area for the high jump, and that he was permanently injured as a result of respondent's negligence. He further testified that he was unable to work because of the pain he experienced as a result of the injury.

The law in the State of Illinois is clear that, in order for a claimant in a tort action to recover damages against the State of Illinois, he must prove that the State of Illinois 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. Respondent owed claimant a duty of ordinary care; such care as a reasonably prudent man would exercise under like circumstances. Under the facts of this case, respondent owed claimant the duty of providing reasonably safe high jump facilities.

Ronald Upchurch testified that the landing area for the high jump was reasonably safe. His opinion was supported by the testimony of Joshua Johnson, a well qualified expert in athletics. It is the opinion of this Court that the testimony of Upchurch and Johnson deserve considerable weight.

The evidence indicates that claimant was warned by both Arthur Benner and Lawrence Quint that he was too heavy to engage in high jumping. Claimant chose to disregard the warnings and was subsequently

injured. It is the opinion of this Court that respondent exercised such care as a reasonable and prudent man would exercise in like circumstances. Claimant has failed to sustain his burden of proof that respondent was negligent in constructing the high jump landing area.

It is the further opinion of this Court that, if it conceded for the sake of argument that respondent did not exercise the required degree of care, the evidence shows that claimant was not in the exercise of due care and caution for his own safety at the time of the accident. Illinois law requires a minor over the age of seven years to exercise that degree of care, which a reasonably careful person of the same age, capacity, intelligence and experience would exercise under the same or similar circumstances. *Wolf vs. Budzyn*, 305 Ill. App. 603; *Hurtnett vs. Boston Store of Chicago*, 265 Ill. 331.

Claimant testified that he jumped twice just before the jump, which resulted in his injury. If so, he must have had knowledge, or should have known the condition of the high jump landing area. If there were spaces between the bags as claimant contends, he should have been aware of that fact, and the possible consequences of jumping into such an area. Claimant was not required to high jump. He was participating in a volunteer recreational program, and did so of his own free choice.

It is the opinion of this Court that claimant, in attempting to high jump for the third time after having observed the condition of the landing area and after having been warned not to jump, was not exercising that degree of due care and caution, which a reasonably prudent person of the same age, capacity, intelligence and

experience would exercise under the same or similar circumstances.

The claim is denied.

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(No. 5449—Claimant awarded \$64.80.)

ADDRESSOGRAPH MULTIGRAPH CORPORATION, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 28, 1968.

ADDRESSOGRAPH MULTIGRAPH CORPORATION, Claimant,  
pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Addressograph Multigraph Corporation, filed its complaint against respondent for the sum of \$64.80 for services rendered the Illinois Department of Labor.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Addressograph Multigraph Corporation, had completed the work as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Sixty-four Dollars and Eighty Cents (\$64.80).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Addressograph Multigraph Corporation, is thereby awarded the sum of \$64.80.

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(No. 5450—Claimant awarded \$67.70.)

PHEASANT RUN, INC., A Delaware Corporation, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

SPENCER AND BISHOP, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Pheasant Run, Inc., a Delaware Corporation, filed its complaint against respondent for the sum

of \$67.70 for services rendered the Illinois Youth Commission.

A stipulation was entered into by claimant and respondent as follows :

“That services were rendered to respondent at the special instance and request of the Illinois Youth Commission.

“That the statements attached to the complaint as exhibit A are due and owing, namely Sixty-seven Dollars and Seventy Cents (\$67.70).

“That, as a result of delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Sixty-seven Dollars and Seventy Cents (\$67.70).

“That upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Pheasant Run, Inc., is thereby awarded the sum of **\$67.70**.

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(No. 5452—Claimant awarded \$1,520.00.)

RAYMOND S. BLUNT AND COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 28, 1968.

NOBLE AND BROWN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Raymond S. Blunt and Company, filed its complaint against respondent, State of Illinois, for the sum of \$1,520.00 for services rendered the Department of Financial Institutions.

A stipulation was entered into by claimant and respondent as follows :

“That services were rendered to respondent at the special instance and request of the Department of Financial Institutions.

“That the statements attached to the complaint as exhibit A are due and owing, namely Fifteen Hundred and Twenty Dollars (\$1,520.00).

“That, as a result of delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Fifteen Hundred and Twenty Dollars (\$1,520.00).

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into ; (2) service is satisfactorily performed, and materials furnished in accordance with

such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Raymond S. Blunt and Company, is thereby awarded the sum of \$1,520.00.

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(No. 5458—Claimant awarded \$167.35.)

HOLY CROSS HOSPITAL, Claimant, *vs.* **STATE OF ILLINOIS**,  
Respondent.

*Opinion filed June 28, 1968.*

HOLY CROSS HOSPITAL, Claimant, *pro se.*

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

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

DOVE, J.

Claimant, Holy Cross Hospital, filed its complaint against respondent for the sum of \$167.35, for materials and services rendered the Department of Children and Family Services.

A stipulation was entered into by claimant and respondent as follows :

"The report of the Department of Children and Family Services, dated February 8, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

"No other oral or written evidence will be introduced by either party.

"The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed and the evidence herein stipulated.

"Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$167.35.

"Neither party desires to file briefs in this proceeding.

"Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present."

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Holy Cross Hospital, is thereby awarded the sum of \$167.35.

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(No. 5462—Claimant awarded \$167.00.)

KAISER SUPPLY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

KAISER SUPPLY, Claimant, pro se.

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

CONTRACTS—*lapsed appropriation.* Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time

said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PERLIN, C.J.

Claimant, Kaiser Supply, seeks the sum of **\$167.00** for materials furnished to the office of the Secretary of State. A Departmental Report from the Supervisor of Buildings and Grounds states that the materials were ordered and delivered. The parties have stipulated that there are no disputed questions of fact, and that the claims arise by reason of a lapsed 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 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; *Gilbert-Hodgman, Inc. vs. State of Illinois*, 24 C.C.R. 509. It appears that all the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of \$167.00.

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(No. 5469—Claimant awarded \$60.00.)

LA SALLE EXTENSION UNIVERSITY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 28, 1968.

LA SALLE EXTENSION UNIVERSITY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**CONTRACTS—lapsed appropriation.** Where contract has been properly entered into, all provisions thereof satisfactorily performed,

proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which such claim could and would have been paid had lapsed, an award will be made.

PERLIN, C.J.

Claimant, LaSalle Extension University, seeks payment in the sum of \$60.00 for services and materials rendered to the Board of Vocational Education and Rehabilitation for a correspondence course for one Beatrice J. Tinsley. The parties have stipulated that, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation, and that the sum requested is lawfully due claimant.

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; *Gilbert-Hodgman, Inc. vs. State of Illinois*, 24 C.C.R. 509. It appears that all the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of \$60.00.

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(No. 5473—Claimant awarded \$116.60.)

SHELL OIL COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

SHELL OIL COMPANY, Claimant, pro se.

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

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

PERLIN, C.J.

Claimant seeks payment of the sum of \$116.60 for aviation fuel purchased by the Department of Public Safety (Division of State Highway Police). The parties have stipulated that the amount claimed is due and owing to claimant. It appears from the record that there are no disputed questions of fact, and that the claim arises by reason of a lapsed 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 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; *Gilbert-Hodgman, Inc. vs. State of Illinois*, 24 C.C.R. 509. All the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$116.60.

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(No. 5476—Claimant awarded \$71.52.)

XEROX CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

XEROX CORPORATION, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Xerox Corporation, filed its complaint against respondent for the sum of \$71.52 for materials and services rendered the Department of Public Aid.

A stipulation was entered into by claimant and respondent as follows :

“That equipment was delivered to respondent at the special instance and request of the Department of Public Aid.

“That the statements attached to the complaint as exhibit A are due and owing in the sum of Seventy-one Dollars and Fifty-two Cents (\$71.52).

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Seventy-one Dollars and Fifty-two Cents (\$71.52).

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Xerox Corporation, is thereby awarded the sum of **\$71.52**.

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(No. 6479—Claimant awarded \$235.00.)

THE MEDICAL GROUP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

THE MEDICAL GROUP, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant, The Medical Group, seeks judgment in the sum of **\$235.00**, for services furnished to one Pat Znidarsich, including professional services, x-ray and laboratory facilities, from September **29, 1966** to March **31, 1967**. The Department of Children and Family Services confirmed that the medical services were rendered to Miss Znidarsich at the request of the agency, and that the sole reason for nonpayment was that the medical statements were not received in time to process before the end of the 74th biennium.

The parties have stipulated that the amount claimed herein is “rightfully due, and would have been paid had said claim been filed prior to the close of the biennium and the transfer of funds to the General Revenue fund.”

Where a contract with the State has been (1)prop-

erly 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; *Gilbert-Hodgmnn, Inc. vs. State of Illinois*, 24 C.C.R. 509. It appears from that record that all of the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of **\$235.00**.

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(No. 5486—Claimant awarded \$600.83.)

THE HOPE SCHOOL, INCORPORATED, A Not-For-Profit Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

TRAYNOR AND HENDRICKS, Attorneys for Claimant.

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

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

DOVE, J.

Claimant, The Hope School, Inc., a Not-for-Profit Corporation, filed its claim against respondent for the sum of **\$600.83** for care of Bonnie Ferguson, a blind person, who was being cared for by the Department of Mental Health, Division of Mental Retardation Services.

A Departmental Report was filed, which stated in part as follows:

“It is true that there is due to The Hope School the sum of \$600.83 for the care of Bonnie Ferguson, which is correctly revealed in exhibit B of the filed complaint.

“Since the sum of \$600.83, which is due The Hope School, was incurred prior to June 30, 1967, or in the 74th Biennium, the Illinois Department of Mental Health, Division of Mental Retardation Services, could not authorize payment of such funds to The Hope School out of 75th biennium appropriations.”

Subsequently a stipulation was entered into by claimant and respondent as follows:

“The report of the Department of Mental Health dated March 28, 1968 (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$600.83.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, The Hope School, Inc., is thereby awarded the sum of \$600.83.

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(No. 5488—Claimant awarded \$460.00.)

LEWIS COLLEGE, LOCKPORT, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

DUNN, STEFANICH, MCGARRY AND KENNEDY, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Lewis College, Lockport, Illinois, seeks to recover from respondent the sum of \$460.00 for tuition, books and supplies furnished one William A. Loehrer.

A Departmental Report, dated January 17, 1968, was filed with the Court of Claims as exhibit C. Subsequently a stipulation by and between claimant and respondent was filed herein on the 24th day of April, 1968.

The stipulation sets forth the following:

“That the claimant, Lewis College, Lockport, Illinois, had enrolled one William A. Loehrer, **194-207**, in its college of studies, and that the tuition for the period of February **6, 1967** through May **26, 1967** is rightfully due claimant herein.

“That the sum so due is Four Hundred Sixty Dollars and No Cents (**\$460.00**).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein, the Court

shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Lewis College, Lockport, Illinois, is thereby awarded the sum of \$460.00.

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(No. 5497—Claimant awarded **\$200.25**.)

ST. LOUIS CHILDREN’S HOSPITAL, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 28, 1968.*

ST. LOUIS CHILDREN’S HOSPITAL, Claimant, pro se.

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

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

PERLIN, C.J.

Claimant seeks payment of the sum of **\$200.25** for services rendered at the request of the East St. Louis

Regional Office of the Division of Child Welfare, Department of Children and Family Services. The parties have stipulated that the sum requested is due and owing to claimant. It appears from the statement of fact that the reason for nonpayment of the hospital bill was that the bill was misplaced, and not discovered before funds for payment thereof lapsed on September 30, 1967.

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; *Gilbert-Hodgman, Inc. vs. State of Illinois*, 24 C.C.R. 509. The record shows that all the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of \$200.25.

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(No. 6136—Claim denied.)

ESSAU MARTIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

ARTHUR J. O'DONNELL, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; PHILIP J. ROCK AND DANIEL KADJAN, Assistant Attorneys General, for Respondent.

**PRISONERS AND INMATES — wrongful incarceration.** Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

**SAME—legislative intent.** The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

DOVE, J.

This is a cause of action brought by claimant against respondent, State of Illinois, for damages under Sec. 8C of the act creating the Court of Claims, which act provides that the Court of Claims shall have jurisdiction to hear and determine:

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, that the Court shall make no award in excess of the following amounts: For imprisonment of five years or less, not more than \$15,000.00; for imprisonment of fourteen years or less, but more than five years, not more than \$30,000.00; for imprisonment of over fourteen years, not more than \$35,000.00; and, provided further, the Court shall fix attorneys fees not to exceed 25% of the award granted.

Claimant, Essau Martin, was arrested on August 17, 1959 by police officers of the City of Chicago, and held in custody without bail on the charge of murder of one Eula Lloyd. On October 20, 1959, a true bill of indictment was returned charging claimant with the murder of Eula Lloyd, and the cause was tried without a jury in March of 1960. On March 23, 1960, a finding of guilty was rendered to the charges contained in the indictment. Claimant was sentenced to the Illinois State Penitentiary for a term of 99 years. A timely Writ of Error was filed with the Supreme Court of Illinois, and the judgment of the Criminal Court of Cook County was reversed, and claimant was released from prison on March 2, 1963.

On August 17, 1959, Essau Martin lived, at 6643 Wabash Avenue, Chicago, Illinois, with his wife and five children. He was 24 years old, and employed at the Argo Refinery, Argo, Illinois, earning approximately \$100.00

per week. Eula Lloyd was claimant's sister-in-law. She was separated from her husband, and lived with an aunt, Beatrice Thomas, at **741** West 59th Street, Chicago, Illinois.

A few days prior to August 17, 1959, Eula Lloyd went to claimant's home, and asked him if he would drive her to look at an apartment she wanted to rent. They went to an address at or near 61st and Yale Streets, and following that they drove around and stopped at a liquor store at 103rd and Indianapolis Boulevard where claimant purchased a bottle of liquor and six cans of beer. They both drank the liquor, and drove to 31st Street and the Lake where they parked and had sexual intercourse on two occasions. Sometime around midnight they drove home, parked a block from claimant's house, and both fell asleep in the car. At daybreak claimant awoke, and Eula Lloyd was gone. Claimant worked that day, and did not see Eula Lloyd until Sunday evening when she returned to his house, and asked if he would drive her to the Damen Avenue Welfare Office on Monday morning. Eula Lloyd returned Monday morning, and she and claimant proceeded to her apartment where she was to change clothes for the trip downtown. On the way they stopped and purchased a half pint of gin and a quart of beer.

Claimant and Eula Lloyd arrived at her apartment at about 8:30 in the morning, and commenced to enter into a drinking and sex orgy. About 6:20 that evening, August 17, 1959, Beatrice Thomas, Eula Lloyd's aunt, came into the apartment. She found the decedent, Eula Lloyd, lying in a bed, clothed only in a half slip, and bleeding heavily from the vagina, while the claimant fully dressed, except for his shirt, was "passed out" on the bedroom floor. The aunt summoned a police ambulance to take the decedent to the hospital. Her death

occurred the following day, and, according to the testimony of the pathologist who performed an autopsy, death was caused by Boeck's Sarcoidosis of the lungs, liver and spleen, contributed to and aggravated by lacerations of the anus and rectum, which resulted in an infection of decedent's belly.

At claimant's first trial on the criminal charge, there was introduced into evidence a statement of defendant given at the time of his arrest to the effect that claimant and Eula Lloyd had engaged in a "savage", "wild" and "wicked" affair, and that he had "just got evil" while drinking and engaging in sex play with the decedent, and had put his hand into her vagina. At the hearing conducted in connection with this cause, claimant stated he did not place his hand in the decedent's vagina, nor did he place his finger, hand or any blunt instrument in the decedent's anus.

Dr. Joseph E. Campbell was called as a witness on behalf of claimant. He stated that he was a forensic pathologist, and that he performed an autopsy on the body of Eula Lloyd. His examination revealed tears extending into the rectum, which resulted in tearing of the tissues surrounding the rectum with bleeding and infection extending throughout decedent's belly. In addition, there was an acute infection and tearing or hemorrhage of the rectum with extension of the infection throughout the belly cavity. Smears of the mouth, vagina and rectum were examined, and sperm were found in the smears of the mouth and vagina. He stated that Boeck's Sarcoidosis is a progressive disease, and can result in death. In his opinion, the cause of death was due to Boeck's Sarcoidosis, contributed and aggravated by the tears of the anus and rectum, which had caused an infection of the belly. The infection in the belly was not

protracted. It was an acute infection of less than one or two days duration. The pathologist testified that the lacerations of the rectum and anus could not have resulted from a fall, but could have resulted from acts of sexual intercourse per anus. The pathologist testified that, but for the tears of the anus and the rectum introducing infection into the belly cavity, Eula Lloyd would not have died as soon as she did. In his opinion the injury to the anus and rectum unquestionably caused Eula Lloyd's death. He further stated that, in his opinion, Eula Lloyd was not in the midst of her menstruation.

Thomas Cunningham was called as a witness on behalf of respondent, and testified that on August 17, 1959 he was a police officer of the City of Chicago, and was a witness to certain statements made by claimant to the effect that he had inserted his hand and arm to a point approximately two inches below the elbow joint into the vagina of the decedent.

Beatrice Thomas was called as a witness on behalf of respondent, and testified that, when she found the deceased on August 17, 1959, there was a gash over her eyebrows, fingernail scratches on her throat, and a bruise at the base of decedent's spinal cord. She further testified that there was blood running down the decedent's legs; that the towels in the bathroom were bloody, as was the bathtub; that there was a string of blood on the couch and dining room chairs, as well as the kitchen chairs; and, that there was considerable blood on the mattress where Eula Lloyd was lying.

Under the law in Illinois, claimant, in order to be entitled to an award for unjust imprisonment, must prove by a preponderance of the evidence (1) that the term served in prison was unjust; (2) that the act for

which he was wrongfully imprisoned was not committed by him; and, (3) the amount of damages to which he is entitled. *Jonnia Dirkans vs. State of Illinois*, No. 4904, (opinion filed on February 25, 1965.) *Munroe vs. State of Illinois*, No. 4913, (opinion filed on April 7, 1966).

In the Dirkans case, the Court held that a claimant attempting to recover an award for unjust imprisonment must prove his innocence of the "fact" of the crime for which he was imprisoned. Claimant contends that his innocence has been determined by the Illinois Supreme Court. In the Supreme Court opinion setting aside the conviction of the Cook County Criminal Court, the Court stated:

"Upon consideration of the entire record, we conclude that grave and substantial doubt exists both as to the criminal agency and the cause of death. Under the circumstances, it becomes our duty to reverse the judgment of the conviction entered by the Criminal Court of Cook County."

The quantum of proof, which claimant must present to this Court to prove his innocence of the crime for which he was imprisoned thereby entitling him to an award of damages from the State of Illinois for time unjustly spent in prison, is greater than the proof required to convince a judge of an Appellate Court that there was reasonable doubt as to his guilt of the crime charged. In the first instance, claimant must prove his innocence of the "fact" of the crime by a preponderance of the evidence, while in the second instance he must only present sufficient evidence to raise a reasonable doubt of his guilt of the crime charged.

It is the opinion of this Court that the State's failure to sustain its burden in the criminal prosecution, that is, to prove guilt beyond a reasonable doubt, does not in itself amount to proof of the innocence of claimant of the

“fact” of the crime by a preponderance of the evidence. This is especially so in a case such as this, where claimant’s evidence of his innocence of the crime is his own uncorroborated testimony, and where there is testimony and evidence in the record tending to incriminate claimant of the crime for which he was charged.

It is the opinion of this Court that claimant’s evidence, consisting chiefly of his own uncorroborated testimony, does not sustain claimant’s burden of proving by a preponderance of the evidence his innocence of the “fact” of the crime for which he was imprisoned, and thereby entitled him to recover damages from the State of Illinois for time unjustly spent in prison.

Claimant’s claim is, therefore, denied.

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(No. 5138—Claim denied.)

GUYLENE BERRY, as Administrator of the Estate of ELLIS THURLOW BERRY, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

R. W. HARRIS, Attorney for Claimant.

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

**HIGHWAYS—*duty of State.*** The State of Illinois is not an insurer of every accident that occurs on its public highways, but does have the duty to exercise reasonable care in the maintenance and care of its highways in order that defective and dangerous conditions likely to injure persons lawfully on the highways shall not exist.

