STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1942-1944

Volume

2

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from December 1, 1942 to November 30, 1944.

By

WM. S. O'BRIEN
Secretary of State and Ex Officio Clerk
and
JOHN D. ALDERSON
Deputy Clerk

VOLUME II

(Published by authority of an order of the State Court of Claims and as required by and pursuant to section 25 of the Court of Claims law, Code 14-2-25).

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PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE ROBERT L. BLAND.....Presiding Judge
HONORABLE CHARLES J. SCHUCK.....Judge
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HONORABLE G. H. A. KUNST.....Alternate Judge
HONORABLE CHAS. G. GAIN.....Alternate Judge

WM. S. O'BRIEN
Secretary of State and Ex Officio Clerk

JOHN D. ALDERSON
Deputy Clerk

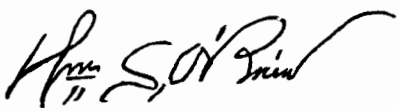
Letter of Transmittal

To His Excellency
Honorable Matthew M. Neely
Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March sixth, one thousand nine hundred forty-one, and an order of the State Court of Claims entered of record on June nineteenth, one thousand nine hundred forty-four, I have the honor to transmit herewith the report of the State Court of Claims for the period from December first, one thousand nine hundred forty-two to November thirtieth, one thousand nine hundred forty-four.

Respectfully submitted,



Secretary of State and
Ex Officio Clerk.

TERMS OF COURT

Four regular terms of court are provided for annually—the second Monday of January, April, July and October.

ENACTMENT OF THE WEST VIRGINIA COURT OF CLAIMS LAW

The Legislature of 1939, under House Concurrent Resolution No. 26, adopted March 11, 1939, created an Interim Legislative Committee to be composed of fourteen members of the Legislature, including the President and five members of the Senate to be appointed by the President, and the Speaker and seven members of the House to be appointed by the Speaker, for the purpose of studying legislative problems designated in the resolution. Among other subjects on the agenda of the committee was: "A plan of determination of claims and grievances against the state and its agencies." The committee was directed to report to the Governor and the Legislature prior to the convening of the next regular Session.

The personnel was:

Governor, Homer A. Holt
Committee members of the Senate
William M. Lafon, President
James Paull
Fred C. Allen
A. M. Martin
A. L. Helmick

Committee members of the House

James K. Thomas, Speaker
Fred L. Shinn
John E. Amos
J. C. Hansbarger
O. C. Flint
Glenn Taylor
Everett F. Moore
Harvey D. Beeler

The Interim Committee having prepared the Court of Claims Bill, it was introduced in the House of the 1941 Legislature, as House Bill No. 218, by James Kay Thomas.

The bill passed March 6, 1941, in effect from passage. It was approved by Governor Matthew M. Neely, becoming the Court of Claims Law—Chapter 20 Acts of the Legislature, 1941, and Article 2, of Chapter 14 of the Code, as amended.

OPERATING EXPENSES OF THE COURT

REPORT OF THE CLERK OF THE COURT OF CLAIMS, ON THE COURT'S EXPENDITURES FOR THE FISCAL YEAR JULY 1, 1942 TO JUNE 30, 1943, INCLUSIVE

PERSONAL SERVICES

Judges' per diem	$6,750.00	
Court Reporter's per diem	560.00	
All Other Personal Services	1,997.50	
Total		$ 9,307.50

CURRENT EXPENSES

Judges' Expenses	1,569.53	
Office Supplies, Dockets, telephone, ice, moving, etc.	857.25	
Transcripts	2,390.50	
Court Report No. 1 (1000 copies)	1,714.56	
Total		$ 6,531.84

EQUIPMENT

Fixtures and Law Books	440.75	
Total		$ 440.75
Total for the Year		$ 16,280.09
Unexpended Balance		$ 8,719.91
Appropriation		$ 25,000.00

REPORT OF THE CLERK OF THE COURT OF CLAIMS, ON THE COURT'S EXPENDITURES FOR THE FISCAL YEAR JULY 1, 1943 TO JUNE 30, 1944, INCLUSIVE

PERSONAL SERVICES	Expenditures	Appropriation
Judges' per diem	$6,750.00	
Court Reporter's attendance	337.50	
Other Personal Services	2,146.67	
Total	$9,234.17	$ 10,600.00
CURRENT EXPENSES		
Judges' Expenses	$1,541.45	
Reporter's Transcripts	997.09	
Other Current Expenses (stationery, office supplies, dockets, telephone, etc.)	228.39	
Total	$2,766.93	$ 3,000.00
EQUIPMENT		
New Furniture and Law Books	$ 77.22	$ 800.00
Total for the Year	12,078.32	
*Unexpended Balance for the Year	2,321.68	
Total (Appropriation)	14,400.00	$ 14,400.00

*This unexpended balance was revived and made available for publishing the second biennial Court Report for the 1945 Legislature, and for other Court expenses if needed.

REPORT OF THE COURT OF CLAIMS

For Period December 1, 1942 to November 30, 1944

(1-a) Approved claims and awards referred to the 1943 Legislature, for the period from December 1, 1942, to February 10, 1943, after Report No. 1 had gone to press; allowed by the 1943 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
248-S	Arnett, Besse D.	State Road Commission	$ 22.50	$ 22.50	February 10, 1943
242-S	Arnold, W. E.	State Road Commission	27.88	27.88	February 8, 1943
219-S	Ashenhart, E. U.	State Road Commission	7.60	7.60	January 27, 1943
203	Bailey, Fleet	State Conservation Commission	----------	2,500.00	February 8, 1943
223	Bennett, Jacob F.	State Road Commission	1,248.00	1,248.00	February 10, 1943
221-S	Bobbitt, J. S.	State Road Commission	22.97	22.97	January 27, 1943
216-S	Bolby, Joe M. Company	State Road Commission	250.00	250.00	February 2, 1943
236-S	Bolyard, Dayton	State Road Commission	31.42	31.42	February 2, 1943
192	Braid, William	State Road Commission	3,500.00	500.00	December 17, 1942
165	Cain, James & Company	State Road Commission	28,500.00	5,500.00	January 26, 1943
226-S	Deck, Helen Clayton, Guardian of Wm. Clayton White, infant	State Road Commission	53.00	53.00	February 9, 1943
198	Donovan, J. H., Dr.	State Road Commission	108.75	108.75	January 15, 1943
198	Dornon, Freda M., Guardian of Robert Dornon, infant	State Road Commission	5,000.00	5,000.00	January 15, 1943
198	Dornon, Freda M.	State Road Commission	5.00	5.00	January 15, 1943
238-S	Edwards, R. H., Dr.	State Road Commission	200.00	200.00	February 2, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(1-a) Approved claims and awards referred to the 1943 Legislature, for the period from December 1, 1942, to February 10, 1943, after Report No. 1 had gone to press; allowed by the 1943 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
167	Geimer, Tessie	State Road Commission	2,500.00	250.00	January 15, 1943
168	Geimer, M. N.	State Road Commission	750.00	350.00	January 15, 1943
218-S	Gore, Jim	State Road Commission	75.79	75.79	January 27, 1943
246-S	Harpold Bros.	State Road Commission	92.00	92.00	February 8, 1943
105	Hatfield, Leslie & Hallie, surviving partners of Harry Hatfield & Company	State Road Commission	44,856.15	7,179.91	December 17, 1942
237-S	Hoover, W. P.	State Road Commission	13.77	13.77	February 2, 1943
211-S	Jones Cornett Company	State Road Commission	12.00	12.00	January 29, 1943
198	Kessel, C. R., Dr.	State Road Commission	148.75	148.75	January 15, 1943
210-S	Keyser, W. R.	State Road Commission	53.61	53.61	January 29, 1943
220-S	Lilly, Effie	State Road Commission	103.35	103.35	January 27, 1943
231-S	Lindsey, M. B.	State Road Commission	50.00	50.00	February 9, 1943
234-S	Lude, M. G.	State Road Commission	5.20	5.20	February 10, 1943
191	Lynch, Max G.	State Board of Control	60.17	60.17	December 17, 1942
224-S	McClung, Alice E.	State Road Commission	720.00	720.00	February 9, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(1-a) Approved claims and awards referred to the 1943 Legislature, for the period from December 1, 1942, to February 10, 1943, after Report No. 1 had gone to press; allowed by the 1943 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
235-S	Park Pontiac, Inc.	State Road Commission	11.00	11.00	February 2, 1943
215-S	Peerless Milling Company, The	State Road Commission	141.00	141.00	January 29, 1943
230-S	Pigott, Bessie A.	State Road Commission	35.00	35.00	February 9, 1943
227-S	Pratt, Effie Savage	State Road Commission	240.00	240.00	February 9, 1943
233-S	Pritchard Motor Car Company and Willie Morris	State Road Commission	110.04	110.04	February 10, 1943
147	Proudfoot, Hugh B.	State Road Commission	1,000.00	250.00	February 8, 1943
243-S	Racioppi, Nicholas	State Road Commission	9.50	9.50	February 8, 1943
225-S	Skelton, Lottie	State Road Commission	840.00	840.00	February 9, 1943
146	Smith, John S.	State Road Commission	43.95	35.00	December 17, 1942
249-S	Stiles, W. L.	State Road Commission	10.00	10.00	February 10, 1943
247-S	Stretton, B. S.	State Road Commission	10.97	10.97	February 10, 1943
245-S	Strickland, George	State Road Commission	53.86	53.86	February 8, 1943
212	Swisher, Ray M.	State Road Commission	.....	3,000.00	February 8, 1943
232-S	Valley Motor Sales, assignee of O. L. Harvey	State Road Commission	252.25	252.25	February 9, 1943
244-S	Woods, Ola	State Road Commission	38.40	38.40	February 8, 1943
		TOTALS	91,213.88	25,628.69	

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
155	Adkins, Roy H., Admr. of estate of Roy Herbert Adkins, Jr., deceased	State Road Commission	$ 10,000.00	$ 3,500.00	July 22, 1943
358-S	Baltimore & Ohio Railroad Co.	State Road Commission	160.00	160.00	July 12, 1944
412-S	Barker, A. C.	State Road Commission	24.94	24.94	October 24, 1944
264	Bassett, George S. & Son	State Road Commission	39.91	39.91	July 30, 1943
362-S	Baylous, E. L.	State Road Commission	25.00	25.00	July 12, 1944
370-S	Beane, L. W.	State Road Commission	50.00	50.00	July 12, 1944
296-S	Bennett, Mrs. S. E.	State Road Commission	47.99	47.99	January 11, 1944
337-S	Bland, Lester	State Road Commission	100.00	100.00	July 11, 1944
394-S	Buck, V. K.	State Road Commission	30.00	30.00	October 10, 1944
336-S	Burgess, C. E.	State Road Commission	60.00	60.00	July 10, 1944
152	Burgess, J. P., admr. of estate of Edward Sinclair Burgess, deceased	State Road Commission	10,000.00	3,500.00	July 22, 1943
156	Burnette, Edward D., Admr. of estate of Edward D. Burnette, Jr., deceased	State Road Commission	10,000.00	3,500.00	July 22, 1943
333-S	Burns, S. E.	State Road Commission	169.79	169.79	October 9, 1944
382-S	Campbell, James M.	State Road Commission	20.40	20.40	October 9, 1944
410-S	Cassady, V. E.	State Road Commission	146.93	146.93	October 24, 1944
398-S	Clark, Dr. T. C.	State Road Commission	243.71	243.71	October 11, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
297-S	Coulter, Helen Roper	State Road Commission	139.95	139.95	January 11, 1944
388-S	Crow, Elmer	State Road Commission	147.50	147.50	October 10, 1944
263	Darling Shops, Inc.	State Road Commission	110.37	110.37	October 12, 1944
375-S	Davisson, Fred W.	State Road Commission	8.16	8.16	July 12, 1944
250	Dixie, Elizabeth	State Capitol Building and Grounds	22.50	22.50	July 29, 1943
334-S	Doolittle, Ralph	State Road Commission	18.36	18.36	July 10, 1944
357-S	Downs, J. M.	State Road Commission	34.68	34.68	July 12, 1944
385-S	Dulaney, Luther C., d/b/a Dulaney Motor Company	State Tax Commissioner	302.17	302.17	October 23, 1944
312½-S	Dyer, Dr. Allen M.	State Road Commission	9.00	9.00	January 12, 1944
283-S	Ely, Catherine D. and Farm Bureau Mutual Auto Insurance Company	State Road Commission	117.12	117.12	October 18, 1943
417-S	Everhart, T. O.	State Road Commission	5.00	5.00	October 25, 1944
391-S	Fahey, Margaret	State Road Commission	385.76	385.76	October 10, 1944
280	Firestone Tire & Rubber Company	State Conservation Commission	43.31	43.31	July 30, 1943
345-S	Firestone Tire & Rubber Company	State Department of Mines	32.56	32.56	October 26, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
261-S	Fitzwater, Pearl	State Road Commission	43.00	43.00	July 14, 1943
197	Fletcher, James M.	State Board of Control	51.76	51.76	February 16, 1944
359-S	Fredeking, J. G. et als., partners, d/b/a Fredeking & Fredeking	State Tax Commissioner	601.75	601.75	August 2, 1944
360-S	Fredeking, J. G., Price, T. H., et als, partners, d/b/a T. H. Price Oil Company	State Tax Commissioner	747.44	747.44	August 2, 1944
361-S	Fredeking, J. G. et als., partners, d/b/a Service Oil & Gas Company	State Tax Commissioner	602.78	602.78	August 2, 1944
251-S	Gandee, J. D.	State Road Commission	9.00	9.00	July 14, 1943
282-S	Goff, G. H.	State Road Commission	114.69	114.69	October 18, 1943
329	Golden, Pauline	State Road Commission	7,500.00	4,000.00	July 27, 1944
411-S	Gray, Dewey	State Road Commission	80.60	80.60	October 24, 1944
342-S	Gregg, Frank T.	State Road Commission	47.18	47.18	July 11, 1944
265-S	Grissell Funeral Home and Elmer E. Schweizer	State Road Commission	623.16	623.16	July 14, 1943
368-S	Grisur, Ignacy	State Road Commission	19.80	19.80	July 12, 1944
415-S	Grose, Roy L.	State Road Commission	25.00	25.00	October 25, 1944
256-S	Hager, Hubert	State Road Commission	38.83	38.83	July 14, 1943
354-S	Heldreth, Henry L. and United States Casualty Company	State Road Commission	39.96	39.96	July 11, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
387-S	Hiley, L. C.	State Road Commission	53.00	53.00	October 10, 1944
403-S	Hill, C. R.	State Road Commission	102.84	102.84	October 25, 1944
302-S	Hill, L. B.	State Road Commission	18.01	18.01	January 12, 1944
288-S	Ice, Bert	State Road Commission	17.85	17.85	October 18, 1943
228	Johnson, Robert (Mrs.)	State Board of Control	$ 35.00	$ 35.00	October 19, 1943
334-S	Johnson, Wilsie	State Road Commission	110.09	110.09	July 11, 1944
153	Jones, C. J., Admr. of estate of Esther Jones, deceased	State Road Commission	10,000.00	3,500.00	July 22, 1943
270-S	Kentucky-West Virginia Junk Company	State Road Commission	20.25	20.25	July 14, 1943
400-S	Kuznior, Adam	State Road Commission	255.00	255.00	October 11, 1944
332-S	Lantz, Willis	State Road Commission	47.53	47.53	July 11, 1944
274-S	Legg, Katie H.	State Road Commission	120.98	120.98	July 14, 1943
314	Lester, Bee	State Road Commission	750.00	750.00	February 1, 1944
328-S	Little, Charles L.	State Road Commission	4.59	4.59	July 10. 1944
154	Lively, E. W., Admr. of estate of Ruth Ann Lively, deceased	State Road Commission	10,000.00	3,500.00	July 22, 1943
284-S	Logan Baking Corporation	State Road Commission	29.84	29.84	October 18, 1943
254-S	McMillon, Luther	State Road Commission	7.14	7.14	July 14, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
363-S	Mabscott Supply Company	State Road Commission	50.00	50.00	July 28, 1944
380	Mallow, Paul and Beula	State Road Commission	30.25	30.25	October 16, 1944
260	Marshall, Frank T.	State Road Commission	10,000.00	3,000.00	November 17, 1943
317-S	Maryland New River Coal Company	State Road Commission	100.00	100.00	January 13, 1944
295-S	May, Hugh W.	State Road Commission	71.02	71.02	January 11, 1944
278-S	Meyers, Otto L. and Iona Meyers	State Road Commission	50.00	50.00	July 14, 1943
418-S	Moore, Tom	State Conservation Commission	145.00	145.00	November 14, 1944
276-S	Meyer, Q. Edward	State Road Commission	32.40	32.40	July 14, 1943
255-S	Norris, E. R.	State Road Commission	2.54	2.54	July 14, 1943
213	Perdue, Arthur B.	State Road Commission	10,000.00	3,000.00	July 17, 1944
214	Perdue, Dollie E.	State Road Commission	5,000.00	1,500.00	July 17, 1944
348-S	Petry, Florence E.	State Road Commission	33.66	33.66	July 11, 1944
322	Pierson, R. Clarence	State Road Commission	1,713.00	250.00	February 15, 1944
307-S	Pocahontas Amusement Corporation	State Road Commission	356.63	356.63	January 12, 1944
293-S	Poland, A. C.	State Road Commission	52.59	52.59	January 11, 1944
193	Polino, Sam G., & Company	State Road Commission	33,617.50	2,070.97	July 31, 1944
294-S	Producers Gas Company	State Tax Commissioner	74.45	74.45	February 16, 1944
338-S	Rathbone, Thomas A.	State Road Commission	80.24	80.24	July 10, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
268-S	Reimer, A. G.	State Road Commission	49.47	49.47	July 14, 1943
343-S	Rentschler, Carl	State Road Commission	117.75	117.75	July 11, 1944
413-S	Reynolds, Mary Harris	State Road Commission	8.16	8.16	October 24, 1944
292-S	Rial, L. D.	State Road Commission	60.00	60.00	January 11, 1944
330-S	Riggs, B. W., Funeral Home	State Road Commission	35.70	35.70	July 10, 1944
289-S	Rose, Ruben	State Road Commission	8.00	8.00	October 18, 1943
287-S	Rudolph, H. L.	State Road Commission	7.65	7.65	October 18, 1943
320-S	Sadd, Shaker	State Road Commission	23.16	23.16	January 13, 1944
305-S	Sanitary Baking Company	State Road Commission	55.00	55.00	January 12, 1944
239	Sargent, Charley	State Road Commission	9,710.70	2,568.03	December 14, 1943
331-S	Schmidt, Teresa	State Road Commission	10.00	10.00	July 10, 1944
300-S	Shaffer (M.D.), C. F.	State Road Commission	71.66	71.66	January 12, 1944
384-S	Shreve, O. R.	State Road Commission	133.57	133.57	October 9, 1944
277-S	Sibbald, Minerva L.	State Road Commission	8.57	8.57	July 14, 1943
416-S	Simms, Benton	State Road Commission	10.00	10.00	October 25, 1944
291-S	Smith, F. M.	State Road Commission	144.74	144.74	January 11, 1944
347-S	Smock, Helen	State Road Commission	34.43	34.43	July 11, 1944
309-S	Snaith, C. B., and Bob Rodgers	State Road Commission	20.40	20.40	January 12, 1944
279-S	Spragg, F. J.	State Road Commission	40.00	40.00	July 14, 1943
355-S	Standard Advertising Corporation	State Road Commission	188.22	188.22	July 11, 1944
308-S	Stewart, Lewis	State Road Commission	9.20	9.20	January 12, 1944
386-S	Stillmack, Lewis	State Road Commission	15.00	15.00	October 10, 1944
319-S	Stone, E. L.	State Road Commission	21.50	21.50	January 13, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
312-S	Stuter, W. O.	State Road Commission	153.87	153.87	January 12, 1944
157	Surber, Joe, Admr. of estate of Marguerette Frances Surber, deceased	State Road Commission	10,000.00	3,500.00	July 22, 1943
373-S	Swint (Bishop), John J.	State Road Commission	900.00	900.00	October 9, 1944
390-S	Teleweld, Inc.	State Tax Commissioner	948.67	948.67	October 23, 1944
381-S	Thornton, Grayson D.	State Liquor Control Commission	22.04	22.04	October 9, 1944
306-S	Tomlinson, Robert	State Road Commission	25.70	25.70	January 12, 1944
262-S	Tyler County Auto Sales	State Road Commission	30.75	30.75	July 14, 1943
369-S	Underwood, Ray	State Road Commission	7.94	7.94	July 12, 1944
208	Upton, Lon E.	State Road Commission	10,000.00	1,500.00	July 22, 1943
335-S	Van Horn, Grace	State Road Commission	6.12	6.12	July 10, 1944
286-S	Varner, G. B.	State Road Commission	59.53	59.53	October 18, 1943
266-S	Webb, W. V.	State Road Commission	60.59	60.59	July 14, 1943
318-S	West, George M.	State Road Commission	71.62	71.62	January 13, 1944
399-S	Wheeling Public Service Company	State Road Commission	255.86	255.86	October 11, 1944
267-S	White, C. P.	State Road Commission	25.00	25.00	July 14, 1943
371-S	Wolf, Junior	State Road Commission	48.26	48.26	July 12, 1944

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1945 Legislature for final consideration and appropriation.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
313-S	Wolfe, Edward L.	State Road Commission	98.94	98.94	January 13, 1944
401-S	Wood, David W.	State Road Commission	49.98	49.98	October 11, 1944
395-S	Workman, Albert	State Road Commission	20.00	20.00	October 11, 1944
		TOTALS	$159,589.21	$50,937.01	

(2) Approved claims and awards satisfied by payments out of regular appropriations for the biennium:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
275	Arbogast, Ray	State Board of Control	$ 62.50	$ 62.50	July 29, 1943
269	Null, Earl	State Board of Control	62.50	62.50	July 29, 1943
		TOTALS	$ 125.00	$ 125.00	

(3) Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the biennium: (None.)

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Courts:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
140	Adkins, Boyd	State Auditor	$ 7,490.00	Denied	January 25, 1943
180	Arbogast, Arlie Lewis	State Road Commission	43.75	Denied	February 10, 1943
181	Arbogast, Howard	State Road Commission	325.00	Denied	February 10, 1943
356	Baisden, Homer	State Road Commission	5,000.00	Dismissed	June 19, 1944
350	Ball, Elmer Clyde	State Department of Public Assistance	125.00	Denied	October 12, 1944
217	Brockus, James R.	State Department of Public Safety	2,400.00	Denied	July 29, 1943
339	Buckley, George L.	State Road Commission	292.50	Denied	July 17, 1944
397	Burns, Delphia Bay	State Road Commission	2,500.00	Dismissed	November 14, 1944
82	Consolidation Coal Company, a corporation	State Auditor	3,844.64	Denied	December 18, 1942
376	Fair, Hazen H.	State Road Commission	373.00	Denied	October 13, 1944
346	Fisher, Herbert	State Board of Control	63.64	Denied	October 25, 1944
136	Ford, Mrs. Mary, William L., Helen, and Eleanor Virginia	County Court Randolph County	235.55	Denied	December 14, 1943
229	Frasier, Ivy, Executrix	State Board of Control	10,000.00	Denied	July 22, 1943
301	Gill, Donald, infant	State Road Commission	50,000.00	Denied	July 11, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Courts:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
316	Harmon, Dora	State Road Commission	15,000.00	Denied	July 17, 1944
323	Hartigan, J. W., M. D.	State Board of Control	2,740.00	Denied	February 15, 1944
139	Lambert, O. D.	State Board of Control	116.74	Denied	October 19, 1943
315	McClure, E. E.	State Board of Control and Department of Building and Grounds	15,000.00	Denied	February 15, 1944
372	Mace, V. E., M. D.	State Road Commission	101.79	Denied	October 13, 1944
175	Marsh, Jack, infant	Board of Education Brooke County	20,000.00	Dismissed	December 13, 1943
174	Marsh, Margaretta	Board of Education Brooke County	10,000.00	Dismissed	December 13, 1943
201	Mattis, Mildred	State Road Commission	.....	Denied	January 15, 1943
158	Miller, F. M.	State Road Commission	1,000.00	Denied	July 12, 1943
298	Morton, Artenis G.	State Road Commission	4,800.00	Denied	January 28, 1944
271	Morton, B. F.	State Road Commission	75.00	Denied	August 27, 1943
273	Mullins, A. B. & J. G.	State Road Commission	780.00	Denied	August 27, 1943
252	Neese, S. E.	State Conservation Commission	140.21	Denied	August 27, 1943
222	New River & Pocahontas Consolidated Coal Company, a corporation	State Road Commission	181,536.78	Denied	November 18, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Courts:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
209	Polino Construction Company	State Road Commission	85,686.20	Denied	November 15, 1944
341	Pruitt, Edward	State Road Commission	.....	Dismissed	June 19, 1944
389	Quick, Emma, Mildred Miller and Harry Miller	State Road Commission	1,928.25	Dismissed	November 15, 1944
349	Ross, J. Shirley	State Road Commission	2,319.00	Denied	July 17, 1944
194	Sandridge, Jennie Canter, Executrix	State Road Commission	360.00	Denied	July 13, 1944
366	Scott, James C.	State Road Commission	5,000.00	Denied	October 12, 1944
365	Scott, Julia W.	State Road Commission	15,000.00	Denied	October 12, 1944
364	Scott, Julia W., Admx. of Estate of Charles P. Scott, deceased	State Road Commission	10,000.00	Denied	October 12, 1944
290	Sims, Agnes Marie, Admx.	State Road Commission	10,000.00	Denied	October 9, 1944
272	Sizemore, W. E., as Sizemore Brothers	State Road Commission	174.60	Denied	August 27, 1943
321	Solomon, Altha E. (Dillon) and F. P.	State Road Commission	7,000.00	Dismissed	November 14, 1944
205	Swartzwelder, Earl	State Road Commission	200.00	Denied	February 9, 1943
195	Swiger, Floyd	State Road Commission	328.65	Denied	February 9, 1943
166	Tacey, James E.	State Road Commission	25,000.00	Denied	January 15, 1943
240-S	Thompson, E. J.	State Road Commission	182.00	Denied	February 8, 1943

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Courts:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
172	Utz, Edward	Board of Education Brooke County	10,000.00	Dismissed	December 13, 1943
173	Utz, John Charles, infant	Board of Education Brooke County	20,000.00	Dismissed	December 13, 1943
353	Varney, Lucinda	State Road Commission	7,500.00	Denied	October 13, 1944
352	Williams, Jessie	State Road Commission	1,500.00	Dismissed	October 16, 1944
392	Wilson, Blanche	State Road Commission	108.16	Denied	October 26, 1944
367	Woofter, Lewis	State Road Commission	982.50	Denied	October 12, 1944
340	Worrell, S. H.	State Road Commission	251.20	Denied	July 25, 1944
351	Wright, Jesse	State Road Commission	1,200.00	Dismissed	October 16, 1944
		TOTAL	$538,704.16		

REPORT OF THE COURT OF CLAIMS (Continued)

(5) Advisory determinations made at the request of the Governor or the head of the state agency:

No.	Name of Claimant	Name of Department Concerned	Amount Claimed	Advisory Determination Requested By	Date of Determination
258	American Insurance Agency, Inc.	State Conservation Commission	$ 895.06	State Auditor	August 2, 1943
310	Dougan, Bretz & Caldwell	State Auditor	17.55	State Board of Control	January 13, 1944

NOTE: Subsections (1), (2), (3), (4), and (5), respectively, of the above table conform to and correspond with the similarly numbered subsections of Section 25 of the Court of Claims Law.

Where an "S" appears after the number of the claim, such claim, as appears from the records of the Court, was concurred in by the department concerned and approved by the Attorney General.

OPINIONS

TABLE OF CASES REPORTED

Cases Submitted and Determined in the Court of Claims of the State of West Virginia

(No. 191—Claimant awarded $60.17.)

MAX G. LYNCH, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed December 17, 1942

When, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy.

Guy Burnside, Esq., for claimant;

Eston B. Stephenson, special assistant Attorney General for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Max G. Lynch seeks an award in the sum of $60.17. His claim is predicated upon the ground that he had been an employee of the West Virginia penitentiary at Moundsville for a period of five years, and that for the year 1941 he earned a vacation of two weeks with pay amounting to the said sum of $60.17. Upon the hearing of the claim it was shown that where an employee of the penitentiary has rendered service for one year he is, during the next year, entitled to a two weeks' vacation with pay some time during the year. The time of the vacation is determined by the

employees of the institution drawing from a box capsules containing the exact date of each employee's vacation. Claimant received such vacation and pay for four years. On the 1st day of March 1942, he with other employees of the penitentiary drew the capsules in accordance with the custom observed for determining their respective dates of vacation. In this manner claimant's vacation was fixed to begin on August 16, 1942, but he resigned his position at the institution on the 16th of May 1942, prior to the date when his vacation should begin. At the time of such resignation claimant was informed by the warden of the penitentiary that there was no money available for the payment of the amount to which he was entitled on account of his earned vacation. It clearly appears from the record that there was no money to the credit of the penitentiary out of which claimant could be paid for the two weeks vacation allowed him for the year 1941 and which he was entitled to be paid during the year 1942. The state board of control, the state agency involved in this case, after due investigation of the claim in question and conference with the attorney general's office, admits that the claim in the amount of $60.17 should be paid. It is further established to the satisfaction of the court that it has been the policy of state departments to allow vacation with pay for two weeks where an employee has been in regular service of the department throughout the year. Liability on the part of the state to pay the claim in question is admitted by the board of control.

We are of opinion and accordingly hold that when, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy.

An award will, therefore, be entered in the instant case allowing claimant Max G. Lynch the sum of sixty dollars and seventeen cents ($60.17).

(No. 105—Claimants awarded $7,179.91.)

LESLIE HATFIELD and HALLIE HATFIELD, Surviving partners of HARRY HATFIELD, and company, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed December 17, 1942

A claim in which the evidence justifies a finding for the claimant company for extra compensation, to wit, for wages paid during "shut-downs" caused by change of plans on the part of the state road commission; fair rental value of equipment on the project not used during the cessation of work caused by said changes; and extra compensation for work done and not contemplated in any manner by the plans and specifications under which the contract was originally entered into.

Appearances:

Okey P. Keadle, Esq., for the claimants;

Eston B. Stephenson, Esq., assistant attorney general and *Arden Trickett,* Esq., state right-of-way agent, state road commission, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant company, in the summer of the year 1936, was awarded a contract by the state road commission for excavating and grading the project known as the 29th street overhead approaches in Cabell county, West Virginia, and designated as project F. A. 187-E. Work began on or about September 1, 1936. On or about January 27, 1937, a flood of the Ohio river interfered with the progress of the work; caused numerous slides and part of the roadway in question to slip away. Work was resumed after the effects of the flood in question had been removed, and continued to about May 26, 1937, when the project was closed down by order of the state road commission for the purpose of changing certain plans,

and remained closed until approximately July 26, 1937, or for a period of about two months.

During this period, the claimant company was obliged to pay its shovel operator, a foreman, and watchman, all of whom were kept on the job during the period in question, although no actual work was done by either of them, except the watchman in carrying out his duties. The shovel operator was paid at the rate of $43.75 per week, or the sum of $350.00 for the period during which there was no work on the project. Likewise the foreman was paid $156.75, and the watchman the sum of $200.00 for the same period. Work was again stopped on the project from September 1 to October 4 by orders of the state road commission, and so far as the evidence reveals, through no fault of the claimant, during which time the claimant company again had an outlay of $509.75 to the employees that the claimant company was obliged to employ and pay, although no work was being done for the period in question. Another "shutdown" took place on or about November 19, 1937, and no work was resumed until some months later, in the year 1938. During all of this time the climant company maintains that it was obliged to keep equipment on the project, as it was expecting from day to day, to be ordered to continue the work and it would be necessary, of course, to have the equipment ready upon such orders being issued by the state road commission. With certain exceptions, as hereinafter pointed out, we feel that the evidence sustains the contention of the claimant that the three different periods during which work was stopped were through no fault of the contractor, and were for periods of time during which weather conditions would be most favorable to the prosecution of the work, and, therefore, most helpful to the claimant in carrying on the project.

The state maintains that the delays were caused through no fault of the state road commission, but, rather, by the floods and the consequent slides, over which the state road commission had no control, and for which it should not be held responsible; in other words, that the interference with the

work was caused by an act of God. However, an examination of the record shows that the state road commission realized that if the project, as planned, was carried out, it would likely be subject to future floods and inundations, and, so, concluded to make changes which would avoid such conditions or situations.

Since the evidence further sustains the contention that claimant was not to blame in any way for the said periods during which it was not allowed to carry on the work, it would seem that claimant would be entitled to some compensation for the damages sustained by it through no fault of its own. The state insists that the employees in question who were kept on the project during the several so-called "shutdowns" were not entitled to any compensation, and the claimant, having voluntarily made the said payments for the wages in question, is not entitled to recover the same. Claimant, however, contends that the watchman was absolutely necessary in taking care and watching over the equipment left on the project, and we agree with this proposition. We also feel that the evidence sustains the contention of the claimant company that the shovel operator and foreman, being called upon to do special work, could not easily be replaced, and that they were being maintained on the payroll of the claimant company owing to the fact that it would have been difficult for the company to replace them or to obtain the services of other men when the work resumed. We also agree with this proposition, and under the circumstances, feel that the claimant company is entitled to the return of the outlay paid in wages and salaries for these men, and amounting in the aggregate to $1216.50.

As herein indicated, the claimant company was obliged to keep certain equipment on the project during the time of the cessation of operations, and claims that it is entitled to a reasonable rental value for this equipment so remaining idle during the "shutdowns" in question. The state, on the other hand, maintains that some of the equipment, if not all, could have been moved to other jobs or projects that the claimant company was then carrying on, and that, therefore, the company

is not entitled to any reimbursement for the equipment that remained idle during the said "shutdown" periods. It can fairly well be assumed, as shown by the record (p. 46) that the claimant company was not in a position to move the equipment or a goodly portion of it from the project in question, and therefore have the benefit of its use, since the claimant company was expecting from day to day to return to work on this project, and this contention is not denied by the state. It is therefore our judgment that the claimant company is entitled to a reasonable rental value for certain of its equipment that was kept on the project, and which could not be used, through no fault of the claimant company, but through the changes of plans made by the state road commission, and which brought about the delays in question. However, in view of the fact, as shown by the record (p. 71-72) no rentals were paid by the claimant company during the periods that the work was shut down, the company could not be entitled to the amount usually paid as a rental value, especially so in view of the fact that the evidence tends to show that some of this equipment could have been moved and was moved to other projects and used by the claimant during the periods that the work had ceased on the project in question. The claimant company maintains that it is entitled to approximately $10,000.00 for these rental values, but we are also of the opinion that under all the circumstances, this is excessive, and that the amount of $2500.00, as reflected by the rental value of the idle equipment, would be fair and just to all parties, and we make the finding accordingly.

Under all the evidence of the case there is but one further question which we feel is entitled to our consideration, so far as an award to the claimant company is concerned, and that is the matter of extra work or special work on the ditches that the road commission ordered constructed for the purpose of diverting the water coming from the hillside embankments and keeping the excavations and project from being further injured or damaged. The project had already been seriously interfered with, as well as damaged by floods of the Ohio river, and the engineers of the road commission were rightfully tak-

ing every means to protect the project from further invasion by water from the hillsides and seeking to divert the same so that the project, when completed, would be permanent in its nature and not require work from time to time in making repairs by reason of the collection of the water from the hillside adjacent to the project. As herein indicated, for this purpose, additional ditches were constructed and we feel that the construction of these ditches could not have been and were not contemplated in any way by the contract in question, which contention, of course, is supported by the location of the ditches and the fact that they were not contemplated by the parties at the time that the contract was entered into. The work on these ditches was extremely difficult and unusual, as compared with the other work on the project. It seems that the contracting company was required to do more work to complete the ditches than under ordinary circumstances, and had trouble in getting equipment to a place where the ditches could be excavated to some advantage and profit. The claimant maintains that it was put to both extra trouble and extra expense (record p. 77) in constructing the said ditches. The claimant maintains that it is entitled to an extra charge for the construction of said ditches at the rate of twenty cents a yard extra, and that 17,300 cubic yards were involved in the additional excavations, and that the claimant company should be paid an additional $3463.41 for the said additional work. We feel that this is a just claim and should be allowed.

Under all the evidence in the case, as submitted, we feel that the claimant contractor is not entitled to any additional compensation for separating the rock from the earth in one of the items filed, but we are of the opinion that this was part of the contract contemplated by the parties, and that the evidence further tends to show that it was usual and necessary in carrying out the work in question, and consequently, must have been contemplated by the claimant when entering into the contract in question.

Under all the circumstances, then, we are of the opinion that the claimant is entitled to an award of $7179.91, made up

of the three several items, to wit: $1216.50 for payments made to employees required on the project during the "shutdown," the sum of $2500.00, as a fair rental value for the equipment in question, and the further sum of $3463.41 for extra compensation in the construction of the special ditches, making a total of seven thousand one hundred seventy-nine dollars and ninety-one cents ($7179.91), and an award is made accordingly.

(No. 146—Claimant awarded $35.00.)

JOHN S. SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed December 17, 1942

Where it appears that the damages to claimant's truck were the result of a head on collision of claimant's truck with a state road truck driven by a state road commission employee on duty which could have been avoided by said state road commission employee, by the exercise of reasonable care and caution, an award will be made to compensate claimant for the damages sustained.

Appearances:

Dayton R. Stemple, Esq., for claimant;

Eston B. Stephenson, Esq., special assistant to the attorney general, for the state.

WALTER M. ELSWICK, JUDGE.

On the 20th day of February 1942, William Bohan was operating claimant's truck on a state road leading from route 250 to the 4-H camp in Barbour county, West Virginia.

The truck was loaded with lime, and when pulling a grade the driver noticed a state road truck coming in the opposite direction and pulled claimant's truck over on his right and stopped. The state road truck, driven by Lee Cross, collided head on into claimant's truck. Cross was on duty at the time and in the employment of the state road commission.

It appears from the evidence that the paved surface of the road at the point of the collision was about 14 feet wide; that with the berm, the road was about 18 to 20 feet wide. It also appears from statements of Cross, made at the time of the collision and in his report of the collision to the road commission, that his brakes were out of order. The road at the time was dry, and the collision occurred in daylight of the afternoon. The driver of the state road truck testified that he saw the claimant's truck 80 feet away as it rounded a curve. As a result of the collision, the radiator on claimant's truck had five leaks, and were of such nature that a new one was required to replace it at an exchange price of $35.00. Claimant also claimed a loss of two gallons of Prestone at a cost of $5.25. The bumper to claimant's truck was also bent. It was a 1940 Dodge truck purchased in 1940 which had been in hauling use since that year.

From all the evidence in the case, we are of the opinion that the collision could have been avoided by the state road commission's truck driver, and from the evidence and stipulations of claimant's attorney and the attorney general, we are of the opinion that claimant is entitled to an award of thirty-five dollars ($35.00). An award will be made for said sum and an order entered accordingly.

(No. 82—Claim denied.)

CONSOLIDATION COAL COMPANY,
a foreign corporation, Petitioner,

v.

STATE (STATE AUDITOR), Respondent

Opinion filed December 18, 1942

A claim which has been barred by a statute of limitations for a period of more than five years prior to the reenactment of chapter 14, article 2 of the 1931 code, creating the court of claims which was of such nature that it could have and should have been presented to the circuit court of Kanawha county for auditing and adjusting and its action reported by the auditor to the Legislature under a proceeding then provided for by statute, held not revived, and an award denied, when petitioner has not been prevented or restricted from prosecuting such claim under the procedure provided prior to the time such claim became barred under the statute.

Appearances:

Tusca Morris, Esq., for the petitioner;

Eston B. Stephenson, Esq., special assistant to the Attorney General for the state.

WALTER M. ELSWICK, JUDGE.

The petitioner, Consolidation Coal Company, a Delaware corporation, and the successor to the Consolidation Coal Company, a Maryland corporation, which latter corporation was authorized to do business in the state of West Virginia from the year 1909 to the year 1935, inclusive, presented its petition for a refund of $3844.64, representing a claim for overpaid corporation license taxes by the said Maryland corporation, and which petitioner alleges were overpaid by reason of the fact that the state auditors of the state of West Virginia during the period in question, namely, for the years 1917 to 1929, inclusive, required payment of corporation license taxes on

the basis of the authorized capital stock of the said Maryland corporation, when in fact the said corporation should have paid a license tax only on its issued and outstanding capital stock, represented by its property owned and used in the state of West Virginia.

From the record it appears that by section 130 of chapter 3 of the acts of the Legislature of West Virginia, second extraordinary session, 1915, and the reenactment thereof by section 130 of chapter 102 of the acts of the Legislature of West Virginia, regular and extraordinary sessions, 1919, the said Consolidation Coal Company, a Maryland corporation, was required by the state auditors for the years 1917 to 1929, both inclusive, to pay its capital stock license tax on the basis of its authorized capital stock rather than on the basis of its issued and outstanding capital stock.

The state contends, among other grounds of defense assigned, that the petitioner is barred by laches and the statute of limitations, from recovering the aforesaid amount of overpaid taxes, and it is therefore encumbent upon us to determine this question. If its claim is barred by the statute of limitations then the court of claims would be without authority to recommend an award.

On November 5, 1929, the Supreme Court of Appeals of West Virginia, in the case of *State* v. *Azel Meadows Realty Company,* 108 W. Va. 118, 150 S. E. 378, declared said section 130 of chapter 3 of the said acts of 1915, and said section 130 of chapter 102 of the said acts of 1919 (sections 126 and 130 of chapter 32 of the code of 1923) in violation of the fourteenth amendment to the Federal Constitution as between foreign corporations. The gist of the decision insofar as it pertains to petitioner's claim was stated in *syllabus 2* thereof as follows:

> "Sections 126 and 130, chapter 32, code, imposing upon a foreign corporation a yearly license tax for the privilege of doing business and holding property in the state is in violation of the 14th amendment of the Federal Constitution as between foreign corpora-

> tions, if and when said license tax is computed according to the proportion of authorized capital stock which is represented by its property owned and used in this state."

This decision, in declaring sections 126 and 130 of chapter 32 of the 1923 code unconstitutional and illegal between foreign corporations, in effect declared the same provisions illegal and unconstitutional under section 130 of chapter 3 of the said acts of 1915. The first case involving the question of the unconstitutionality of acts of like kind was decided by the Supreme Court of the United States in the case of *Air-Way Electric Appliance Corporation* v. *Day, Treasurer of the State of Ohio,* 266 U. S. 71, wherein the court held:

> "The Ohio act, having no tendency to produce equality, and being of such character that there is no reasonable presumption that substantial equality will result from its operation, violates the equal protection clause of the Fourteenth Amendment."

This case was decided on October 20, 1924, and on January 19, 1925, the general attorney for the Consolidation Coal Company, addressed a letter to the then state auditor calling his attention to this court decision.

Section 21, article 2, chapter 14 of the present code, Michie's code section 1147 (16), chapter 20, section 21 acts of 1941, provides:

> "The court shall not take jurisdiction over a claim unless the claim is filed within five years after the claim might have been presented to such court. If, however, the claimant was for any reason disabled from maintaining the claim, the jurisdiction of the court shall continue for two years after the removal of the disability. *With respect to a claim arising prior to the adoption of this article,* the limitaton of this section shall run from the effective date of this article: *Provided, however That no such claim as shall have arisen prior to the effective date of this article shall be barred by any limitation of time imposed by any other statutory provisions if the claimant shall prove*

to the satisfaction of the court that he has been prevented or restricted from presenting or prosecuting such claim for good cause, or by any other statutory restriction or limitation." (Italics supplied.)

By chapter 12, article 3, section 3, of the code of 1931; Michie's code, section 1021, which was section 9, chapter 17 of the code of 1923, it was provided:

"*No claim shall be allowed by the auditor after five years from the time when it might by law have been presented for payment.* No petition shall be received in either branch of the Legislature claiming a sum of money, or praying the settlement of unliquidated accounts, unless it be accompanied with a certificate of disallowance by the auditor, or by the officer, board, or person whose order or requisition was necessary to authorize payment thereof, stating the reason why it was rejected. *Nor shall a petition be presented to the Legislature for the payment of any claim against the state which might have been asserted under the provisions of article two, chapter fourteen of this Code, unless it be accompanied by a copy of the record of the proceedings of the proper court upon such claim.*" (Italics supplied.)

By chapter 14, article 2, sections 1 and 5 of the code, prior to the amendment of 1941, it was provided:

SECTION 1. "Any person having a pecuniary claim against the State, which the auditor has disallowed in whole or in part, may apply by petition to the circuit court of the county in which the seat of government is, to have such claim audited and adjusted."

SEC. 5. "No such petition as is mentioned in section one of this article shall be presented or filed, and no such suit as is mentioned in the next preceding section shall be brought after five years from the time the claim of the petitioner or plaintiff might have been presented or asserted. . . ."

Neither the petitioner nor its predecessor applied by petition to the circuit court of Kanawha county to have its claim

audited and adjusted before or after the decision in the case of *State* v. *Azel Meadows Realty Company, supra.*

Chapter 14, article 2, section 3, of the code of West Virginia of 1931, provided for the following procedure when such petition was filed:

> "The court shall ascertain and enter of record what sum, if any, is due to the petitioner upon the claim mentioned in the petition and shall certify its decision to the auditor whether the claim, or any part thereof, be allowed or not; and, if such claim or any part of it be allowed, the auditor *shall report the same to the legislature at its next session.* But no such claim shall be paid until an appropriation shall be made therefor by the legislature." (Italics supplied.)

There is not any attempt on the part of the petitioner to show that it was prevented or restricted from filing its petition in the circuit court and having its claim presented by the auditor to the Legislature as said section 3 of article 2, chapter 14 of the 1931 code required. This section made it the duty of the auditor to so present the claim if such action had been taken. The auditor had refused to pay the claim and a remedy was afforded the petitioner by the procedure then provided for presenting the claim to the Legislature. The petitioner was advised by the auditor that legislative action was necessary before he could make refund (record pp. 21 and 40.) Therefore, petitioner was not misled or prevented from taking the required procedure for submitting the claim within the prescribed period of five years to the circuit court to be then reported by the auditor to the Legislature.

The petitioner contends that it was without legal authority to compel the state auditor to certify its claim to the board of public works and that it was at the mercy of the state auditor, and that even if the state auditor and the board of public works had honored the refund, the Legislature might have turned it down and refused an appropriation therefor; that the remedy provided for under section 9 of chapter 17,

of the code of 1923 was incomplete and inadequate, but we are of the opinion that the remedy provided under said section 9 of chapter 17 was not exclusive, but that the claim could have been presented under chapter 37 of Barnes code of 1923, chapter 14, article 2 of the code of 1931, which provided that the auditor "shall report" such action by the circuit court to the Legislature.

The petitioner also contends that the circuit court was not such a tribunal that could pass upon the constitutionality or the unconstitutionality of this tax law, under sections 1 and 5 of chapter 37 of the code of 1923, chapter 14, article 2 of the code of 1931; that the terms of these sections of the statute did not confer jurisdiction on the circuit court to determine the constitutionality of the law in respect to the taxes being audited by that court. We are of the opinion that while it may be true that the circuit court did not have jurisdiction to pass upon the constitutionality of the assessment, neither would the court of claims have this right, but the only opportunity which our Supreme Court had to pass upon its constitutionality of the statute was at the time it rendered the decision in the case of *State* v. *Azel Meadows Realty Company, supra.* This was November 5, 1929. The decision in this case would be the only authority which the court of claims has for the unconstitutionality of the law. The court of claims is a special instrumentality of the Legislature and the Legislature does not declare its own acts unconstitutional. The circuit court of Kanawha county would have had the same decision before it from November 5, 1929, which the court of claims now has. The basis on which petitioner now files its claim is that the statute was declared unconstitutional by our Supreme Court on November 5, 1929 in the *Azel Meadows Realty Company* case. The taxes had been paid before this decision was rendered which the Kanawha circuit court would have had as authority for its action.

Section 21, article 2, chapter 14 of the present code, Michie's code 1147 (16) does not state that the petitioner must have had an adequate remedy in law or equity prior to the creation

of the court of claims which statute creating same repealed the former provisions of article 2 of chapter 14. It is true that in the case of *Standard Oil Company of New Jersey* v. *Fox,* 6 F. Supp. 494, the court had to deal with the question of whether or not the plaintiff had an adequate remedy at law, which, if existing would have denied the plaintiff in that case relief by injunction. In our opinion, the court would necessarily have to hold the same today as it held in that case, and grant injunctive relief against an unconstitutional statute in view of the provisions of section 4, article 2, chapter 14 of the present statute, referring to the court of claims, Michie's code cum. supp. which provides that:

> " . . . The court shall not be invested with or exercise the judicial power of the state in the sense of article eight of the constitution of the state. A determination made by the court shall not be subjected to appeal to or review by a court of law or equity created by or pursuant to article eight of the constitution. . . ."

Section 12, article 2 of chapter 14, Michie's code cum. supp. 1147(7) provides:

> " . . . But no liability shall be imposed upon the state or any of its agencies by a determination of the court of claims approving a claim and recommending an award, unless the legislature has previously made an appropriation for the payment of a claim subject only to the determination of the court. . . ."

The court in the case of *Standard Oil Company of New Jersey* v. *Fox, supra,* in dealing with the subject of whether or not the plaintiff had a sufficient remedy at law to deprive it of relief by injunction states that the former statute (chapter 14, article 2) was doubtful and ambiguous and made the remedy at law in question debatable and uncertain for the reason that the claim could not be paid until an appropriation was made therefor by the Legislature. The statute prior to the act of 1941 did not specify that a determination made by the circuit court should not be subjected to appeal or to review and did not expressly state that no liability shall be imposed

upon the state or any of its agencies by a determination of the circuit court approving and auditing a claim, but which was so held by the court in its reasoning as a grounds for injunctive relief. Such limitations are expressly set forth in the 1941 act which leaves to the courts of the state a right to enjoin the enforcement of an unconstitutional statute by injunction due to the lack of an adequate remedy provided for in a court of law.