**SAME—*maintenance of shoulder.*** The State of Illinois must maintain the shoulder of a road in a reasonably safe condition, but the shoulder is not intended for travel or use when there is nothing to interfere with travel on the highway.

**NEGLIGENCE—evidence.** Where evidence disclosed that claimant's decedent was driving tractor along and upon the shoulder of a highway in violation of statute, violation of such statute held to be prima facie evidence of negligence.

**SAME—contributory negligence.** Where evidence indicated that there was no emergency or other legitimate reason for decedent to drive his tractor on the shoulder of the road rather than on the paved portion of the highway, the Court held claimant failed to sustain the burden of proof that decedent was free from contributory negligence.

DOVE, J.

This is a cause of action brought by claimant against respondent, State of Illinois, for the death of claimant's husband. Claimant alleges that respondent negligently failed to maintain a portion of the shoulder running along Illinois Route No. 127 in a safe and proper condition.

On June 13, 1963, Ellis Thurlow Berry, the 39 year old husband of the claimant herein, was driving his tractor in a southerly direction along and upon the shoulder of Illinois Route No. 127. At a point about 1 1/10 miles south of the Union County line, and approximately 100 feet north of Cooper Creek in Alexander County, Illinois, the tractor ran off the shoulder and down a sharp embankment, and turned over pinning Ellis Berry beneath it. As a result of the accident Ellis Berry sustained severe injuries resulting in his death.

Claimant alleges that respondent was negligent in allowing pieces of blacktop slab to lay concealed in the grass and weeds along the west shoulder of Illinois Route No. 127; that respondent negligently failed to keep the shoulder free and clear from the pieces of blacktop slab; and, that respondent negligently failed to mow the grass and weeds along the shoulder of the highway, so that the pieces of blacktop slab would be visible, all of which acts

of negligence proximately caused the death of the decedent.

There were no actual eyewitnesses to the accident. However, one Oscar Gaskill testified that immediately before the accident he was driving his truck along Illinois Route No. 127 in a southerly direction approaching the scene of the accident when he saw the decedent driving his tractor along the shoulder of the road, and that, as he passed, Berry grinned and waved to him. Gaskill further testified that, after he passed Berry, he looked in his rear view mirror, and did not see Berry. Gaskill then turned around, and went back to the scene of the accident where he found Berry pinned beneath the tractor.

The law in the State of Illinois is clear. 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; *Link vs. State of Illinois*, 24 C.C.R. 69. This Court has held many times that the State is not an insurer of all persons traveling upon its highways. *McNary vs. State of Illinois*, 22 C.C.R. 328; *Link vs. State of Illinois*, 24 C.C.R. 69.

The evidence indicates that Berry had driven his tractor on the shoulder of Illinois Route No. 127 for some distance before the accident, but it does not indicate that an emergency of any nature caused the decedent to turn off the highway, or that the decedent turned off the highway onto the shoulder to avoid an accident, or to allow approaching vehicles to pass in safety.

Claimant has cited the case of *Hammond vs. State*, 24 C.C.R. 368, as authority for the proposition that farm

vehicles have a right to use the shoulder of the highway as they see fit. While it is true that the second headnote of the syllabus of the Hammond case sets forth this proposition, a reading of the case discloses that there is no such proposition of law supported by any authority. The headnote was mistakenly extracted from a summation of the testimony in the case prepared by Commissioner Presbrey. In his report to the Court the Commissioner summarized the testimony of one of the State's engineers by saying that "the engineer further stated that there was no regulation against farm vehicles using the shoulder as they saw fit." This is not the law in Illinois.

The Uniform Act Regulating Traffic on Highways, referred to as Sec. 151 of Chap. 95½, Ill. Rev. Stats., provides as follows :

"(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except. as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
2. When the right half of a roadway is closed to traffic while under construction or repair;
3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
4. Upon a roadway designated and sign posted for one way traffic;
5. Whenever there is a single track paved road on one side of the public highway and two vehicles meet thereon, the driver on whose right is the wider shoulder shall give the right-of-way on such pavement to the other vehicle.

(b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place, and under the conditions then existing, shall be driven in the right-hand lane available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction, or when preparing for a left turn at an intersection or into a private road or driveway."

The Uniform Act Regulating Traffic on Highways, referred to as Sec. 109 of Chap. 95 $\frac{1}{2}$ , Ill. Rev. Stats., defines the term "roadway" as follows:

**"(d) Roadway.** That portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively."

It appears from the evidence in this case that the decedent Berry was driving his tractor along and upon the shoulder of the highway in violation of the statute requiring the driver of vehicles upon highways to drive on the right half of the roadway, except in special situations enumerated in the statute. It is the Illinois rule of law that the violation of an ordinance or statute, such as Sec. 151 of the Uniform Act Regulating Traffic on Highways, is prima facie evidence of negligence. *Miller vs. Burch*, 254 Ill. App. 387.

In a recent case decided by this Court, *Welch vs. State of Illinois*, No. 5057, suit was brought to recover damages for the death of a truck driver, who had driven his truck off the highway onto the shoulder of the road and into a large hole in the shoulder causing the truck to fall into a ravine, killing the driver. There was evidence introduced that the driver had driven onto the shoulder to avoid hitting an oncoming car, which was on the wrong side of the road, and that the truck skidded out of control. In awarding damages for the death of the truck driver, the Court held that the driver was not guilty of contributory negligence, because the shoulder of the highway was being used for an intended purpose, namely, the avoidance of an accident.

In the case of *Lee vs. State of Illinois*, No. 5076, claimant sought to recover damages for the death of his

wife. The evidence showed that the front wheel of the car driven by the wife dropped off the paved portion of the highway and onto the lower shoulder of the road. In attempting to return the car to the paved portion of the highway the decedent lost control of the car, and it overturned. There was testimony to the effect that the shoulder was 3 to 4 inches lower than the paved highway. It was plaintiff's contention that this difference in level constituted negligence on the part of the State proximately causing the accident. In denying recovery this Court held that the decedent was contributorily negligent in allowing the front wheel of her car to drop off the paved highway onto the shoulder. The Court also made reference to Sec. 151 of the Uniform Act Regulating Traffic on Highways, which has been set forth above, and stated that the acts of the decedent did not fall within any of the exceptions to the rule, which requires vehicles to be driven on the right half of the roadway.

Courts in other jurisdictions have rendered similar decisions. In *McNaughton vs. State*, 9 App. Div. 2d 990, 194 N.Y.S. 2d 873, the Court held that the State must maintain the shoulder of a road in reasonably safe condition, but that the shoulder is not intended for travel or use when there is nothing to interfere with travel on the paved highway. In this case the Court held the State not liable for injury to plaintiff, who for no apparent reason drove his car onto the shoulder of the road. In the case of *Guyette vs. State*, 22 App. Div. 2d 975, 254 N.Y.S. 2d 552, the Court held that, even assuming the State was negligent in permitting a rut in the shoulder of a road, claimant could recover only if he established that an emergency necessitated his driving upon the shoulder. In the case of *Miller vs. State*, 201 Misc. 859, 106 N.Y.S. 2d 528, the Court held that the principle relied upon by

claimants that the shoulder of a highway must be maintained in a reasonably safe condition for use when occasion requires was applicable only when operation on the shoulder rather than on the pavement was a reasonable recourse by reason of some emergency or special condition. It appears from the evidence in the case at bar that there was no emergency or other legitimate reason for decedent Berry to drive his tractor on the shoulder of the road rather than on the paved portion of the highway.

It is the opinion of this Court that claimant has failed to sustain the burden of proof that decedent was free from contributory negligence. Claimant's evidence of decedent's careful habits and the circumstances of the accident are not sufficient to rebut the evidence of contributory negligence on the part of the decedent. Contributory negligence on the part of the decedent bars any recovery for the death of the decedent.

An award to claimant, Guylene Berry, as Administrator of the Estate of Ellis Thurlow Berry, deceased, is, therefore, denied.

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(No. 5209—Claim denied.)

**WILLIAM BENDER**, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed August 16, 1967.*

**Petition of Claimant for rehearing denied August 14, 1968.**

**D. A. McGRADY**, Attorney for Claimant.

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

*PRISONERS AND INMATES — wrongful incarceration.* Before an award will be made for wrongful incarceration, claimant must prove by a preponderance of the evidence (1) that the time served in prison was unjust; (2) that the act for which he was wrongfully imprisoned was not committed; and, (3) the amount of damages to which he is entitled.

*SAME—legislative intent.* The language found in Chap. 37, Sec. 439.8C, Ill. Rev. Stats., intended that claimant, prior to any recovery for wrongful incarceration, must establish his complete innocence of the “fact” of the crime for which he was imprisoned.

### PEZMAN, J.

This action is brought against the State of Illinois for damages under Sec. 8C of the Act creating the Court of Claims, which provides that the Court of Claims shall have jurisdiction to hear and determine :

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 \$15,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$35,000.00; and provided further, the Court shall fix attorney’s fees not to exceed 25% of the award granted.

William Bender, claimant, was arrested and charged together with Robert W. Richards, of committing the crime of armed robbery of a tavern in Carlinville, Illinois, on May 7, 1954. Bender pleaded “Not Guilty” to the charge, and after a trial was found guilty by a jury on September 9, 1954. On September 15, 1954, Bender was sentenced to the Illinois State Penitentiary for the duration of his natural life.

On October 17, 1960, the Supreme Court of the State of Illinois reversed the conviction, and remanded the cause. On January 28, 1961, the defendant-claimant, William Bender, was again convicted upon trial for the crime of armed robbery as charged, and was sentenced to the

Illinois State Penitentiary for a term of not less than three years nor more than twenty-five years. On March 23, 1962, the Supreme Court of the State of Illinois again reversed the conviction, and remanded the cause to the Circuit Court of Macoupin County, Illinois. On May 17, 1963, Bender made bond, and was released from custody having been imprisoned in various jails and penitentiaries in the State of Illinois since May 10, 1954. The charge of armed robbery was dismissed by the State of Illinois in December, 1964.

The question to be decided in this case is whether claimant has carried the burden of proving and establishing his innocence of the crime of which he was charged, and for which he was imprisoned. At the original trial on the charge of armed robbery, Richards testified for the State, and named Bender as the person who committed the crime using an automobile and gun, which were owned by Richards, and loaned to Bender for the robbery. Bender claims that the testimony of Richards is false.

Bender testified in the cause before this Court that on the night of the robbery he had borrowed a 1952 Chrysler automobile belonging either to Robert W. Richards or to Richards' wife, and, while driving around the City of Springfield, Illinois, between 10:00 P.M. and 11:00 P.M., was involved in a one car accident at 14th or 15th and Madison Streets at the railroad crossing. He stated that he left the scene of the accident without reporting it to the police, and did not have his injuries treated in Springfield because he was on parole, and did not want to get in trouble with his parole officer for driving an automobile in violation of the terms of his parole. He further testified that he then returned the keys to the car to Vivian Richards at the Gay Nineties tavern, and told her about

the accident. He then went to his brother's home, and he, his brother, and his brother's wife drove to Peoria, Illinois, where they got a room at the Andre Hotel. They drove to a hospital in Peoria where the cut on the right side of Bender's face was treated requiring 96 sutures. Bender did not give his correct name at the hospital. On May 10, 1954, Bender was arrested in a room in the Andre Hotel, Peoria, Illinois, in the company of one Peggy Lee Baird.

It should be noted that Bender did not contend at either of his two trials on the armed robbery charge that at the time the crime was committed he was driving a borrowed car around the City of Springfield, Illinois, and that he wrecked the car in Springfield, Illinois, causing the injury to his face.

Claimant did not produce a single witness to corroborate his story, although it would appear from his testimony that his brother, his brother's wife, Vivian Richards, or Peggy Lee Baird could have helped him in this regard. The evidence in this case discloses that the Springfield, Illinois, police records show no indication of an accident having occurred as described by claimant.

In *Munroe vs. State of Illinois*, Case No. 4913, this Court said that one of the primary issues to determine in a case brought under Sec. 8C of the Court of Claims Act was whether claimant was innocent of the crime for which he was imprisoned. The burden is on claimant to prove by a preponderance of the evidence that the act for which he was wrongfully imprisoned was not committed by him.

In the case of *Jonnia Dirkans vs. State of Illinois*, Case No. 4904, this Court held that claimant must prove his innocence of the "fact" of the crime.

It is the opinion of this Court that in view of the evidence in this case, and in view of the fact that claimant has failed to produce even one witness to corroborate his testimony as to his innocence of the crime with which he was charged, claimant has totally failed to carry the burden of proving by a preponderance of the evidence that the act for which he was imprisoned was not in fact committed by him.

The claim is hereby denied.

*Opinion on Rehearing*

This cause coming on to be heard upon the petition of claimant for rehearing, and the Court having examined said petition and the file in said cause of action finds that claimant has failed to adequately allege those points, which were purported to have been overlooked or misapprehended by the Court.

The cause at hand was brought under Section 8C of the Court of Claims Act, which states as follows:

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 \$16,000.00; for imprisonment of 14 years or less but over 5 years, not more than \$30,000.00; for imprisonment of over 14 years, not more than \$36,000.00; and provided further, the Court shall fix attorney's fees not to exceed 26% of the award granted.

This is not a trial de novo of the guilt or innocence of claimant, but a hearing in which claimant must prove his innocence of the crime of which he was charged in the original criminal case in the lower Court by a preponderance of the evidence. This interpretation of Sec. 8C of the Court of Claims Act, and the proof required have been followed by the Court of Claims since the passage of Sec. 8C by the legislature. *Roland Munroe, Jr. vs.*

*State of Illinois*, No. **4913**; *Jonnia Dirkans vs. State of Illinois*, No. **4904**; *Henry Napue vs. State of Illinois*, No. **4912**.

Claimant's petition for rehearing alleges that the Court has failed to consider the presumption of innocence that has never been overcome in claimant's case, as there is no legal conviction, and that by dismissing charges the State has conceded to the innocence rather than the guilt of claimant. This Court finds that claimant has confused two separate forums and two separate theories of law. The original forum wherein the claimant was tried for an alleged crime, and wherein the claimant must have been proven guilty beyond all reasonable doubt, and the Court of Claims wherein claimant seeks to recover against the State under Sec. 8C of the Court of Claims Act. There is no legal relationship between the finding of the Supreme Court as to whether or not the civil rights of claimant were violated, and the finding of the Court of Claims wherein claimant seeks recourse under a statutory provision in a semi-judicial forum, which was created by the legislature for the purpose of hearing those causes of action against the State of Illinois that are constitutionally prohibited in normal courts of law. In this latter forum, rules of evidence and procedure and elements of proof are of a special nature often dissimilar to those rules prescribed in a Court of criminal jurisdiction.

This Court affirms its previous determination in the hearing of this cause, and finds that claimant has failed to allege any points of law or fact that had been overlooked or misapprehended by the Court. Claimant's petition for rehearing is denied.

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(No. 5345 — Claimant awarded \$50.00.)

BARKER MILLING AND GRAIN COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* August 14, 1968.

BARKER MILLING AND GRAIN COMPANY, Claimant, *pro se.*

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

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

DOVE, J.

Claimant, Barker Milling and Grain Company, seeks to recover from the State of Illinois payment in the sum of \$50.00 for an advance on warehouse license never issued. Demand for said sum was refused on the grounds that funds appropriated for such payments had lapsed.

A stipulation was entered into by claimant and respondent as follows :

“The report of the Illinois Commerce Commission to the Illinois Attorney General, dated December 2, 1966, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$50.00.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Barker Milling and Grain Company, is thereby awarded the sum of \$50.00.

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(No. 5433—Claimant awarded \$547.46.)

THE FIRESTONE TIRE AND RUBBER COMPANY, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

Opinion filed August 14, 1968.

THE FIRESTONE TIRE AND RUBBER COMPANY, Claimant,  
pro se.

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

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

PEZMAN, J.

Claimant, The Firestone Tire and Rubber Company, filed its complaint against respondent for the sum of \$547.46 for materials furnished the Bureau of Machinery

of the Division of Highways of the Department of Public Works and Buildings.

A stipulation was entered into by claimant and respondent as follows :

“The report of the Department of Public Works and Buildings dated July 3, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of **\$547.46**.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, The Firestone Tire and Rubber Company, is hereby awarded the sum of \$547.46.

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(No. 5438—Claimant awarded \$3,900.00.)

ARTHUR M. GOLDRICH, Claimant, *vs.* STATE OF ILLINOIS,  
Respondent.

Opinion filed August 14, 1968.

ROSENTHAL AND SCHANFIELD, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks to recover the sum of \$3,900.00 for services rendered as a Certified Public Accountant in examining certain credit unions as per direction of Joseph E. Knight, Director of the Department of Financial Institutions.

On or about the 22nd day of April, 1968, claimant and respondent entered into a stipulation of facts, which reads as follows:

“That services were rendered to respondent at the special instance and request of the Department of Financial Institutions.

“That the statements attached to the complaint as exhibit A are due and owing, namely, three thousand nine hundred dollars (**\$3,900.00**).

“That, as a result of delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment of transfer of the claim has been made.

“That there is rightfully due to claimant the sum of three thousand nine hundred dollars (**\$3,900.00**).

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

From the stipulation, set forth above, it appears that the reason for non-payment was the lapse of an appropriation. This Court has repeatedly held that, where a con-

tract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Arthur M. Goldrich, is hereby awarded the sum of \$3,900.00.

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(No. 5445—Claimant awarded \$591.30.)

EDWARD LIMPERIS, TRUSTEE IN THE MATTER OF CHICAGO SEATING COMPANY, INC., a Bankrupt, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 14, 1968.

AHERN and GILLOGLY, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, Edward Limperis, as Trustee in Bankruptcy for Chicago Seating Co., Inc., a Bankrupt, seeks to recover the sum of \$591.30 purportedly due and owing to bankrupt for materials and services rendered to the Department of Public Works and Buildings under contract No. 73198 at The Tinley Park State Hospital, Tinley Park, Illinois.

Exhibit A attached to the complaint is a letter from Lorentz A. Johanson, Supervising Architect of the Department of Public Works and Buildings, which letter states as follows:

“This will acknowledge receipt of your form letter, dated September 16, 1967, with reference to the above captioned subject.

“Our contract is with the Chicago Seating Company, and we require a letter from that company, signed by its officials, agreeing to your appointment as their authorized collector.

“For your information, there remains an unpaid balance of *only* **\$591.30** on this contract.”

Subsequently, on the 21st day of May, 1968, a stipulation was made and entered into by and between the Trustee in Bankruptcy and the Department of Public Works and Buildings, through William G. Clark, Attorney General. It reads as follows:

“That Edward Limperis is the duly appointed and acting Trustee in the matter of Chicago Seating Co., Inc., Bankruptcy No. **65 B 4343**.

“That the bankrupt corporation furnished certain works and services for and in behalf of the Department of Public Works and Buildings under contract No. **73198** at the Tinley Park State Hospital, Tinley Park, Illinois.

“That under the terms of the contract the State of Illinois, Department of Public Works and Buildings, is indebted to the bankrupt corporation in the amount of **\$591.30**, which is the unpaid balance due on the total contract price.

“That no assignment or transfer of the claim has been made.

“That the claimant is justly entitled to the amount therein claimed from the State of Illinois.

“That he has made no other claim to any person, corporation or tribunal other than the State of Illinois.”

Claimant, Edward Limperis, Trustee in the matter of Chicago Seating Co., Inc., a bankrupt, is hereby awarded the sum of \$591.30.

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(No. 5446—Claimant awarded \$161.46.)

XEROX CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 14, 1968.

XEROX CORPORATION, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, Xerox Corporation, filed its complaint against respondent for the sum of **\$161.46** for materials and services rendered the Division of Highways, Bureau of Traffic, of the Department of Public Works and Buildings.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Xerox Corporation, had completed the work as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of One Hundred Sixty-One and 46/100 Dollars (\$161.46).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this

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

Claimant, Xerox Corporation, is thereby awarded the sum of **\$161.46.**

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(No. 5447—Claimants awarded \$1,934.00.)