The right of petitioner to file its petition with the circuit court of Kanawha county certainly vested as to all of its claim on November 5, 1929 with the decision of the court in the case of *State* v. *Azel Meadows Realty Company.* If its petition had been filed with the circuit court promptly the state auditor would have been required under the statute to report the court's action to the Legislature at its next session which was in 1931. It would appear that by following the five year limitation of the statute that the claim in its entirety was barred for presentation to the Legislature by the statute of limitations in 1936. It being a pecuniary claim, that is to say, one relating or pertaining to money, a proceeding was then provided for having it presented to the Legislature. In view of the record of the case and the statute, a majority of the court are of the opinion that petitioner's claim could have been presented to the Legislature upon the finding of the circuit court of Kanawha county at any time from November 5, 1929 through 1934-1936. This was not done. The statute of limitations certainly had run on the claim by the year 1936.

It does not appear from the record that any facts were presented to the court of claims which could not have been presented to the circuit court of Kanawha county. When we consider the object and purpose of the statute which repealed the former five sections of article 2, chapter 14, and enacted in their place the present twenty-six sections we cannot conceive that the Legislature intended to revive claims which had already been barred by a statute of limitations which were claims of such nature that the Legislature had provided a procedure for having them presented to it for an appropriation.

The purpose of the present law as set forth in section 1 of the statute is to provide a method for the consideration of claims which cannot be determined in a court of law or equity. A method had existed for the hearing and presentation of the claim in question before the circuit court of Kanawha county. The claim had been barred from consideration by the Legislature by a general statute at least 5 years prior to the passage of the 1941 statute. For the reasons herein stated a majority of the court are of the opinion that an award should be denied and an order will be entered accordingly.

Judge Schuck dissents and will file a dissenting opinion setting forth his views.

CHARLES J. SCHUCK, JUDGE, dissenting.

The majority opinion denying relief to the claimant company is based entirely on the proposition that the claimant is barred by the statute of limitations, on the ground that the claim could have or should have been presented to the circuit court of Kanawha county for audit and adjustment within a period of five years prior to the enactment of the act creating the court of claims. I assume that all other questions involved are from the very nature of the opinion resolved in the favor of the claimant company.

Under the statute creating the state court of claims the following provision seems to be the only restriction or limitation placed upon a petitioner to bar his claim from consideration by this court:

> ". . . That no such claim as shall have arisen prior to the effective date of this article shall be barred by any limitation of time imposed by any other statutory provision if the claimant shall prove to the satisfaction of the court that he has been prevented or restricted from presenting or prosecuting such claim for good cause, or by any other statutory restriction or limitation."

The question now arises as to whether or not, under the portion of the act just quoted, petitioner has shown to the satisfaction of the court that it put forth every effort in prosecuting its claim and that it was not guilty of any laches or negligence so far as the delay of its presentation was concerned.

The majority opinion relies entirely on chapter 12, article 3, section 3 of the code (Michie's code of 1931, section 1021), which was section 9, chapter 17 of the code of 1923, and which article is to the effect that no claim shall be allowed by the auditor after five years from the time when by law it might have been presented for payment. Chapter 14, article 2, sections 1 and 5 of the code, prior to the amendment of 1941, prescribed that anyone having a pecuniary claim against the state which has been disallowed by the auditor shall present the same to the circuit court of the county in which the seat of government is, to have the claim audited and adjusted, and then provides further, in effect, that no suit shall be allowed unless presented within five years from the time that the claim may have been asserted.

The West Virginia courts have never passed on the statutes in question sufficiently to give a well-defined interpretation of the meaning and scope of the provisions thereof, and in the case of the *Standard Oil Company of New Jersey* v. *Fox*, reported in 6 F Supp. 494, and affirmed by the Supreme Court of the United States, the court held, when considering the statutes in question, that they were not free from doubt and ambiguity, and that the claimant did not have a complete remedy at law by virtue of the provisions of the said statutes and that, therefore, it could not be deprived of its right to enforce its claim by reason of the doubt and ambiguity that existed with reference to the said statutes. The court further held in the said case that the West Virginia statutes had never been made clear by the decisions of the West Virginia courts, and that the act in question was merely a statutory proceeding for the auditing of a claim against the state.

If this conclusion is correct, then, under the circumstances, the circuit court of Kanawha county would simply be going

through a process of bookkeeping to ascertain the amount that was due, if any, to the claimant company, with admittedly no right to enforce its decree or judgment in this regard. The circuit court of Kanawha county had no right to determine the constitutionality or unconstitutionality of the acts under which the several auditors sought to enforce the payment of the tax, and had, in my judgment, no power whatever to enforce any decree, order, finding, or judgment that might have been made, favorable to the claimant. There is no denial that the claimant was pressing its claim, as shown by the testimony in this case, in every possible way, and by all manner of means, and that the position assumed by the several auditors was so arbitrary as to give the claimant little satisfaction in the effort it was putting forth to obtain the refund.

Assuming that the circuit court of Kanawha county had made a finding for the claimant, from which finding no appeal could be taken, it is still not clear, under the interpretation of our West Virginia statutes, as to whether any remedy would have existed by which the claimant could have availed itself in the attempt to obtain the refund in question.

It is urged that if the claim had been submitted to the said circuit court of Kanawha county and an award made, that the auditor would then have been obliged to have presented the matter to the next session of the Legislature for its consideration, and this, in my judgment, is all that could have been done under the law as it was during the period in question. Let us assume that this method would have been carried out and the Legislature would have refused to make an appropriation. Would that fact, under all the existing circumstances, have prevented this court from giving further consideration to the claim in question? I do not think so. We have considered other claims which have heretofore been adversely treated by the Legislature to which they were submitted, and have made awards to be submitted to the next session of the Legislature for consideration. This has all been done under our idea and interpretation of the phrase "equity

and good conscience" as set forth in the statute creating this court and in consideration of the testimony supporting and sustaining an award.

The *acts* heretofore quoted, being vague and ambiguous, as held by our highest court, the provisions thereof should not now be used to bar a claimant who so far as the testimony shows made every effort to have the several auditors "see the light" and refund the amount of taxes improperly and illegally collected.

For myself, I am of the opinion and I believe a proper construction of the act creating the court of claims, with reference to the barring of claims in this court, means that no limitation is placed on the prosecution of a claim where it is shown unqualifiedly, as in this case, that a petitioner had done everything possible within a reasonable period of time, considered in the light of all the circumstances, to obtain redress and to have some remedy for a tax illegally assessed and illegally collected. The state collected the tax in question and used the amount for its own purposes. That it was collected wrongfully and without warrant of law there is now no question, and to allow the state to appropriate the excess amount and to sanction the holding and appropriation thereof on a mere technicality is, in my judgment, wrong and improper.

By the more recent decisions of courts throughout the country, we seem to be getting away from the position heretofore maintained, that where taxes are wrongfully paid by an individual, and no claim is made for the same within a required period, that the taxpayer is barred from recovery. The broader view seems to be that if the taxpayers put forth every effort to reclaim the improper payment, short of actually bringing suit in law or in equity, that the state is morally bound to repay, on the theory that justice must be done and that the mere technicality will not deprive the taxpayer of this right unless it is shown that he was wanton and flagrant in the matter of delay.

Under the very language of the statute heretofore quoted with reference to barring any claim, it seems to me that its very language implies that considerable latitude must be allowed the claimant and that unless he has wholly failed in prosecuting his claim, he should not be barred from a proper presentation and hearing in this court. I repeat, under the circumstances, and in view of the evidence showing the determined effort on the part of the claimant to obtain redress from time to time and the effort to have his claim paid, all of which is not denied in any manner by the state; and further, in view of the fact that, in my judgment, the circuit court of Kanawha county did not have jurisdiction to determine the constitutionality of the act under which the payments were made, and seemingly could not have enforced any finding with reference to the amount in question, so far as the auditor was concerned, that the claimant did everything possible to maintain his claim and cannot therefore be charged with being guilty of laches or be barred by any statute of limitations in conflict with the only limitation prescribed in the act creating this court for the consideration and presentation of a claim before it.

(No. 192—Claimant awarded $500.00.)

WILLIAM BRAID, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed December 18, 1942

When it appears from the evidence that the state road commission has made an entry upon property leased, equipped and used for a golf course, and in surveying places stakes in such proximity to the holes on said course and removes sod to the extent that it may not be used in its customary manner, before the right of the tenant to possession of such leased premises is terminated, and such tenant is shown to have sustained damages in consequence of such entry and work of the state road commission, an award will be made in favor of the tenant for the loss of profits suffered by him.

William Herbert Belcher, Esq., for claimant,

Arden Trickett, state right of way agent for state road commission for respondent.

ROBERT L. BLAND, JUDGE.

By agreement in writing bearing date on the third day of March 1934, the Chesapeake and Ohio Railway Company leased to William Braid, the claimant, a parcel of land at St. Albans, in Kanawha county, West Virginia, containing 53.74 acres, more or less, to be used as a golf course. Said lease was from year to year, with a clause therein providing that either party thereto should have the right to terminate the same at any time before the date fixed therein for the termination of said lease upon giving to the other party ninety days written notice of the intention so to do.

Mr. Braid took possession of the property immediately after the execution of the lease. A part of the leased property was converted into a golf course containing nine holes. In order

to make the property suitable for the course it was necessary to do a great deal of work in grubbing and clearing the land which had grown up in brush and trees. To do this work and properly equip the course for use necessitated the expenditure of about five thousand dollars. Claimant built a club house on the land, equipped with hot and cold water and showers, costing about a thousand dollars. He also constructed a garage and made other substantial improvements from year to year thereon. From the year 1934 to June 1942, Mr. Braid maintained said leased property as a golf course and built up a lucrative business in the operation of said land as such course.

On the 26th of May 1942, claimant's lessor, the Chesapeake and Ohio Railway Company, notified him that it desired to terminate said lease agreement of March 3, 1934, ninety days days from June 1, 1942, or as of August 31, 1942, in accordance with the paragraph four thereof. He was further advised that such action was taken as a portion of the property was required by the state.

It thus appears that claimant was entitled to the possession and use of the leased property until and including the 31st day of August 1942. However, according to the testimony of Mr. Braid upon the hearing of his claim, the state road commission made an entry upon the property as early as August 1941. It did certain surveying on the land and placed stakes on the golf course. When interrogated as to when such stakes were placed on the course Mr. Braid testified: "Well, I think the first of them was placed about a year ago. They came down there surveying the first of August and then they kept up nearly all winter." There is no contradiction of this statement found in the record. It appears that about five of the nine holes of the course were affected by these stakes, and it was impossible for claimant to mow the grass on account of the stakes. In July 1942, the road commission moved thousands of yards of dirt with a steam shovel in the neighborhood of hole NO. 4 for the purpose of building a road through the land. This dirt was removed from that portion of the land used by claimant as a golf course. Hole NO. 4 was entirely

destroyed. In addition to digging dirt at hole NO. 4 and driving stakes down through five holes of the course, practically all of the sod on hole NO. 7 was cut away. This, according to claimant, was done about June 1942. The removal of sod from the course was continued untill August 1942. It appears from the evidence that the road commission removed as much as fifteen thousand feet of sod from the course. The sod was removed from the golf course at different times and some of it was taken to the state police barracks.

Claimant contends that by reason of the entry of the road commission upon the premises and the work done by it thereon he has been damaged at the very least in the sum of $3500.00, and asserts his claim for that amount. It is shown that his gross income for the year 1940 was $1969.65. For the year 1941 his gross income amounted to $2,178.60. For the year 1942 his gross income was only $83.40. For the year 1940 claimant's approximate profit from the operation of the golf course was $1200.00; for the year 1941, $1500.00, and for the year 1942 he lost $250.00.

Respondent resists the allowance of an award in favor of claimant and moves the dismissal of his claim. It argues that clalimant's petition alleges the taking of private property for public use without just compensation being paid therefor, and, therefore, the court of claims does not have jurisdiction in the premises. It directs attention to article 5 of the Constitution of the United States and article 3, section 9, of the Constitution of West Virginia, providing that private property shall not be taken or damaged for public use without just compensation. It relies upon *Hardy* v. *Simpson,* 116 W. Va. 440, and *Riggs* v. *State Road Commissioner,* 120 W. Va. 298, and maintains that the claim in question is controlled by said cases.

If it could be shown that claimant would have a remedy in a court of law for redress for the damages which the record shows that he has sustained, the court of claims would not have jurisdiction of the claim, since subsection 7, section 14, chapter 20, acts of the Legislature of 1941, excludes from

the jurisdiction of the court any proceeding that may be maintained on behalf of the claimant in the courts of the state. We do not think, however, that the claim asserted is controlled by the cases cited by respondent. Neither do we think that claimant has a remedy in the courts of the state. Respondent's entry upon the golf course was made during the time that claimant was entitled to the possession of the property. It is true that claimant's lease was to terminate and end August 31, 1942, but until that time claimant was entitled to the possession and use of the leased premises. Claimant's lease was personalty, not realty. It was not subject to condemnation. It was the entry of the road commission on the course premises and work done therein to the detriment of claimant before his right to the possession of the land ended that gave him the right to maintain his claim in this court, since he had no other remedy to pursue. It is reasonably clear from the evidence that claimant was deprived of profits that he might and would have earned from the unmolested operation of his golf course for the months of April, May, June, July and August in the year 1942. Considering the gross receipts yielded by the golf course for the years 1941 and 1942 and deducting the expenses incurred in those years, claimant would in all probability have earned a net profit of $100.00 per month during said five months had it not been for the change done to the course by the road commission. We think the record sustains this assumption. Of course an award should not be made on the basis of speculative profits, but in the instant case there is enough evidence in the record to warrant the finding that claimant's business would have yielded him a net profit of $100.00 per month from April to September.

The motion to dismiss the claim must be overruled.

Under all the facts and circumstances disclosed by the record we feel that the claimant has established his right to an award of five hundred dollars ($500.00), and an order will be entered accordingly.

(No. 166—Claim denied.)

JAMES E. TACEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1943

When claimant fails to show by the evidence that injuries received in a fall from an approach to a bridge on the highway were caused by lack of due care on the part of the state road commission, and it appears that he failed to exercise due care for his own safety to avoid the accident, an award will be denied.

Appearances:

David A. McKee, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, for the state.

WALTER M. ELSWICK, JUDGE.

The claimant sustained personal injuries when he fell over an embankment at the approach of a bridge over Wheeling creek at Elm Grove in Ohio county, West Virginia, about 4 o'clock P. M., on Sunday the 20th day of August 1939. From his testimony it appears that he had left his home at about one o'clock on that afternoon and spent the time sitting around on the street watching boys and people walking up and down the street until about four o'clock of that day. He then started to go across the bridge to visit relatives at Security, and upon approaching the bridge, an automobile drove near to him. He then stepped backward and fell through an opening between the bridge beam and an iron fencing over an embankment about twenty feet deep. He testified that in his opinion the automobile was traveling about 25 to 30 miles per hour. The road approached the bridge at an angle and it appears that this opening between the steel fence along the embankment and the bridge beam was at or near the apex of the angle.

From the testimony of other witnesses it appears that this opening or space between the bridge and the metal fence was from 15 inches to 24 inches in width. It also appears that the rod connecting same had been broken for a week or longer prior to the time that claimant fell, but there was no evidence offered that its condition had been reported to the road commission, or was of such nature that its agents or employees should have known of its existence by the exercise of reasonable diligence. Claimant testified that he had frequently crossed the bridge and knew that automobiles frequently struck the metal railing and that it was thus frequently broken.

From the evidence it further appears that claimant was taken to the Wheeling hospital, where he remained for examination and treatment two days. An x-ray examination showed that there was a fracture involving the transverse processess of the fourth and fifth lumbar vertebrae on the left side. After leaving the hospital, claimant was confined to his bed for a period of about eight weeks. While in the hospital, he was also treated for a small laceration of the skin on the scalp.

It appears that prior to the accident claimant had been employed as a coal loader by Valley Camp Coal Company, and received a separation notice from the coal company on November 20, 1939, showing that he was separated from employment on that date, the same stating that he was "laid off because no work was available." Claimant then made application for and received unemployment compensation from the unemployment compensation commission of West Virginia for a period of 28 weeks. In his application to secure such compensation, claimant stated: "I am unemployed and have registered for work. I am able to work and available for work. I last worked on 11/20/39. My regular occupation is coal mining. I lost my job because of lack of work. I received no dismissal wages."

Although the fall itself would indicate the possibility of some bodily injury by reason of the depth and abrupt decline

of the embankment, however, in order to establish a cause or reason for the claimant to have to lay straight on his back for a period of eight weeks as a result of his injury, it was necessary to supply medical testimony with reference to his examination and treatment at the Wheeling hospital on the evening of the injury. In the absence of the attending physicians who were in the armed services of our country at the time of the hearing it was stipulated and agreed by and between claimant, by counsel, and the attorney general for the state to submit as to the physical injuries of claimant the history and records from the Wheeling hospital. This history and record shows his systems review, as follows: "In the emergency room the patient was very confused and delirious. He was also intoxicated."

The claimant testified that he had not been drinking any intoxicants on the day of his mishap. His brother-in-law also testified that he talked with him a few minutes before and did not observe any evidence of drinking. However, can we say that we are in better position to judge from this evidence under all the circumstances and evidence in the case that the claimant was sober, than his attending physician who examined and treated him in the emergency room of the hospital immediately or soon after he fell from the embankment? This accident happened in broad daylight and at a place where claimant knew that automobiles frequently swung around the curve or angle in the approach to the bridge. He knew that automobiles frequently broke the rod fastening the fence to the bridge. There was no evidence that the particular automobile was being driven in a reckless manner.

From all the evidence in the case, we are of the opinion that claimant could have avoided the accident with the exercise of due care for his own safety. The state is not an insurer, and the evidence fails to reveal that the claimant sustained his injuries by reason of the lack of due diligence on the part of the respondent, the state road commission. We, therefore, deny an award and an order will be entered accordingly.

(No. 198—Claimants awarded $1,262.50.)

ROBERT DORNON, an infant, by FREDA M. DORNON, his guardian, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1943

Where the testimony shows that an operator of a state road commission grader was negligent in operating the said grader, and by reason of the said negligence a boy twelve years of age was severely injured, an agreed award of $1262.50 will be sanctioned and authorized by this court.

Appearances:

Oliver D. Kessel, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant Attorney General for the state.

CHARLES J. SCHUCK, JUDGE.

On or about the 27th day of May 1942, Robert Dornon, the claimant, an infant of twelve years of age, together with several other boys, was following a grader operated by a state road commission employee in and about the town of North Ravenswood, in Jackson county, and engaged in play in the vicinity where the grading work was being carried on and done by the employees of the state road commission. The driver of the said grader was aware of the presence of the children playing on the street where the work was being done, and while being followed by some four or five boys, including the claimant, the operator of the grader reached a street intersection, and in backing or turning the said grader, seemingly without notice to the claimant and the other boys who were

following it or playing nearby, struck the claimant, knocked him down, and part of the grader passed over the claimant's body. Claimant was severely injured, sustaining a fracture of the pelvic bone in two places, as well as a fracture of his arm, and was confined in the hospital for approximately two weeks, after which he was returned home, where he was obliged to remain in bed for some seven weeks more.

By stipulation, it is agreed by the state road commission, represented by the assistant attorney general, and counsel for the claimant that the sum of one thousand two hundred and sixty-two dollars and fifty cent ($1262.50) is a proper and just amount in full settlement of the claim, and an award is made accordingly.

The said amount so awarded to be divided as follows: $1,000.00 to Freda M. Dornon, as the guardian of the said Robert Dornon, an infant; $108.75 to Dr. J. H. Donovan, for medical services; $148.75 to Dr. C. R. Kessel, for medical services; and $5.00 to the said Freda M. Dornon, expended for ambulance service.

(No. 201—Claim denied.)

MILDRED MATTIS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1943
Opinion on rehearing filed October 28, 1943

A case in which the claimant's negligence was of such a nature and degree as to bar any recovery, notwithstanding the serious injuries she sustained in the accident.

Appearances:

Messrs. *Ambler, McCluer & Ambler (James S. McCluer,* Esq., and *Fred L. Davis,* Esq.,) and *William Bruce Hoff,* Esq., of Parkersburg and *Emmett Abel,* Esq., of McConnelsville, Ohio, for the claimant;

Eston B. Stephenson, Esq., assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

On the 11th day of October 1941, the claimant, a resident of McConnelsville, Ohio, became a passenger with one Louise Abel, of the same place, in an automobile owned by the father of the said Louise Abel, and later the two ladies were joined by one Jack Henniger at Beverly, Ohio, and Gordon Lockhart, and between twelve-thirty and one o'clock on that night, the four persons started in the said automobile from Beverly, Ohio, to Marietta, Ohio, and later went to Parkersburg, West Virginia, the said claimant Mildred Mattis riding in the front seat with Lockhart, who was driving the car. It appears from the evdence that the said four persons were simply out for a ride, were somewhat unacquainted with Parkersburg, and had reached the said city between two-thirty and three o'clock on the morning of October 12; that in some manner not fully explained by the evidence, except that they were then hunting for a restaurant or place to eat, they eventually got to the outskirts of Parkersburg and while traveling on East street at and near the railroad viaduct crossing said street and near the bridge over the Little Kanawha river, the machine in question, while being driven by the said Lockhart, collided with one of the piers or pillars on the said viaduct, causing serious damages to the claimant and the wrecking of the automobile in which they were then passengers.

Claimant contends that the accident was caused by the condition of said East street; that the said street was in bad repair; that the streetcar tracks thereon were separated from the traveling lane by an elevation of cement work or barrier

near the said viaduct which was highly dangerous to any automobilists using the highway in question, and that although driving at a moderate speed, the said automobile, in passing off the side street onto the said East street, and around or back of another automobile parked near the intersection of Jeanette and East streets, apparently struck a rut in the said street, causing the machine to become and be beyond the control of the driver and bringing about the collision in question.

Claimant maintains that at the time of the collision or just shortly before, the car was being driven at a moderate rate of speed, to wit, twenty-five or thirty miles per hour (record p. 96). However, the witness Stemple, who was the automobile repairman, testified (record p. 152) that "The front end of the car was hit about the center, the motor and steering wheel was driven back into the front seat, the front seat was tore loose and drove up against the dash, the seats were all tore loose, the drive shaft had bent the jumbo housing back until it knocked the gas tank off." The same witness testifying further says, as to the speed of the car at the time of the collision, "I would say not less than thirty miles an hour, approximately maybe 40-45." That the car was driven at a high rate of speed, in fact at an excessive rate, is evidenced by the extent of the injuries which left the car almost beyond repair and a hopeless wreck so far as rebuilding it was concerned, the testimony being that the car would require repairs to the extent of $490.00 to be put in the condition it was previous to the time of the accident.

The lights on the viaduct were undoubtedly burning, as testified to by the witness Baker (record p. 156) who was employed in a garage near the place of the accident and was on duty at the time it took place, and was at the scene shortly afterward and noticed the red lights in question burning. He referred specifically to the red lights as being on the pillars of the viaduct. This witness also testifies (record p. 156) that the accident took place about three-thirty in the morning and that the locality where the accident took place is

one of the suburbs in the outlying districts of Parkersburg. The testimony further shows that the said red or warning lights could be seen at a distance of approximately 185 feet when entering East street from the nearest cross street to the said viaduct, and for over 400 feet when entering East street from the other cross street beyond and parallel to Jeanette street. The evidence also shows that the weather was good and that there was no interference with visibility.

Under all the circumstances, notwithstanding the serious injuries to the claimant, we cannot say that the state is liable for the accident in question or for the damages which the claimant has sustained. In the first place, the state is not an absolute insurer to those using the highway. They still have a duty incumbent upon them to use such care as is necessary under all the attendant circumstances to prevent injuries to themselves. Seemingly ample lights were fixed on the viaduct in question to give warning of the presence and location of the said viaduct and its supporting pillars; and these lights could be seen at least 185 feet away from the viaduct, assuming that the claimant and those riding with her in the machine had passed onto East street from the nearest intersecting street, namely Jeanette. If they did not pass onto East street from Jeanette street, then they could have seen the lights if they had been watching and had been careful on a strange highway, in a strange city, and in an outlying district, at least 400 feet away from the viaduct. The evidence also shows that the said viaduct was lighted underneath, seemingly with ample lights. Are we justified in assuming that the claimant and her companions were seeking a place to obtain food at three or three-thirty o'clock on the morning of the accident, when the very fact that they had passed through the heart of Parkersburg, as testified to by them, would have afforded ample opportunity for them to have obtained food, and in fact, with more likelihood of having their wants fulfilled than by driving into the outskirts of the city of Parkersburg? The reason given may or may not have been the true one that prompted the journey to East street. The evidence does not disclose that the claim-

ant protested in any manner to the driver's handling of the car, nor does it appear that she or the other occupants of the automobile observed the lights on the viaduct when entering East street shortly before the accident took place. If the automobile had been driven with the necessary and required care and caution when entering East street, it could in our opinion, have been brought to a stop before colliding with the viaduct. It may be true, as the testimony shows, that the street in question was not in the best of repair, but we feel that this fact was not the proximate cause of the accident or the injuries to the claimant.