JOSEPH T. KING, THEODORE G. LASSIN AND HERMAN LESLIE,  
Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

LAZARUS AND WINOKUR, Attorneys for Claimants.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,  
Assistant Attorney General, for Respondent.

**CIVIL SERVICE ACT—award for salary during period of illegal suspension.** Where evidence showed that claimants were illegally suspended, they were entitled to awards.

DOVE, J.

Claimants, Joseph T. King, Theodore G. Lassin and Herman Leslie, filed their complaint against respondent for various amounts hereinafter set forth for services rendered the Department of Public Works and Buildings.

A stipulation was entered into by claimants and respondent as follows :

“That, prior to April 21, 1967, claimants were employees of respondent, and that, on March 2, 1967, each of them was advised by

telegram that he was being suspended for thirty days without pay pending an investigation of garage operations.

“That on April 1, 1967 each claimant was reinstated, and that on April 21, 1967 the position of each claimant was abolished.

“That claimants are entitled to the pay due them during the period of suspension as follows:

Claimant, Joseph T. King .....	\$716.00
Claimant, Theodore G. Lassin .....	609.00
Claimant, Herman Leslie .....	609.00

“That the parties will present no witnesses nor evidence before Commissioner Griffin.

“That the Court shall decide and render judgment herein according to the rights of the parties, and in the same manner as if the facts stipulated herein were proved upon the trial of said issues.”

We are of the opinion that each of the claimants is justly entitled to the amount claimed from the Department of Public Works and Buildings.

Claimant, Joseph T. King, is awarded the sum of \$716.00.

Claimant, Theodore G. Lassin, is awarded the sum of \$609.00.

Claimant, Herman Leslie, is awarded the sum of \$609.00.

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(No. 5500—Claimant awarded ~~\$426.17.~~)

R. DRON ELECTRICAL COMPANY, A Delaware Corporation,  
Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

R. DRON ELECTRICAL COMPANY, A Delaware Corporation,  
Claimant, pro se.

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

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

PERLIN, C.J.

Claimant, R. Dron Electrical Company, a Delaware Corporation, engaged in electrical construction and maintenance, seeks the sum of **\$426.17** for services rendered the State of Illinois.

The Departmental Report, which was submitted by the Division of Highways, states as follows:

“In April, 1965, the State of Illinois, through its Department of Public Works and Buildings, Division of Highways, contracted with R. Dron Electrical Company for certain repairs to traffic signals located at the intersection of Route Nos. 111 and 140 in Madison County.

“The repairs were ordered by properly authorized persons in District 8 of the Division of Highways, and they were made promptly and satisfactorily. The charges for the material and labor used in making the necessary repairs were reasonable.

“No part of R. Dron Electrical Company’s bill of **\$426.17** has been paid, and the only reason the bill cannot now be paid is that the appropriation therefor has lapsed.

“As of September 30, 1965, there was an unobligated balance of sufficient amount in the appropriation from which the claimant’s invoice could and would have been paid.”

It has long been a rule of this Court that, 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; *Gilbert-Hodgman, Inc., vs. State of Illinois*, 24 C.C.R. 509.

Since all the qualifications have been met in the instant case, claimant is hereby awarded the sum of \$426.17.

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(No. 5512—Claimant awarded **\$738.70.**)

KEUFFEL AND ESSER COMPANY, A Corporation, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

WOLFE, KLEIN, BONNER AND BEZARK, Attorneys for  
Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks to recover the sum of \$738.70 for materials furnished to the Division of Highways of the Department of Public Works and Buildings.

A stipulation was entered into by claimant and respondent as follows :

“That services were rendered to respondent at the special instance and request of the Department of Public Works and Buildings, Division of Highways.

“That the statements attached to the complaint as exhibit A are due and owing, namely Seven Hundred Thirty Eight Dollars and Seventy Cents (**\$738.70**).

“That, as a result of delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Seven Hundred Thirty Eight Dollars and Seventy Cents (**\$738.70**).

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

Where the evidence shows that the only reason a claim was not paid was because the appropriation for the biennium in which the service was performed had lapsed, this Court has held that it would make an award. *Continental Oil Company vs. State of Illinois*, 23 C.C.R. 70, and *M. J. Holleran, Inc., vs. State of Illinois*, 23 C. C. R. 17.

Claimant, Keuffel and Esser Company, a Corporation, is hereby awarded the sum of \$738.70.

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(No. 5513—Claimant awarded \$2,145.87.)

CHICAGO HOUSING AUTHORITY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed August 14, 1968.*

KULA AND HALL, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

**DOVE, J.**

Claimant, Chicago Housing Authority, is seeking to recover the sum of \$2,145.87 for unpaid rent due claimant from recipients of assistance from the Cook County Department of Public Aid.

It appears that on or about March 20, 1959 the Chicago Housing Authority entered into an agreement

with the Cook County Department of Public Welfare, a county department under the supervision and direction of the Illinois Department of Public Aid, pursuant to statute, whereby it was agreed that the Cook County Department of Welfare would reimburse claimant for any unpaid rent, not to exceed \$50.00, owing by a vacated tenant who is or was a recipient of public assistance at the time the rent accrued.

Subsequently a written stipulation was entered into by claimant and respondent as follows:

“That rentals due for billing to **Cook** County Department of Public Aid for the unpaid rent of vacated recipient tenants were rendered to the Department of Public Aid.

“That the statements attached to the complaint as exhibit **A** are due and owing, namely, Two Thousand One Hundred Forty-five Dollars and 87/100 (**\$2,145.87**).

“That, as a result of a delay in billing, payment was not made prior to the closing of the biennium appropriation.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Two Thousand One Hundred Forty Five Dollars and 87/100 (**\$2,145.87**).

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract ; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Continental Oil Company vs. State of Illinois*, 23 C.C.R. 70, and *M. J. Holleran, Inc., vs. State of Illinois*, 23 C.C.R. 17.

Claimant, Chicago Housing Authority, is hereby awarded the sum of **\$2,145.87**.

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(No. 5208—Claimant awarded \$1,188.53.)

HAROLD M. WAGNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

ROLLAND H. STIMSON, Attorney for Claimant.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN AND ARTHUR L. BERMAN, Assistant Attorneys General, for Respondent.

**CIVIL SERVICE Am—Police Merit Board—payment of salary during period of unlawful suspension.** Where evidence showed that claimant was unlawfully suspended as a trooper, 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.

DOVE, J.

Claimant seeks \$4,400.00 in damages allegedly incurred by loss of salary during his suspension as an employee of the Illinois State Highway Police.

From the evidence introduced at the hearing and the affidavit filed by stipulation, it appears that:

1. Claimant, Harold Wagner, was a duly appointed and acting trooper of the State Highway Police of the State of Illinois.

2. On November 15, 1963, he was suspended as a trooper.

3. The Illinois State Police Merit Board entered an order on July 10, 1964 directing the Superintendent of the Illinois State Police to reinstate claimant to the rolls of the Illinois State Highway Police as of November 16, 1963.

4. Claimant was off duty for a period of eight months. His salary immediately prior to his suspension was \$550.00 per month for a forty-five hour week, and, had he not been suspended, he would have

received in salary from the State of Illinois as a police trooper the sum of \$4,400.00.

5. While he was suspended, claimant was employed in private industry at a lower hourly rate than he would have received as a highway patrolman, and, instead of working forty-five hours a week as a highway patrolman, he averaged approximately sixty hours per week. His total earnings from private industry during the period of his suspension were \$3,876.86. Of the aforesaid amount \$665.39 was the sum of money claimant received for overtime work, or work in excess of forty-five hours per week in his private employment. It, therefore, follows that he received from employment for forty-five hours per week the sum of \$3,211.47 during the eight months of his suspension.

It is the opinion of this Court that claimant has amply demonstrated his intent to mitigate damages, and that he is entitled to recover the amount of the salary unlawfully withheld from him, less in mitigation any earnings he may have received for working forty-five hours per week. Claimant earned **\$3,211.47** during the period of his suspension. This amount will, therefore, be used in mitigation of his claim of \$4,400.00.

Claimant is hereby awarded the sum of \$1,188.53.

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(No. 5465—Claimant awarded \$196.60.)

MUNICIPAL TUBERCULOSIS SANITARIUM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

MUNICIPAL TUBERCULOSIS SANITARIUM, Claimant, pro se.

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

*CONTRACTS—lapsed appropriation.* Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which

such claim could and would have been paid had lapsed, an award will be made.

DOVE, J.

Claimant, Municipal Tuberculosis Sanitarium, filed its complaint in the Court of Claims on February 2, 1968 in which it seeks the sum of \$196.50 for services rendered.

A Departmental Report was filed, which stated in part:

“The total of \$196.50 is due the vendor as all students received the services indicated on the voucher, and no payment was made to the vendor for the period shown.”

Subsequently a written stipulation was entered into by claimant and respondent, which reads as follows:

“The report of the Department of Vocational Education and Rehabilitation, dated March 13, 1968, (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein, and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$196.50.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

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

tion for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, an Illinois Corporation, vs. State of Illinois*, Case No. **5261**, opinion filed February **24, 1966**. It appears that all qualifications for an award have been met in the instant case.

Claimant, Municipal Tuberculosis Sanitarium, is therefore, hereby awarded the sum of **\$196.50**.

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(No. 5470—Claimant awarded \$51.92.)

MELVIN PAINTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

MELVIN PAINTER, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks from respondent payment of the sum of **\$51.92** for services rendered to the Department of Mental Health of the State of Illinois. The complaint alleges that such demand was refused on the grounds that funds appropriated for such payment has lapsed. The parties have stipulated that claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not made prior to the closing of the biennium 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert Hodgman, Inc., vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$51.92**.

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(No. 5495—Claimant awarded \$911.38.)

COMMONWEALTH EDISON COMPANY, A Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

JOSEPH C. SIBLEY, JR., and EMMET T. GALLAGHER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant seeks to recover for services rendered the office of the Secretary of State at its North Auto and Drivers License Division, 5401-5429 North Elston Avenue, Chicago, Illinois. From the complaint it appears that a bill in the sum of \$911.38 had been misplaced, and was not resubmitted within time to be paid from the appropriation for the biennium.

On September 9, 1968, an amended stipulation of facts was entered into by and between claimant and respondent, which reads as follows:

“That equipment was delivered to respondent at the special instance and request of the Secretary of State of the State of Illinois.

“That the statements attached to the complaint as exhibit A are due and owing in the sum of Nine Hundred Eleven Dollars and **38/100 (\$911.38)**.

“That no assignment or transfer of the claim has been made.

“That there is rightfully due to claimant the sum of Nine Hundred Eleven Dollars and **38/100 (\$911.38)**.

“That upon the foregoing agreed case filed herein, the Court shall decide thereon and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved up upon the trial of said issue.”

It is clear that this is a matter of a lapsed appropriation. The statement for services of claimant was not received until the funds for the biennium when the services were rendered had lapsed.

This Court has consistently held that, when the appropriation for the biennium from which a claim should have been paid has lapsed, it will enter an order for the amount due claimant.

Claimant is hereby awarded the sum of \$911.38.

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(No. 6504—Claimant awarded **\$657.19**.)

SINCLAIR REFINING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

SINCLAIR REFINING COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Sinclair Refining Company, seeks to recover the sum of \$657.19 for fuel oil furnished to the Department of Mental Health.

A stipulation was entered into by claimant and respondent as follows :

“That claimant, Sinclair Refining Company, had furnished materials as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Six Hundred Fifty Seven and 19/100 Dollars (\$657.19).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennium appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof had occurred.

“That upon the foregoing agreed case filed herein the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Sinclair Refining Company, is, therefore, awarded the sum of \$657.19.

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(No. 5528—Claimant awarded \$889.40.)

GENERAL TELEPHONE COMPANY OF ILLINOIS, Claimant, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

VERNON C. MAULSON, Attorney for Claimant.

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

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

DOVE, J.

General Telephone Company of Illinois, claimant, seeks judgment in the amount of \$889.40 for telephone services rendered the Department of Mental Health during the period from August 1, 1965 through June 30, 1967 at the Jacksonville State Hospital, Jacksonville, Illinois.

The sole reason for nonpayment was that the statement for services was not received in time to process before the end of the 74th Biennium.

The parties have stipulated that the amount claimed herein is due, and that “neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$889.40.”

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; *Gilbert-Hodgman, Inc., vs. State of Illinois*, 24 C.C.R. 509. It appears from the record that all of the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of \$889.40.

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(No. 5536—Claimant awarded \$178.49.)

KANE COUNTY SERVICE COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 25, 1968.*

KANE COUNTY SERVICE COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; ERTA J. COLE, Assistant Attorney General, for Respondent.

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

DOVE, J.

Kane County Service Company, claimant, seeks judgment in the sum of \$178.49 for 1,630 gallons of No. 2 grade fuel oil delivered to the Department of Public Works and Buildings, Division of Highways, St. Charles Maintenance Storage Building, 1425 South Avenue, St. Charles, Illinois, on March 22, 1967.

The parties have stipulated that “there is lawfully due claimant the sum of \$178.49”, and that said sum would have been paid if claimant’s statement had been filed prior to the close of the biennium.

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; *Gilbert-Hodgman, Inc., vs. State of Illinois*, 24 C.C.R. 509. It appears from the record that all of the qualifications have been met in the instant case.

Claimant is hereby awarded the sum of \$178.49.

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(No. 5542—Claimant awarded \$25.25.)

NORTHWESTERN BUSINESS COLLEGE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 25, 1968.

NORTHWESTERN BUSINESS COLLEGE, Claimant, pro se.

WILLIAM G. CLARK, Attorney General ; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks payment of the sum of \$25.25 for materials furnished the Division of Vocational Rehabilitation of the State of Illinois. The complaint alleges that payment of claimant's demand was refused on the ground that funds appropriated for such payment had

lapsed. The parties have stipulated that claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not made prior to the closing of the biennium 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert-Hodgman, Inc., vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$25.25**.

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(No. 5254—Claimant awarded \$69,454.00.)

MASS CONSTRUCTION COMPANY, A DELAWARE CORPORATION,  
Claimant, *us.* STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1969.

CARBARY AND CARBARY AND THOMAS D. DOPLER, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**CONTRACTS**—*extra* compensation allowed. Where contract provided that "if unit price bids are requested by State, the contractor is to be paid for the actual amounts used whether it be more or less than the total estimated by the State on the Schedule of Prices," and claimant was required to construct additional cofferdams, claimant not limited to the amount specified by contract.

PERLIN, C.J.

Claimant, a Delaware Corporation, seeks to recover the sum of **\$69,454.00** alleged to be due and unpaid under

a contract for the erection of two parallel seven-span bridges on Interstate Route No. 57 over the Little Wabash River in Effingham County, Illinois. The amount requested is for the construction of eight cofferdams (water-tight enclosures from which water is pumped to expose the bottom of a river, and permit work to be done there) at the contract unit price of \$8,000.00 each, and for 1,732 cubic yards of cofferdam excavation at the contract unit price of \$7.00 per cubic yard.

The project involved the erection of twelve concrete piers to be erected as part of the substructure for the two bridges to support their superstructures. The piers, having the same general structural detail, were designated as follows :

Pier No. 1-East	Pier No. 3-East	Pier No. 6-East
Pier No. 1-West	Pier No. 3-West	Pier No. 6-West
Pier No. 2-East	Pier No. 4-East	Pier No. 5-West
Pier No. 2-West	Pier No. 4-West	Pier No. 5-East

The contract between claimant and respondent was executed on July 1, 1963. Claimant was required to begin work ten days after execution and approval of the contract, and to complete performance prior to August 1, 1964, subject to certain provisions for extensions of time. Claimant's bid was accepted in the amount of \$486,454.80.

The evidence shows that at the time the contract was executed claimant and respondent anticipated that cofferdams would be required to be driven in connection with piers No. 3 and 4, which was stated specifically in the contract. Claimant's witness, Walter C. Glaze, an engineer who prepared the bids for claimant, testified that the parties anticipated the possibility that cofferdams would also be required to be driven in connection with the construction of piers Nos. 1, 2, 5, and 6 (both East and West).

The language of the contract pertaining to the cofferdams and cofferdam excavation is as follows:

**“Cofferdams:** It is anticipated that cofferdams will be required for the construction of piers Nos. 3 and 4 of the bridges. Bid items for these cofferdams are included in the total bill of materials on the plans. . . .

“The contract unit price each for cofferdams at the piers designated will be payment in full for furnishing all materials and the construction of the cofferdams, its maintenance during construction of the pier, and subsequent removal; . . .

**“CofferdamExcavation:** This work shall consist of all foundation excavation for the piers without classification except rock, within the limits of the cofferdams, and the disposal of all excess material obtained from such excavation as elsewhere specified. . . .

“This work will be paid for at the contract unit price per cubic yard for cofferdam excavation.”

The undisputed evidence further shows that construction was begun by claimant during the first week in July, 1963. Excavation for piers Nos. 3, 4 and 6 was commenced. Claimed encountered a “fine, runny, silty sand” at pier No. 6, and tried to carry out the excavation operation by using a crane with digging buckets, but, as fast as it dug, the soil would come in from the sides and both ends of the hole. A point was reached where the approach embankment constructed by another contractor was endangered. Claimant found it impossible to proceed without the construction of cofferdams.

On July 19, 1963, claimant wrote to the District Engineer for respondent as follows:

“In the contract covering the above Section, piers Nos. 3 and 4 of both structures call for cofferdams as payment items. After excavating at pier No. 6, we find that unstable subsoil conditions similar to that of piers Nos. 3 and 4 prevail; that is a running silt condition. At pier No. 5 we presently have an excavation approximately 40 feet wide at the top, and are still unable to get down to the footing elevation. The sides are filling in so badly that it is impossible to proceed on construction without cofferdams. Rather than delay construction and further disturb adjacent subsoil, we are preparing to drive a cofferdam at this location—pier No. 6.

“We are of the opinion the same condition will also prevail at several of the other piers.

“We invite your inspection of the aforementioned conditions, and, if you have any feasible solutions other than using cofferdams, we will cooperate in trying other suggested methods.

“Please let us know your findings as soon as possible.”

By letter dated July 22, 1963, the District Engineer, I. C. Bliss, through his agent, Robert M. Gamble, replied:

“Replying to paragraph three of your letter, dated July 19, 1963, this is to inform you that an inspection has been made of the excavation for pier No. 6, and *it appears that your only solution is to use sheeting or cofferdam.* (Emphasis supplied)

“The plans and special provisions require payment for a cofferdam for piers Nos. 3 and 4 of both bridges. No cofferdam is required on the remaining piers, and no payment can be made if you decide to use cofferdams on these piers. The borings on the plans show that even though piers Nos. 1, 2, 5, and 6 are approximately 13 feet higher than piers Nos. 3 and 4, the excavation is well in waterbearing sandy loam, which would indicate that sheeting of some type would be required. . . .”

Mr. Herman Mass, president of Mass Construction Company, testified that upon receiving the letter he decided to proceed under protest. He further testified that he did not agree with the conclusion of the District Engineer that no payment would be made for cofferdams at piers Nos. 1, 2, 5 and 6, although they were necessary, because the plans and proposal state that they only estimate the amount of cofferdams, which may be required. Mr. Mass stated that he protested the conclusion, but decided to proceed because of the time limit and penalty clause for noncompletion.

Mr. Gamble, the only witness presented for respondent, testified that it would have been impractical to have constructed the bridge without the cofferdams, although he further stated that he did not make any recommendations to the State that they re-negotiate for new cofferdams on the balance of the piers.

A letter from claimant to Mr. Virden. E. Staff, Chief Highway Engineer, Department of Public Works and Buildings, which was admitted into evidence without objection, summarizes claimant's position in the instant proceedings, and states in part:

II

"In its Proposal to the Department, which was incorporated into the Contract, the Contractor was required to give the following assurances to the Department :

6. The undersigned declares that he understands that the *quantities mentioned are approximate only, and that they are subject to increase or decrease; that he will take in full payment therefor the amount of the summation of the actual quantities, as finally determined, multiplied by the unit prices shown in the schedule of prices contained herein.* (Underscoring supplied)

8. The undersigned further agrees that, if the Engineer decides to extend or shorten the improvement, or otherwise alter it by additions or deductions, including the elimination of any one or more of the items, *he will perform the work as altered, increased or decreased, at the contract unit prices.*" (Underscoring supplied)

III

"The Contract Schedule of Prices for work to be performed provides in part :

Item Number	Pay Item Description	Quantity	Unit of Measure	Unit Price	Total Price
050004	Cofferdams	4.00	EACH	8,000.00	32,000.00
050005	Cofferdam Excavation	1,800.00	CU YD	7.00	12,600.00
...."					

VI

"Provisions of the Contract Specifications pertinent to the issue between the District Engineer and the Contractor are:

**4.1 INTENT OF THE PLANS AND SPECIFICATIONS.** The intent of the plans and the specifications is to prescribe a complete outline of work, which the Contractor undertakes to do in full compliance with the contract. The Contractor shall . . . construct all . . . structures, and such additional, extra, and incidental construction as may be necessary to complete the work . . . in a substantial and acceptable manner.

### 4.3 ALTERATIONS, CANCELLATIONS, EXTENSIONS, AND DEDUCTIONS.

.....“Should such changes in the plans result in an increase or decrease in the quantities of the work to be performed, the Contractor shall accept payment as follows:

(a) All such work as appears in the contract as specific items accompanied by unit prices shall . . . be paid for at the contract unit prices.”

...

“Thereafter during the months of August, September, October, and November, **1963**, work on piers Nos. **1**, **2**, **5**, and **6** proceeded, and at each pier a cofferdam with the necessary excavation had to be erected and carried out in order to complete construction. At all times performance was under the constant inspection of the District Engineer and his forces. There was never any difference or dispute between the forces of the Contractor and the District Engineer over the question that the cofferdams and excavation therefor were absolutely necessary and essential as the only solution to provide for erection of all piers at the two bridges.”

#### *The Issues*

“During and after completion of the project the Contractor demanded payment for performance of cofferdam excavation and the erection of cofferdams, required as the only solution at piers Nos. **1**, **2**, **5**, and **6**, according to the unit prices fixed for these items in the Contract Schedule of Prices, i.e., \$8,000.00 each for the eight additional cofferdams, and \$7.00 per cubic yard for the cofferdam excavation.

“Over the repeated protests of the Contractor, the District Engineer took the position that, despite the requirement for cofferdams to making possible the completion of work at all piers, he had no authority to pay for either the cofferdams or the excavation in connection therewith other than for that done at piers Nos. **3** and **4**.”

Respondent’s main contention deals with the following provision in the “Standard Specifications for Road and Bridge Construction” :

“**9.4 PAYMENT FOR EXTRA WORK.** Extra work, which results from any of the changes as specified in Article **4.3**, shall not be started until receipt of a written authorization or work order from the Engineer, which authorization shall state the items of work to be performed, and the method of payment for each item. Work performed without such order will not be paid for.”

Respondent argues that the District Engineer did not give the required authorization; that claimant was warned that it would not be paid; and, that an engineer in charge of public construction work has no authority to modify a stipulation requiring a written order for alterations or extras.

Paragraph 4.3 quoted above, to which 9.4 refers also, states that a supplemental agreement will be required when such changes involve a net increase or a net decrease in the amount of the contract of more than 25% of the original contract price. However, the provisions of the specifications, which are most directly in point, may be found in paragraph 2.2 as follows:

“2.2 INTERPRETATION OF ESTIMATE OF QUANTITIES. An estimate of quantities of work to be done and materials to be furnished under the specifications is given in the proposal. It is the result of careful calculations, and is believed to be correct, but it is given only as a basis for comparison of proposals and the award of the contract. The Department does not expressly or by implication agree that the actual quantities involved will correspond exactly therewith: nor shall the bidder plead misunderstanding or deception because of such estimate of quantities, or of the character, location, or other conditions pertaining to the work.

*“Payment will be based on the actual quantities of work performed in accordance with the contract, at the contract unit prices specified. No allowance will be made for any change in anticipated profits due to an increase or decrease in the original estimate of quantities. . . . (Emphasis supplied)*

In the case of *Chism, Inc., vs. State of Illinois*, No. 5313, which also involved interpretations of the above sections of the “Standard Specifications for Road and Bridge Construction”, this Court held that claimant is not limited to the amount specified by the contract. The Court further stated that Section 9.3 of the Specifications provide that “if unit price bids are requested by the State, the contractor is to be paid for actual amounts

used whether it be more or less than the total estimated by the State on the Schedule of Prices.’’

In the instant case, the bid sheet called for bids on four cofferdams and on 1,800.00 cubic yards of cofferdam excavation. Claimant bid \$8,000 per cofferdam and \$7.00 per cubic yard of excavation. Claimant was not asked nor given the opportunity to bid on any other quantities than those specified. Therefore, respondent’s contention that claimant should have realized the need for the additional cofferdams, and should have so provided in its bid, must be rejected.

Respondent submitted no evidence to show that the cofferdams constituted “extra work”, and were not included within the scope of the original contract. The requirement of a supplemental agreement where the variation is more than 25% of the original contract price is not applicable in the instant case.

Claimant is entitled to \$64,000.00 for eight additional cofferdams at the unit price of \$8,000.00 each, and \$5,454.00 for additional cofferdam excavation. Claimant is hereby awarded the sum of \$69,454.00.

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(No. 5329—Claimants awarded \$4,000.00.)

DOMINIKAS GIEDRAITIS AND ELENA GIEDRAITIS, his wife,  
Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

GROMER, ABBOTT AND WITTENSTROM, Attorneys for  
Claimants.

WILLIAM G. CLARK, Attorney General; MORTON L.  
ZASLAVSKY AND ARTHUR L. BERMAN, Assistant Attorneys  
General, for Respondent.

**DAMAGES—evidence. Proof required to establish damages must not be remote, speculative nor uncertain.**

PERLIN, C.J

Claimants seek recovery of **\$7,125.00** for damages sustained on February **14, 1966**, as the result of a fire started by an escaped inmate of the Elgin State Hospital.

The evidence reveals the following undisputed facts :

On February **14, 1966**, the Elgin State Hospital had two patients under its supervision and control, named Michael Schmitz, age **14**, and Larry Fisher, age **12** or **14**. Both boys were housed in Halloran Cottage, which was a ward locked **24** hours a day, and held teenagers who were behavior problems. The doors of Halloran Cottage are unlocked by the ward attendant only if a patient has a "ground pass." Neither Michael Schmitz nor Larry Fisher had been granted a pass, and were not permitted to have keys to the outer doors in their possession. On the same date, one Ruth Bordsen was employed by the Elgin State Hospital as a psychologist and ward program coordinator, and was working in the Halloran Cottage as a ward program coordinator. Mrs. Bordsen testified that from his record she had personal knowledge that Larry Fisher had a history of setting fires. She further stated that she carried the key to Halloran Cottage on her key ring; that Halloran Cottage is locked **24** hours per day, and none of the rules allowed any inmates of that Cottage to have keys. Mrs. Bordsen further testified that, during a party for the inmates on February **14, 1966**, she left her keys on a table in front of her, and Michael Schmitz removed the key to Halloran Cottage. After Michael Schmitz had secured the key to the outer doors of the building from Mrs. Bordsen's key ring, he unlocked the west and south ward

doors of the Halloran Cottage. Patient Fisher hid under a bed when the rest of the patients went to the party, and, after Michael Schmitz unlocked the outside ward door, Fisher exited from the Halloran Cottage between 8:30 and 9:00 P.M. Fisher went directly to claimants' building where he stuffed paper and cardboard in a hole in the building, and lighted this matter with a match. He then returned to the ward.

Respondent does not question the facts as set forth above, and specifically "does not contest the question of liability in this cause," but raises objection to the claim as follows:

(1) Claimants' wilful breach and violation of Rule 5 of the Court of Claims justifies dismissal of their complaint, and denial of their claim.

(2) Claimants have failed to sustain their burden of proof in relation to the damages incurred.

In support of its first objection to the claim, respondent contends that the original complaint as sworn to by Dr. Dominikas Giedraitis was for the amount of \$16,478.11, representing \$5,478.11 of personal property and \$11,000.00 for the building. Respondent further contends that claimant stated upon oath that "he and his wife, Elena Giedraitis, are owners of the claim; that no assignment or transfer of the claim or any part thereof, or interest therein, have been made; that claimants are justly entitled to the amount claimed in the foregoing complaint from the State of Illinois, or the appropriate State Agency, after allowing all just credits; and, that this claim, or any claim arising out of the same occurrence has not been previously presented by claimants herein to any person, corporation, or tribunal, other than

the State of Illinois.” The complaint was filed in the Court of Claims on July 25, 1966.

Respondent also sets forth Rule 6 of the Court of Claims, which provides as follows :

“If the claimant shall, subsequent to the filing of his complaint in the Court of Claims, commence a proceeding in another tribunal, or present a claim to any other person or corporation for damages arising out of the same occurrence or transaction, then, in that event, the claimant shall immediately advise the Court of Claims in writing as to when, where and to whom such claim was presented or proceeding commenced. The complaint then pending in the Court of Claims will be continued generally until the final disposition of said claim or proceeding. Failure of claimant to notify the Court of Claims, as provided herein, shall be ground for dismissal of the complaint.”

Respondent contends that claimants have violated Rule 5 and Rule 6 of the Court by having sworn to a complaint, which was filed on July 25, 1966, that they owned the claim, that no assignment or transfer of the claim or a part thereof had been made, and, that no claim arising out of this occurrence had been previously presented to any person, corporation or tribunal other than the State of Illinois. Because Dr. Giedraitis testified at the hearing that he had settled a claim for damage to the building and a claim for damage to personal property with the Royal Exchange Assurance Company in the amount of \$5,000.00 on the building and \$3,337.35 for the personal property in June, 1966, respondent alleges that claimant falsely swore to the affidavit attached to the complaint, and that the cause should, therefore, be dismissed.

The evidence shows that at the opening of the hearing in the instant case, the attorneys for claimants set forth the facts of the insurance claim as follows:

“MR. WITTENSTROM: Rule 6 of the Rules of the Court of Claims provides that, if claimant shall subsequent to the filing of his complaint present a claim to any other person or corporation for dam-

ages arising out of the same occurrence, 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.

"Now I have, subsequent to the filing of the complaint, discovered that claimants have presented claims, and I ask permission at this time to file a letter setting forth the facts required by Rule 6.

"(Whereupon document is marked claimants' exhibit No. 5 by the Reporter.)

"MR. WITTENSTROM: Any objection?"

"MR. ZASLAVSKY: No objection.

"THE COURT: Let the record show that claimants' exhibit No. 5 is admitted into evidence without objection."

Claimants' exhibit No. 5 is a letter from Mr. Wittenstrom to Mr. Routman, dated March 8, 1967, which states as follows :

"Pursuant to Rule 6 of the Rules of the Court of Claims of the State of Illinois, this is to advise the Court of Claims in writing that claimants have presented a claim to the Royal Exchange Assurance Company, 309 West Jackson Blvd., Chicago, Illinois, for damages arising out of the same occurrence or transaction. Such claim has been finally disposed of, and such company has paid claimants **\$8,337.35.**"

Dr. Giedraitis testified that a Royal Exchange Home Owner's Policy, admitted into evidence without objection, was in force on his property at the time of the fire. He further testified that this policy insured his dwelling for \$25,000.00, appurtenant private structures for \$5,000.00, and unscheduled personal property for \$10,000.00.

Dr. Giedraitis stated that the property destroyed was a combination barn, garage and summer house, which was just repaired, and items of personal property located within the structure of the building. Dr. Giedraitis testified that he notified the insurance company of the fire, and was paid \$5,000.00 for the building, which was the total loss allowed under the policy, and **\$3,337.35** for the items of personal property.

It appears that the insurance company settled the claim in June, 1966. Dr. Giedraitis stated that he had not notified his lawyers that he had received a check, because he had not talked to them. Nowhere in cross-examination or elsewhere is there evidence to conclude that claimant wilfully, maliciously, or intentionally tried to mislead the Court by stating that the claim had not been submitted elsewhere, as charged in the brief of respondent. In fact, at the very start of the hearing, one of claimants' attorneys called the insurance settlement to the attention of the Court, and introduced the letter explaining the settlement, and later, the insurance policy, without objection from respondent.

The next question to be decided is the amount of damage incurred by claimants in the burning of their building and personal property. Respondent contends that claimants have failed to sustain their burden of proof in relation to the damages incurred.

Real property consisting of a combination barn, garage, and summer house were insured for \$5,000.00, which amount was received in full. Claimants contend that the total value of the real property destroyed was \$11,000.00. Dr. Giedraitis testified that the summer house was attached to the garage. The barn was made of shingles over wood, and had an electric garage door.

Claimants called two witnesses to testify as to the market value of the building when it was burned. Clarence Dietrich, a general contractor, testified that he rebuilt part of the building after the fire for \$10,400.00, but did not rebuild the summer house. He stated that in his opinion the market value of the building was between \$10,000.00 and \$11,000.00 on February 14, 1966 before the fire.

Edwin Haas, a building contractor, who remodeled the structure before the fire, testified that the market value of the structure before the fire on February 14, 1966 was at least \$10,000. Respondent presented no testimony on the question of the value of the real property.

Dr. Giedraitis testified that he accepted the sum of **\$3,337.35** from the insurance company for personal property, but that did not include payment for an eighteen foot boat, two motors and a trailer. Claimant testified that he was paid about \$500.00 for these items in the insurance settlement. Claimant stated that he brought the boat second hand, and paid the seller \$500.00, and the promise of medical services, but he does not know exactly how much service he has since rendered the seller.

Claimants produced no other witness to testify as to the value of the boat, motors and trailer, and Dr. Giedraitis did not establish himself as an expert in this field. This Court has held that it is fundamental that the burden of proving the element of damages is upon claimants. "The proof required to establish damages must not be remote, speculative, nor uncertain." *Frega vs. State of Illinois*, 22 C.C.R. 399, 400. Claimants have not sustained their burden of proof with regard to the value of the boat, motors and trailer.

It appears that the market value of the building was \$10,000.00 immediately before the fire destroyed it. Claimants were paid \$5,000.00 in insurance. According to the evidence, the foundation of the building remained. Therefore, claimants are awarded the sum of \$4,000.00.

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(No. 5368—Claimant awarded \$2,600.00.)

Alice Kelly, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1969.

GEORGE B. LEE, Attorney for Claimant.

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

**STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—notice of defect.** Where claimant, an invitee, fell on a dangerous stairway where no guard rails were provided, recovery was permitted, since there was nothing to warn of the dangerous stairway and the location where claimant was injured, and claimant was unable to see the stairway because of a crowd of people.

**NEGLIGENCE—evidence.** Where evidence disclosed that respondent was negligent in failing to have guard rails on a stairway, failing to mark the dangerous condition with appropriate signs, and failing to adequately supervise the tour, an award will be allowed.

PERLIN, C.J.

Claimant, Alice Kelly, seeks recovery of \$5,609.00 for injuries sustained on May 1, 1966, while attending an open house at the A. L. Bowen Children's Center in Saline County, Illinois. Claimant alleges that respondent was negligent in conducting claimant, along with other people, onto a loading platform, which had an unprotected stairway from which she fell.

The undisputed facts reveal that there was an open house at the A. L. Bowen Children's Center, which was attended by a large number of people. Groups consisting of twenty to thirty people each were formed to go through the Center. An employee of the Center conducted each tour, and was in charge of each group.

Claimant was in one of the groups described above, which started in the Administration Building, and, after going through the kitchen, the group was directed through

a door onto a concrete loading platform where claimant fell. The evidence shows that there was no guard rail on an open stairway leading from the kitchen to the loading platform. She was toward the rear of a group of approximately thirty people when she fell. The same person conducted her tour throughout,

Other persons who were part of the group in claimant's tour testified that they did not see the stairway at the time because of the large group, and that there was no guard rail or protective device on the stairs.

Mr. Paul Tanner, an employee of the A. L. Bowen Children's Center, testified that the public was invited to the open house, and that approximately 5,000 people attended.

Mrs. Kelly testified that she decided to take a tour of the Bowen Center after seeing an invitation in the newspaper.

Respondent contended that claimant was a licensee and not an invitee, and had failed to maintain the burden of proof that Respondent was guilty of wilful and wanton misconduct. Respondent cites several cases, which define "invitee" as one "on the premises by invitation to transact business in which the parties were mutually interested."

Respondent quotes the Illinois Supreme Court in *Ellguth vs. Blackstorce Hotel, Inc.*, 408 Ill. 343, 347, 348, as follows:

"The materiality of the question of whether plaintiff was an invitee or licensee arises from the fact that a heavier duty of care is placed upon an owner of premises toward an invitee than toward a licensee or trespasser. Toward an invitee the owner of premises must use reasonable care and caution in keeping the premises reasonably safe for use by such invitee; while toward a licensee no duty is owed by such owner, except not to wantonly and wilfully injure him. . . . To

be upon premises by an implied invitation means that the person is there present for a purpose connected with the business in which the owner of the premises is engaged, or which he permits to be carried on . . .

“It is frequently a difficult question to decide whether the injured person is a licensee or invitee. The test is said to be whether one goes upon the premises of the owner by invitation to transact business in which the parties are mutually interested. . . .”

Respondent cites further cases to the effect that a social guest is treated as a licensee and not an invitee, and, therefore, must prove wilful and wanton misconduct in order to recover against the possessor of the land.

In the case of *Levy vs. State of Illinois*, 22 C.C.R. 694, 696, this Court held:

“The fact that the State institutions have visitors’ days, and encourage visits with patients, would indicate that claimant was more than a ‘licensee’ and should be treated as an ‘invitee’.”

In the case of *LeRoux vs. State*,<sup>307</sup> N.Y. 397, 121 N.E. 2d 386, 46 A.L.R. 2d 1063, the court held that a person going upon land owned by the State, and maintained for public purposes and public use is not a mere licensee to whom the State owes no duty other than to refrain from wilful or wanton injury, but is an invitee entitled to the exercise of reasonable care to prevent or warn against dangers, which the State’s agents knew, or should have known, existed. In that case, the claimant fell into an uncovered abandoned well while on land in the State reforestation area for the purpose of berry picking. The signs posted in the area said “Public Hunting Ground.” The court pointed out that the property upon which the claimant was injured was specifically maintained for public purposes and for public use. The court stated:

“In the case at hand claimant and her family had entered upon the preserve with knowledge gained from signs, which bore the legend ‘Public Hunting Ground’. They thus became entitled to expect that

the State, as owner and maintainer of land for public use, would exercise reasonable care to prevent, or to warn against dangers to claimant and others coming upon the land, which the State's agents knew, or should have known, existed."

Respondent cites the case of *Burris vs. State of Illinois*, 24 C.C.R. 282, to support its contention that claimant in the instant case was a licensee instead of an invitee. In that case the American Red Cross sponsored an event, which was held in the State Capitol Building. Neither the construction of the platform, nor the event in question was under the supervision of the State of Illinois. It had not invited claimant to its building, and she was there because of her activities in the American Red Cross. There was no question of the negligence of the State of Illinois.

The instant case presents a different factual situation. Both the event to which claimant was invited and the physical premises were under the control of respondent. Respondent specifically placed an invitation in the newspaper, and maintained control of the crowds, which appeared as a result thereof. There was nothing to warn of a dangerous stairway in the location where claimant was injured, and witnesses testified that they could not see the stairway because of the crowd of people. There is no question of claimant's being contributorily negligent, since it is clear that she was in due care for her safety, and was merely following directions given by the tour leader.

The Court must conclude that respondent was negligent in failing to have guard rails on the stairway, failing to mark the dangerous condition with appropriate signs, and failing to adequately supervise the tour.

The evidence revealed that claimant suffered fractures of the radius and ulna of the right arm. She had

a laceration of the scalp and right ear, which required twenty sutures in treatment. A closed reduction of the right colles was performed, and a circular plaster cast was applied. She was in the hospital for three days, and was then referred to a bone specialist for further care. Claimant was operated on by a specialist, and had a pin put through her thumb to hold the break in place. She was in a cast for six weeks. At the hearing claimant testified that, if she tries to turn her hand quickly, she is bothered, and there is some disfigurement. Dr. Frank P. Skaggs, who treated her, did not testify as to permanent disability.