Our conclusion is that the proximate cause of the injuries was the highly negligent manner in which the car was being operated just previous to and at the time of the accident, and the failure on the part of all of the occupants of the car, including the claimant, to exercise that degree of care necessary under the circumstances for her protection and safety. The negligence of the driver was, under the circumstances, her negligence, and consequently, their combined acts constituted the proximate cause of the accident of which she now complains. Giving full consideration to the testimony, and appreciating the fact that the claimant has been severely injured, we cannot, however, find that the state or the state road commission was at fault, and therefore deny the claim.

Under the foregoing decision it is unnecessary, of course, to give consideration to the plea of want of jurisdiction heretofore filed by the state.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

At a former term of this court, claimant was denied an award, and subsequently her attorneys filed their petition for a rehearing, urging that the court allow them to submit further briefs and be heard in oral argument in support of the matters contained in the said petition.

The court granted the request set forth in the petition, treated the whole matter as upon rehearing, received addi-

tional and further briefs from both claimant and respondent, and heard further arguments, and the matters involved were again submitted to the court for its further consideration and determination.

We have very carefully again considered all the testimony of this case in connection with the additional briefs filed and the arguments submitted, and while it may be that reasonable men may differ as to the facts, we are convinced that the accident in question was occasioned by the negligent operation of the automboile in which complainant was riding at the time, and which negligence was the proximate cause of the accident to complainant; we are, therefore, constrained to follow our previous decision and again deny an award.

(No. 167, 168—Claimants awarded $250.00, $350.00.)

TESSIE GEIMER, Claimant

v.

STATE ROAD COMMISSION, Respondent.

M. N. GEIMER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1943

Where a claimant is injured on the highway by the faulty or negligent operation of a snowplow at the hands of a state road commission employee, and the claimant himself is free from any negligence, an award will be made in his favor.

Appearances:

Linn B. Farrell, Esq., for the claimants;

Eston B. Stephenson, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

On March 8, 1941, while claimants were traveling along route 50 at Wolf Summit in Harrison county, West Virginia, in an Oldsmobile automobile, a snowplow being driven by a state road commission employee collided with the claimants' automobile, causing injuries to the claimant Tessie Geimer and to the automobile, owned by M. N. Geimer. There were several inches of snow on the highway which was being removed by the snowplow in question. At the place where the accident happened there was a railroad crossing which, however, as the testimony shows, was covered by snow and not easily seen by the operator of the snowplow.

The testimony tends to show that the said operator was using the plow so that the blade thereof was very close to the surface of the highway, and while he no doubt intended to raise it when he came to the railroad intersection in question, he failed to do so and by reason thereof, the snowplow struck the railroad crossing, was thrown across the highway and directly in the path of claimants' oncoming automobile. The snowplow could be seen by the claimants for a considerable distance, but the evidence shows that claimant M. N. Geimer operated his car within the speed limit and was on the right side of the highway, considering the direction in which he was traveling, and therefore, not guilty of any negligence. On the other hand, the evidence shows that the operator of the snowplow was an experienced driver who had never before had an accident and was seemingly a trusted employee in the operation of trucks and snowplows so far as his employment by the road commission was concerned.

The operator admits (record p. 175) that it was snowing on the evening of the accident, which happened somewhat after four o'clock in the afternoon; that there were three or four inches of packed snow on the road, and that he had

slowed up where he thought the railroad crossing was located. He further stated (record p. 175), ". . .but I guess I didn't slow up in time . . . hit the crossing, slid, and came together just as Mr. Geimer was passing or starting to." (Record p. 176). The operator also admits that he knew of the location of the railroad crossing and had passed there many times, and that the crossing was a good crossing and one of the smoothest in the county. (Record p. 177).

Considering the condition of the weather, the location of the railroad crossing, and the work in which the operator was engaged, it, of course, became his duty to take all necessary precautions when he reached the railroad crossing, in order that he might not collide with or inflict injuries to any persons using the opposite side of the highway. Under all of the attendant circumstances, it would seem that he should have stopped his snowplow before reaching the railroad crossing in order that he might not collide with claimants' oncoming automobile, which he could plainly see at a distance before the said crossing was reached. Not having taken the necessary precautions, and having caused the collision by the operation of the snowplow without any fault on the part of the claimants, he, of course, was guilty of such negligence as, in our judgment, was the proximate cause of the accident.

Claimants' automobile was considerably damaged, and claimant, M. N. Geimer, testified, (record p. 16) that it would require $395.56 to make the necessary repairs. It was a 1940 model and had been driven by the claimant M. N. Geimer for over a year previous to the time of the accident. Considering the age of the car and its previous operation, and applying the rule that the property damage in such cases is the difference between the value of the car imcediately before and after the accident, we feel that the sum of three hundred and fifty dollars ($350.00) is proper and just for damages to the automobile in question, and we make an award accordingly. The testimony does not show any

injuries to the claimant M. N. Geimer personally, and he is making no claim for any in this matter.

The question then presented for the further consideration of the court is the damages to which the claimant Tessie Geimer may be entitled by reason of injuries to her.

By her testimony, she claims that she sustained severe head injuries; that she has been highly nervous since the accident; and that she has been unable to attend to her work as a housewife and also as one who helped her husband operate a certain barbecue stand or business located near Salem in Harrison county. The testimony further reveals that several years previous to the accident the claimant Tessie Geimer had had an accident in the city of Pittsburgh, Pennsylvania, having fallen on an icy pavement and sustained fractures of the tenth dorsal vertebra and of the coccyx. She was confined in a hospital by reason of the said accident, and was obliged to wear a cast and afterward a brace for more than a year after the time of the accident. On another occasion previous to the accident for which the claim is made here, she was also obliged to undergo an operation for the removal of a cyst on one of her ovaries.

Undoubtedly the accident in Pittsburgh as well as the ovary operation had their effects upon her nervous system and impaired her ability to do her work as a housewife and a helper to her husband to a very considerable degree. The witness Williams (record p.p. 126-30), who was a witness offered by the claimants, testified that in November 1940, she, Mrs. Geimer, seemed rundown, nervous, and her "back was aching"; and in answer to a question propounded to him with reference to her condition (record p. 132) said, "She was hardly able to do anything." This, as indicated, was in the year 1940, several months before the accident in question happened to her, and the witness Williams is quite positive about the month and time in which he noticed her condition. Another witness, Katherine Garner, testified that she had worked with the claimant Tessie Geimer at what

was known as the Log Cabin Inn on route 50 for approximately two years, or from 1938 to 1940, sometime before this accident happened. This witness testified (record p. 167) that the claimant complained all the time; and that she complained about her back and being nervous; and that she complained often of this condition. This witness also testified that claimant was nervous. All of which seem to indicate that previous to the time of the accident for which she now seeks damages, she was in a highly nervous state and unable to perform the work which she had theretofore been doing.

The court had all the witnesses before it, noticed their actions and demeanors and we are inclined to give full value to the testimony of the witnesses just referred to; and while perhaps the accident on the highway occasioned by the collision with the snowplow would, of course, not be conducive to helping her physical condition, yet, so far as we know, the injuries not being serious, have not contributed very much to bringing about her present physical condition. There are no aggravating circumstances so far as the operator's degree of negligence may have been concerned, and therefore, no damages as any punishment should be allowed.

Considering all the facts and the circumstances surrounding the happening of the accident, the previous physical condition of the claimant Tessie Geimer, and the nature and extent of the injuries inflicted by the accident complained of, we feel that the sum of two hundred and fifty dollars ($250.00) is an ample amount to compensate her for the damages caused by the collision with the snowplow, and we recommend an award accordingly.

(No. 140—Claim denied.)

BOYD ADKINS, Claimant,

v.

STATE (STATE AUDITOR), Respondent,

Opinion filed January 25, 1943

Where a commissioner in chancery to whom school land suits were referred for the usual accounting required in such suits, failed to avail himself of the remedy afforded commissioners in chancery for payment of services performed for the court in such suits, by filing his certificate, under oath, showing the number of hours that he was actually and necessarily employed in such matters, to enable the chancellor to fix his fee based upon such services performed, before the funds available for its payment are disbursed, as prescribed by law in such cases, but has pursued another method not authorized by law, and received substantial fees under such method without complying with the requirements of the statute, there was no liability of the state to pay additional fees by reason of the acts abolishing the office of school land commissioner and thus preventing his collection of additional fees under the method so pursued at variance with the terms of the statute.

Appearances:

J. Floyd Harrison, Esq., for the claimant, and *claimant* in person;

Eston B. Stephenson, Esq., special assistant to the Attorney General, and *Hugh N. Mills,* chief clerk, auditor's department, for the state.

WALTER M. ELSWICK, JUDGE.

Claimant, Boyd Adkins, filed his claim in this court seeking an award of $7,490.00 for fees alleged to be due him as a commissioner in chancery in certain school land suits formerly pending in the circuit court of Wayne county, West Virginia.

From the record in this case, it appears that the circuit court of Wayne county, West Virginia, in certain school land suits therein pending entered orders of reference to the claimant as a commissioner in chancery on March 15, 1930 and July 10, 1930 to take accounts in said causes and to report to the court his findings as directed by said orders of reference. It also appears that said claimant filed various reports in said chancery causes with the court as directed. From these reports, it would appear from the numbering of the tracts that a total of 1203 tracts of land were proceeded against in said chancery causes. It also appears from the record that said commissioner in chancery made reports to the court on 749 tracts of land so proceeded against.

Adequate funds were in the hands of the school land commissioner to pay claimant's claim, as appears from the record, at the time that he filed said reports but no claim was made or order entered by the court allowing him a fee based upon the number of hours of service performed by him. Certain fees were allowed and paid him, however, as hereinafter shown.

Court order, entered July 14, 1931 (stipulation NO. 1) provided:

> "That where the commissioner of school lands has caused a tract or tracts to be referred to a commissioner in chancery and a report is had as required by law that there shall be taxed as a part of the costs such fees for the commissioner in chancery as are now allowed in other chancery causes."

Barnes' code of West Virginia chapter 105, section 7, pertaining to sale of lands for school funds, provided:

> "All suits brought and prosecuted under the provisions of this chapter, shall be commenced as provided in chapter one hundred and twenty-four of the code, and proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice

> as other suits in chancery in the state courts of this state, except as herein otherwise provided. In all cases where an order of publication is issued, there shall be therein set out the number of tracts in which non-residents are interested as owners or claimants, with a general description as to location and quantity of each."

Barnes' code chapter 137, section 5, pertaining to fees allowed to commissioners in chancery (in effect at the time that the orders of reference to claimant were entered) provided:

> "For any service, such as the court of which he is commissioner may from time to time prescribe . . . , not exceeding one dollar where less than an hour is employed, and if more than an hour be employed, not exceeding the rate of one dollar for each hour, or in lieu thereof, twenty-five cents per hundred words, as the commissioner may elect. A commissioner returning a report shall annex thereto a certificate, under oath, that he was actually and necessarily employed for a number of hours, to be stated therein, in performing the services for which the fees stated at the foot thereof are charged. Until such certificate is made, no such fees shall be allowed or paid. A commissioner shall not be compelled to make out or return a report until his fees therefor be paid or security given him to pay so much as may be adjudged right by the court to whom the report is to be returned, or if it be a circuit court, by the judge thereof in vacation, unless the court or judge see cause to order it to be made out and returned without such payment or security, and shall so order."

Chapter 59, article 1, section 8 of the code of 1931 was substantially the same in effect.

Barnes' code chapter 105, section 13, pertaining to payment of costs in a school land suit, provided:

> "The cost of every such suit shall be ascertained and taxed by the clerk as in other chancery cases, and shall be paid out of the proceeds of the sales of

> said real estate, and not otherwise, to the several persons entitled thereto, if sufficient for the purpose; but if such proceeds are not sufficient to pay the whole of such costs and commissions and the expenses aforesaid of the commissioner of school lands, the same shall be paid therefrom to the several persons entitled thereto pro rata."

There is not any evidence in the record to indicate the number of hours that claimant was actually and necessarily employed as commissioner in chancery in the discharge of his duties as such under the orders of reference committed to him in these school land suits. The claimant alleges in his petition "That the law under which said causes were referred to the petitioner provided for the payment of a fee of $10.00 for each tract reported by your petitioner to be paid when the tracts were sold by the commissioner of school lands, or redeemed by the owner."

We do not know of any law to that effect and none is cited in the brief by counsel for claimant. An order was entered by the said court in vacation April 6, 1942 reciting that a fee of ten dollars ($10.00) was allowed claimant for each tract reported on by him, which was redeemed by the taxpayer, said fee of ten dollars ($10.00) being taxed as a part of the costs and paid by the taxpayers, but this order fails to show that the statute had been complied with or that a fee had been fixed or sought by claimant commensurate with hours of service performed prior to the distribution of all funds in the hands of the school land commissioner.

We do find from the record that the following sums of money were paid to the claimant, as commissioner in chancery in these school land suits under methods at variance with the terms of the statute, namely:

(1) An order was entered by the court June 3, 1930, allowing the claimant a fee of two hundred and fifty dollars, ($250.00) as commissioner in chancery "for services in looking up the records and making reports in this cause of the im-

proper tracts hereinbefore mentioned." (Audit, commissioner of school lands, Wayne county, October 1, 1931, p. 10, stipulation NO. 12).

(2) An order was entered by the court October 13, 1930, allowing the claimant a fee of seven hundred sixty-two dollars and fifty cents ($762.50) as commissioner in chancery "for 305 dismissals and for work done in school land matters." *(Id.)*.

(3) An order was entered by the court December 18, 1930, allowing the claimant a fee of two hundred and twenty-five dollars, ($225.00) as commissioner in chancery, and Pearly Newman for "working up 380 dismissals and other work done at the request of M. J. Ferguson, commissioner of school lands and J. T. Lambert, attorney for the state." *(Id.)*.

The foregoing allowances were paid to the claimant out of school land funds. (*Id.* under disbursements p. 44).

(4) It appears from the record (audit 1931, stipulation NO. 12, p. 15, and audit 1939, stipulation NO. 13, p. 10) that fees aggregating five thousand five hundred and seventy five dollars, ($5,575.00) were assessed and paid to claimant as commissioner in chancery in said causes on redemptions at the rate of ten dollars ($10.00) for each tract of land redeemed regardless of the fact that the redemption orders state that the defendant "appeared generally and waived process and service of process thereof and proceedings at rules and moved the court to file said bill and answer and hear this cause thereon and ascertain without reference to a commissioner the amount to be paid in redemption of said land."

(5) Fees totaling one thousand four hundred and seventy dollars ($1470.00) were paid to claimant as commissioner in chancery in said causes out of school land funds from July 1931 through December 12, 1936 (audit Wayne county commissioner of school lands, 1939 stipulation NO. 13, p.p. 49-58, summary p. 60).

By order entered by said court in said causes August 17, 1938, the court directed payment of three hundred and ten dollars ($310.00) to Boyd Adkins as commissioner in chancery for services rendered prior to the "Act of the extraordinary session, 1933, affecting school land matter." This sum was ordered paid out of school land funds from 62 tracts of lands redeemed prior to sale reported by the school land commissioner (audit 1939 stipulation NO. 13 p.p. 7 and 11) although the school land commissioner had previously been released and discharged from his bond by order of the court entered December 31, 1936 (stipulation NO. 7). It would appear that said sum of three hundred and ten dollars ($310.00) had been paid to claimant out of school land funds November 16, 1934 after all of his reports as commissioner had been filed (1939 audit, p. 57).

It appears from the said audit of the school land commissioner of January 9, 1939, stipulation NO. 13, p. 58 that detailed expenses such as stamps amounting to fifteen dollars ($15.00) had been paid out of the school land funds to claimant.

The school land commissioner made a report showing disbursement of all funds in his hands and was released of his bond by order entered December 31, 1936. Disbursements were made to claimant through December 14, 1934 with adequate funds left to pay claimant's claim if said court had determined that the fee was proper. (Audit 1939, p. 58). The office of school land commissioner was abolished by acts of 1933.

We find that claimant is not entitled to an award by this court for the following reasons, to wit:

(1) That the record does not show the number of hours that claimant was actually and necessarily employed as commissioner in chancery in said suits or that he complied with Barnes' code, chapter 137, section 5; code of 1931, chapter 59,

article 1, section 8 by filing the required certificate duly verified to enable him to receive the fees paid him or that for which he claims; no such fee was claimed as was provided by statute and none fixed by the court to enable claimant to hold a lien on the lands or proceeds of redemptions;

(2) That a commissioner acts as an assistant to the trial judge and his pay was determined by the statute in these cases as in other chancery suits and not contingent upon the outcome of the suits; claimant elected to accept the fees paid to him without complying with the law pertaining to the payment of compensation to commissioners in chancery for such services performed and we are not in position to say that he has not been adequately paid for all hours of services performed as such commissioner;

(3) That even though such claimant might have been entitled to share in the portion of the funds which were paid to the state, exclusive of the funds paid over to the county and municipalities, this court would not be in position from the record to make an accounting as to what fees paid to claimant were proper or improper; or, in event that such portion of said sums so paid to the state were insufficient to pay claimant and other claimants of costs, this court would not be in position to direct payment from the proceeds of sales to the several persons entitled thereto pro rata, as was directed to be done by Barnes' code, chapter 105, section 13; code 1931, chapter 37, article 3, section 25, and not otherwise;

(4) An adequate remedy was afforded the claimant in the courts of the state which was not pursued nor sought by the claimant.

An award is denied.

(No. 165—Claimant awarded $5,500.00.)

JAMES CAIN & COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 26, 1943

Where a contract for road improvement is interfered with or delayed by the action of the state road commission, through no fault of the contractor, and the contractor thereby suffers loss by not being able to use his equipment or part thereof, and, in consequence, said equipment remains idle during the period of the delay, then the contractor is entitled to a reasonable rental value as damages for said equipment so idle during the period of the delay or interference. Reaffirming *Keeley Construction Company* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 168.

Appearances:

Byron B. Randolph, Esq., and *John A. Cain*, Esq., for the claimant;

Arden Trickett, Esq., state right-of-way agent, state road commission, and *Eston B. Stephenson*, Esq., special assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant company on or about the 16th day of April 1930, entered into a contract with the state road commission for the excavation and grading of a certain road and project in Greenbrier county and known as project NO. 2023. The project contemplated the grading and draining of about 12,880 lineal feet, some concrete work, the construction of a small bridge, provision for certain fills and borrow excavations and classified and unclassified excavations of considerable proportions. The larger portion of the borrow was to be

taken from hillsides near Caldwell and belonging to the Chesapeake and Ohio Railroad company. Work was begun under the contract on or about the latter part of April 1930, the claimant having theretofore moved certain equipment on the project or job. The claimant continued its work, although interrupted several times on account of disputes between the railroad company and the road commission, until the late fall and winter months, and, finally, on or about February 20, 1931, work was stopped by reason of the said disputes and not resumed for approximately six months, during which time some of the equipment of claimant remained idle on the job and for the rental value of which the claimant principally bases its claim.

Claimant also maintains that this work was stopped by reason of an injunction order on complaint of the Chesapeake and Ohio Railroad but the evidence on this point is not decisive; however, there can be no question that the claimant and the state are in agreement that the work was eventually stopped by order of the state road commission. Subsequently, and before work was resumed, the state road commission relet to another concern certain portions of the work theretofore embraced in the contract entered into with the claimant, and the claimant maintains that this action was a further interference with the performance of its contract with the road commission.

It seems that the chief controversy between the railroad company and the state road commission was the construction of a certain ten foot square concrete viaduct, to be erected along the line of the project and under one of the principal fills to be made along the route of the project. It was nearly six months before the said company and the state road commission arrived at a settlement and work again resumed. These delays were caused not through any fault of the claimant company but by reason of the action of the state road commission in not having made a settlement with the railroad company concerning the matters in dispute previous to the time that the contract in question was entered into.

The contract, as first entered into with the claimant, did not contemplate the culvert in question, but contemplated merely the construction and erection of certain pipe under the fill, which was not sufficient, however, so far as the railroad company was concerned, and to which construction the said company would not agree.

Under all circumstances and testimony, then, we are driven to the conclusion that the claimant company was not at fault and undoubtedly suffered losses, not such as are referred to or contemplated by the terms and provisions of the contract, since it was prevented from doing work at the very season of the year when work could have been carried on with some degree of profit and to the advantage of the claimant company, which it had the right to assume at the time the contract was entered into. The question, however, presents itself as to the measure or amount of damages.

A careful analysis of the testimony of the engineer, Worthington, shows that in most respects the contractor received payment for approximately the grading and drainage as set forth in the contract. It is true that while the contract contemplated 26,000 yards of borrow the final estimate showed 18,272; however, the contractor undoubtedly benefited by the overhaul, which contemplated in the first instance but 8,645 yards, and the contractor was finally paid for 140,708 yards, so that in these respects the final estimates balance quite well with the estimates as set forth in the original contract and specifications. We come then to the proposition of the rental value that may be due the contractor by reason of the delay of interferences with the work as hereinbefore set forth, and in this respect there is a marked difference between the testimony submitted by the claimant and that of the engineer Worthington. Among other matters, the claimant maintains that it is entitled to a rental of $300.00 per month for the period in question for each of six trucks, but we believe, taking all the testimony into consideration, that these trucks were easily removable from the project to another which the claimant company had in the same section

of the state, if found necessary, and could be returned to the project under consideration on very short notice, and that, therefore, the claimant would not be entitled to the amount asked for with reference to this item. The witness Worthington also testified that the shovel in question for which the claimant asks a thousand dollars per month was not on the project after the beginning of March of the year in question, and this testimony seems to be supported by the claimant, (record p. 160) the witness Tom Cain stating that the equipment in question could have been used on a Monroe county job which was being prosecuted at the time of this delay, and which was in an adjacent county, and that one shovel, seemingly the gas shovel in question here, was used on the Monroe county project.

Considering the evidence as a whole, and bearing in mind the equipment used and the period of time it was probably idle and could not be used elsewhere, we are of the opinion that the sum of fifty-five hundred dollars ($5500.00) would be a fair award to the claimant as damages for the interference with its contract and the delay caused by the controversy between the aforesaid railroad company and the state road commission, and we find in the said amount accordingly.

(No. 218-S—Claimant awarded $75.79.)

JIM GORE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 27, 1943

CHARLES J. SCHUCK, JUDGE.

The claimant, Jim Gore, seeks reimbursement in the sum of $75.79, which amount represents the damages for repairs to claimant's car injured on the 22nd day of November 1942, by a collision with state road commission truck NO. 430-4 (center line truck). The state road truck has an overall with of 10′ 2″, and seemed to have extended considerably over the center line of the road at the time of its approach to claimant's car. By reason of the extension over said center line it collided with and inflicted the injuries to claimant's car as herein set forth.

An investigation by the state road commission places the blame for the accident on the driver of the state road truck. The state road commission does not contest the claimant's right to an award for the aforesaid amount, but concurs in the claim for that amount; the claim is approved by the special assistant to the attorney general as one that should be paid. We have considered the claim upon the record submitted and are of the opinion that it should be entered as an approved claim and an award in the sum of seventy-five dollars and seventy-nine cents ($75.79) is made accordingly.

(No. 219-S—Claimant awarded $7.60.)

E. U. ASHENHART, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 27, 1943

CHARLES J. SCHUCK, JUDGE.

This claim is in the amount of $7.60 as damages for injuries to the complainant's automobile when it struck a protruding steel rail on Main street in Clarksburg, West Virginia, December 5, 1942, in the nighttime of said day, the said steel rail having been removed in connection with the removal project of the state road commission then being carried on at the time and place indicated. The record reveals that the steel rail in question was for some reason allowed to protrude out of line and over and upon the line used for automobile traffic. From the record, the claimant was not at fault and the rail in question should not have been allowed to protrude over the said traffic lane.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the allowance of the claim for the amount in question; the claim is also approved by the special assistant to the attorney general. After consideration of the record as submitted we are of the opinion that it should be entered as an approved claim, and an award of seven dollars and sixty cents ($7.60). is made accordingly.

(No. 220-S—Claimant awarded $103.35.)

EFFIE LILLY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 27, 1943

CHARLES J. SCHUCK, JUDGE.

On the 12th day of December 1942, while claimant was driving her car over and along what is known as the Elgood road near Pettry in Mercer county, and while proceeding up a grade on said road she observed state road truck #1030-33 approaching her on the opposite side of the said road. The road was somewhat icy and covered with snow and from the record it appears that the claimant stopped her car on the right side of the road, but as the said state truck approached her, evidently being driven near the middle of the road, it collided with her automobile causing the damage in question.