Claimant is hereby awarded the sum of \$2,600.00.

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(No. 5381—Claim denied.)

BROADWAY LITHO AND PRINTING CORPORATION, Claimant,  
*vs.* STATE OF ILLINOIS AND BOARD OF GOVERNORS OF STATE  
 COLLEGES AND UNIVERSITIES, Respondents.

*Opinion filed April 17, 1969.*

ZELDEN AND LEBOLD, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; DUNN, DUNN,  
 BRADY, GOEBEL, ULBRICH AND HAYES, Attorneys for Re-  
 spondent, The Board of Governors of State Colleges and  
 Universities.

**CONTRACTS—services rendered.** Where evidence disclosed that the printing and production of a newspaper failed to meet the standards customarily found in the industry and required by contract, the Court held that such failure constituted a substantial breach of the contract and denied recovery.

PEZMAN, J.

Claimant seeks to recover the sum of \$365.00 from respondent for services rendered to Illinois Teachers

College of Chicago-North in the publication of a school newspaper issued under the name "The Interim".

Pursuant to stipulations made and entered into verbally before the Commissioner, the entire matter was submitted to the Court upon the basis of two exhibits, these exhibits being two copies of the newspaper in question, marked as joint exhibits Nos. 2 and 2a. The only issue in this case is whether or not claimant fulfilled his contract to perform the service of printing the newspaper, or failed to fulfill the same, because of the many errors in spelling, punctuation, quotations, and the nature of the work done and services performed.

This Court has examined both exhibits. Joint exhibit No. 2 is the product of claimant after all of the errors have been detailed and noted. Joint exhibit No. 2a is the issue of the newspaper in question without any notations or indication of error. There can be no doubt about the Court's decision. The newspaper in question was poorly produced. Certain pages were printed upside down, and the entire issue is replete with errors in spelling, punctuation, and the nature and style of print required. This Court holds that the printing and production of the newspaper issue in question failed to meet the standards customarily found in the industry and required by the contract, and that such failure constituted a substantial breach of contract on the part of claimant.

Claim is, therefore, denied.

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(No. 5386—Claimant awarded \$6,500.00.)

MARGUERITE WHITE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

SEYMOUR SCHEFFRES AND SAMUEL ALLEN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY AND ETTA J. COLE, Assistant Attorneys General, for Respondent.

**STATE PARKS, FAIRGROUNDS, MEMORIALS AND INSTITUTIONS—*status of visitors.*** Claimant, who served in the capacity of a public foster mother, and fell on an icy sidewalk on the grounds of the Illinois State Training School for Boys where she had gone for the purpose of visiting her foster son, held to be an invitee.

**SAME—*duty to remove snow.*** Court held it is not reasonable for the State of Illinois to invite visitors, and then provide as the only access route a sidewalk covered with ice and snow.

**SAME—SAME—*evidence.*** Respondent negligent in failure to use ordinary care toward its invitees where evidence showed that six days had passed since precipitation had fallen on sidewalk where claimant was injured, and other walks on the premises had been cleared.

PERLIN, C.J.

Claimant seeks recovery of \$10,000.00 for injuries suffered on January 31, 1965, when she fell on an icy sidewalk on the grounds of the Illinois State Training School for Boys. Claimant was employed as a foster mother by the City of Chicago, and had gone to the School for the purpose of visiting her foster son, Philip Swar.

The testimony showed that on the day in question claimant took a chartered Greyhound bus from the Chicago Loop, and was delivered to the gate of the School.

When the gates were opened, she walked on a long sidewalk from the gate to the administration building. The sidewalk was covered with two inches of snow and ice. After leaving the administration building she walked on another sidewalk to the cottage where her foster son was living. This sidewalk was clean. There was no snow or ice on it.

Claimant testified that she had visited her foster son the week before, on January 24, 1965, and there was a half inch of snow and a little bit of ice on the sidewalk leading from the gate to the administration building. The sidewalk from the administration building to the boy's cottage was clean on that day also.

After leaving the boy's cottage on January 31, 1965, claimant returned to the administration building to check out, and then entered the sidewalk to proceed to the gate. She was walking slowly, and fell about half way between the administration building and the gate.

Claimant further testified that she had been employed for eighteen years as a foster mother by the City of Chicago, Children's Division; that her duties were to take care of the children, as if they were her own; that Philip Swar was about three days old when he came into her care. She stated that she still had custody of Philip Swar when he went to St. Charles, and that he had been there about four months at the time of her accident. She would visit him once a week on Sundays. She earned \$150.00 per month as a foster mother. After taking a chartered Greyhound bus to the Training School she had to go into the office at the gate to get a pass, which was the only way she could get in, wait until the gates were opened, and walk up a sidewalk, which had about two inches of ice and snow on the day in question.

Respondent contends that claimant is not entitled to a recovery because (1) she was a mere licensee on the premises of respondent; (2) that claimant has failed to establish that respondent did not exercise ordinary care to maintain its sidewalks; and (3) respondent is not liable for injuries resulting from the general slipperiness of streets and sidewalks due to natural causes.

Respondent argues that a licensee may be inferred where the object of the visit is the mere pleasure or benefit of the visitor, and the duty owed by one to a licensee is the duty not to injure him wilfully or wantonly.

Claimant contends as follows: that she was engaged in the business of the respondent, since she had served in the capacity of foster mother for about eighteen years, and had the duty to "care for, assist, give material support, comfort and advice to the foster son. By visiting Philip Swar, the foster son, almost every week, she was assisting in the work of respondent by giving counsel to the boy, and assuring him that someone did care for him. She, therefore, assisted the State in the rehabilitation process. As a public foster mother, claimant was an invitee, and entitled to all the rights of an invitee."

In the case of *Levy vs. State of Illinois*, 22 C.C.R. 694, 696, this Court specifically held:

**"The fact that the State institutions have visitors' days, and encourage visits with patients would indicate that claimant was more than a 'licensee', and should be treated as an 'invitee'."**

The Court must conclude that claimant was an invitee, and was entitled to have reasonable care and caution used to keep the premises reasonably safe for her use.

The next question to be resolved is whether respondent exercised reasonable care in maintaining its premises. The Departmental Report states in part: "On January 31, 1965, we had a high temperature of 17 degrees and a low temperature of -7 degrees. One and one-half inches of snow fell between the hours of 6:00 A.M. and 10:00 P.M., and four inches of snow had accumulated on the ground during this day. At the time of this alleged accident, we were recovering from a very serious ice storm." A letter from C. William Ruddell, Superintendent, states :

“At the time Mrs. White fell and injured herself, the Training School was just recuperating from a very serious ice storm, during which time the institution itself was considerably crippled in its operation due to the severity of the storm.”

Respondent did not produce any witnesses at the time of the hearing. However, claimant introduced a copy of the U.S. weather reports for January, 1965, which showed that the ice storm, to which respondent was alluding, struck northern Illinois on January 23, 24, and 25.

Respondent cites several cases to the effect that respondent is not liable for injuries resulting from the natural accumulation of ice and snow on sidewalks. (*Strappelli vs. City of Chicago*, 371 Ill. 72; *Graham vs. City of Chicago*, 346 Ill. 638; *Ritgers vs. City of Gillespie*, 350 Ill. App. 485 ; *Cronin vs. Brownlie*, 348 Ill. App. 448.)

In the case of *Levy vs. State of Illinios*, 22 C.C.R. 694, the Court examined the majority and minority rules concerning liability for snow removal. It cited the case of *Durkin vs. Lewitx*, 3 Ill. App. 2d 481, 123 N.E. 2d 151. In that case the issue was whether a landlord had the duty to use reasonable care in the case of snow removal. The Court stated:

“Illinois has firmly and decisively fixed upon the landlord the duty to use reasonable care with respect to premises used in common, and its place logically and sensibly belongs in the so-called Connecticut line. That rule was interpreted in *Goodman vs. Corn Exchange National Bank & Trust Co.*, 1938, 331 Pa. 587, 200 Atl. 642, 643, as follows:

“It may be stated as a general rule that there is no absolute duty to keep outside steps free from ice and snow at all times. Where the precipitation is recent or continuous, the duty to remove such obstruction as it forms cannot be imposed, and the dangers arising therefrom are viewed as the normal hazards of life, for which no owner or person in possession of property is held responsible. It is only when the owner or possessor, having a duty to remove snow and ice, improperly permits an accumulation thereof to remain after a reasonable length of time for removal has elapsed, that liability may arise for the unsafe and dangerous condition thereby created.”

The Court also stated that the general rule in Illinois exempts municipalities and owners of adjoining property adjacent to the public way from liability for injuries resulting from the natural accumulation of ice and snow. None of the cases cited in support of the statement is in point.

The more recent case of *Sims vs. Block*, 236 N.E. 2d 572 wavers between both rules. It stated that, where the owner-landlords did make an effort to remove the snow from a parking lot, they became charged with the duty of exercising ordinary care in accomplishing the clearing of the lot.

In the *Levy* case, recovery was denied because respondent submitted evidence showing that it had shoveled the walks on the day of the snowfall, four days before the accident, and had, therefore, discharged its duty of ordinary care in the maintenance of its premises.

The most reasonable reconciliation of the rules set forth above would be to apply the test of whether respondent exercised reasonable care in maintaining its premises. Application of the *Sims* rule would leave one with the conclusion that, if claimant had fallen on a patch of ice on the cleaned sidewalk leading from the administration building to the cottage, she could recover, but, having fallen on a sidewalk where no effort was made to remove the ice and snow, she cannot recover.

The case of *Prater vs. Veach*, 35 Ill. App. 2d 61, 181 N.E. 2d at 741, 739, while not specifically concerned with ice and snow sets forth the following guide for the duty owed by the owner of land to an invitee.

**“The owner of land is subject to liability for bodily harm or wrongful death to invitees resulting from natural or artificial conditions only if he knows of the condition and realizes that it involves an unreasonable risk to invitees, or permits them to remain on the**

land without exercising reasonable care to make the conditions reasonably safe or to warn invitees of the condition and the risk involved therein.”

In the instant case, respondent has presented no evidence to show that it made any attempt to remove the ice and snow from the sidewalk in question. Respondent submitted that it had no time to do this. However, the weather reports showed that six days had passed since the precipitation had fallen.

It is not reasonable for the State of Illinois to invite visitors, and provide as the only access route a long sidewalk covered with ice and snow. The risk of injury was clearly foreseeable. It would appear that six days was enough time to clear the walk, since other walks on the premises were in fact cleared. Respondent was negligent in its failure to use ordinary care towards its invitees.

After claimant fell, she was taken by ambulance to Delnor Hospital where she was x-rayed and treated. She stayed from Sunday until the following Thursday. Her arm was in a sling, and a collar was put around her neck. Dr. Richard Grayson attended her at the hospital. After she returned home she received treatment from Dr. Charles Lee Williams. He found that she could not close her right hand, had no grip, and her shoulder pained her constantly. He diagnosed her condition as peri-arthritis of the right shoulder with partial Volkmann's ischemic contracture over the right hand and forearm.

She was examined by respondent's doctor, John F. Gleason, on June 21, 1967. His finding was a well healed fracture of the greater tuberosity of the right humerus, and moderate restriction of motion of the right shoulder. He further found that the finger tips of the right hand lack one and one-half inches of touching the palm. Dr.

Gleason found that she was unable to grip large diameter objects with the injured hand, that there is decreased sensation over the right arm and forearm as compared with the left, and stated: "There is considerable limitation of motion in the metacarpal phalangeal joints and proximal and distal interphalangeal joints of all the fingers of the right hand."

Claimant testified that she did not receive any money from the City of Chicago after Philip Swar was in St. Charles, and that the last time she received a check was the month before the accident. Prior to her accident claimant had been a foster mother for a period of eighteen years, and was earning \$150.00 per month. until the month before the accident. She was born in 1906. Claimant stated that she was unable to continue as a foster mother or to obtain other work, because her hand could not close.

Claimant is hereby awarded the sum of \$6,500.00.

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(No. 5425—Claimant awarded \$450.00.)

JACK KASE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

RINELLA AND RINELLA, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; MORTON L. ZASLAVSKY, Assistant Attorney General, for Respondent.

**MOTOR VEHICLES**—*escheat of safety responsibility deposit.* Evidence disclosed that claimant was entitled to a refund of monies escheated to State pursuant to Chap. 95½, Sec. '7-503, 1959 Ill. Rev. Stats.

PERLIN, C.J.

Claimant, Jack Kase, is seeking recovery of \$450.00, which was deposited with the Office of the Secretary of State pursuant to the Motor Vehicle Law (1959 Ill. Rev.

Stats., Chap. 95 $\frac{1}{2}$ , Sec. 7-503) on January 27, 1961. The requirement of deposit arose out of an automobile accident, which involved a vehicle being driven by his wife, Gloria Kase. Claimant also requests 5% interest from September 19, 1960, and \$152.00 for attorney's fees.

The evidence shows that claimant received a receipt from the Safety Responsibility Division of the Office of the Secretary of State, together with a letter, dated January 30, 1961, stating that he and Mrs. Kase were in full compliance with the provisions of the Illinois Safety Responsibility Law, and that the deposit would be returned on September 16, 1962 upon their application, if there was no unsatisfied judgment or court action pending, and before that date, if proof of settlement of all claims for damages and personal injury, or proof of final adjudication of non-liability was filed.

The evidence further shows that claimant received a letter from respondent, dated July 15, 1964, requesting information concerning whether a suit had been filed against claimant, and that claimant advised the Office of the Secretary of State on August 24, 1964 that such a suit had been filed. On June 5, 1967 and July 7, 1967, claimant sent letters requesting refund of the security deposit, and enclosed a release from the injured parties in the aforesaid suit. Claimant received a letter, dated July 11, 1967, advising him that he had not replied to the letter from the Office of the Secretary of State, dated July 15, 1964, and that the money deposited had been transferred to the General Revenue Fund. On July 18, 1967, photostatic copies of the letters set forth above were sent to the Secretary of State, Safety Responsibility Division.

The parties have stipulated that the facts, as stated

above, are undisputed. It appears that the funds were transferred to the General Revenue Fund through the error of respondent, and that claimant was in full compliance with the law at all times. It is not the practice of this Court to allow interest or attorney's fees unless specifically authorized by statute.

Claimant is hereby awarded the sum of \$450.00.

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(No. 5461—Claimant awarded \$162.54.)

SKELLY OIL COMPANY d/b/a AURORA SKELGAS SERVICE,  
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 27, 1969.*

SKELLY OIL COMPANY, Claimant, *pro se.*

WILLIAM G. CLARK, Attorney General; ETTA J. COLE,  
Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks from respondent payment of the sum of \$162.54 for materials provided the Division of Highways of the State of Illinois. The demand for the payment was refused on the grounds that funds appropriated for such payments had lapsed.

A stipulation submitted by the parties agree that the materials were furnished, and that there is lawfully due the amount requested by claimant.

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. *Gilbert-Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$162.54.

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(No. 5484--Claimant awarded \$36,113.76)

DONALD S. TIMMONS, COUNTY TREASURER OF PIATT COUNTY, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

C. E. CORBETT, Attorney for Claimant.

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

STATE OFFICERS AND AGENTS—state Treasurer. Where claimant and respondent agreed by reason of Departmental Report that claimant was entitled to refund of overpaid inheritance tax, recovery allowed.

PERLIN, C.J.

Claimant, Donald S. Timmons, County Treasurer of Piatt County, Illinois, seeks recovery of \$36,113.76 due claimant from Adlai E. Stevenson, III, Treasurer of the State of Illinois. There are no disputed questions of law or fact in the instant case.

A stipulation submitted by the parties includes a report of the State Treasurer, which states in part:

“Paragraph 7. The Piatt County Treasurer’s report for the month of June, 1967, dated July 6, 1967, lists inheritance tax and interest collected in the estate of Robert Allerton totaling Nine Hundred Two Thousand Eight Hundred Forty-four Dollars and Eight Cents (\$902,844.08). In compliance with Section 394 of Chapter 120, Illinois Revised Statutes of 1965, the State Treasurer allowed County

Treasurer's fees in the above captioned estate in the amount of Thirty Six Thousand One Hundred Thirteen Dollars and Seventy-six Cents (\$36,113.76).

"Paragraph 8. The County Treasurer of Piatt County filed with the State Treasurer's Office a petition for refund of fees in the amount of Thirty-Six Thousand One Hundred Thirteen Dollars and Seventy-six Cents (\$36,113.76), inasmuch as he had not retained sufficient funds to cover his four (4) per cent County Treasurer's fee from the deposits made June 22, 1966 in the Estate of Robert Allerton.

"Paragraph 9. Said claim for refund was thereafter disallowed by the Attorney General, State of Illinois, by opinion letter dated July 19, 1967. Said opinion letter stated that the fees were not payable from the State Treasurer's appropriation for refund of Overpaid Inheritance Tax, 75th General Assembly. On July 20, 1967, the County Treasurer of Piatt County was notified by letter from the State Treasurer's Office that his petition for refund of fees had been disallowed by the Attorney General, giving reason that his fees were not payable from the appropriation for inheritance tax refund."

An amendment to the stipulation, which was filed in the Court of Claims on February 19, 1969, further provides :

"That claimant and respondent agree that by reason of the Departmental Report, heretofore filed herein, claimant is entitled to recover from respondent the sum of \$36,113.76, as such sum is lawfully due and owing to claimant, and retention by the State of Illinois would constitute unjust enrichment."

Claimant is hereby awarded the sum of \$36,113.76.

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(No. 5501—Claimant awarded \$1,443.75.)

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, An Illinois Not-For-Profit Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN AND PLATT, Attorneys for. Claimant.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks recovery for medical services rendered to one Norman Sailor, a ward of the Division of Child Welfare, Department of Children and Family Services of the State of Illinois, in the amount of **\$366.50**; and for medical services rendered in May and June, 1966 to one Dallas Kozfkay, also a ward of the Department, in the amount of **\$1,077.25**. The reason for nonpayment is the lapse of the biennial appropriation.

The parties have stipulated that the amount of **\$1,443.75** is lawfully due to claimant.

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. *Gilbert-Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$1,443.75**.

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(No. 5514—Claimant awarded \$19,898.92.)

COMMERCIAL LIGHT COMPANY, A CORPORATION, Claimant,  
vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

CONDON AND HYNAN, Attorneys for Claimant.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

CONTRACTS—where evidence showed that contractor was prevented from completion of his work by reason of delay of general contractor, resulting in loss to sub-contractor, wholly without, his fault, an award will be made in the absence of contractual agreement to the contrary.

PERLIN, C.J.

Claimant corporation filed its complaint for the sum of \$42,925.00, which it claimed represented additional costs incurred in the execution of a contract entered into with the Department of Public Works and Buildings in March, 1964, for electrical work at the Diagnostic Hospital, Tinley Park State Hospital, Tinley Park, Illinois.

The parties, have submitted a stipulation, which provides, in part, that claimant entered into the above mentioned contract in the net amount of \$139,274.00 for the complete electrical work for the Diagnostic Hospital; that the contract required claimant to work "In progress with General Work and work of other contractors engaged on the project,"; that the contractor for General Work agreed in its contract to complete construction within 370 days after date of notification of award; that due to material experimentation and other unforeseen difficulties in enforcing and meeting contractual quality requirements on the part of all contractor:, the contractor for General Work was not certified as completed until March of 1967, although claimant could reasonably have anticipated completion on or about April 1, 1966; that claimant's work was thus delayed being dependent on the General Work Contractor.

The stipulation further states that "respondent, in the absence of a contractual agreement to the contrary, has been held liable for such a delay occasioned by one prime contractor to another. *Kaiser vs. State of Illinois*,

7, C.C.R. 99; *Divane Bros. Electric Co. A Corporation, vs. State of Illinois*, 22 C.C.R. 546”.

The parties have agreed as to the amount of loss incurred by claimant, as follows:

“It is further stipulated by and between the parties by their respective attorneys that the filing of the briefs and abstracts and all notices with respect thereto be and the same are hereby waived, and that a judgment order be entered in the amount of Nineteen Thousand Eight Hundred Ninety Eight Dollars and Ninety Two Cents (**\$19,898.92**) in favor of claimant and against respondent.”

The stipulation is signed by Attorney General William J. Scott and the attorneys for claimant.

There being no further question to be determined by this Court, claimant is hereby awarded the sum of \$19,898.92.

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(No. 5524—Claimant awarded **\$489.75**.)

ST. JOHN'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, An Illinois Corporation, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

GRAHAM AND GRAHAM, Attorneys for Claimant.

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

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

PEZMAN, J.

Claimant seeks to recover, in three Counts, for services rendered at the request of The Department of Children and Family Services. Count I is for services rend-

ered to one Frederick Oberlander, age nine (9), in the sum of \$137.75. Count II is for services rendered to one Susan A. Oberlander, age seven (7), in the sum of \$139.10; and, Count III is for services rendered to one William H. Jackson, age sixteen (16), in the sum of \$212.90.

On September 16, 1968, a stipulation was made and entered into by and between claimant and respondent, wherein it was agreed that a report of the Department of Children and Family Services, dated August 28, 1968, attached to the stipulation as exhibit A by reference, and made a part of the record, be admitted into evidence without objection by either party. Exhibit A clearly and concisely states that all three of the statements on the part of claimant, shown in Counts I, II and III are correct, and claimant was entitled to payment. The same exhibit A also states that the appropriation for each of these statements had lapsed.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *American Oil Company, Inc., a Corporation, vs. State of Illinois*, 24 C.C.R. 492; *The Pittsburgh and Midway Coal Mining Company, a Corporation, vs. State of Illinois*, 24 C.C.R. 510.

Claimant, St. John's Hospital of the Hospital Sisters of The Third Order of St. Francis, an Illinois Corporation, is awarded the sum of **489.75**.

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(No. 5531—Claimant awarded \$1,620.00.)

BLACKMORE AND GLUNT, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

BLACKMORE AND GLUNT, INC., Claimant, pro se.

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

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

PEZMAN, J.

Claimant seeks to recover for certain merchandise furnished pursuant to invitation to bid and purchase order. Claimant delivered the merchandise to the Department of Mental Health, Peoria State Hospital, Peoria, Illinois, on approximately August 7, 1967. On August 31, 1967, claimant's invoice was presented to the State of Illinois Department of Mental Health and the Department of Finance for payment. On or about April 17, 1968, this invoice was returned to claimant with notification that payment was refused for the reason that the appropriation out of which the payment of said invoice would have been made had lapsed.

A Departmental Report was filed, and on the 20th of August, 1968, a stipulation was entered into by and between claimant and respondent, wherein it was stipulated that the report of the Department of Mental Health would be incorporated and admitted into evidence without objection by either party. The stipulation further indicates that the parties did not desire to file briefs, were waiving any notice of hearing, and did not

object to the entry of an order in favor of claimant and against respondent in the sum of \$1,620.00.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *American Oil Company, Inc., a Corporation, vs. State of Illinois*, 24 C.C.R. 492; *The Pittsburgh and Midway Coal Mining Company, a Corporation, vs. State of Illinois*, 24 C.C.R. 510. It appears that all qualifications for an award have been met in the instant case.

Claimant, Blackmore and Glunt, Inc., is, therefore, hereby awarded the sum of \$1,620.00.

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(No. 5538—Claimant awarded \$20.54.)

MCGRAW-HILL BOOK COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1969.

MCGRAW-HILL BOOK COMPANY, Claimant, pro se.

WILLIAM J. SCOTT, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, McGraw-Hill Book Company, filed its

complaint against respondent for the sum of **\$31.94** for materials furnished to the Department of Mental Health of the State of Illinois.

Thereafter a stipulation was entered into by claimant and respondent as follows:

“The Report of the Department of Mental Health, dated February 17, 1969 (a copy of which is attached hereto, marked exhibit A, and, by this reference, incorporated herein and made a part hereof) shall be admitted into evidence in this proceeding without objection by either party.

“No other oral or written evidence will be introduced by either party.

“The Commissioner to which this case has been assigned and the Court may make and file their reports, recommendations, orders and decisions based upon the pleadings heretofore filed, and the evidence herein stipulated.

“It is agreed between the parties hereto that the claimant’s claim will be reduced from the amount of **\$31.94** to **\$20.54**, pursuant to the evidence presented by the Departmental Report hereto attached, and marked exhibit A.

“Neither party objects to the entry of an order in favor of claimant and against respondent in the sum of \$20.54.

“Neither party desires to file briefs in this proceeding.

“Both parties waive notice of any hearing, and agree that the aforesaid order may be entered without either party being present.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, McGraw-Hill Book Company, is, therefore, awarded the sum of **\$20.54**.

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(No. 5549—Claimant awarded \$347.08.)

SCM CORPORATION, Claimant, OS. STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

SCM CORPORATION, Claimant, pro se.

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

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

PERLIN, C.J.

Claimant seeks from respondent payment of the sum of \$347.08 for materials provided for the Department of Mental Health of the State of Illinois. The parties have stipulated that the report of the Department of Mental Health shall be made a part of the stipulation, and shall be admitted into evidence in the proceeding without objection by either party.

Said report includes the following statement:

“. . . The complaint, as submitted, is a legitimate complaint and request for payment for materials supplied to Dixon State School at a value of \$347.08.”

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. *Gilbert-Hodganzaw, Inc., A Corporatiow, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$347.08.**

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(No. 5581 — Claimant awarded \$5,630.93.)

THE SALVATION ARMY, An Illinois Corporation, Claimant,  
*vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

KENNEDY, GOLAN AND MORRIS, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

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

PEZMAN, J.

Claimant, The Salvation Army, an Illinois Corporation, seeks to recover from respondent the sum of \$5,630.93, said sum of money having been advanced by claimant for support of indigent persons. Vouchers were submitted to the Department of Public Aid, but were refused on the grounds that funds appropriated for such payments had lapsed.

This Court has repeatedly held that, where a contract has been (1) properly entered into; (2) services satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Gilbert-Hodgrnan, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509; *American Oil Company,*

*In-e., a Corporation, vs. State of Illinois, 24 C.C.R. 492; The Pittsburgh and Midway Coal Mining Company, a Corporation, vs. State of Illinois, 24 C.C.R. 510.* It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$5,630.93.**

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(No. 5585—Claimant awarded \$1,596.83.)

**EVEREADY MANIFOLD CORPORATION**, An Illinois Corporation, *vs.* **STATE OF ILLINOIS**, Respondent.

*Opinion filed April 17, 1969.*

**EVEREADY MANIFOLD CORPORATION**, Claimant, *pro se.*

**WILLIAM J. SCOTT**, Attorney General; **SAUL R. WEXLER**, Assistant Attorney General, for Respondent.

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

**PEZMAN, J.**

Claimant seeks to recover the sum of **\$1,596.83** for materials provided to the Office of the Secretary of State, and alleges that the demand for payment of said sum was refused on the grounds that funds appropriated for the Secretary of State for such payments had lapsed.

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

the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due. *Gilbert-Hodgman, Inc., a Corporation, vs. State of Illinois*, 24 C.C.R. 509; *American Oil Company, Inc., a Corporation, vs. State of Illinois*, 24 C.C.R. 492; *The Pittsburgh and Midway Coal Mining Company, a Corporation, vs. State of Illinois*, 24 C.C.R. 510. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$1,596.83.

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(No. 5601 — Claimant awarded \$139.90.)

EUGENE DIETZGEN COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 17, 1969.*

EUGENE DIETZGEN COMPANY, Claimant, pro se.

WILLIAM G. CLARK, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Eugene Dietzgen Company, a Delaware Corporation, filed its complaint against the respondent for the sum of \$133.90 for materials furnished the Illinois Department of Public Works and Buildings, Division of Highways, Springfield, Illinois.

A stipulation was therefore entered into by claimant and respondent, as follows :

“That claimant, Eugene Dietzgen Company, had furnished materials as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of One Hundred Thirty Three Dollars and Ninety Cents (\$133.90).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof has occurred.

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Eugene Dietzgen Company, is, therefore, awarded the sum of \$133.90.

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(No. 5612—Claimant awarded \$657.75.)

MAX GERBER, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1969.

MAX GERBER, INC., Claimant, pro se.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed* appropriation. Where contract has been properly entered into, all provisions thereof satisfactorily performed, proper charges made therefor, adequate funds were available at the time said contract was executed, and the appropriation from which

such claim could and would have been paid had lapsed, an award will be made.

DOVE, J.

Claimant, Max Gerber, Inc., filed its complaint against respondent for the sum of \$657.75 for materials furnished the Department of Mental Health, Peoria State Hospital, Peoria, Illinois.

Thereafter a stipulation was entered into by claimant and respondent, as follows :

“That claimant, Max Gerber, **Inc.**, had furnished materials as alleged in claimant’s statement of claim.

“That there is lawfully due the claimant the sum of Six Hundred Fifty Seven Dollars and Seventy Five Cents (\$657.75).

“That, as a result of delay in billing by claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof has occurred.

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Max Gerber, Inc., is, therefore, awarded the sum of \$657.75.

CALLAGHAN AND COMPANY, An Illinois Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed* April 17, 1969.

RIORDAN, MALONE AND SCHLAX, Attorneys for Claimant.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

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

DOVE, J.

Claimant, Callaghan and Company, an Illinois Corporation, filed its complaint against respondent for the sum of \$14,365.00 for legal publications and books furnished the Secretary of State, Springfield, Illinois.

Thereafter a stipulation was entered into by claimant and respondent, as follows:

“That claimant, Callaghan and Company, an Illinois Corporation, had furnished materials as alleged in claimant’s statement of claim.

“That there is lawfully due claimant the sum of Fourteen Thousand Three Hundred Sixty Five Dollars and No Cents (**\$14,365.00**).

“That, as a result of delay in billing by the claimant herein, payment was not made prior to the closing of the biennial appropriation.

“That claimant continues to be the sole person interested in this claim, and that no assignment thereof has occurred.

“That, upon the foregoing agreed case filed herein, the Court shall decide thereon, and render judgment herein according to the rights of the parties in the same manner as if the facts aforesaid were proved upon the trial of said issue.”

This is a matter of a lapsed appropriation, and this Court has repeatedly held that, where a contract has been (1) properly entered into; (2) service is satisfactorily

performed, and materials furnished in accordance with such contract; (3) proper charges made therefor; (4) adequate funds were available at the time the contracts were entered into; and, (5) the appropriation for the biennium from which such claim could have been paid had lapsed, it would enter an award for the amount due.

Claimant, Callaghan and Company, an Illinois Corporation, is, therefore, awarded the sum of \$14,365.00.

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(No. 5240—Claimants awarded \$35,160.)

ELAINE SCUDIERO, Administratrix of the Estate of RALPH SCUDIERO, Deceased; ELAINE SCUDIERO, Individually; and ELAINE SCUDIERO, Parent and Next of Friend of JANICE SCUDIERO, JOYCE SCUDIERO AND JUDITH SCUDIERO, Minors, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 13, 1969.*

JOHN T. MARTIN, Attorney for Claimants.

WILLIAM G. CLARK, Attorney General; GERALD S. GROBMAN and ARTHUR L. BERMAN, Assistant Attorneys General, for Respondent.

**NEGLIGENCE—burden of proof.** Before claimants may recover they must prove by a preponderance of the evidence (1) that respondent was negligent; (2) that the negligence was the proximate cause of the accident; (3) that claimants were free from contributory negligence; and, (4) damages.

**HIGHWAYS—duty to warn motoring public.** Although the State is not an insurer of all who travel on its highways, 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, the State is negligent if it does not notify the public of such condition.

**SAME—evidence.** Where there was no evidence introduced to show that the deceased or claimants exercised anything but due care for their safety, or that the cause of the accident was other than the condition of the highway, respondent held guilty of negligence, which was the proximate cause of accident.

PERLIN, C.J.

Claimants seek recovery of damages arising out of an automobile accident on February 10, 1965 in which Ralph Scudiero, the husband of claimant, Elaine Scudiero, and the father of the other claimants, was killed, and the other claimants injured.

Claimants contend that the accident was caused by the negligence of respondent in that it carelessly maintained and failed to repair holes or defects in the highway, and failed to post adequate warning signs, when it knew or should have known of the existence of the holes or defects.

Before claimants may recover they must prove by a preponderance of the evidence (1) that respondent was negligent; (2) that the negligence was the proximate cause of the accident; (3) that claimants were free from contributory negligence; and, (4) damages.

Claimants introduced evidence, which established the following:

On February 10, 1965, Ralph Scudiero was driving his automobile on U.S. Route No. 20 in a westerly direction, about 10:25 P.M. Claimant, Elaine Scudiero, was riding in the front seat of the automobile, and the three Scudiero children, Janice, Joyce, and Judith, were riding in the rear. Elaine Scudiero testified that her husband was driving in the curb lane of the four lane highway at about 35 miles per hour. When the car reached the area in the road at or near Bill Bailey's Motor Sales, Inc., (19 West 326 Lake Street, Addison, Illinois) the left front wheel dropped into a hole, and the car swerved. The vehicle then went into the lane of traffic from the opposite direction, colliding with an eastbound car. Accord-

ing to claimant, after she felt the car going into the hole, her husband had his hand on the wheel at all times, and did not hit the brake hard. She further testified that the area where the car went out of control was at the west end of the Bailey car lot. After the collision, Mrs. Scudiero was taken in one ambulance with her husband, and her daughters were taken in another ambulance. Her husband was pronounced dead at the hospital.

About ten or twelve days after the accident, Mrs. Scudiero testified she returned to the spot in the road where the collision occurred, and saw an area of ruts running about 8 to 10 yards. Claimant stated that the last time her husband had traveled on the highway was Christmas, 1964. She herself had driven on the highway in question about a month before the accident, and had noticed ruts and holes. She further testified that the tires on the automobile were good, and it had snow tires at the time of the accident.

Janice Scudiero, age 16, the daughter of decedent and Elaine Scudiero, testified that she was riding *as* a passenger in the automobile in the rear seat on the left side of the car. She described the accident as follows: "We were going along, and then all of a sudden the car must have hit a rut, and we started to jump—well, joggle up and down. All of a sudden the car went out of control, and it started to swerve, and then we went into the other lane." She was taken to the hospital in an ambulance where she was treated for injuries. Janice also testified that the car swerved out of the lane of traffic twice before the impact.

Joyce Scudiero, age 13, testified that she was sitting in the middle of the rear seat, and her sister Judy was sleeping on her right. She stated: "We were driving,

and all of a sudden I felt like the car, well, went into this rut-like, and he was trying to get it out, so he couldn't, so the car started swinging—he must have somehow got it out, and we started to go into the other lane. Then we hit the car.” She said that she had a cut on her leg, a bruise on her arm, a cut on her head and scratches all over her face. She testified she has completely recovered, and that she never saw a doctor after she left the hospital.

Judith Scudiero testified she was asleep at the time of the accident; that she hurt her neck and left knee; that the discomfort lasted about four days; that she is fully recovered, and has no after effects.

Carmen Scudiero, a brother of the decedent, testified that Ralph Scudiero had four children, Jacquelyn, Janice, Joyce and Judy, and that he was a good father. He first learned of the accident at five minutes to twelve on February 10 when he was called to the hospital. He went to the scene of the accident about nine o'clock the following morning, and testified that a photograph of the area of the highway at the west end of Bailey's Used Car Lot correctly portrayed its condition at that time, with ruts and water on the road. He drove over the area, and his wheel hit the ruts described above.

Joseph Scudiero, also a brother of the decedent, testified that he had occasion to travel on Lake Street to get to and from his work, and used the highway in question daily; that he had noticed the conditions portrayed in the photograph at least two or three weeks before the accident occurred; that he did notice State of Illinois trucks maintaining the road before February 10, 1965; that he had hit the ruts, and bounced or swerved; that he never saw any signs warning him of rough pavement; and, that

sometimes he didn't see the ruts, because they were full of water.

Ralph Louis Blust testified that he lived about four blocks from Bill Bailey's; that he is a volunteer fireman with the Addison Fire Department; that he left the fire house, located two blocks east of Addison Road on Lake Street about 10:15 or 10:20 on the night of the accident; that the condition of the pavement was good except for a stretch in front of Bill Bailey's, which was "very rough, very bad"; that the speed limit at or near Bill Bailey's is 45 miles per hour; that in some instances the condition of the highway was worse than portrayed in the photograph because of deep ruts, which have water in them; that the conditions were as portrayed at least a week or two before February 10, 1965; that he came upon the accident before the ambulances arrived; that he did not notice any signs warning of the condition of the highway, barricades, or detour signs; that he had driven over the bumps in the past, and tried to straddle them; and, that this was a highly traveled road.

Larry Herbord testified that he was a police officer for the Village of Addison; that he did not investigate the accident in question; that he was very familiar with the general condition of the highway in question as it existed on February 10, 1965; that the condition of the road was worse than that shown in the photographs; that there was one very bad hole; that the conditions had existed for a couple of weeks; that there were no warning signs displayed, which would make a motorist aware of the highway; that the lighting at the scene of the occurrence was darker than it was just east of it; that the general condition of the highway was good from at least a mile east of the area in question; and, that he

traveled over the same spot every night, and the area “jarred the living hell” out of his vehicle.

Dorrence Little testified that he was traveling east on Lake Street in the far right lane at about 50 miles per hour when he saw an oncoming vehicle swerve into his lane, apparently regain control, and then swerve into his lane again; that he struck the other car on the driver’s side, after trying to run off the road into a parking lot to avoid hitting the car; that he drives on the highway daily; that the lane going west was worse than the other; that from time to time the bad spots are repaired, but eventually became bad again; that the weather was good, but there might have been frost at the spot; that he had never observed warning signs in the area, with respect to the condition of the highway; that he did observe patchwork being done; and, that the ruts and holes shown in the photograph were there for at least three days prior to February 10, 1965.

Nicholas Steffan testified that he was employed by the State of Illinois as a maintenance field engineer for the Division of Highways, and is in charge of the highways in DuPage County; that in February, snow, thaw and rain caused chuck holes in many of the roads in DuPage County; that the highways get resurfaced when funds are available; that Lake Street was resurfaced in 1953; that, prior to February 10, 1965, a request was made from the Department for resurfacing in November, 1964; that the money has to be allotted for the next season’s program; that during the winter the holes are patched with a cold mix, which is temporary in nature; that time cards show cold patching was done on Lake Street on February 10; that cold and rain, freezing and thawing take the patches out, and the “next day we patch

them again until such time we can put a permanent patch in"; that the highways are inspected every day; that he personally inspects the highway, and has a supervisor and two foremen inspecting highways; that a maintenance man in each section maintains a particular section of the road; that the first thing the maintenance men do is ride their section of the road to ascertain the filling of holes, weather conditions, and debris on the highways; that he did ride Lake Street on February 9; that he did request that Lake Street be resurfaced in 1964 and 1962; that Lake Street was high on priority for reconstruction, because of the amount of traffic it had in 1962, 1963, 1964 and 1965, but no funds were available; that a permanent patching job was done on Lake Street about three years prior; that three men maintain the area, and are on the road every day; that every two miles there is a sign posted "rough pavement" as a warning to motorists; that he could not say where the signs were posted in relation to the accident; that the cold mix at times does not last an hour, because of the heavy speed of traffic, and the tires spinning it right out; that the cold patches would last about 12 hours or less on the day of the accident; that the westbound traffic is heavy at night with freezing and thawing and with water getting underneath, the cold mix might come out right after rush hour; and, that the presence of water indicated that the area in front of Bill Bailey's was a low area, or the area somewhere around it was not drained.