The state road commission, after an investigation of the accident, does not contest the claimant's right to an award for the amount claimed, to wit, $103.35, but concurs in the claim for that amount; the claim is also approved by the special assistant to the attorney general as one that should be paid. After consideration of the case upon the record submitted, we are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of one hundred three dollars and thirty-five cents ($103.35).

(No. 221-S—Claimant awarded $22.97.)

J. S. BOBBITT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 27, 1943

CHARLES J. SCHUCK, JUDGE.

On November 12, 1942, while driving his automobile over and upon Scott street in the town of Princeton, West Virginia, claimant's car was struck by state road commission truck #1030-5, as the said state road truck was about to be backed into the state road garage located at and near the point of the collision. It was a four-lane road, and it seems that the claimant was proceeding along what is known as the third lane of the said road and in backing into the said garage the said state road truck for some reason swung over and protruded on the said third lane and thereby collided with claimant's car and inflicting the damages complained of. So far as the record reveals there was no notice to the claimant from the operator of the said state road truck that he was about to swing the said truck over and upon the said lane then being used and traveled upon by the said claimant.

After investigation the state road commission does not contest the claimant's right to an award in the amount of $22.97, but concurs in the payment of the same; the claim is likewise approved for payment by the assistant to the attorney general.

Considering the case upon the record as submitted we are of the opinion that it should be entered as an approved claim and an award in the amount of twenty-two dollars and ninety-seven cents ($22.97) is accordingly made.

(No. 211-S—Claimant awarded $12.00.)

JONES CORNETT COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 29, 1943

ROBERT L. BLAND, JUDGE.

It appears from the record of this claim that about five o'clock P. M. on September 17, 1942, state road commission truck NO. 1030-82, ran into and collided with a Dodge pickup truck, bearing West Virginia license NO. B46-59, owned by the claimant. The accident occurred on Riverside Drive, Welch, West Virginia, and was caused by defective brakes on the road commission truck. Claimant's vehicle was standing in traffic. The road commission truck was being driven at a speed of between fifteen and twenty miles an hour. When the driver attempted to apply brakes he was unable to stop the truck. For the damage done to claimant's truck it seeks an award of $12.00.

The state road commission concurs in the claim. The assistant to the attorney general approves the claim as one that should be paid. We are also of the opinion, from the facts shown by the record, that it should be approved.

We, therefore, award to the claimant, Jones Cornett Company, the sum of twelve dollars ($12.00).

(No. 210-S—Claimant awarded $53.61.)

W. R. KEYSER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 29, 1943

ROBERT L. BLAND, JUDGE.

The record of this claim was prepared by the state road commission and filed with the clerk of this court on November 13, 1942. The claim is for $53.61, and grows out of an automobile accident which occurred on Riverside Drive, Welch, West Virginia, on September 17, 1942. On that day claimant's Chevrolet automobile, bearing West Virginia license number 9-461, was standing still in traffic when state road commission truck NO. 1030-82 ran into it, causing damages to the extent of the claim as shown by an itemized statement of Center Chevrolet Sales Company, of Welch, made a part of the record. It appears that failure of brakes on the road commission truck to work was responsible for the accident. The claimant was in no way at fault. The road commission recommended the payment of the claim. The assistant attorney general, having examined the claim, approves its payment.

Upon the showing made by the record, which has been considered informally by the court, we are of opinion that an award should be made for the claim.

An award of fifty-three dollars and sixty-one cents ($53.61) is, therefore, now made in favor of claimant W. R. Keyser.

(No. 215-S—Claimant awarded $141.00.)

THE PEERLESS MILLING COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 29, 1943

ROBERT L. BLAND, JUDGE.

On July 28, 1942, a truck of claimant, loaded with merchandise, broke through a state controlled wooden bridge on secondary road 53-4 in Wirt county, West Virginia. Merchandise shown to be of the value of $62.19 was lost. The truck was damaged to such extent that it required $78.81 to repair it. The sum of $141.00 is claimed for the loss of merchandise and damage to the truck. The claim is supported by itemized statement filed with the record. The accident was caused by the defective condition of the bridge.

The state road commission recommends the payment of the claim and the assistant to the attorney general approves its payment.

An award is now made in favor of the claimant, The Peerless Milling Company, for the sum of one hundred and forty-one dollars ($141.00).

(No. 216-S—Claimant awarded $250.00.)

THE JOE M. BOLBY COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1943

ROBERT L. BLAND, JUDGE.

The claim involved in this case is the sum of $250.00. The state road commission recommends its payment. The assistant to the attorney general approves the claim as one that should be paid. It is considered informally by the court upon the record made and filed by the road commission with the clerk. From this record it appears that in October 1941, claimant, the Joe M. Bolby Company, constructed a float for the road commission of West Virginia to be used in the Mountan State Forest Festival at Elkins, West Virginia, which was held in that year. The building of said float had been previously authorized and directed by the road commission at the price of $250.00. It was used on the occasion of the festival. Subsequently the road commission transmitted an invoice for the contract price to the auditor and requested him to issue his warrant therefor. The auditor refused to honor this invoice, and the claim has not been paid. Strictly and technically the auditor was right in his action in the premises. However, the state received the benefit of the advertisement, and it is within the power of the Legislature to make an appropriation for the amount of the claim. The claim was contracted for a public purpose. In view of the advertisement which the state received on the occasion of the festival, the concurrence in the claim by the state agency concerned and the approval of the payment of the claim by the special assistant to the attorney general, we recommend to the Legislature the advisability of making an appropriation in favor of claimant, The Joe M. Bolby Company for the said sum

of two hundred and fifty dollars ($250.00) in full settlement of the claim.

(No. 235-S—Claimant awarded $11.00.)

PARK PONTIAC, INC., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1943

ROBERT L. BLAND, JUDGE.

The claim in this case is informally considered by the court upon a record thereof made by the state road commission and filed with the clerk on January 2, 1943. This record is not as full and complete as it might and should have been prepared, but from it we are able to ascertain and find that about 3:30 o'clock on the afternoon of October 29, 1942, a school bus was being driven on a highway in South Malden, Kanawha county, West Virginia. State road commission truck NO. 130-18, operated by one Lynn Dyer, and a private car owned and driven by one John Henderson, of Marmet, West Virginia, were following the school bus. Both the state truck and private car attempted, at the same time, to pass the school bus, with the result that a collision occurred and the front and rear fenders of the Henderson vehicle were damaged and repaired by claimant, Park Pontiac, Inc., of 228 Dickinson street, Charleston, West Virginia. For making said repairs the claimant filed a claim in the amount of $11.00 with the road commission. The report of the accident made to the road commission by Burl S. Sawyers, maintenance assistant, stated that the Henderson car struck the road truck and absolved the road commission from responsibility. The road commission's investigation of the circumstances of the accident, however, shows that the "state truck was definitely at fault." The department therefore

recommends the payment of the claim. The assistant to the attorney general has approved the claim as one that should be paid.

In view of said concurrence in and approval of said claim and the finding made by the investigation made by the road commission that the driver of the state truck was at fault in the premises, we award the claimant, Park Pontiac, Inc., the sum of eleven dollars ($11.00).

(No. 236-S—Claimant awarded $31.42.)

DAYTON BOLYARD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1943

ROBERT L. BLAND, JUDGE.

This is a claim in the amount of $31.42. The payment thereof is recommended by the state road commission. Its payment is approved by the special assistant to the attorney general. It is submitted to and considered by the court of claims under section 17 of the court act. The record was prepared by the road commission.

On December 4, 1942,, about 5:00 o'clock P. M., on the Terra Alta-Aurora Pike, in Preston county, West Virginia, state road commission truck NO. 430-143, operated by Clifford Myers, an employee of the road commission, was backed into a one-half ton truck owned by claimant, which was parked at the time. The estimated damage done to the truck is shown to be the amout of the claim. There is no excuse for the act of negligence exhibited by the record.

An award is made in favor of claimant, Dayton Bolyard, for thirty-one dollars and forty-two cents ($31.42).

(No. 237-S—Claimant awarded $13.77.)

W. P. HOOVER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1943

ROBERT L. BLAND, JUDGE.

The record of this claim, prepared by the state road commission, was filed with the clerk on January 8, 1943, and now considered informally by the court, discloses that on December 8, 1942, employees of the state road commission were engaged in spreading cinders on the slippery pavement of state route NO. 250, near Mannington, Marion county, West Virgina. About 2:00 o'clock in the afternoon of that day claimant was driving his 1933 Plymouth automobile on the highway and when it reached the place in the road where the state road commission employees were working and was passing the cinder truck, the workman spreading the cinders, not having observed his approach, threw a shovel of cinders against, and broke the windshield of, his car. The Main Street Garage, of Mannington, furnished and installed a new windshield, for $13.77, the amount of the claim.

The road commission recommends the payment of the claim, and the assistant to the attorney general approves the claim as one that should be paid.

We are of opinion to, and do now, award to the claimant, W. P. Hoover, the sum of thirteen dollars and seventy-seven cents ($13.77).

(No. 238-S—Claimant awarded $200.00.)

R. H. EDWARDS, M. D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1943

ROBERT L. BLAND, JUDGE.

The claim involved in this case grows out of a collision between state road commission truck NO. 1025-9, with a snow shovel attached thereto, operated by Raymond Akers, an employee of the state road commission, and a Chevrolet automobile, bearing West Virginia license NO. 81-348, owned and driven by claimant, R. H. Edwards, M. D. The accident occurred at approximately 10:00 o'clock on the morning of January 13, 1941, on U. S. route NO. 52, within the eastern corporate limits of the city of Welch, in McDowell county, West Virginia. The road truck was traveling west. Claimant's car was traveling east. There was a thin coat of ice and snow on the north side of the pavement of the highway which extended out on the pavement between three and four feet to the center of the road at the place where the collision took place. There is some conflict in the record as to responsibility for the collision, but from all the facts set forth therein we are of opinion that claimant was free from fault and that the occurrence was due to the manner in which the road truck was operated.

Claimant says that he encountered a long state road truck with the shovel projecting in front several feet to the right side, with double wheels on the rear, in the act of negotiating a curve in the highway. It was at once apparent to him that the truck was taking up part of his side of the road, which fact made it impossible for him to pass the truck. He applied brakes and at the same time pulled the car all the way over to the cement shoulder, and gripped the steering

wheel tightly to protect himself. He succeeded in getting past the front wheel of the truck but there was not space enough between the cement shoulder and the rear wheel for the truck to allow him to pass. The front wheel of his vehicle was caught by the rear wheel of the truck and his car was knocked out of the road up on the bank. Claimant's automobile was badly damaged. It is shown by an itemized estimate made by the McBride-Hurd Motor Company, of Welch, made a part of the record, that the car was damaged to such extent that it would require the sum of $312.06 to pay for necessary repairs.

After the collision claimant's automobile and the road truck remained at the place of the accident until an investigation was made by M. M. Davis, Jr., a constable of Browns creek district of McDowell county. He arrived at the scene a few minutes after the accident happened near a curve in the highway. He states that it was very clear that claimant's car was over on his side of the road as far as he could get. It was against the curb, and the rear of the car had skidded over the curb and against the embankment. The state road commission truck had collided with the front end of claimant's car to the right of the center of the highway in the direction that claimant was traveling. Mr. Davis' investigation showed that the road commission truck was responsible for the collision.

The road commission agreed with claimant upon a settlement of his claim for $200.00, subject to the approval of the court of claims. The claim is approved by the attorney general.

From the showing made by the record, prepared by the state road commission and filed with the clerk January 8, 1943, we are of opinion that a settlement of the claim for said sum would be fair, and advantageous to the state.

We, therefore, award to the claimant, R. H. Edwards, M.D., the sum of two hundred dollars ($200.00) in full settlement of his said claim, subject to the approval of the Legislature.

(No. 242-S—Claimant awarded $27.88.)

W. E. ARNOLD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

CHARLES J. SCHUCK, JUDGE.

On October 3, 1942, claimant was driving his automobile over and upon a state highway near Montgomery, West Virginia; he was being followed by state road truck 930-59, operated and driven by one J. L. Dean, Jr., a state road employee. For some reason not set forth in the record, claimant stopped his car and the said state road truck so driven and operated as aforesaid, crashed into the rear of the claimant's truck, causing damages to the extent of $27.88. No fault or negligence is found on the part of the claimant; in fact, the record reveals that the driver of the state truck admitted he, the state truck driver, was at fault.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of twenty-seven dollars and eighty-eight cents ($27.88).

(No. 243-S—Claimant awarded $9.50.)

NICHOLAS RACIOPPI, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

CHARLES J. SCHUCK, JUDGE.

On April 22, 1942, while claimant's automobile was parked on a highway in the city of Morgantown, West Virginia, state road truck 430-41 ran into and collided with the said automobile, causing damages to the extent of $9.50. The record reveals that there was no negligence on the part of the claimant and that his car was parked on the said highway as herein stated.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of nine dollars and fifty cents ($9.50).

(No. 244-S—Claimant awarded $38.40.)

OLA WOODS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

CHARLES J. SCHUCK, JUDGE.

On December 31, 1942, claimant's car was parked off the highway in Charleston, West Virginia, and state road grader 134-76, being then operated by a state road employee, collided with claimant's car, causing damages to the extent of $38.40 to the claimant. It appears from the record, as submitted, that the drag link on the state road grader became loose or unfastened, making it impossible to properly steer the grader, and thereby causing the accident in question. No fault or negligence is imputed to the claimant.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of thirty eight dollars and forty cents ($38.40).

(No. 245-S—Claimant awarded $53.86.)

GEORGE STRICKLAND, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

CHARLES J. SCHUCK, JUDGE.

On December 8, 1942, claimant's car was injured by being struck by prison labor truck P30-15, which seemingly backed into claimant's car while it was stopped near the approach to a bridge on the Rocky Ford road near Ashton, West Virginia. While it is not stated definitely, yet the record seems to indicate that the state truck in question was backed into claimant's car while the latter automobile was immediately to the rear of the said truck and standing still. In backing up without notice to the claimant the state truck collided and inflicted the damages as set forth.

The state road commissoin does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of fifty-three dollars and eighty-six cents ($53.86).

(No. 246-S—Claimant awarded $92.00.)

HARPOLD BROS., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

CHARLES J. SCHUCK, JUDGE.

During the month of June 1942, the state road commission, by its employees, was engaged in hauling gravel through the town of Ravenswood, West Virginia, and while said hauling was being carried on, one of the trucks so operated spilled about a bushel of gravel on the highway near the front of the store or business operated by the claimants. Seemingly, so far as the record reveals, no attention was paid to the gravel so spilled and deposited upon the highway, nor was any effort made by the employees of the state road commission to clean the highway by reason of the said gravel having been spilled or deposited thereon. One of the trucks of the state road commission, shortly after the spilling of the gravel, as aforesaid, ran into the same and caused one of the stone or gravel to be thrown or cast through the plate glass window of the claimants' store or business building, causing damages to the extent of $92.00, after all salvage value had been considered.

The state road commission does not contest the claimants' right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of ninety-two dollars ($92.00).

(No. 203—Claimant awarded $2,500.00.)

FLEET BAILEY, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed February 8, 1943

One who is summoned or drafted by a state forester to assist in fighting a forest fire is entitled to all reasonable protection when complying with the said summons, and if injured while being transported to the scene of the fire, through no negligence of his own, and in an automobile not under his control, then, under the circumstances, he is entitled to an award.

Appearances:

Herman D. Rollins, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant attorney general for the state.

CHARLES J. SCHUCK, JUDGE.

Fleet Bailey, the complainant, now a young man of twenty-eight years of age, and living at Oceana, Wyoming county, was on the 19th day of April 1937 summoned by a state forester, one Will Kennedy, to assist in fighting a forest fire in that particular part of our state. Claimant and others who were likewise summoned and expected to help in subduing the said fire, were being transported to the place of the fire in an automobile hired by the said forester, Kennedy, and driven by one Darrell Lamb; the said driver, the forester, and claimant riding in the front seat of the said car. While nearing the town of Baileysville on the way to the scene of the fire, and as the party was ascending a grade near a slight curve, an oncoming car approaching in the opposite direction, for some reason not definitely disclosed by the evidence, caused the driver of the car in which claimant was riding to sud-

denly turn the automobile to the right and by so doing, drove the car over the edge of the embankment, causing it to fall over the same and down a declivity of several hundred feet. The claimant was so seriously injured that he was confined in the hospital at Welch for a period of twelve days, afterward being removed to his father's home, where he remained in bed for ten months before he was able to walk. After this time he obtained work in a garage, but has been unable to do any heavy work or to lift any weight such as he had been able to do before his accident. The injuries to his spine and back, as testified to by two eminent physicians, are permanent. Both physicians agree that he will always be fifty per cent disabled and that he will never fully recover from the injuries that he received by reason of the accident in question. No negligence can be imputed to the claimant. He was obliged to accompany the state forester under penalty of being guilty of a misdemeanor for his refusal to respond to the demand of the forester, and under the circumstances, is, in our opinion, in a much different position than one who is riding in an automobile of his own notion or as an invited guest. Before the injuries in question he was earning approximately four dollars per day. He has heretofore been paid by reason of an act of the Legislature at the rate of $30.00 per month.

Considering all the evidence, the nature and character of his injuries, the fact that he was obliged to accompany the state forester when asked to do so for the purpose of fighting the forest fire in question, and the fact that he is permanently injured and will be, in the opinion of both physicians, permanently disabled and incapacitated, we feel that an award of two thousand five hundred dollars ($2500.00) should be made to the claimant and recommend that the Legislature make an appropriation in the aforesaid amount accordingly.

(No. 212—Claimant awarded $3,000.00.)

RAY M. SWISHER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

Where a state road commission employee is injured by reason of defective equipment, through no fault of his own, and is in no manner connected with the operation of the said equipment, then an award will be made to him as a matter of compensation for the injuries received. This accident happened before the employees of the road commission were placed under the provisions of the workmen's compensation act, and therefore an award is made in accordance with the following decision.

Appearances:

The *Claimant* appears in his own behalf;

Eston B. Stephenson, Esq., special assistant Attorney General for the state.

CHARLES J. SCHUCK, JUDGE.

Ray M. Swisher, the claimant, was injured on or about the 24th day of November 1936, while working for the state road commission rebuilding a bridge in Hampshire county, at and near Romney, and which bridge crossed the south branch of the Potomac river at the place indicated. From the evidence, it appears that claimant was doing rough carpenter work, as well as performing the work of a laborer, and that during the course of the reconstruction of the bridge in question it became necessary to load certain steel beams which were then lying at the edge of the said stream nearby, and to transport them up the bank to the place where the said bridge was located and was being repaired. One load of the

said beams had already been hauled and delivered to the appointed place, and during the course of the reloading of the truck, the accident in question happened. Some five or six steel beams had already been loaded upon the truck that was being used for transporting them, when the chain on the truck, fastened to the hoist, broke and allowed the beams in question to fall over and upon the claimant, severely and permanently injuring him. The claimant had no connection with the operation of the truck, and seemingly knew nothing of the apparatus or the equipment used in connection with hauling and transporting the said steel beams.

Under the circumstances, of course, he could not be charged with any negligence and from the evidence adduced, it is reasonable to make the deduction that the chain which broke was too light and not strong enough to carry the load of the weight of the beams that were being transported to the bridge. As stated, the claimant had no control over the operation of the truck or its equipment, and was at the time performing the work of a laborer in connection with other employees.

That he was permanently injured, there can be no question. He was confined to a hospital for forty-two days and has not worked since the time of the accident. The Legislature of 1939 made an appropriation of $30.00 per month for his benefit, which has been paid. The Legislature of the 1941 session made an appropriation of $46.00 per month, which appropriation will expire July next. He is forty-nine years of age and at the present time, in addition to the help received as indicated, he receives some help from his sister, as well as from his son, who is in the armed forces of our country at the present time. He has a daughter seventeen years of age. His injuries consisted of a fractured and crushed vertebra, necessitating, besides the hospital treatment, the adjustment of a cast covering the greater portion of his body, which he was obliged to wear for some months afterward. He still becomes dizzy, cannot stoop without pain, and has been unable to do any work whatsoever since the time of the accident, over six years ago.

Under all the circumstances and facts in this case, and finding that the claimant could not be charged with any negligence whatever, we feel that an award of three thousand dollars ($3000.00), payable to him in a lump or full sum, would be equitable and just, and therefore we make an award accordingly.

(No. 240-S—Claim denied.)

E. J. THOMPSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

ROBERT L. BLAND, JUDGE.

Section 17 of the court of claims act, authorizing the determination of claims against the state under the shortened procedure provision of the statute, stipulates that the state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court. It further provides that the record shall be filed with the clerk and that the court shall consider the claim informally upon the record submitted. In pursuance of this section the state road commission prepared the record of the above captioned claim and filed it with the clerk on January 11, 1943. The claim is for $182.00. The state road commission concurs in its payment and assigns as reason for such payment that it would be "more economical to pay than to defend," and that it "desires to save wear on tires in transportation of witnesses. Some of the witnesses are nonresidents and cannot be compelled to attend." The approval of the claim for payment by the assistant attorney

general is as follows: "This report seems to indicate that the state cannot adequately defend this claim under regular procedure." It does not thus appear that the claim in question has been approved by the attorney general as one that, in view of the purposes of the statute, should be paid.

From our examination of the record we are not prepared to agree with the state road commission that the claim should be paid. In this connection we are constrained to observe that state agencies should be exceedingly careful before concurring in the payment of claims against the state that are not to be heard by the court under the regular procedure prescribed by the court act and that are to be considered only informally upon the record prepared and filed by such agency. Before any such concurrence or approval for payment it should be very clear from the record filed that the claim asserted against the state is possessed of merit and should, under all of the facts and circumstances disclosed by the record, be ascertained by the court to be an approved claim and an award made therefor.

The claim grows out of an accident in which state road commission truck NO. 530-98, operated by Fred Belt, was involved with a school bus operated by an employee of claimant E. J. Thompson, of Cumberland, Maryland, on U. S. highway NO. 220, near Creasaptown, Maryland, on May 14, 1942. It appears from a report made to J. H. Feingold, chief clerk of the state road commission, by L. R. Taylor, district engineer, under date of January 7, 1943, that the records and reports of the accident do not show liability or fault in any manner on the part of the state road commission. Mr. Taylor expressed the opinion that it would be more economical and advisable to settle the claim of Mr. Thompson than to make defense thereto, and for that reason recommended the approval for payment of the claim under consideration. He stated that to defend the claim in the court of claims it would be necessary to "induce several employees of the Western Maryland Railway Company, residents of Maryland, to go to Charleston in addition to some of our employees. Loss of time, transpor-

tation, and lodging of witnesses would amount to more than the claim."

It appears from the record that the accident occurred about eight o'clock in the morning. A Western Maryland Railroad truck was driving on the highway. It was followed by a school bus, seemingly owned by claimant E. J. Thompson. As the school bus approached the Western Maryland Railroad truck it swerved to the left of the truck ahead of it and attempted to pass it, but being unable to do so swerved to the right of the truck and to prevent colloding with the Western Maryland Railroad truck came to an abrupt stop. Almost instantaneously the state road commission truck crashed into the rear of the school bus. As a result of the collision the school bus was damaged and it is shown by the record that claimant paid $182.00, the amount for which his claim is filed, for the purpose of repairing the bus. At the time the accident occurred the school bus was transporting twenty-five pupils to the Creasaptown school. All of these pupils suffered injuries to some extent. Two of them were sent to a hospital for treatment. Each of these pupils could assert a claim against the state of West Virginia if the state road commission truck were shown to be responsible for the accident.

We are of opinion from the showing made by the record prepared by the state road commission and filed with the clerk that the state road commission truck was not responsible for the accident and that it was not at fault in any way. We are further of opinion that the driver of the school bus was negligent in attempting to pass the Western Maryland Railroad truck and in stopping the school bus abruptly at the time when it was inevitable that the road truck and the school bus must of necessity collide. The driver of the school bus gave no sign or indication of his purpose to swerve from the left to the right of the Western Maryland Railroad truck or to bring his bus to a sudden and unexpected stop immediately in front of the road truck. The driver of the road commission truck had no warning and no opportunity to avoid the collision. The responsibility for the accident rests with the manner

in which the school bus was operated. We find that the claim of Mr. Thompson is not one for which the state of West Virginia should respond to him in damages.

It might oftentimes appear to the state road commission that it would be more economical to make settlement of a claim asserted against the state on account of the alleged negligence of the road commission than to defend against such claim. The court of claims, however, cannot look with favor upon or sanction such settlements. We have no power to make awards except for claims shown to be meritorious and for which in view of the purpose of the statute creating the court of claims recommendations should be made to the Legislature for appropriations. The state has power to interpose any legal or equitable defense that it may see fit to make against an unjust claim filed against it or any of its agencies, and it is its duty to make such defense.

The court of claims cannot be bound by any settlement proposed to be made by any agency of the state unless such proposed settlement is shown to be warranted by the record of the claim.

The claim in question, being an improper claim against the state of West Virginia, is now denied and dismissed and an order will be made accordingly.

(No. 147—Claimant awarded $250.00.)

HUGH B. PROUDFOOT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 8, 1943

Where private property not taken for public use but damaged by blasting in the course of grading, draining and hard-surfacing with a rock base of a public road an award may be made for such damage.

Dayton R. Stemple, Esq., and *D. D. Stemple,* Esq., for claimant;

Eston B. Stephenson, assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this case claimant Hugh B. Proudfoot represents that he is the fee simple owner of a tract of farm land in Union district, Barbour county, West Virginia, containing 125 acres, improved by fences, orchards, dwelling house, outbuildings, and a spring. He says that in the year 1939 the state road commission of West Virginia undertook to sponsor a road project in Barbour county, West Virginia, known as project 6101-3, for the grading, draining and hard-surfacing with a rock base of a public road, locally known as the Indian Fork road, from a point near the Lower Indian Fork schoolhouse to a point near the Upper Indian Fork school and that the construction and work incident to the building of said road was shortly thereafter undertaken by the works progress administration, under the direction and supervision of the state road commission of West Virginia, and that said road was constructed and builded through his land. He contends that at the time of the construction of said road he had a fine spring of water, constructed similar to a reservoir, by a split rock and cement wall, about three feet wide and five feet long, and

twenty inches deep, so constructed, as he maintains, that no surface water could enter the spring.

Claimant's land abuts on both sides of the Indian Fork road. Above the road and on the northern or upper side thereof, on a steep knoll or cliff unsuitable for farm cultivation, he maintains a hog pen and hog lot. This hog lot is very much higher than the road. The spring in question is located approximately forty feet southwest of the Indian Fork road and about twenty-three feet lower in elevation than the road. On the lower or southern side of the road is an eight room dwelling house occupied by claimant and his family. The spring is between forty and fifty feet east of the residence. The land slopes from the road in the direction of the residence and spring. The spring is built at a low point on this slope. The water flows into the spring from the right hand corner as one enters the spring house. It is the contention of claimant that the source of the water that supplies this spring is on the hog lot far above the roadway.

Claimant alleges in his petition that the state road commission, in constructing said road, through said works progress administration and its employees, made a cut in the land between said spring of water and the hog house and hog lot for a depth of about five feet, and that in making said cut it had to remove a part of the strata of rock which underlies the land of claimant, and is over and above the underground stream furnishing water to said spring, and that in making said cut and in removing a part of the said strata of rock the road commission, through its agents, drilled into said rock strata and put off large shots of dynamite or other explosives far below the road bed, and thereby cracked the underlying strata of rock and caused it to gape apart and permit surface water from the road ditch and the road bed, from the hog pen and hog lot to enter into said cracks and crevices so created in said strata of rock and thereby flow into his spring of water, and that on each occasion when it rains the water in said spring becomes contaminated, filthy, muddy and wholly unfit for human consumption.

As a result of the alleged action of the road commission in the grading and shooting of the strata of rock on said road claimant says that he has been damaged and suffered loss to the amount of $1000.00, for which sum his claim is asserted.

The assistant attorney general has filed a plea denying all liability on the part of the state to respond in damages to the claimant.

The claim was heard and investigated at a continuance of the October term of this court held at Clarksburg, West Virginia, at which time the members of the court visited the road in question and made an examination of the spring alleged to have been damaged by reason of the road work.

It appears that about the time that work commenced on the project and when it was apparent that blasting would be done in order to remove the rock from a hump in the road, claimant expressed fear that injury might be done to his spring, if shooting were done. This was before there had been any shooting of the rock. At a point in the road where the hump existed the rock extended the entire width of the road. It was deemed necessary by the state road commission to remove this hump and for that purpose to blast the rock. Holes were drilled in this rock formation from two to five feet in depth. These holes were drilled from four to six feet apart. Deposits of dynamite were then used and the rock blasted from the right of way. Claimant contends that this blasting loosened the rock and allowed the water from the hog lot and road right of way to run into the spring. He testified that in his judgment enough of this rock could have been removed with picks. The gist of his complaint is that the road commission was negligent in the manner of removing the hump from the road right of way, and that such negligence damaged his spring.

Upon the laying out of a highway the public acquires not only the right of way, but also the powers and privileges incident to that right, among which is the right to keep the highway in proper repair. To accomplish this purpose the proper

officers may do any act in the highway that is necessary or proper to make and keep the way safe and convenient for the public travel. They may raise or lower the surface, dig up the earth, cut down trees, and use the earth, stone and gravel within the limits of the highway in a reasonable and proper manner. 37 Cyc. 204.

Was the work done in a reasonable and proper manner in this case? Claimant contends that it was not. He maintains that the holes in the road were drilled to an unnecessary depth. The proof offered upon the hearing would appear to support his position. Before any drilling was done claimant called attention to the location of his spring and to the danger that might result from blasting the rock in the road. The road commission had notice of the location of the spring of water and its proximity to the road. It was charged with the duty of using reasonable care and diligence to avoid damaging the spring. While it is true that the road commission in building, constructing and repairing highways of the state is vested with certain judgment and discretion it cannot disregard the rights of abutting property landowners. The evidence shows that heavy deposits of dynamite were placed in numerous holes drilled in the highway at an exceeding and apparently unnecessary depth and blasted at the same time. After this blasting had been done the water in the spring became disturbed and muddy. Three or four gallons of water stood in the ditch on the roadside. Claimant informed employees of the road commission that the water in the spring was coming from the water in the ditch on the roadside. Workmen on the road project suggested to claimant that he and they should go to the road, stir up the water in the ditch and see what effect it would have on the water in the spring. They did so. In a short time they went to the spring and found the water beginning to become muddy. The evidence shows that within twenty or twenty-five minutes after a hard rain the water in the spring becomes muddy and unfit for use for about two days. This condition occurs whenever there is a snow or hard rain. On June 14, 1942, after a hard rain C. R. Sigley who owns a farm adjoining the land of claimant went to the spring

and obtained a bottle of water, which he sealed and which was exhibited to the court upon the hearing of the case. This water showed a heavy deposit of sediment.

We are forced to conclude from all of the evidence in the case that the spring in question was damaged in consequence of the work done on the highway. According to this evidence, not refuted by the state in any way, the work of blasting the rock from the road right of way was negligently conducted. In consequence of this negligence claimant is shown by the evidence to have sustained damage. It is true that from the year 1939 until the hearing of the claim claimant and his family have used the water from the spring for drinking and household purposes, but always after a rain or snow the family suffers inconvenience and deprivation from the use of the water.

Giving due effect to all of the evidence and a personal examination of the spring by the members of the court, we are of opinion that the claimant has established a case entitling him to a small award.

We therefore award to claimant, Hugh B. Proudfoot, in full settlement of all damages sustained or suffered by him by reason of the matters and things in his petition mentioned and set forth and as disclosed by the record the sum of two hundred and fifty dollars ($250.00).

(No. 224-S—Claimant awarded $720.00.)

ALICE E. McCLUNG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted under the shortened procedure prescribed by section 17, of chapter 20 of the acts 1941, by the state road commission. From the record submitted it appears that John McClung received a fatal injury as a result of being struck on his leg by a snowplow. He was injured while on duty as an employee of district 9 of the state road commission, at Lewisburg, West Virginia. He had opened the garage door to let the snowplow in the garage and as the truck and snowplow entered the garage he was struck on the leg by the snowplow blade. He sustained the injuries on January 25, 1936, was admitted to the Greenbrier Valley hospital at Ronceverte, West Virginia on February 3, 1936, and died on February 9, 1936. When admitted to the hospital his leg had abscessed at the place of the injury. At the time of the injury he was sixty years of age, and left surviving him his widow, Alice E. McClung. By acts of the Legislature of 1937, under general appropriation, the sum of $1456.75 was appropriated to John McClung, to be paid from the state road fund, under caption "To pay claims against the state road commission resulting from personal injury . . . this amount appropriated for remainder of fiscal year ending June 30, 1937, and to remain in effect until claims are paid." By acts of 1939 the sum of $730.00 was appropriated to Alice E. McClung, his widow, under the caption "To pay claims against the state road commission resulting from personal injury . . . this amount is appropriated for the remainder of fiscal year end-

ing June 30, 1939 and to remain in effect until June 30, 1940." By acts of 1941 an appropriation was made to Alice E. McClung for the sum of $720.00 under a similar caption.

At the time of the injury causing death the state road commission was not a subscriber to the workmen's compensation fund. It would appear from the record submitted and general appropriation acts of the Legislature that although the road commission was not contributing to the workmen's compensation fund, it was the intent and policy of the Legislature to provide for benefits by appropriations for the purpose to the widow of the deceased equivalent to those provided for by chapter 23, article 4, section 10*(d)* of the code, Michie's code section 2535, which reads as follows:

> "*(d)* If the deceased employee leaves a dependent widow or invalid widower, the payment shall be thirty dollars per month until death or remarriage of such widow or widower, . . ."

The claim as submitted by the road commission is for compensation to the widow of the decedent at $30.00 per month from January 1, 1943, to January 1, 1945, or $720.00. The claim is approved for payment under the shortened procedure by the assistant to the attorney general.

In view of the policy and intent shown by the Legislature in providing for compensation to dependents in such cases, the recommendations of the department involved, and the approval of the attorney general's office, we recommend an award of seven hundred twenty dollars ($720.00), and an order will be entered accordingly.

(No. 225-S—Claimant awarded $840.00.)

LOTTIE SKELTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted to the court by the state road commission under the shortened procedure, section 17 of the act. The commission requests that an appropriation be made to continue payments of compensation to Mrs. Lottie Skelton, widow, and Ann Skelton, infant daughter of George Skelton, deceased.

The claim upon the record presented was heard informally by the court as required by law. It appears from this record that George Skelton was fatally injured while in the course of his employment with the state road commission on the new highway just outside of the city limits of Princeton, in Mercer county, West Virginia. At the time of the injury he had been sent to start a compressor in use on the highway, and was struck by a Ford coupe, owned and driven by C. D. McIntosh of Bluefield, West Virginia. He received a fracture of the skull on left side, and died as a result of the injury on October 17, 1935.

The deceased was 35 years of age at the time of his death. He was survived by his widow, Lottie Skelton, and Ann Skelton, a daughter, who will be 14 years of age February 8, 1943. At the time of the injury the state road commission was not a subscriber to the workmen's compensation fund.

It appears from the record and acts of the Legislature that the following sums have been appropriated and paid by the state road commission, to wit, acts of 1937 "to pay claims

against the state road commission resulting from personal injury . . . this amount appropriated for remainder of fiscal year ending June 30, 1937, and to remain in effect until claims are paid . . . Mrs. Geo. Skelton $1200.62." Acts of 1939 "to pay claims against the state road commission resulting from personal injury . . . this amount is appropriated for the remainder of fiscal year ending June 30, 1939, and to remain in effect until June 30, 1940 . . . to be paid from the state road fund . . . Mrs. Lottie Skelton $1347.50." Acts of 1941 "to pay claims against the state road commission resulting from personal injury . . . this amount is appropriated for the remainder of fiscal year ending June 30, 1941, and to remain in effect until June 30, 1942 . . . to be paid from the state road fund . . . Mrs. Lottie Skelton $840.00."

It appears from the record and said general appropriation acts of the Legislature, that although the road commission was not contributing to the workmen's compensation fund at the time of the injury causing death, it was the intent and policy of the Legislature to provide for benefits by appropriations for the purpose, to the widow and child of the deceased equivalent to those in effect as prescribed by chapter 23, article 4, section 10 *(d)* of the Code, Michie's code section 2535, which reads as follows:

> *"(d)* If the deceased employee leaves a dependent widow or invalid widower, the payment shall be thirty dollars per month until death or remarriage of such widow or widower, and in addition five dollars per month for each child under sixteen years of age, to be paid until such child reaches such age, or, if an invalid child, to continue as long as such child remains an invalid. . . ."

The claim as submitted by the road commission is for compensation to the said Lottie Skelton, as widow, at $30.00 per month from January 1, 1943 to January 1, 1945, or $720.00 and for compensation to said infant child, Marjorie Ann Skelton, at $5.00 per month, from January 1, 1943 to January 1, 1945, or $120.00, making a total award of $840.00 recommended.

The claim is approved for payment under the shortened procedure by the assistant to the attorney general.

In view of the policy and intent shown by the Legislature in providing for compensation to dependents in such cases, the recommendations of the department involved and the approval of the attorney general's office, we recommend such an award, in the sum of eight hundred and forty dollars ($840.00).

(No. 226-S—Claimant awarded $53.00.)

HELEN CLAYTON DECK, Guardian for WILLIAM CLAYTON WHITE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted upon the record by the state road commission under the shortened procedure prescribed by section 17 of chapter 20 of the acts of 1941. From the record it appears that William White was killed on March 26, 1935, while driving a loaded truck for the state road commission during the course of his employment. He stopped the truck to back up to dump and stalled the engine. He then lost control of the truck which went through a guard-rail and over a steep bank, 1023 feet from the point at which he started backing. The speed of the truck was estimated at 5 miles per hour when it went over the bank. No mechanical defects were apparent after accident.

At the time of decedent's death the state road commission was not a subscriber to the workmen's compensation commission. The decedent, William White, left surviving him a son, William Clayton White, who was under sixteen years of age, but who will arrive at the age of 16 on the 9th day of June 1943.

Appropriations were made by the Legislature in the nature of compensation to the infant child of the deceased employee as follows: By appropriations act of 1937, the sum of $600.00 for the then ensuing biennium; by appropriations act of 1939, the sum of $240.00, for the then ensuing biennium, and by appropriations act of 1941, the sum of $240.00.

The claim as submitted is for the sum of $53.00, representing compensation for 5 months at $10.00 per month, and 9 days at 33-1/3 cents per day as compensation to be continued until said William Clayton White arrives at the age of sixteen. This recommendation is made since the state road commission did not carry workmen's compensation at the time of the fatal injury.

In view of the policy and intent shown by the Legislature by said appropriations made, the recommendations of the department concerned and the approval for payment by the special assistant to the attorney general, we recommend an award of $53.00 payable to Helen Clayton Deck, guardian for William Clayton White.

(No. 227-S—Claimant awarded $240.00 for two infant children)

EFFIE SAVAGE PRATT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted on the record by the state road commission under the shortened procedure prescribed by section 17 of chapter 20 of the acts of 1941. From the record it appears that Theodore Savage met his death while on duty as an employee of the state road commission on route NO. 60, Huntington-Barboursville road. At the time he received his fatal injuries he was carrying a red flag and was standing at some point on the westbound traffic lane. A short time before, he was seen by the tractor driver facing east and waving the flag at a Chevrolet coupe which was approaching from the east. A tractor-grader was turning around in the road and had reached a position at about right angles to the center line and had all of the 20 foot concrete pavement blocked. There was room for westbound traffic to go around the rear of the grader on the earth shoulder which was approximately 10 feet wide at that point. The decedent was stationed at about 15 feet east of the grader. After flagging the Chevrolet coupe, he was seen by a driver of a road grader facing west with his back turned to the approaching coupe. The grader driver saw that the approaching coupe was approaching too rapidly and was then too close to Savage to stop. He shouted to Savage to stop, but it was then too late and the car struck him and then traveled the remaining 15 feet and crashed into the grader. Theodore Savage was killed instantly. He was thirty-five years of age at the time of his death.

The decedent left a widow, Mrs. Effie Savage, and two infant children under sixteen years of age. At the time he

sustained said fatal injuries the state road commission was not a subscriber to the workmen's compensation fund. By acts of the Legislature of 1937, general appropriations bill, an appropriation of $1370.00 was made as compensation to said widow and infant children for the then ensuing biennium. By acts of the Legislature of 1939 general appropriations bill, the sum of $960.00 was appropriated as compensation to said widow and infant children for the then ensuing biennium. By acts of the Legislature of 1941 general appropriations bill the sum of $360.00 was appropriated as compensation to said infant children. The widow remarried in 1939, and reimbursed the accounting division of the state road commission in the sum of $720.00.

It appears from the record and said general appropriation acts of the Legislature that although the road commission was not contributing to the workmen's compensation fund at the time of the injury causing death it was the intent and policy of the Legislature to provide for benefits by appropriations for the purpose to the widow and infant children of the deceased equivalent to those in effect as prescribed by chapter 23, article 4, section 10 *(d)* of the code, Michie's code section 2535, which reads as follows:

> "*(d)* If the deceased employee leaves a dependent widow or invalid widower, the payment shall be thirty dollars per month until death or remarriage of such widow or widower, and in addition five dollars per month for each child under sixteen years of age, to be paid until such child reaches such age, or, if an invalid child to continue as long as such child remains an invalid: . . ."

The claim as submitted by the road commission is for compensation to said two infant children of the deceased employee, whose names are Charles Layman Savage and Lois Elaine Savage, at the rate of $5.00 per month for each child from January 1, 1943 to December 31, 1944, or a total of $240.00.

In view of the policy and intent shown by the Legislature in providing for compensation to dependents in such cases,

the recommendations of the department involved and the approval of the attorney general's office, we recommend an award to said infant children in monthly payments of $5.00 to each, from January 1, 1943 to December 31, 1944, respectively.

(No. 230-S—Claimant awarded $35.00.)

BESSIE A. PIGOTT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted by the state road commission under the shortened procedure prescribed by section 17, chapter 20, of the acts of 1941.

From the record submitted it appears that on November 27, 1942, the left front wheel of the state road commission truck became locked, causing the bumper of the truck to strike claimant's car. As a result claimant's Studebaker car was damaged, as follows: Left rear fender smashed, taillight bracket broken, left rear wheel bent and left bumper brace broken. The costs of repairing claimant's car amounted to the sum of $35.00 as shown by itemized statement of Gillis Motor Company.

It appears that the claimant was not at fault and that the collision occurred by reason of the state road truck being out of repair. The state truck was not insured. Payment of the claim is recommended by the road commission and approved by an assistant to the attorney general. From the record and recommendations we make an award to claimant for thirty-five dollars ($35.00).

(No. 231-S—Claimant awarded $50.00.)

M. B. LINDSEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted under the shortened procedure by the state road commission. From the record it appears that on November 17, 1942, a truck owned by the state road commission and driven by one of its employees collided with claimant's Reo pickup truck at the east end of a one-way bridge near Lex, West Virginia. It appears that the road employee misjudged the distance from the bridge when seeing claimant's truck traveling on the bridge. He did not reduce the speed of the state truck or cut to his side of the road. As the claimant's truck was clearing the bridge on its side of the road the state truck struck claimant's pickup truck, seriously damaging the left front fender, and cut a small hole in left front tire. The claimant was not at fault. The costs of repairs to the claimant's truck by reason of the collision amounted to the sum of $50.00. The road commission recommends payment of the claim, which recommendation is approved by the assistant to the attorney general. From the record and recommendations we make an ward to the claimant of fifty dollars ($50.00).

(No. 195—Claim denied.)

FLOYD SWIGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

The state is not liable for medical and surgical expenses incurred by the father of a child seven years of age who suffered personal injuries as the result of an unavoidable accident when he suddenly emerged from between two parked automobiles and started to cross a state highway in front of an approaching state road commission truck, and was knocked down and run over.

Linn B. Ferrell, Esq., for claimant;

Eston B. Stephenson, Esq., assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

On the 16th day of March 1933, Floyd Swiger, Jr., a child of claimant, aged seven years, was run over and severely injured by state road commission truck NO. 430-1, on east Main street, in the city of Salem, Harrison county, West Virginia, being a part of U. S. route NO. 50. The accident occurred about eight o'clock in the morning near the store of Troy E. Davis, and a short distance from Harden school, but outside of the school zone limits. The boy's parents resided over the Davis store. The boy entered the store and purchased some candy. He then left the store and went out into the street where two automobiles were parked. He stood between these cars and waited until a state road commission truck, traveling westward, had passed. He thereupon attempted to quickly cross the street or highway, when he was struck, knocked down and run over by a second state road commis-

sion truck, operated by one Harry Richards, which was following the truck that had passed the child. The youth had failed to observe the approach of the second truck.

After the accident Dr. Edward Davis, of Salem, was called and administered emergency treatment. The boy was subsequently removed to the St. Mary's hospital in Clarksburg, where he was given medical and surgical care and attention. Claimant, father of the child, seeks an award for the reasonable expenses incurred by him in the treatment and care of his son. The record shows that he has incurred expenses amounting in the aggregate to $321.40.

The only eye witness of the accident to testify in support of the claim was one Parley Sparks. Giving full weight and credit to his evidence it clearly appears therefrom that the accident was unavoidable. We cannot find from such evidence that there was negligence on the part of the driver of the state road commission truck. This driver testified that he did not see the boy until he darted from between the two parked cars in front of his truck. The accident could not have been avoided.

Under the facts disclosed by the record we cannot find the claim to be one that should be paid under the provisions of the court of claims act.

An award, therefore, is denied, and the claim dismissed.

(No. 232-S—Assignee of claimant awarded $252.25.)

VALLEY MOTOR SALES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

CHARLES J. SCHUCK, JUDGE.

On July 2, 1942, state road commission truck NO. 138-27 crashed into the rear of the automobile of one O. L. Harvey, of Henshaw, West Virginia, while the said automobile was stopped on the highway near Cabin Creek, in Kanawha county, seriously injuring the automobile in question and causing damages in the amount of $252.25. From the record as submitted for our consideration the accident was caused by wet brakes on the truck and which by reason of their condition failed to hold and operate properly thereby causing the truck to crash into the automobile of said Harvey, as herein stated.

The state road commission agrees to an award in the amount of the said damages and this action is concurred in and approved by the assistant attorney general.

The then owner of the automobile, O. L. Harvey, has since transferred and assigned all of his rights and interest in any award to the Valley Motor Sales Company of Charleston, West Virginia, as shown by a copy of the assignment filed in the record before this court.

We, therefore, are of the opinion that an award should be made and recommend accordingly that an award of two hundred fifty-two dollars and twenty-five cents ($252.25) be made to the Valley Motor Sales Company of Charleston, West Virginia, as the assignee of the said O. L. Harvey.

(No. 205—Claim denied.)

EARL SWARTZWELDER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 9, 1943

A claim is denied when claimant fails to establish liability on the part of the department concerned by the production of proper evidence as proof in support of his claim.

Appearances:

Claimant, *Earl Swartzwelder,* in his own right;

Eston B. Stephenson, Esq., assistant Attorney General, for the state.

WALTER M. ELSWICK, JUDGE.

This claim is made against the state road commission for "4000 cubic yards of stone gotten from the Kingwood quarry at 5 cents per cubic yard and applied on purchase order of February 26, 1940 . . . $200.00." The foregoing quotation is taken from claimant's statement to the state road commission under date of December 12, 1940. This purchase order or agreement dated February 26, 1940, was signed by claimant and Burr Simpson, the then state road commissioner, and is filed and made a part of the record on this claim. It provided that the quantity was "not to exceed 8000 cubic yards" and that the agreement "shall be in force until January 1, 1941, or until the completion and acceptance by the state of project NO. 39-M-CW-1."

From the evidence it appears that three agreements were executed by claimant and the road commission. The first one was dated December 5, 1938, for an amount of stone not to exceed 4000 cubic yards. Under this agreement the road commission took and paid claimant for 3920 cubic yards. The second agreement was dated July 24, 1939 for an amount of stone not to exceed 6000 cubic yards. Under this agreement the road commission took and paid claimant for 5000 cubic yards (record pp. 48, 51 and 55). Payment for all of this stone had been made by the following checks, to wit: (1) check dated July 17, 1939 for $196.00; (2) check dated September 12, 1939 for $150.00, and (3) check dated December 27, 1939 for $100.00.

The third agreement upon which claimant bases his claim carries the date of February 26, 1940, in the caption thereof, and bears witness before the signatures thereon April 29, 1940. A check was drawn to claimant under date of April 26, 1940 for $50.00 in payment of 1000 cubic yards of stone. The endorsement shows that the same was paid May 3, 1940. Claimant says that after this check was paid and said last mentioned agreement was signed, Bert Gibson, the county road supervisor, advised him that the road commission had obtained stone from the quarry for which the commission would owe him something like $230.00. Mr. Gibson died in June 1940, soon after the purported conversation with claimant. No evidence of other witnesses was offered by claimant as proof that the rock was obtained by the commission, and it would appear that the road commission's office did not have any record of the stone having been obtained. Claimant contends that some of the stone was obtained in the latter part of 1939 and the early part of 1940 "all during the winter months" (record pp. 6 and 7). This agreement refers to road project NO. 39-M-CW-1, which would indicate that the stone was to be used on same. Claimant made no effort to keep a record of the stone taken from the quarry by the road commission or by others. No evidence is offered to show that the road commission obtained more stone for this or other projects than was paid for. The evidence shows payment of $73.85

to claimant on November 22, 1940 and $89.45 on July 10, 1941, under the purchase agreement.