Walter Kehoe testified that he was employed in the capacity of maintenance foreman in the Northeast Section of DuPage County; that he had charge of that section of Lake Street, or U.S. No. 20, between Addison Road and U.S. Route No. 53; that he had a crew of three men working on Lake Street; that he traveled over the various

highways in his district not less than two times per day; that all crews make a trip on the highway in the morning to check for chuckholes and debris; that time cards are kept of the work; that time cards showed "patching holes" on Lake Street between Addison and Route No. 53 on February 10, 1965; that he drove over the highway on February 10, and there were some holes; that the photograph admitted into evidence shows the condition of the highway as it existed when he saw it on February 10, 1965, with peeling of blacktop caused by water and hydraulic pressure pushing it up; that the center lane had a few holes; that after patchwork was done the holes would be level with the road; that the depressions were four to six inches deep; that it would be easy for patchwork to be done one day, and pop out the following day because of water and heavy trucks; that there were "rough pavement" warning signs every two miles, and, "there would have to be one" in front of Bill Bailey's, because it would be two miles from Walnut Street; that the three men crew would travel about twelve miles of four lane highway; that the records do not show the exact place of the patchwork; that he did not see a sign warning of icy conditions or bad pavement in the photograph; and, that the spot near Bailey's was a low level area, and would accumulate water or condensation.

Chester Galus testified that he was employed by the State of Illinois as a highway section man; that he had charge of Lake Street on February 10, 1965 and the area in question; that the total area of approximately 10½ miles of four line pavement is inspected once in the morning and once in the afternoon for holes, ruts, abrasions, dead animals, debris and wood; that, if holes or ruts are spotted, they get the material to fix it; that they used cold pack to fill the holes and ruts, with some lasting for

indefinite periods and others coming out in **13** or **14** hours; that there were signs warning of rough pavement in the area in question, and the one westbound would be slightly under a mile from Bill Bailey's; that the general condition of the highway immediately adjacent to Bill Bailey's Car Lot was in fair condition; that "patch holes" on a time card is different from "patching", which means taking out the top section with an air hammer, cleaning it out, and making a real patch; that he did not remember if he did patchwork in front of Bill Bailey's on February **10**; that after the accident it was not in bad condition; that it would have taken about **45** minutes to remedy the condition portrayed in the photograph; that, if it is impossible to repair properly, barricades and flashers are put up; that, if he had time, and had seen the conditions portrayed on the photograph, he would have followed the procedure with the air hammer, or cleaned out the hole with a pick by hand and made the patch. Mr. Galus further testified that, if everything is not repaired, "we work overtime until we do repair it. **If** it's impossible to repair it properly, barricades and flashers are put up." Mr. Galus also stated that if he passed over a section of the highway, which looked like the photograph in evidence, he would "definitely not" leave for the night leaving the section of the highway in that condition.

Although the State is not an insurer of all who travel on its highways, 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, the State is negligent if it does not notify the public of such condition. *Mitchell vs. State of Illinois*, **24** C.C.R. **61**; *Sisco vs. State of Illinois*, **24** C.C.R. **306**.

The Court must conclude that respondent was negligent in its failure to maintain U.S. Route No. 20, or Lake Street, in a reasonably safe condition for motorists, or, as an alternative, post adequate warning signs or signals. Without exception, all witnesses for claimants and respondent testified that the area of the highway on which the accident occurred, specifically the westbound lane in front of the west end of the used car lot, which was located at 19 West 326 Lake Street, Addison, Du Page County, was filled with ruts and holes, and often covered with water, which acted to conceal some of the defects. All of respondent's witnesses testified that they knew of the condition of the area in question. Although claimants' witnesses testified that they saw no warning signs, respondent's witnesses stated that there were rough pavement signs every two miles. This hardly seems adequate when there was no sign at the spot, which all parties stated was one of the worst. Respondent could have exercised reasonable care in maintaining the area by doing the patching job, which took 45 minutes instead of the "patch holes" job, which was known not to last in the heavy traffic, which occurred daily. Respondent's witness, Mr. Galus, also testified that it would have been possible to put up barricades and flashers, if an area is impossible to repair. The condition in question had lasted at least three days to two weeks before the accident. Respondent, through its daily inspections, knew or should have known of the dangerous condition of the road.

There was no evidence introduced to show that the deceased or claimants exercised anything but due care for their safety, or that the cause of the accident was other than the condition of the highway. Respondent was guilty of negligence, which was the proximate cause of the ac-

cident, resulting in the death of Ralph Scudiero and the injuries of the other claimants.

The evidence further revealed that Ralph Scudiero was 47 years old at the time of his death; that he had been married to Elaine Scudiero for 16 years; that four children were born of the marriage, Janice, Jacquelyn, Joyce and Judith; that he was employed by Ray Roberts Steak House in West Chicago, and earned a net amount of \$110.00, all of which he contributed to the support of his family; and, that he was in good health.

The evidence further shows that on February 10, 1965, Elaine Scudiero was employed by the Roselle Snack shop as a waitress earning \$40 to \$45 per week. As a result of the accident, she sustained a fracture of the fibula, fracture of the left elbow, lacerations of the scalp and leg. She remained in the hospital for eight days, and was on crutches about five weeks. She was disabled until April 18, 1965.

Dr. James Boyd, who treated Mrs. Scudiero at the time of the accident, stated that there may be some arthritis developing in the elbow region, and that she will have pain in the left leg related to the fracture. He also treated Janice Scudiero who had multiple abrasions of the left lower leg and laceration of the chin, multiple contusions, fracture of the left fibula, with a residual fracture of the fibia and a scar of the chin. Janice remained in the hospital six days and on crutches for a month.

Joyce Scudiero had a cut on her leg, a bruise on her arm, a cut on her head and scratches over her face. She has completely recovered, and never saw a doctor after she left the hospital. Judith Scudiero had discomfort of the neck and left knee for about four days.

Claimant Elaine Scudiero is hereby awarded the sum of \$25,000.00, as Administratrix of the Estate of Ralph Scudiero, deceased; Claimant, Elaine Scudiero, individually, is hereby awarded the sum of \$7,500.00; Janice Scudiero, a minor, is hereby awarded the sum of \$2,250.00; Joyce Scudiero, a minor, is hereby awarded the sum of \$250.00; and Judith Scudiero, a minor, is hereby awarded the sum of \$150.00.

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(No. 5273—Claimants awarded \$731.51.)

SALVATORE CASTORO and JOY ANN CASTORO, Claimants, *vs.*  
STATE OF ILLINOIS, Respondent.

*Opinion filed May 13, 1969.*

KIRKLAND, BRADY, McQUEEN, MARTIN AND CALLAHAN,  
Attorneys for Claimants.

WILLIAM J. SCOTT, Attorney General, MORTON L. ZAS-  
LASKY AND SAUL R. WEXLER, Assistant Attorneys General,  
for Respondent.

PRISONERS AND INMATES—burden *of proof*. State is liable for damages only if negligent in allowing inmate to escape from an institution.

CONTRIBUTORY NEGLIGENCE—*leaving keys in automobile*. Statute prohibiting the leaving of keys in an automobile does not apply to automobile parked on private property.

SAME—*leaving car unlocked*. Claimant was not guilty of contributory negligence merely because he left car unlocked.

DOVE, J.

Claimants bring this action to recover for damages to their automobile. On October 15, 1965, claimants were the owners of a 1963 Chevrolet Impala automobile. On that date Salvatore Castoro parked the automobile on a private parking lot located adjacent to his employer's place of business. While the automobile was parked in

this area, it was stolen by one Michael Creed, a patient at the Elgin State Hospital, who drove it to the intersection of LaFox and Quarry Streets in South Elgin, where the automobile collided with a utility pole. Claimants are seeking to recover damages in the sum of \$672.19 for repairs to the automobile, and \$80.00 for rental of an automobile while claimants' vehicle was being repaired.

It appears from the record in this case that the damage to claimants' automobile amounted to the sum of \$651.09, and that claimants further expended the sum of \$80.42 for rental of a car from the Avis Rent-a-Car Company. It further appears that, at the time the automobile was stolen by Creed, the keys were in the ignition and the doors unlocked. Respondent contends that the act of leaving the keys in the ignition and the doors unlocked constituted contributory negligence on the part of claimant, Salvatore Castoro; that such negligence was the proximate cause of claimants' damage; and, that claimants should, therefore, be denied recovery. Respondent also contends that claimants have failed to sustain the burden of proof with respect to showing that respondent was negligent in allowing Michael Creed to escape.

With regard to claims filed for damages caused by an escaped inmate of a State institution, prior decisions of this Court clearly indicate that the State is not an insurer, and is liable for damages only if the State is negligent in allowing the inmate to escape. *Malloy vs. State of Illinois*, 18 C.C.R. 137; *Fern L. Huff vs. State of Illinois*, 22 C.C.R. 361. It was stipulated to by respondent that the automobile in question was stolen by Michael Creed, an inmate of Elgin State Hospital, after he had escaped from said institution, and while at large

on unauthorized absence. Respondent offered no testimony with respect to the question of negligence in allowing Michael Creed to escape. In *U.S. Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, the Court held that it was incumbent upon the State to come forward with evidence to show that it was not negligent in a situation such as this. Without such a showing, it will be presumed that the State was negligent, based upon the inferences to be drawn from the fact of the escape. In the case of *Finch vs. State of Illinois*, 22 C.C.R. 376, the Court held that, where there was nothing in the record to indicate whether or not the State was negligent in allowing a patient to escape from a State institution, that the doctrine of *res ipsa loquitur* would apply, and that the burden would be upon respondent to make some showing that the State was not negligent in allowing the patient to escape. Inasmuch as respondent has not offered any proof showing that it was not negligent in allowing Michael Creed to escape, this Court, therefore, concludes that claimant has borne the burden of proof that respondent was negligent in allowing the inmate to escape, and that such negligence was the proximate cause of damage to claimants' automobile.

Respondent also contends that claimants were contributorily negligent in allowing the keys to remain in the ignition and the doors unlocked at the time said automobile was stolen. In *U. S. Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, an automobile was parked in the driveway of a private residence. It was stolen by an escapee from the Dixon State School, who drove it into a parking meter. In that case the Court pointed out that there was no rule of common law requiring that keys be removed from an automobile, and the Court went on to hold that the

statute prohibiting the leaving of the key in the ignition of an automobile did not apply to an automobile parked on private property. In *Stanko vs. Zilien*, 33 Ill. App. 2d (1961), the Court held that the “Key in the Ignition” statute does not apply to persons who had their cars on private property, and which were stolen at a later time and driven away. The Court went on to say that the statute was not intended to apply to them, but to those who leave their cars on public highways with the ignition on, and the cars were then stolen.

It is the opinion of the Court that claimants herein were not guilty of contributory negligence in allowing the keys to their automobile to be in the ignition of the car while it was parked on the parking lot in question. It is the opinion of this Court that Sec. 189 of Chap. 95½, Ill. Rev. Stats., referred to as the “Key in the Ignition” statute, does not apply to a vehicle in any place other than on a public highway.

Claimants are hereby awarded the sum of \$731.51.

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(No. 5375—Claimant awarded \$122.10.)

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

Opinion filed *May 13, 1969.*

REDMAN AND SHEARER, Attorneys for Claimant.

WILLIAM J. SCOTT, Attorney General; EDWARD L. S. ARKEMA, JR., and SAUL R. WEXLER, Assistant Attorneys General, for Respondent.

**PRISONERS AND INMATES—burden of proof.** State is liable for damages only if negligent in allowing inmate to escape from an institution.

**CONTRIBUTORY NEGLIGENCE**—*leaving keys in automobile.* Statute prohibiting the leaving of keys in an automobile does not apply to automobile parked on private property.

**SAME**—*leaving car unlocked.* Claimant was not guilty of contributory negligence merely because he left car unlocked.

DOVE, J.

Claimant brings this action to recover for theft of certain items of personal property valued at **\$122.10** from his automobile. On November **16, 1966**, the automobile of claimant, Frank Kendrick, was stolen. At the time of the theft various items of personal property owned by claimant were located inside the vehicle. Claimant parked his unlocked car, with the keys in the ignition in a private parking area parallel to the street, and about forty feet from his home on 7th Street in St. Charles, Illinois. Sometime between midnight and **5:30 A.M.** the following morning the vehicle containing the personal property was stolen.

Approximately one week later, Mr. Alfred Buscher, a representative of the St. Charles School for Boys, returned to claimant a green corduroy coat, which had been damaged. On December **5, 1966**, Mr. Buscher again contacted claimant by letter acknowledging the theft of items listed by claimant, and stated that claim could be initiated through the Court of Claims of the State of Illinois. The letter further acknowledged the probability of the theft by inmates of the Boys' School, who had escaped on November **16, 1966**.

Respondent contends that claimant has failed to prove that the State was negligent in allowing the inmates to escape, and further that claimant was contributorily negligent by reason of the fact that he left the keys to the car in the ignition when it was parked in front of his residence.

Prior decisions of this Court have held that the State is not an insurer, and is liable for damages only if the State is negligent in allowing the inmate to escape from a State institution. *Malloy vs. State of Illinois*, 18 C.C.R. 137; *Huff vs. State of Illinois*, 22 C.C.R. 361. Respondent offered no testimony with respect to the question of negligence in allowing the inmates of the Boys' School to escape on the date in question. In the case of *U. S. Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, the Court held that it was incumbent upon the State to come forward with evidence to show that it was not negligent in a situation such as this. Based upon the evidence submitted by claimant in this case, and upon respondent's failure to offer any evidence showing its freedom from negligence in allowing inmates to escape from the State institution, the Court concludes that claimant has borne the burden of proof; that respondent was negligent in allowing the inmates to escape; and, that such negligence was the proximate cause of claimant's loss of personal property.

It is the further opinion of this Court that claimant was not guilty of contributory negligence in allowing the keys to his automobile to remain in the ignition and the doors unlocked at the time said automobile was stolen. In the case of *U. S. Fidelity and Guaranty Company, A Corporation, vs. State of Illinois*, 23 C.C.R. 188, the Court pointed out that there was no rule of common law requiring that keys be removed from an automobile, and the Court held that the statute prohibiting the leaving of the key in the ignition of an automobile did not apply to an automobile parked on private property. In the case of *Stanko vs. Zilien*, 33 Ill. App. 2d (1961), the Court held that the "Key in the Ignition" statute does not apply to persons who have their cars on private property.

It is the opinion of the Court that the area in which claimant had parked his automobile should not be classified as a public highway, and that, therefore, to leave the keys in the car was not in violation of the statute.

Claimant is hereby awarded the sum of \$122.10.

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(No. 5560—Claimant awarded \$2,500.00.)

MARIE M. PARROTT, Claimant, 'us. STATE OF ILLINOIS, Respondent.

*Opinion filed May 13, 1969.*

MICHAEL F. RYAN AND ARTHUR A. LEVISOHN, Attorneys for Claimant.

WILLIAM G. CLARK, Attorney General; ETTA J. COLE, Assistant Attorney General, for Respondent.

**CONTRACTS—lapsed 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 contract was entered into, an award for amount due will be allowed.

PEZMAN, J.

Claimant seeks from respondent payment of the sum of \$2,500.00 for services rendered to the Department of Mental Health of the State of Illinois. The complaint alleges that such demand was refused on the grounds that funds appropriated for such payment had lapsed. The parties have stipulated that claimant is entitled to the sum requested, and that, as a result of claimant's delay in billing, payment was not made prior to the closing of the biennial 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert-Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$2,500.00.

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(No. 5623—Claimant awarded \$500.00.)

WANDA ROZMAREK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 13, 1969.*

JOSEPH J. CIACCIO, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

**MOTOR VEHICLES—escheat of safety responsibility deposit.** Evidence disclosed that claimant was entitled to a refund of monies escheated to State pursuant to Chap. 95½, Sec. 7-503, 1961 Ill. Rev. Stats.

DOVE, J.

Claimant, Wanda Rozmarek, is seeking recovery of \$500.00, which was deposited with the office of the Secretary of State pursuant to the Motor Vehicle Law (1961 Ill. Rev. Stats., Chap. 95½, Sec. 7-503) on December 27, 1962. The requirement of deposit arose out of an automobile accident, which involved a vehicle driven by claimant. Claimant is also requesting \$175.00 for attorney's fees.

The Departmental Report shows that claimant received a receipt from the Safety Responsibility Division of the office of the Secretary of State, dated December

27, 1962; that, on July 6, 1966, claimant received another letter from the office of the Secretary of State, Safety Responsibility Section, advising her that the above deposit had been on file with the office of the Secretary of State for over three years; and further advising claimant that, unless a claim was filed within thirty days, the deposit would be transferred to the General Revenue Fund, as provided by statute. No claim was filed, and the security deposit was thereafter transferred to the General Revenue Fund.

The parties have stipulated that the facts appearing in the Departmental Report are true and undisputed. Sec. 7-503, Chap. 95 $\frac{1}{2}$ , 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 is justly entitled to a refund. It is not the policy of this Court to allow attorney's fees unless specifically authorized by statute.

An award is accordingly made by this Court to claimant, Wanda Rozmarek, in the amount of \$500.00.

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(No. 5143—Claimant awarded \$25,000.00.)

MARTIN J. McMAHON, d/b/a McMAHON PRODUCE COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion re liability filed January 11, 1966.*

*Opinion re damages filed May 29, 1969.*

THOMAS AND THOMAS, Attorneys for Claimant.

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

**NEGLIGENCE—*res ipsa loquitur*.** Where claimant has made a prima facie case based on the application of the *res ipsa loquitur* doctrine, and there is no evidence of contributory negligence on his part, recovery will be allowed.

**DAMAGES—*evidence*.** Extent of allowable damages must be established by competent evidence and with a reasonable degree of certainty.

DOVE, J.

The claim of Martin J. McMahon, d/b/a McMahon Produce Company, was filed in this Court on January 27, 1964 seeking an award of \$83,275.10 (later reduced by amendment to \$25,000.00) for damages to a warehouse, equipment, inventory, produce and office furnishings, which were caused by a fire purportedly started as a result of the negligence of the employees of respondent.

The case is submitted to this Court only on the question of liability, claimant and respondent having filed a joint motion for separate trials on the issues of liability and damages, which motion was heretofore granted by the Court. At the hearing held before the Commissioner, the only testimony taken was that of claimant's witnesses.

The case arises out of a fire, which occurred in Rockford, Illinois on January 14, 1963. Claimant, owner of a produce and beverage business, was the lessee of a portion of a building located at 340 Tinker Street in Rockford, and used it as an office and warehouse.

The Department of Public Aid of the State of Illinois also leased a portion of the same building for use as a surplus food storage and distribution depot. The uncontroverted evidence establishes that the fire started in that portion of the building occupied and controlled by respondent ;that at the time the fire started in respondent's portion of the building the only persons present were two Illinois Public Aid employees, namely Irving Pollitt and

Virgil August Schoenweiss; that both Pollitt and Schoenweiss had been drinking intoxicating liquor on the job that day for several hours prior to the fire; and, that Pollitt was in fact drunk at the time of the fire, and for several hours prior thereto; that Pollitt was alone in the office in an intoxicated condition for at least thirty minutes prior to the fire, while Schoenweiss was on the second floor of respondent's portion of the building.

The evidence further establishes that in the office on the first floor of respondent's portion of the building a gas operated space heater and an automatic electric coffee pot, were being used immediately prior to the fire; that the heater had no automatic shutoff, but had to be turned on and off with pliers; that after the fire the heater was dug up by firemen, and the on-and-off value was found in a full "on" position; and, that the fire originated in the small office where the space heater was located.

The evidence further discloses that the wiring in this portion of the building was faulty and dangerous. When the dock lights were turned on, the fuse would blow, and the employees would then re-set the fuse control, and turn the lights on again until they stayed on without blowing a fuse.

Claimant has not been able to prove the proximate cause of the fire, but, in our opinion, he does not have to do so in this case, as the evidence fully supports the fact that claimant has made a prima facie case for recovery on the basis of the application of the doctrine of *res ipsa loquitur*, and liability is thereby established against respondent. There is no evidence of contributory negligence on the part of claimant. (*Edmonds vs. Heil*, 333

Ill. App. 497; *Metz vs. Central Ill. Electric and Gas Co.*, 32 Ill. 2d 446.)

The doctrine of *res ipsa loquitur* is succinctly stated in 38 Am. Jur. 989, Sec. 295:

“The conclusion to be drawn from the cases as to what constitutes the rule of *res ipsa loquitur* is that proof that the thing, which caused the injury to the plaintiff, was under the control and management of the defendant, and that the occurrence was such as in the ordinary course of things would not happen if those who had its control or management used proper care, affords sufficient evidence, or, as sometimes stated by the court, reasonable evidence, in the absence of an explanation by the defendant, that the injury arose from or was caused by the defendant’s want of care.”