We are of the opinion that the evidence does not justify making an award to claimant, and that the only evidence offered in support of the validity of the claim was the testimony of claimant that the county road supervisor had told him that the road commission owed him the money claimed. The county road supervisor is dead and such testimony would not be sufficient to justify an award. There is not any record or memorandum to support claimant's contention. On the contrary a check for $50.00 was cashed for claimant on May 3, 1940, which was dated April 26, 1940, and no doubt delivered when the last purchase contract was executed by claimant. The presumption is that this check was in payment of the stone obtained prior to the time that this agreement was executed. Certainly if other stone had been obtained during that period which was not included in this check the claimant had all the month of May after the contract was signed and before the supervisor's death to have secured a memorandum or statement from the supervisor to the contrary. For the foregoing reasons an award is denied.

(No. 248-S—Claimant awarded $22.50.)

BESSE D. ARNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

CHARLES J. SCHUCK, JUDGE.

On May 27, 1941, while claimant was driving her car along and over the Buckhannon-Clarksburg pike the said car collided with what is known as an iron marker used by the state road commission to protect the wet center line, and which marker had been misplaced and in a position where it could cause damage to any oncoming car on the said highway. The damage to the car in question consisted of the destruction of a tire and tube, amounting to $22.50. The record shows that the district engineer in charge of the highway in question admits that the marker was placed in a wrong position or place on the highway, and caused the accident in question. The claim was concurred in by the state road commission and approved by the special assistant attorney general as one that should be paid.

From the record as submitted we are therefore of the opinion that the claim is one that should be allowed, and we make an award accordingly in favor of the claimant, Besse D. Arnett, in the said amount of twenty-two dollars and fifty cents ($22.50).

(No. 249-S—Claimant awarded $10.00.)

W. L. STILES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

CHARLES J. SCHUCK, JUDGE.

While claimant's car was following state road commission truck #630-67, at and on what is known as project NO. 184-C, in Marshall county, West Virginia, it seems that the said truck stopped, and as the car of claimant started to pulll out and pass said state road truck the truck started to back without notice to claimant, and by such action on the part of the operator of the state road commission truck it collided with claimant's car causing damage in the sum of $10.00.

The accident happened January 4, 1943, at about 9:45 A. M. The record reveals that the accident was caused by the negligence of the state truck driver, and the state road commission recommends that the claim be approved for payment, which action is concurred in by the special assistant to the attorney general.

We are therefore of the opinion that from the record as submitted an award of ten dollars ($10.00) should be made to the claimant, W. L. Stiles, and such recommendation is made accordingly to the Legislature.

(No. 234-S—Claimant awarded $5.20.)

M. G. LUDE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

WALTER M. ELSWICK, JUDGE.

This claim is submitted under the shortened procedure, with the recommendation of the state road commission that the claim should be paid.

From the record submitted it appears that on August 17, 1942, a state road commission shovel was pulling rails when a bolt flew off and hit a glass in the door of claimant's car breaking same. Claimant's car was parked in front of a garage opposite to where the shovel was working, at Washington street between Truslow and Court streets, in the city of Charleston. The costs of replacing the glass amounted to the sum of $5.20. From the investigation made by the road commission it was found that claimant was not at fault and that the costs of replacing the glass should be paid by the state. Payment of the claim is approved by a special assistant to the attorney general.

From the record we are of the opinion that an award should be made, and recommend an award of five dollars and twenty cents ($5.20).

(No. 233-S—Claimant awarded $110.04.)

PRITCHARD MOTOR CAR COMPANY, and
WILLIE MORRIS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

WALTER M. ELSWICK, JUDGE.

This claim was submitted to the court under the shortened procedure, with the recommendation of the state road commission that the claim should be paid.

From the record it appears that a state road commission truck was used to haul creek gravel for use on the Cabin Creek road. On July 2, 1942, the truck had just pulled out of the creek with wet brake linings onto the highway. There was a line of cars parked on the railroad crossing, and while driving past them the state truck driver applied the brakes with no effect, which resulted in his crashing into a car owned by one O. L. Harvey, driving Mr. Harvey's car into the car owned by claimant, Willie Morris. The front and back ends of the car were mashed in and a tire was ruined. The necessary repairs on the car amounted to a cost of $110.04. Investigation of the road commission shows that the damages were caused due to the wet brakes and that the state should pay the costs of the repairs to claimant's car. From the record it appears that Pritchard Motor Company, of Charleston, West Virginia, made the repairs upon said car. A special assistant of the attorney general approves payment of the claim.

From the record we are of the opinion that the claim should be paid and make an award to Pritchard Motor Company and Willie Morris in the sum of one hundred ten dollars and four cents ($110.04).

(No. 247-S—Claimant awarded $10.97.)

B. S. STRETTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

WALTER M. ELSWICK, JUDGE.

This claim was filed by the state road commission under the shortened procedure. From the record submitted, it appears that the state truck came out of a side road, pulling a toolbox and swerved around and struck a car driven by a Mr. Saunders coming from the opposite direction. The toolbox scraped the side of his car and the Saunders car then struck the car owned by the claimant, B. S. Stretton. The costs of making the repairs to the claimant's car amounted to the sum of $10.97. It appears that the truck driver was at fault. The road commission recommends payment of the costs of repairs to claimant which payment is approved by the attorney general. We recommend an award to claimant in the sum of ten dollars and ninety-seven cents ($10.97).

(No. 180, 181—Claims denied.)

ARLIE LEWIS ARBOGAST, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

HOWARD ARBOGAST, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made.

W. Holt Wooddell, Esq., for claimants;

Eston B. Stephenson, Esq., assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

These two cases were heard upon an agreed stipulation of facts, from which it appears that claimant, Arlie Lewis Arbogast, in company with two other persons, was driving an automobile owned by his brother, claimant Howard Arbogast, about 9:30 o'clock P. M. on the 14th day of March 1942, eastward over state route NO. 33, in Randolph county, West Virginia, about seven miles from the city of Elkins. As the car was proceeding around a curve along the Cheat river, a large stone or boulder, estimated to weigh 1500 pounds rolled into the highway, without warning, almost immediately in front of the car, from the left side and above the highway, and collided with the left front side of the automobile while both were in motion. As a result of the impact the car was precipitated over the embankment to the right side of the high-

way, a distance of about two hundred feet. It turned over many times and came to rest in the bed of the Cheat river.

In consequence of the accident the automobile was totally destroyed.

The stone or boulder apparently became dislodged from its position on the road right-of-way on account of a recent thawing of the earth which had formerly supported it.

Claimant Arlie Lewis Arbogast was thrown from the automobile with such force that he became unconscious. It is shown that he suffered painful injuries. He was taken to the Davis Memorial hospital at Elkins, where he received medical attention. He incurred hospital bills and expenses amounting to $28.60. As a result of the accident he lost three days' employment at $5.05 per day, amounting to $15.15. An overcoat of the value of $25.00 which was in the car when the accident occurred was damaged and rendered valueless.

It is shown that the fair market value of the automobile of claimant Howard Arbogast was $300.00.

The amount of all losses and damages sustained by claimants is $368.75.

It appears from the evidence adduced before the court that the employees of the state road commission had patrolled and maintained the particular section of the highway where the accident occurred, with due regard for the likelihood or possibility of slips and slides resulting from the freezing and thawing of the ground in the particular section of the highway, in the same manner and with the same degree of care exercised in patrolling and maintaining all sections of state highway in Randolph county.

It is also disclosed by the record that at the time of the accident there were "falling rocks" signs properly located at each end of the through cut at the scene of the accident.

It is shown that the temperature in the vicinity of the accident on March 13, 1942, showed a low temperature of 37° from five to seven o'clock A. M., and a high temperature of 67° from two to three o'clock P. M. on the same day. The evidence also shows that the temperature in the vicinity of the accident on the day of its occurrence was a high of 64° from five o'clock to six o'clock P. M., and that there were light rains during the evening of said day.

In claim NO. 49, *Sarah E. Moore* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 93, we stated in the opinion that the mere fact of injury received on a state highway raises no presumption of negligence on the part of the state road commission. In the same case, following our holding *in re* claim NO. 5, *Ruth Miller* v. *State Board of Control,* 1 Ct. Claims (W. Va.) 97, we held:

> "Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made."

In re claim NO. 133, *Ada Harless* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 241, we held that where the evidence seems to indicate and tends to show that the state road commission was not negligent in maintaining a certain bridge . . . and that the said state road commission exercised reasonable care in maintaining and controlling said bridge . . . an award would be refused.

In re claim NO. 179, *R. L. James* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 343, we held:

> "The court of claims will not make an award in a case where the evidence shows that the state road commission has used reasonable care and diligence in the maintenance of a state controlled highway on which claimant wrecked his motor vehicle by colliding with a large stone or boulder that had become dislodged from a cliff or hillside and fallen on said highway the night preceding or early morning of such accident, and in which it further appears from the

evidence that the employees of the state road commission had no knowledge of the likelihood of such happening."

In re claims NO. 188 and NO. 189, *Fred Harvey* v. *State Road Commission* and *Rosa Harvey* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 345, we held:

"Where it appears from the evidence that the employees of the state road commission had no knowledge of a large stone and slide falling from the mountainside onto the highway due to its recent occurrence and had no previous warning of the likelihood of its falling from making their routine examinations of the highway, the state not being a guarantor of the safety of travelers on its roads and highways will not be held liable for personal injuries or property damages suffered by claimants when their motor vehicle runs into such stone."

In re claim NO. 117, *L. C. Clark* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 230, we held as follows:

"The fact that a stone or rock falls from the mountainside adjacent to a public road or highway, striking and wrecking a passing automobile, does not of itself constitute negligence on the part of the state road commission. The state or its agency, the state road commission, not being a guarantor of the safety of travelers on its roads and highways, must either have notice of the dangerous condition and position of such stone or rock on the banks along the highway, or have known of it by the proper examination of the highway at the place where the accident happened, and have failed to take the necessary steps to remove the rock, and thus prevent an accident, before the state or its agency, the state road commission, becomes liable."

We do not think that the facts disclosed by the record establish the right of the claimants, or either of them, to an award.

Awards are, therefore, denied, and the claims dismissed.

(No. 223—Claimant awarded $1,248.00.)

JACOB F. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 10, 1943

Where a state road commission employee is injured by reason of a dynamite explosion, through no fault of his own, and from the evidence it appears that he was using a mixed case of dynamite, and from all probability from the evidence a stick of dynamite had an explosive cap in it, setting off the explosion, then an award will be made to him as a method of compensation for the injuries received. The injuries were received before the employees of the road commission were placed under the provisions of the workmen's compensation act, and an award is made in accordance with the following decision.

Appearances:

The *Claimant* appears in his own behalf;

Eston B. Stephenson, Esq., assistant Attorney General, for the state.

WALTER M. ELSWICK, JUDGE.

Claimant, Jacob F. Bennett, was permanently injured by a dynamite explosion while working for the state road commission in Nicholas county, West Virginia, on March 20, 1934. A hole fourteen feet deep had been drilled on the day before the accident. The claimant was assisting one Walter Humphries in loading the hole with dynamite. They began loading about two o'clock in the afternoon, and had placed about fifty sticks of dynamite in the hole. The hole was about half full of water and from all the evidence it would appear that it was not a hot hole. Neither does it appear that there could have been a live spark. The explosion went off without warning, and the only conclusion that can be drawn from the evidence is that the last stick of dynamite dropped in the hole

happened to have a cap in it. From the evidence it appears that the claimant was using a mixed case of dynamite. They were using "forty" dynamite, and while loading the particular hole claimant found a "sixty" stick of dynamite and laid it on the bank above the hole. A battery was used to set off the blast. It would appear that claimant had had considerable experience in handling dynamite and that he was not in any way at fault. From the report of the then county road supervisor it appears that claimant was receiving 55 cents per hour, although claimant testified that he believed that he was receiving either 73 or 83 cents per hour. At the time of the explosion he was forty-eight years of age, married, and the father of five children, whose ages are from twenty to twenty-seven.

Claimant received as a result of said explosion the following injuries: Abrasions of the left side of his face and eye, conjunctiva hemorrhaged, abrasions of the left arm and right leg; midway between the ankle and knee a cut about one and one-half inches long exposing the bone; abrasion of the left thigh. Both eardrums were perforated, the left ear entirely gone. He suffered with constant headaches and vertigo when in a recumbent position. He was discharged from the Mountain State hospital on March 28, 1934, but upon being readmitted to the hospital June 9, 1934, showed no improvement in his condition. He still had considerable blankness of mind at times. Examination showed a very well developed but undernourished adult. There was then a groove of the right frontal region of the forehead, suggesting a fracture. On October 1, 1934 he was readmitted to the hospital with complaint of burning sensation in his forehead, dull headache in back of head and numbness of legs below the knee. At this time the attending physicians were of the opinion that claimant had a post-traumatic concussion of the brain resulting from the dynamite explosion which is very similar to shell shock.

From the certification of Dr. Eugene S. Brown, the attending physician of claimant, under date of December 28, 1942,

it appears that he has been attending the claimant for the past several years for the disability resulting from the said dynamite explosion. He says that he does not attempt to enumerate the various technical descriptions of various symptoms, but that they remain unchanged so far as he has been able to determine; namely extreme nervousness, inability to remember, plan, manage or in any measure take care of himself or manage his affairs; hearing and eyesight both very poor and a general muscular atrophy and malnutrition of system generally which is apparently a result of permanent nervous system damage.

By the general appropriations act of the Legislature of 1935 appropriations were made as follows: "To pay claim of Jake Bennett, employee injured while in employ of state road commission:

For remainder of year ending June 30, 1935, including hospital	$1,137.00
For year ending June 30, 1936	642.00
For year ending June 30, 1937	312.00
Total	$2,091.00"

By general appropriations act of the Legislature of 1937 an appropriation was made, to be paid from the state road fund, of $1416.02, to Jacob F. Bennett for claim resulting in his personal injury. By general appropriations act of 1939 the sum of $1248.00 was appropriated to Jacob F. Bennett. The same amount was appropriated to him by general appropriations act of 1941. Each of the foregoing appropriations were made for the then ensuing bieniums; that is to say, for the period of time from the fiscal year of the date of each act, until the end of the fiscal year preceding each session of the Legislature.

From the evidence in this case it appears that the claimant was without fault and no negligence is attributed to him. It does appear that he had been furnished a mixed case of dyna-

mite and that by all probability it contained a stick of dynamite containing an explosive cap. It appears that it was a case of such nature as to have justified an award, by reason of carelessness or negligence of his superiors.

The state road commission was not a subscriber to the workmen's compensation fund at the time claimant was injured. It has been the apparent policy of the Legislature to award compensation to claimant in the nature of payments similar to those payable by the workmen's compensation commission. The claimant in this case has expressed his desire to receive compensation in this manner rather than to receive a lump sum award. His reason for this is prompted by his inability to attend to any business affairs due to deranged mental condition caused by the explosion.

Claim is filed for $1248.00 in the nature of compensation for disability for the biennium of 1943-1945.

In view of the evidence in this case, the apparent policy and intent of the Legislature, and the expressed desire of claimant to have compensation paid in such manner as heretofore paid, we recommend an award of twelve hundred and forty-eight dollars ($1248.00), payable to the claimant monthly, at the rate of $52.00 per month, for the ensuing biennium of 1943 and 1945.

(No. 158—Claim denied.)

F. M. Miller, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1943

Where a tenant rents property with full knowledge that it is to be taken for road improvement purposes by the state, and where by the provisions of his lease he is entitled to but a thirty-day notice to vacate, and is given more than the said period to remove his business after the purchase of the property by the state, he is not entitled to any damages, and an award will be refused.

Appearances:

Claude Smith, Esq., for the claimant;

Arden Trickett, Esq., state right-of-way agent, state road commission, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, F. M. Miller, was engaged in the restaurant business in South Charleston, Kanawha county, West Virginia, in a building owned by one S. T. McClellan, and operating under a lease from the said McClellan, dated the 26th day of August 1941. Claimant maintains that this lease was for a period of three years, beginning from the 1st day of September 1941, and the rent payable at the rate of $50.00 per month. Considering the lease as a whole, and considering further that it was urban property that was being leased, it appears to us that the claimant had but a lease from month to month, and could be required to give up the premises on a thirty-day notice.

It appears from the evidence that at the time this lease was executed, both the lessor and the claimant knew of con-

templated improvements, by virtue of which the state, through the state road commission, was to take over the ground and property upon which the building in question was located, for the purpose of constructing a new highway and viaduct at the place in question and found necessary by reason of the demands made upon the industrial plants in that particular section, as well as a desire to change the right-of-way of the Chesapeake and Ohio Railroad Company.

The lease itself contains a provision to the effect that if the lessor is deprived of the ownership of the building by "due process of law" the lessee shall have no action against him for any breach of the rental contract. This provision was made in contemplation of the improvement referred to herein, and by reason of contracts that had already been made by the officials and agents of the state road commission, indicating a taking over or purchase of the property in question.

The claimant himself admits, (record p. 24) that he knew of the commission's intention to take over this property as early as the spring of 1941, which would be at least several months before the lease in question was entered into between him and the lessor, McClellan. From the testimony, it appears that after the purchase of the property had been made from the lessor by the state road commission, the lessor was given a period of thirty days within which to remove the buildings that were located on the property and that it was at the end of a period of about sixty days that the buildings were ultimately removed. The property was sold by the lessor by deed dated the 25th day of May 1942, and not taken by any condemnation proceedings. Under these circumstances, is the claimant entitled to any remuneration by reason of the purchase of the property under the conditions herein detailed?

One item of his claim is that he could not use the personal property such as stools, cooking utensile, etc. in his new business. Under no circumstances could this be an item that could be maintained as against the state road commission by reason of its purchase, since the change to the new building

in which claimant's business is now located, together with its appointments and fixtures, was entirely the choice of the claimant and could not enter into any consideration so far as an element of damages would be concerned.

We are also of the opinion that, in view of the fact that the claimant had at least thirty days within which to close his business after the purchase of the property by the state road commission and that it was approximately sixty days before the buildings were removed, that he had sufficient constructive notice of the purchase of the property by the state road commission, and that he knew all about the transaction and the purpose for which the property was being purchased; that even under the provisions of his lease he would not have been entitled to a longer notice, if the same had been formally given, and having knowledge from before the time he leased the property that it was to be taken over for road improvement purposes, that he cannot now claim any damage against the state road commission by reason of the purchase of the property in question. He does not stand in the position of an innocent tenant whose enjoyment of a lease is interfered with by condemnation of the property that he occupied as such tenant, without due notice and compensation, but, on the other hand, had at least constructive notice of the sale of the property and the purpose for which it was to be used in the future. Under all the circumstances and evidence in the case, we are of the opinion that he was not deprived of any property rights by reason of any action at law or by reason of the purchase of the property, and therefore refuse an award .

(No. 251-S—Claimant awarded $9.00.)

J. D. GANDEE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

G. H. A. KUNST, JUDGE.

Top of claimant's truck was damaged by rock from blasting operations of respondent at Kelly Hill, Kanawha county, on December 7, 1942. The amount of claim is $9.00, cost of repair.

Respondent recommends and the attorney general approves payment.

An award of nine dollars ($9.00) is made to claimant.

(No. 254-S—Claimant awarded $7.14.)

LUTHER McMILLON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

G. H. A. KUNST, JUDGE.

Claim is for damage to claimant's car, caused by respondent's truck being out of control by reason of ice on road, December 5, 1942, and striking car on road at Lashmeet, Mercer county. The amount of claim is $7.14, cost of repair.

Respondent recommends and attorney general approves its payment.

An award of seven dollars and fourteen cents ($7.14) is made to claimant.

(No. 255-S—Claimant awarded $2.54.)

E. R. NORRIS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

G. H. A. KUNST, JUDGE.

Claimant's car was damaged when he backed car into streetcar rails negligently left by employees of respondent in claimant's private driveway at Glendale, Marshall county, on December 19, 1942.

The amount of claim is $2.54, payment of which is recommended by respondent, and approved by the attorney general.

An award of two dollars and fifty-four cents ($2.54) is made to claimant.

(No. 256-S—Claimant awarded $38.83.)

HUBERT HAGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

G. H. A. KUNST, JUDGE.

Respondent's truck crossed center line of road and collided with claimant's truck on state route 80, at Greenville, in Logan county, on October 10, 1942, and caused damage claimed, $38.83. This was the cost of repair, 25% of cost of repair

having been deducted for damaged condition of truck previous to collision.

Respondent recommends and the attorney general approves payment of claim.

An award of thirty-eight dollars and eighty-three cents ($38.83) is made to claimant.

(No. 261-S—Claimant awarded $43.00.)

PEARL FITZWATER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

G. H. A. KUNST, JUDGE.

Car of claimant was damaged by an insecurely fastened wheel-barrow falling from respondent's truck and striking it. The accident happened under Reed underpass in Kanawha county, April 20, 1942. The amount of claim is $43.00, actual cost of repair.

Respondent recommends and the attorney general approves its payment.

An award of forty-three dollars ($43.00) is made to claimant.

(No. 262-S—Claimant awarded $30.75.)

TYLER COUNTY AUTO SALES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

ROBERT L. BLAND, JUDGE.

From the record in this case it appears that on the afternoon of February 22, 1943, Robert Johnson, truck driver for the state road commission of Tyler county, was driving state road truck NO. 630-65, working on route 18, project 3314, two miles southeast of Sistersville. The said Johnson was dumping a load of mud to fill a break in the side of the highway that had recently settled due to wet weather, and in order to dump this load of mud where it was needed it was necessary to place the truck crosswise of the highway, using the greater half of this section of roadway. To empty the truck bed Johnson found it necessary to jerk the truck forward to loosen the sticky mud that clings to the bottom of the truck bed. While this was being done, Hugh Cooper, state road commission flagman, directed Owen, the driver of the Chrysler car, to pass the state road truck. In so doing the state truck moved slightly forward catching the left rear fender on the Chrysler car causing damages thereto.

The record of the claim under consideration was prepared by respondent and filed with the clerk on the 1st day of April 1943. The road commission recommends the payment of the claim. It is approved by the attorney general as one that should be paid. In our judgment the state road commission was responsible for the accident and for the damages sustained by claimant. The sum of $30.75 was actually incurred by claimant in the repair of his motor vehicle as shown by an itemized statement made a part of the record.

We, therefore, award to claimant, Tyler County Auto Sales, the sum of thirty dollars and seventy-five cents ($30.75).

(No. 265-S—Claimants awarded $623.16.)

GRISSELL FUNERAL HOME, and
ELMER SCHWEIZER, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

ROBERT L. BLAND, JUDGE.

The claim embraced in this proceeding arises out of a highway accident which occurred on route 2, project 184-c, approximately two miles south of Moundsville in Marshalll county, West Virginia, on Friday morning, March 12, 1943. It appears from the record prepared by respondent and filed with the clerk on April 10, 1943, that on the said morning of March 12, at about 11:00, a crew of Marshall county state road commission employees was clearing the ditch along route NO. 2, working truck shovel NO. 625-3 for loading truck NO. 630-67. When engaged in such work it is necessary to maintain one-way traffic through the men-working zone, always using a flagman to instruct traffic. George Ruckman, driving truck NO. 630-67, had returned to the working zone from unloading his truck at the waste pit and stopped the truck headed toward the ditch on the left side of the highway 110 feet south of the shovel, waiting for an opportunity to turn the truck to be reloaded. Roy Myers, another truck driver, driving truck 630-81, following Ruckman a short distance behind, passed and stopped his truck also on the left side of the road and at this particular moment both state road trucks were stopped. An ambulance, driven by Elwood Grissell, of Moundsville, traveling south at a moderate rate of speed was given the all clear signal to drive on through the men-working zone by the flagman, Charles Weidebush. Suddenly, without orders, Ruckman backed his truck in front

of the ambulance causing the claimant, Grissel, to run into the truck and damage the ambulance to an itemized amount of $623.16. The flagman, Weidebush, states that Ruckman was parked at the side of the road with the truck doors and windows closed and did not look to him for any signal, as is customary for drivers to do, and backed the truck in front of the ambulance while he and Paul Bungard, a shovel operator, were shouting to him to stop the truck.

As a result of the accident the ambulance was very badly damaged and the claimant, Grissell Funeral Home incurred liability in the sum of $623.16 for materials furnished and work and labor done in repairing the vehicle.

It does not appear from the record that claimant, Grissell Funeral Home, has made settlement with claimant Elmer Schweizer for this amount.

The state road commission recommends an award in favor of the two claimants for the said sum of $623.16. The attorney general approves this payment as one which in contemplation of the court act should be paid. Our examination of the record convinces us that the claim asserted is just and meritorious and entitled to an award.

We, therefore, award to claimant, Grissell Funeral Home and claimant Elmer E. Schweizer, jointly, the sum of six hundred twenty-three dollars and sixteen cents ($623.16).

(No. 266-S—Claimant awarded $60.59.)

W. V. WEBB, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

ROBERT L. BLAND, JUDGE.