In this case, respondent has offered no evidence or explanation as to how this fire started. It is un rebutted that respondent was in control of that portion of the building where the fire started. Our Court has heretofore held in the case of *Mertel vs. State of Illinois*, 20 C.C.R. 287, that:

“The doctrine of *res ipsa loquitur* is grounded upon the principle of law that where one has charge or management of a thing in connection with which an accident happens, which in the ordinary course of things does not happen if those who have the management thereof use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of proper care. The fact of this occurrence, therefore, will be deemed to afford *prima facie* evidence to support recovery in absence of any explanation by the defendant attempting to show that the occurrence was not due to its want of care. There was no explanation in the record of how the accident happened, nor was there any evidence of any negligence on behalf of the claimant. There being no rebuttal to the *prima facie* case made by the claimant, the facts are sufficient to support an award to claimant.” (*Westerfield vs. State of Illinois*, 18 C.C.R. at 186.)

Similarly, this Court allowed recovery for damages incurred to a house and its contents caused by a tow target, which fell from a National Guard airplane, and 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*. (*Northwestern National Insurance Company, Et Al., vs.*

*State of Illinois*, 24 C.C.R. 261). This Court likewise cited with approval therein the case of *Mertel vs. State of Illinois*, 21 C.C.R. 558, which was also a case of application of the doctrine of *res ipsa loquitur*. The reasoning of those cases is applicable to the case at bar.

The issue of liability is, therefore, resolved against respondent and in favor of claimant, Martin J. McMahon, d/b/a McMahon Produce Company, and a further hearing will be had solely on the question of damages.

#### **Opinion Re Damages**

Claimant filed his claim with this Court on January 27, 1964, seeking an award of \$83,275.10, which was later reduced by amendment to \$25,000.00, for damages to equipment, inventory, office furniture, and loss of profits, caused by a fire purportedly started as a result of the negligence of the employees of respondent, State of Illinois.

The issue of liability was resolved in favor of claimant by opinion of this Court filed January 11, 1966. Testimony on the issue of damages was taken in the City of Rockford, Illinois on May 12, 1967. The only witnesses were claimant, James R. Zant, an individual engaged in the office supply business, and Loren Towne, an individual engaged in the refrigeration and air conditioning business.

Claimant's evidence discloses that the following items were destroyed by the fire:

**A. OFFICE FURNISHINGS.** Claimant initially alleged that the value of the office furnishings destroyed was \$4,394.50. Claimant's witness, James R. Zant, manager of an office equipment and supply store, testified that in his opinion the office furnishings destroyed in the fire had a fair market value of \$670.00. Mr. Zant

gave no opinion as to the value of certain items of office equipment. However, there is testimony of claimant indicating that their value amounted to at least \$230.00, thereby making the total fair market value of office furnishings and equipment destroyed by the fire \$1,000.00.

B. WAREHOUSE EQUIPMENT. Under this category claimant lists refrigeration equipment destroyed at \$18,000.00, and miscellaneous items totaling \$3,460.00. Claimant testified that his figures were based on his estimate as to what it would cost to replace the items lost. Loren Towne, one of the owners and operators of Miller Engineering Company, testified on behalf of claimant that he had been in the refrigeration and air conditioning business for 15 years, and had serviced claimant's equipment for 10 years. Loren Towne further testified that the value of the refrigeration equipment lost in the fire was \$14,000.00, and miscellaneous equipment valued at \$600.00.

C. UPSTAIRS STORAGE. There is evidence in the record that the value of 75 banana boxes and 50 banana drums destroyed in the fire was \$450.00.

D. WAREHOUSE STORAGE. In this category, there is evidence in the record, which establishes the following damages :

Canfield Beverages .....	\$2,350.00
Loss of Profit on the same .....	695.00
Canfield Empty Bottles .....	150.00
Graf beverages and miscellaneous beverages	3,023.50
Loss of profit on Graf and miscellaneous beverages .....	1,209.40

E. COOLER. The evidence is that the wholesale cost of the items in the cooler destroyed in the fire was \$300.00, with a loss of profits of \$100.00. There is also evidence that the beverage truck destroyed by the fire

should be valued at \$1,200.00, and that the accounts receivable, which were not collectable by reason of the fact that all of the records were destroyed, amounted to approximately \$2,500.00.

**F. LOSS OF BUSINESS.** This is the final category of damages. Claimant testified that as a result of the fire he was put out of business. He testified that his past profits amounted to approximately \$800.00 net per month. There was ample testimony that before the fire he had an established business in wholesale beverages and produce, and that because of the fire he was not able to resume that business. There was testimony bearing on the reasonable certainty that profits would have been made, orders received before and after the fire, output capacity of the business before the fire, output capacity of the business after the fire, and claimant's inability to relocate.

In the opinion of this Court there is ample testimony in the record to make an award for loss of business.

While some of the evidence introduced by claimant with respect to the value of items destroyed in the fire appears somewhat uncertain, it is the opinion of this Court that such evidence is not so uncertain, contingent, or speculative as to bar a recovery. It is the opinion of this Court that claimant has established by competent evidence the extent of damages suffered, and has established the amount of damages with a reasonable degree of certainty. Considering all of the elements of the case and the various categories of damage, which claimant has suffered, it is the opinion of this Court that claimant has sustained a loss in excess of \$25,000.00.

An award is hereby made to claimant in the amount of \$25,000.00.

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(No. 5573—Claimants awarded \$43,800.00.)

VILLAGE OF WESTON, a Municipal Corporation; WEST CHICAGO STATE BANK, an Illinois Corporation; THE ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation; THE COMMONWEALTH EDISON COMPANY, an Illinois Corporation; SAMUEL A. LA SUSA; LOUIS ANCEL; WILLIAM S. LAWRENCE AND ASSOCIATES, INC.; EDMUND M. BURKE AND ASSOCIATES, LTD.; GRUMLEY, DICKE, THORNTON AND CLARK; AND WHEATON DAILY JOURNAL, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 29, 1969.*

ANCEL, STONESIFER AND GLINK, Attorneys for Claimants.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, Assistant Attorney General, for Respondent.

**MUNICIPAL CORPORATION—recovery for professional services performed on behalf of municipal corporation.** Where, as a direct and proximate result of the acquisition by the State of all taxable property, a village was precluded from collecting property taxes and the inability of the village to provide funds for payment for professional services was destroyed, a claim will be allowed.

PERLIN, C.J.

Claimants seek recovery of a total sum of \$43,800.00 resulting from professional services performed on behalf of the Village of Weston by the claimants, pursuant to contracts entered into between the claimants and the Village of Weston.

The parties in this case have submitted a stipulation, which sets forth in part the following:

- “3. That claimants submitted bills for their services, and that said bills were approved by the Corporate Authorities of the Village at a duly constituted meeting.
- “4. That the amounts set forth in Paragraph 6 hereof are the fair and reasonable value of the services performed by the claimants, and that said amounts are due and owing.
- “5. That, as a direct and proximate result of the acquisition by the State of Illinois of all of the property comprising said Village of Weston, thus removing all such property from the tax rolls as tax exempt property, the said Village will be precluded from levying or collecting any future property taxes, thus destroying the ability of said Village to provide funds to pay the amounts claimed by the claimants herein.
- “6. That the following (reduced) amounts represent and are a fair and reasonable settlement and compromise of the claims herein, which, as compromised, are as follows:
 

Samuel A. La Susa .....	\$ 30,000.00
Louis Ancel .....	6,800.00
William S. Lawrence and Associates, Inc. ..	6,000.00
Edmund M. Burke and Associates, Ltd. ..	2,000.00
	\$ 43,800.00
- “9. That each of the claimants herein is justly entitled to receive from the State of Illinois in this cause the amounts set forth in Paragraph 6 hereof.”

The stipulation further states that “upon the approval of said claims in this proceeding, the Corporation Authorities of the Village of Weston will take such action as may be necessary to cause the dissolution of said Village of Weston as a municipal corporation.”

There being no question in dispute, the claimants are hereby awarded the sum of \$43,800.00 to be distributed as set forth in the foregoing stipulation.

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(No. 5606—Claimants awarded \$403,278.80.)

COUNTY OF COOK AND COOK COUNTY DEPARTMENT OF PUBLIC AID, Claimants, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed May 29, 1969.*

EDWARD V. HANRAHAN, Attorney for Claimants.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, 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.

Claimants, County of Cook and the Cook County Department of Public Aid, seek recovery of \$408,278.80 for hospitalization services rendered to various citizens of Cook County under Chap. 23, Sec. 12-21.15 (Public Aid Code), 1967 Ill. Rev. Stats., which provides in part :

“In counties providing aid under Article VII for persons who fall sick or die in a city, village, or incorporated town of more than 600,000 inhabitants, or in an incorporated town, which has superseded a civil township located within such county, the Illinois Department shall reimburse the county for expenses incurred for such aid (1) in a county hospital maintained by it under Sec. 24 of ‘An Act to revise the law in relation to counties’, . . .”

The complaint sets forth that the hospital rendered the services described, and gave blood to various patients ; that the respondent’s requirements of examining, auditing, approving each patient’s account have been so examined, audited, and approved by the agents and representatives of respondents; and that the claimants are entitled to the amount claimed.

In answer to the complaint, respondent sets forth the Departmental Report of the State of Illinois, Department of Public Aid, which states that claimants failed to submit invoices for the services claimed before the appropriation for the biennium lapsed from which such claim could have been paid, and that claimants are justly entitled to the amount of the claim. The report also admitted all claimants’ allegations.

Claimants have requested summary judgment of its claim. Respondent does not contest claimants' motion. There appear to be no triable issues of fact.

It has long been a rule of the Court that, 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. *Gilbert-Hodgman, Inc., a Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimants' motion for a summary judgment is hereby granted, and claimants are hereby awarded the sum of **\$403,278.80**.

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(No. 5568—Claimant awarded \$2,632.50.)

MARX INDUSTRIAL MAINTENANCE, INC., An Illinois Corporation, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 3, 1969.*

HERMAN R. TAVINS, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER, 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 seeks recovery of the sum of **\$2,632.50** for landscape services at State License Centers. It ap-

pears that the services were performed by claimant for the Secretary of State, Purchasing Division.

The parties have stipulated that there is lawfully due the claimant the sum of **\$2,632.50**. They further stipulate that, as a result of delay in billing by the claimant, payment was not made prior to the closing of the biennial 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 contract was entered into, this Court will enter an award for the amount due. *Gilbert-Hodgman, Inc., A Corporation, vs. State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of \$2,632.50.

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(No. 5574—Claimant awarded \$38,144.49.)

ANKEN CHEMICAL AND FILM CORPORATION, Claimant, vs.  
STATE OF ILLINOIS, Respondent.

*Opinion filed June 3, 1969.*

ANKEN CHEMICAL, AND FILM CORPORATION, Claimant,  
pro se.

WILLIAM J. SCOTT, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

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

PERLIN, C.J.

Claimant seeks recovery of the sum of \$38,400.99

from respondent for materials and services rendered to the Office of the Secretary of State, Department of Motor Vehicles.

It appears that the materials and services were received by respondent, but that, as a result of delay in billing by the claimant, payment was not made **prior** to the closing of the biennial appropriation.

The parties have stipulated to a reduced sum in part as follows:

**"7. That the said amount of \$38,144.49 is lawfully due and owing to the claimant from the respondent, and should be paid."**

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. *Gilbert-Hodgrnan, Inc., A Corporation*, vs. *State of Illinois*, 24 C.C.R. 509. It appears that all the requirements have been met in the instant case.

Claimant is hereby awarded the sum of **\$38,144.49**.

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(No. 5440—Claimant awarded \$2,416.00.)

GERTRUDE K. ALLEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 11, 1969.*

MAX L. WEINBERG, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; LEE D. MARTIN, Assistant Attorney General, for Respondent.

**LEASES—recovery of monies erroneously paid to third party.** Where evidence established that rental was paid in error to third

party, who was the purported owner of real estate, actual owner entitled to recovery.

PEZMAN, J.

Claimant seeks to recover the sum of \$2,415.00 for rent of premises occupied by respondent, as well as damages, interest and reasonable attorneys fees. From the complaint it appears that the State of Illinois had been renting certain premises from one Robert R. Collier, alleged owner of the premises, under the terms of a lease, which began December 1, 1961. The complaint alleges that Collier was not the owner of the premises, and that claimant was the proper person entitled to receive rent for occupation of the same.

On the 17th day of April, 1968, a stipulation executed by claimant's counsel and the Attorney General on behalf of the State of Illinois, was filed with the Clerk of the Court. The Court refused to consider this stipulation on the basis that it was not completely adequate in relation to the circumstances involved, and requested that the parties work out a more detailed stipulation of facts. On the 19th day of February, 1969, an amendment to the stipulation was filed by the Attorney General on behalf of the State of Illinois as respondent stating as follows :

**"7. That under the stipulation of facts entered into between Francis S. Lorenz, Director of the Department of Public Works and Buildings, and claimant, claimant is justly entitled to recover from respondent the sum of \$2,415.00, as such sum is lawfully due and owing to claimant."**

Taking into consideration the facts as set forth in the original stipulation, and the recommendation of the Attorney General contained in the amendment set forth above, claimant is awarded the sum of \$2,415.00.

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(No. 5595—Claimant awarded \$10,657.50.)

THE COUNTY OF RANDOLPH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 20, 1969.

DON J. KOENEMAN, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; LEE D. MARTIN, 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.

YERLIN, C.J.

Claimant, The County of Randolph, seeks reimbursement of \$10,657.50, representing expenses incurred by claimant and its officials for services performed in connection with court proceedings involving petitions for Writs of Habeas Corpus by 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 hereto have stipulated to the facts herein, and have agreed that with appropriate deletions "the total amount of the claim is the sum of \$10,657.50".

Similar claims have heretofore been adjudicated in this Court, the most recent being Case No. 5378.

An award is, therefore, made to claimant, The County of Randolph, in the amount of \$10,657.50.

**CASES IN WHICH ORDERS OF DISMISSAL WERE  
ENTERED WITHOUT OPINION**

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- 5126 Boden Products, Inc.  
5246 Ann D. Hall and Kenneth Hall  
5322 B & B Electric, Inc.  
5349 Alex Steigerwaldt, as Next Friend, Etc.  
5358 Jeanette Dorfman  
5362 Kay P. Kmetz  
5370 Peterson-Roberts Construction Co., A Delaware Corporation  
5374 Mercy Hospital, Urbana, Illinois, An Illinois Corporation  
5393 Seymour S. Price  
5394 Kyle Inniss, A Minor, Etc.  
5402 Russell K. Davis, Et Al  
5404 Josephine Bromberg  
5441 Moline Public Hospital  
5453 Kenneth Goff and JoAnne Goff  
5517 Leamon Harris, Jr.  
5590 Mamie Jo Bryant  
5603 Joel Dryer, A Minor, by Suzanne Kaufman, his Mother and Next Friend

## INDEX

	Page
<b>CIVIL SERVICE ACT</b>	
Court Costs .....	10
Damages .....	10
Mitigation of Damages .....	117, 402
Salary During Illegal Removal .....	117, 396. 402
Unlawful Discharge .....	10
 <b>CONTRACTS</b>	
Ambiguity .....	182
Breach .....	430
Damages .....	1
Delay in Performance .....	138. 444
Evidence— Compliance .....	83
Extra Compensation Allowed .....	182. 346. 412
Illinois Purchasing Act .....	131
Lapsed Appropriations .....	
38. 41. 42. 44. 45. 47. 48. 52. 73. 75. 81. 94. 97. 111.	
114. 115. 137. 147. 189. 197. 198. 201. 203. 204. 205.	
207. 226. 228. 229. 230. 268. 269. 270. 275. 276. 280.	
281. 283. 284. 285. 286. 288. 289. 324. 326. 327. 332.	
334. 336. 356. 357. 359. 360. 361. 362. 363. 364. 366.	
367. 369. 370. 389. 390. 392. 393. 395. 398. 399. 400.	
403. 405. 406. 407. 409. 410. 411. 440. 443. 445. 447.	
448. 450. 451. 452. 453. 454. 456. 474. 485. 486. 487	
Lease of Realty .....	488
Mistake .....	107
Oral Authorization .....	131
Performance .....	1. 39
Privity .....	55
Salary .....	107
Standards— Breach of .....	430

	Page
<b>COUNTIES</b>	
Expense of Habeas Corpus .....	95. 490
Reimbursement to County .....	55
<b>DAMAGES</b>	
Additional Awards .....	149
Certainty of .....	477
Credit— Private or Insurance Proceeds .....	149
Leased Equipment .....	186
Proof Required .....	420
Wrongful Death .....	155. 166
<b>EVIDENCE</b>	
Burden of Proof .....	<b>232. 344. 420</b>
Contributory Negligence .....	339. 378
Escape .....	278
Negligence .....	378
Notice	
Constructive .....	173
Actual .....	232
Proximate Cause .....	232. 328
Release-effect of .....	313
Wrongful Incarceration .....	178
<b>HIGHWAYS</b>	
Contributory Negligence .....	98. 222. 232.318. 339
Duty of State .....	339. 377
Exempt from Local Assessment .....	122
Leased Equipment .....	187
Negligence :	
Accumulation of Ice .....	155
Due Care .....	328. 457
Duty to Warn Public .....	222. 232. 457
Evidence .....	98. 318
Maintenance .....	20.219. 262. 377
Notice of Defect .....	262. 339
Warning Devices .....	20. 232. 339

	Page
Right-of-way :	
Damages .....	128
Eminent Domain Act .....	128
 ILLINOIS NATIONAL GUARD	
Negligent Operation :	
Vehicles .....	149
 LEASES	
Erroneous Payment .....	488
 MOTOR VEHICLES	
Escheat of Financial Responsibility payment .....	
.....	49. 51. 53. 112. 190. 438. 475
Leaving Vehicle Unlocked .....	468. 472
 MUNICIPAL CORPORATION	
Acquisition by State of Taxable Property .....	483
 NEGLIGENCE — See Also Highways	
Assumption of Risk .....	87
Burden of Proof .....	77. 101. 299. 351. 457
Care Required of Minor .....	351
Condition of Premises .....	87. 257. 426
Contributory Negligence .....	77. 299. 468
Due Care .....	87
Duty to Invitee .....	.25, 66, 77, 87
Evidence — See Separate Heading	
Guardrails — stairway .....	426
Keys in Vehicles .....	468. 472
Maintenance of Canal .....	272
National Guard Vehicles .....	149
Proximate Cause .....	104, 308
Res Ipsa Loquitur .....	477
Snow Removal .....	432
Wrongful Death .....	66. 155

PRACTICE AND PROCEDURE	Page
Burden of Proof .....	344
Court of Claims Act .....	155
Court Costs .....	10
Jurisdiction of Court .....	215
Stipulations .....	.39, 76. 92

## PRISONERS AND INMATES

Attorneys Fees .....	119
Contributory Negligence .....	14, 60
Damage— Escaped Inmates .....	14. 32. 163. 278
Duty to Protect Patients .....	166, 308
Mitigation of Damages .....	14
Negligence :	
Injury to Inmate .....	351
Escape .....	468. 471
Recovery for Services .....	252
Wrongful Incarceration .....	
.....	119, 178. 192. 208. 246. 280. 303. 371. 384

## RELEASE

Mistake as to Effect .....	313
----------------------------	-----

## STATE OFFICERS AND AGENTS

Mutual Mistake of Fact .....	170
Overpayment of Inheritance Tax .....	441

STATE PARKS. FAIR GROUNDS. MEMORIALS  
AND INSTITUTIONS

Duty To:	
Invitee .....	66. 344. 426
Maintain .....	173. 432
Public .....	257
Notice of Defect .....	426
Services— Inmate .....	252
Status of Visitors .....	432
Workmen's Compensation .....	171

## WORKMEN'S COMPENSATION ACT

Supplemental Award .....	171. 337
--------------------------	----------