The record of this claim, prepared by the state road commission and filed in the court of claims on the 12th day of April 1943, shows that a Dodge automobile owned by claimant, W. V. Webb, of Williamson, West Virginia, was seriously damaged on the 8th day of March 1943, on U. S. route NO. 52, in the city of Williamson, Mingo county, West Virginia. On that day claimant's car was parked on West Fourth avenue in said city of Williamson, when a state owned truck ran into it and caused the damage complained of. It appears from the record that it required the sum of $60.59 to repair the machine. The report made to the state road commission concerning the accident clearly indicates that it was the direct result of negligence on the part of respondent.

Respondent has recommended the payment of the claim as filed and the attorney general has approved the same as one which should be paid. We are of opinion, upon the showing made by this record, that the claim is just and one which the state as a sovereign commonwealth should in equity and good conscience discharge and pay. An award is therefore made in favor of claimant, W. V. Webb, for the said sum of sixty dollars and fifty-nine cents ($60.59.)

(No. 267-S—Claimant awarded $25.00.)

C. P. WHITE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

ROBERT L. BLAND, JUDGE.

A claim made against the state road commission by C. P. White in the sum of $25.00, for damages sustained to his automobile on route 19-21 in Raleigh county, on December 21, 1942, when his motor vehicle was run into and seriously injured by a state owned vehicle, was adjusted by compromise settlement, subject to the approval and ratification of this court. The record of the claim was prepared by respondent and filed on April 13, 1943. It appears from this record that the compromise sum agreed upon is fair and reasonable, and, under all the circumstances disclosed by the record, a fair settlement.

The state road commission recommends payment of this claim and the attorney general approves the same as one that should be paid. We therefore award to the claimant, C. P. White, the said sum of twenty-five dollars ($25.00).

(No. 268-S—Claimant awarded $49.47.)

A. G. REIMER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

ROBERT L. BLAND, JUDGE.

The claim involved in this action is the result of the negligence of the driver of a state owned motor vehicle. The accident occurred on the 6th day of April 1943 on U. S. route #60 at Fudges creek, Cabell county, West Virginia. It is shown that while a case tractor of the state road commission was being towed to a garage for repairs to its steering gear, the radius rod came loose and dropped to the hard surface of the highway, causing the tractor to veer to left where it sideswiped the passing car owned by claimant. The record shows that the operator of the state vehicle was at fault and that the accident was the direct result of respondent's negligence in the management of the vehicle. A verifying invoice, made a part of the record, shows that the claimant incurred liability in the sum of $49.47 for the necessary repairs to his car.

The state road commission, after an investigation of the circumstances attending the accident recommends the payment to the claimant; the attorney general approves it as one that should be paid. From our examination of the record, which was prepared by respondent and filed in this court on the 21st day of April 1943, we are of opinion that the claim is just and should be paid. An award is therefore now made in favor of claimant, A. G. Reimer, in the said sum of forty-nine dollars and forty-seven cents ($49.47).

(No. 270-S—Claimant awarded $20.25.)

KENTUCKY-WEST VIRGINIA JUNK COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

Claimant, the Kentucky-West Virginia Junk Company, of Williamson, West Virginia, seeks reimbursement in the sum of $20.25, which amout it claims as damages for an injury to its truck occasioned by the negligence of the driver of state road truck #230-97, in the city of Williamson, Mingo county, on January 25, 1943. The damages in question were paid by the claimant, and were occasioned by the state road truck swinging too widely over the center line of the road on which the accident happened and thereby causing a collision with claimant's oncoming truck.

The state road commission does not contest the claimant's right to an award for the said amount but concurs in the claim for that amount, and the claim is approved by a special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record as submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of twenty dollars and twenty-five cents ($20.25).

(No. 274-S—Claimant awarded $120.98.)

KATIE H. LEGG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

Claimant, Katie H. Legg, of Quinwood, West Virginia, seeks reimbursement in the sum of $120.98 as damages to her car, caused by state road truck #930-75 pulling out in front of claimant's car without proper notice to the claimant, the accident having happened on U. S. route NO. 60 near Alta, Greenbrier county, on March 18, 1943. The state maintenance engineer in a communication to the state road commission on May 27, 1943, accepts responsibility for the amount in question on the part of the state road commission, and states that the accident was caused by the negligence of the state road employees in charge of the state road truck in question.

The state road commission does not contest claimant's right to an award for the said amount but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record as submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of one hundred twenty dollars and ninety-eight cents ($120.98) in full settlement.

(No. 276-S—Claimant awarded $32.40.)

Q. EDWARD MYER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

Claimant, Q. Edward Myer, of Philippi, West Virginia, seeks reimbursement in the sum of $32.40 as damages to his automobile occasioned by a collision with state road truck NO. 730-72, on route NO. 119, near what is known as Flatwoods Quarry, said collision having taken place on the 23rd day of March 1943. It appears from the record that while claimant had used the road in question on previous occasions, yet at all such times a flagman, employed by the state road commission, was placed to take care of traffic passing the quarry in question, at and about the time that state road trucks were either entering or leaving the said quarry. At this particular time no flagman was on duty. From the record it is shown that the state road truck swung or pulled over to the left of the center white line in an endeavor to make a right turn into the said quarry, and in so doing collided with claimant's automobile causing the damages in question.

The state road commission does not contest the claimant's right to an award for the said amount but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case on the record as submitted and are of the opinion that it should be entered as an approved claim and accordingly an award is made in the amount of thirty-two dollars and forty cents ($32.40) in full settlement.

(No. 277-S—Claimant awarded $8.57.)

MINERVA L. SIBBALD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

The claimant, Minerva L. Sibbald, of Elkins, West Virginia, seeks reimbursement in the sum of $8.57 for damages to her car occasioned by the failure of the state road commission's maintenance crew to remove rocks which had been allowed to collect on a graded road in Randolph county, West Virginia, and which happened on the 1st day of December 1942. The road in question was a secondary road that had been graded by the maintenance crew of the respondent, and which crew, as stated, had failed to remove rock and other material and causing the injuries to claimant's automobile in question.

The state road commission does not contest the claimant's right to an award for the said amount but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record as submitted and are of opinion that it should be entered as an approved claim and an award is made accordingly in the sum of eight dollars fifty-seven cents ($8.57) in full settlement.

(No. 278-S—Claimants awarded $50.00.)

OTTO L. MEYERS, and IONA MYERS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

Claimant, Otto L. Meyers and his daughter Iona Meyers, of 471 Spruce street, Morgantown, West Virginia, seek reimbursement in the sum of $50.00 for personal injuries to the said daughter, Iona Meyers, now approaching her twenty-second birthday, and occasioned by defective flooring on a bridge crossing the Monongahela river at Morgantown, West Virginia, and maintained by the state road commission. It appears from the record that the said Iona Meyers at the time of the accident, namely August 13, 1939, was eighteen years of age, and was injured by being thrown to the floor of the said bridge, by the said defective wooden flooring, through no fault of her own.

The state road commission does not contest the claimant's right to an award for the said amount, as a compromise settlement, for the injuries to the said Iona Meyers, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of fifty dollars ($50.00), in full settlement, to the said claimant Otto L. Meyers as the father of the said claimant Iona Meyers, and to the said Iona Meyers in her own right as well.

We further find that before payment is made of the amount in question to the claimants, or either of them, that a full

release should be signed and executed to the state road commission on the part of both claimants, releasing the state, and especially so the state road commission, from any other claim for damages by reason of the said occurrence.

(No. 279-S—Claimant awarded $40.00.)

F. J. SPRAGG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1943

CHARLES J. SCHUCK, JUDGE.

Claimant, F. J. Spragg, of Littleton, West Virginia, seeks reimbursement in the sum of $40.00 which amount is claimed as damages to claimant's car occasioned by state road truck #300-703 negligently colliding therewith and causing the damages in question. The accident happened on March 7, 1943. Claimant's truck was parked along the highway, route 250, near Kingmont in Marion county, West Virginia, and while so parked, the state road truck in question, not being securely locked, drifted back and struck and collided with the left side of claimant's automobile, causing the damages which occasioned the outlay of the amount in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of forty dollars ($40.00) in full settlement.

(No. 229—Claim denied.)

IVY FRAZIER, Executrix of the estate of
U. M. FRAZIER, deceased, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 22, 1943

Upon a claim for wrongful death where no workmen's compensation was carried by the department concerned at the time of the death, when it appears from the evidence that the death was due to natural causes and not to any injury or other cause incident to the course of decedent's employment, an award will be denied.

Appearances:

Linn Mapel Brannon, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, for the state.

WALTER M. ELSWICK, JUDGE.

The evidence taken on this claim reveals that U. M. Frazier, while employed by the board of control at Weston state hospital, Weston, West Virginia, died on the twenty-sixth day of February 1935. It also appears that at that time the board of control was not a subscriber to the West Virginia workmen's compensation fund. Letters of administration were issued to Ivy Frazier, widow of U. M. Frazier, by the clerk of the county court of Lewis county, West Virginia, on January 26, 1943. The decedent had been employed as an attendant at said hospital for a period of about twenty-four years prior to his death.

From the evidence it further appears that on the morning of the twenty-fifth day of February 1935, the decedent U. M. Frazier had walked from his home in Weston to said hospital, a distance of about three-fourths of a mile (record p.p. 122-124); that he left home about six o'clock and that it would take about twenty minutes to walk from his home to the hospital (record p.p. 121-122). He had arrived at the hospital and reported for work as an attendant in ward NO. 8 at about six thirty o'clock (record p.p. 75 and 96) when one of the patients by the name of John Charney started a disturbance by swearing and threatening to strike the attendant Frazier. At this time another attendant Otis Saunders reported for duty on the ward and he together with Ray Morrison an attendant helped Frazier place Charney in a strong room. Said Morrison occupied a room about 75 feet away from Charney and Frazier when he heard Charney swearing (record p.p. 59, 97) at which time the door to his room was open. John Charney was a small man weighing about 124 lbs. and a little over 5 feet 1¾ inches tall, and Frazier was a man weighing around 175 to 180 lbs. and was about 5 feet 9 inches tall. Charney was an epileptic patient. He was unruly and resented being corrected. (Record p.p. 72, 110).

There were from fifty to sixty patients in ward NO. 8 (record p.p. 9, 38), with three day attendants, namely, said U. M. Frazier, Otis Saunders, and Worthy Carson (record p. 36). At seven o'clock from twenty-five to thirty patients were taken to breakfast from the said ward NO. 8 to the dining room by the attendants Otis Saunders and Worthy Carson, during which time U. M. Frazier was left in charge of the ward. (Record p. 38). After all patients were served breakfast, Otis Saunders and U. M. Frazier started to shave the patients at about eight o'clock. At that time U. M. Frazier stated that he was getting sick and then went to his room and lay down on his bed (record p.p. 40, 98). Later Dr. Bobes a hospital physician was called to treat him and advised that he should be left in his room and not moved (record p. 8). Dr. Bobes was serving in the armed forces of our country at the time of the hearing.

At the hearing there was testimony introduced to the effect that the decedent, Frazier, stated that on the evening before his death that he had been attacked by and had had a scuffle with the patient John Charney while the other two attendants of the ward were out to take patients to the dining room. The witness Worthy Carson also testified that Charney was taken to the strong room after patients had been served breakfast. The purported statements of decedent were casual in nature and would not under the circumstances come within the exceptions to the hearsay rule excluding such testimony. However, we have the testimony of Carson, Saunders and Morrison, the only persons present when Charney was placed in the strong room, to the effect that Frazier made no statement to them that he had had any attack by or scuffle with Charney (record p.p. 41, 61, 97). None of them noticed any disarrangement of his clothing or marks on his body, although a torn tie was exhibited in evidence by Mrs. Frazier as having been torn in a scuffle by the patient Charney. The witnesses Saunders and Morrison were positive in their testimony that Charney was placed in the strong room before the patients were served breakfast. The witness Morrison asked Frazier if he had gotten injured when placing Charney in the strong room, and he answered that he hadn't, but that he was suffering from indigestion; that he was accustomed to such spells, (record p.p. 51, 63, 79, 88, 89). He never mentioned any scuffle to either Morrison or Saunders at any time (record p.p. 78, 99). There was a clear view from Morrison's room to where Charney and Frazier were at ward NO. 8 (record p.p. 66, 86, 97), and Morrison testified that Charney had not made an attack upon Frazier (record p. 61). Morrison was not an employee of the hospital at the time of the hearing.

No report of any accident was ever made to the hospital staff or to the board of control, and no claim was made for any neglect or default of the board of control or of its officers and employees as to the cause of the decedent's death until the filing of this claim.

The death certificate of U. M. Frazier filed at the vital statistics office states that the decedent died from angina pectoris, coronary occlusion.

On the morning before his death U. M. Frazier was suffering pain. He was vomiting "corruption, and blood in with it." (Record p. 55). Dr. D. P. Kessler was called after Mr. Frazier's death. He found "his whole frame seemed to be flushed, a great deal of flushing, his face and chest." (Record p.p. 33, 34). Dr. Kessler had made a casual observation or examination of Mr. Frazier a short time prior to his death and at that time failed to detect any heart condition requiring treatment. (Record p.p. 28, 29). He made no notation of his findings and testified from memory only. He did not make a urinalysis and did not make an examination with a cardiograph. No post-mortem examination was taken.

In view of all of the evidence in the record we are therefore confronted with the question as to whether U. M. Frazier died from natural causes or from causes incident to his employment. We are of the opinion from the evidence that his death was not due to any cause incident to his employment but was due to a heart condition. We therefore deny an award.

(No. 208—Claimant awarded $1,500.00.)

LON E. UPTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 22, 1943

1. When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night.

2. Where the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negligence will be considered in determining whether or not an award should be made, and if made, the amount thereof.

Appearances:

D. D. Stemple, Esq., and *Dayton R. Stemple*, Esq., for the Claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General for the state.

WALTER M. ELSWICK, JUDGE.

From the evidence submitted it appears that on the night of September 29, 1941, the claimant, Lon E. Upton, while walking on the Ford Run road in Barbour county, West Virginia, stepped off the upper edge of a bridge or culvert spanning a stream known as Ford Run, and fell into the bed of the stream. The stream bed consisted of a rock bottom and the stream was practically dry at the time. Claimant fell about seven and one-half feet from the top of the bridge covering to the stream bottom.

It further appears from the evidence that when this bridge or culvert structure was first built that there was a side wall or curb extending up about 16 to 18 inches on each side. This bridge was originally constructed by the county court of Barbour county, West Virginia. After the state road commission took charge of the road under the act of 1933 a fill was made by filling in between these curb walls leaving the sides of the bridge or culvert leveled off with the traveled portion of the structure (record p.p. 79, 80). The bridge or culvert was built on a skew with 28½ feet between head walls, that being the length of the structure inside the head walls. (Record p. 81). It was placed a few feet up stream out of alignment with the road and there is a curve in the roadway where the bridge or culvert crossed the stream. (Record p.p. 11, 83). The opening under the culvert was five feet wide by five feet high. The bridge or culvert in question was about 350 to 400 feet from the intersection of said Ford Run road and the Morgantown or Beverly pike. Claimant resided about 300 yards from the bridge site and had traveled over the same a number of times in the daytime.

On the night in question claimant left his home at about eight to eight-thirty in the evening and went to the home of Guy House who resided on the bank of the road about 100 feet straight up from the road. With the path leading from the road to the house of Guy House on which claimant traveled it was a distance of about 175 to 200 feet. It was necessary for claimant to travel over the bridge or culvert to go to and from the home of Guy House. (Record p. 15). Claimant had gone to employ House to cut his corn. When he left home it was beginning to get dark. While at the home of House, it began to rain and continued to rain after he started to return to his home about ten o'clock in the evening. (Record p. 16). By that time it was so dark claimant could not see the road. The rainwater had overflowed a small culvert above the bridge and this overflow of water had washed cinders and gravel on the pavement of the road between the House residence and the bridge in question (record p. 17).

From the end of the said path at the road it was a distance of about 25 feet to the bridge (record p. 19).

Claimant had no light and had followed the path leading from Guy House's residence down the road and then proceeded down the road to the bridge and while on the bridge couldn't see either the bridge or the road. Trees were standing on the road right of way opposite the bridge. He then thought he was too far to the right and stepped to his left off into the stream bed. We find from the evidence that claimant was taking all reasonable and necessary precautions that his duties as a traveler on the road in question required of him.

During the hearing the respondent offered testimony to the effect that the structure in question was classified by the road commission as a culvert and not a bridge and apparently relied upon this as a defense to the claim filed. From this testimony it would appear that a bridge is classified as a structure across a stream with the floor flush with the roadbed, and a culvert is built lower down with a fill on top of it to bring it up to level with the roadbed. From all the evidence in this case we are of the opinion that regardless of what the structure and roadbed is called the structure, whether it be a bridge or a culvert, was dangerous and such as would likely be the cause of the mishap in question. We are of the opinion that after the filling in of the curbs or side wall of the structure as originally made, that a curbing, railing or some other device should have been erected as a warning or a protection to pedestrians traveling as claimant found himself in this case. This was the duty of the state road commission when repairing or taking over the road under the act of 1933. See claim No. 31, *Hershberger* v. *Road Commission,* 1 Ct. Claims (W. Va.) 52.

As a result of the fall claimant sustained a broken leg and arm. He was confined at the Davis Memorial hospital at Elkins, West Virginia, for a period of four months and two days before his leg was placed in a cast, and two weeks after

the cast was set. He later remained in said hospital for a period of 13 days (record p.p. 24, 25). He was still using crutches at the time of the hearing, and his leg where broken has abscessed and is still a running sore. Pieces of bone have worked out of the abscessed spot. Claimant has been advised by the attending physicians of said hospital that they believe it best now to amputate his leg. (Record p.p. 25, 26). Claimant has apparently suffered considerable pain and will no doubt be unable to do any work for quite some time. He had worked on the farm and in the coal mines. He had no skilled trade and received very little education, not having completed more than the second or third grade when leaving school.

The statement of Dr. Benjamin I. Golden who attended claimant filed in the case as an exhibit, and under an agreed stipulation by counsel for claimant and the assistant to the attorney general for the state, is as follows:

> "The above patient was admitted to the Davis Memorial hospital for the first time on September 29th, 1941. On admission, he was suffering from a severely lacerated lower lip; fracture of the left wrist; laceration of the left thumb; compound fracture involving the distal one-third of the left femur and knee joint, with approximately one inch of the shaft of the femur protruding through the skin. The fractured fragments showed marked comminution.
>
> "The patient stated that the cause of this accident was due to falling from a bridge while he was enroute home. He stated it was very dark, the bridge had no side rails, and he fell off of it.
>
> "Following the injury, massive infection developed and at the present time, he has an active osteomyelitis. On our examination a month ago, we recommended amputation at the mid-thigh. The condition from which he is now suffering is entirely the result of the accident. He has been admitted to the hospital repeatedly since the original admission because of localized abscess formation and on three or more occasions we have operated in an effort to clean up the infection, and have failed."

From all the evidence in the case we are of the opinion that the condition of the bridge was such as would create a liability and justify an award, and from all the evidence we are of an opinion that an award of fifteen hundred dollars ($1500.00) would be fair and just. An order will be so entered by a majority of the court, accordingly.

Judge Bland dissents and will file an opinion setting forth his reasons.

ROBERT L. BLAND, JUDGE, dissenting.

As I read and interpret the record in this case there should be no award in favor of the claimant. If for no other reason, contributory negligence on his part would preclude and bar an award.

The Supreme Court of West Virginia has held that the state road commission is a direct governmental agency of the state, and as such is not subject to an action for tort. *Mahone* v. *Road Commission,* 99 W. Va. 397. In the opinion in that case Judge Hatcher says:

> "By virtue of section 35, article 6 of the Constitution, an individual has no right of action against the state. He has no greater right against an agency of the state to which it has delegated performance of cetrain of its duties. The State Road Commission is such an agency. Therefore, the plaintiff herein cannot maintain his action against this Commission. The law in relation thereto is thoroughly established by the decisions of this court in *Barber Admx.* v. *Spencer State Hospital,* 95 W. Va. 463, in *Miller* v. *State Board of Agriculture,* 46 W. Va. 192, in *Gordon* v. *State Board of Control,* 85 W. Va. 739, and in *Miller Supply Co.* v. *State Board of Control,* 72 W. Va. 524."

Chapter twenty of the acts of the Legislature of 1941, creating the court of claims, does not increase or enlarge the liability of the state. There is no statute making the state liable for the accident sustained by claimant.

It is not conceived that it was the purpose of the Legislature in creating the court of claims to attempt to nullify or hold for naught the constitutional immunity of the state from suit or to abrogate or supersede the decisions of the Supreme Court based upon and giving effect to such constitutional inhibition.

From time to time claims arise against the state which as a sovereign commonwealth it should, in equity and good conscience, discharge and pay. They may properly be denominated moral obligations of the state. It was for the purpose of adjudicating and taking care of claims of this character that the court of claims was created. The Legislature contemplated that all such claims should be thoroughly investigated and when they were made to appear to be just and proper awards should be made therefor. The disposition of each claim should depend upon its individual merits. Such claims were presented in large numbers to the Legislature at each session, and few were ever given an adequate consideration on account of the unavoidable pressure of legislative duties. The court of claims is intended to relieve the Legislature of the burden imposed upon it by the filing of such claims. Its duty is to act in both an investigating and advisory capacity. It is to be presumed that when three members of the court have made thorough investigation of such claim and are in accord with respect to the disposition that should be made thereof the Legislature would be in a position to act intelligently in relation thereto, but where the determination of a claim is not unanimous the court act expressly provides that such fact shall be brought to the attention of the Legislature by a dissenting statement or opinion.

In the instant case I think the *syllabus* is too broad and imposes a duty and obligation on the part of the state road commission unwarranted by general law.

(No. 152, 153, 154, 155, 156, 157—Claimants awarded $3,500.00 each.)

J. P. BURGESS, C. J. JONES, E. W. LIVELY, ROY H. ADKINS, EDWARD D. BURNETTE and JOE SURBER, administrators, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 22, 1943
Opinion on rehearing filed February 16, 1943

1. When the state road commission by the act of 1933 assumed control and authority over the primary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night.

2. Where the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negligence will be considered in determining whether or not an award should be made, and, if made, the amount thereof.

Appearances:

Myron R. Renick, Esq., and *T. C. Townsend,* Esq., for the claimants;

Eston B. Stephenson, Esq., special assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, J. P. Burgess, administrator of the estate of Edward Sinclair Burgess, deceased, together with five other administrators of the estates of Esther Jones, Ruth Ann Lively, Roy Herber Adkins, Jr., Edward D. Burnette, Jr., and Mar-

guerette Francis Surber, respectively, bring their several claims against the state road commission for damages resulting from the deaths of the aforesaid Edward Sinclair Burgess, Esther Jones, Ruth Ann Lively, Roy Herbert Adkins, Jr., Edward D. Burnette, Jr., and Marguerette Francis Surber, occasioned by the automobile in which the said six persons were riding being driven or precipitated over a high embankment adjacent to primary road or route NO. 61 at and near Deepwater, in Fayette county, West Virginia, on the night of January 26, 1941. All of the said six persons, so far as the record reveals, were instantly killed in the said accident. Each claim is brought in the amount of $10,000.00 and as the facts and circumstances surrounding the happening of the accident are identical, so far as the individual claims are concerned, the court combined them and heard all of the testimony at one hearing, and the claims are now so considered, one opinion only being necessary and governing the disposition of all the said claims or actions.

The testimony shows that the accident happened on the night of January 26, 1941, at approximately 10:45 o'clock; it was a dark, misty night, with limited vision, and while not a fog, yet weather conditions were such as to make it difficult to keep the windshield of an automobile clean and free so as to have an unimpaired vision while driving. The road in question reaches from a point near the Kanawha river about six or seven miles from the town of Montgomery, up the mountainside in the direction of Oak Hill; is steep, and at the place of the accident thereof, when traveling toward Oak Hill, has a very high, dangerous and quite precipitous embankment or fall, approximately ninety feet high. It was over this embankment that the automobile in question was driven, falling the entire distance down the side thereof and landing on the railroad tracks below. There were no barriers or railings constructed along the highway at the point in question where the accident took place, nor were there any markers or signs posted along the road to warn persons of its condiiton nor of the nearby embankment; nor was there any white line on the highway to indicate its center or its

possible width, by which an automobilist could or may have been guided.

The claimants maintain that the state road commission was negligent in failing to provide guards or barriers, as the place where the accident happened was very dangerous; and that the commission was further negligent in not having proper warning signs and in not having the highway marked and lined as a further security to the traveling public.

The state resists the claims on the ground *(a)* that the state road commission was not bound to erect guardrails or barriers and *(b)* that the occupants of the automobile were guilty of contributory negligence and therefore the representatives of their several estates barred from any recovery.

In addition to the testimony taken by the court, the members thereof, after the said hearing was closed, realizing the importance of the claims and the questions involved, personally visited the scene of the accident and were thereby afforded a better opportunity for the consideration of the testimony in its application to the various questions raised by the claimants and by the state.

Considering first the legal question offered by the state as to whether or not the road commission was obliged to erect barriers or guardrails, this court had held on several occasions that:

> "When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night." *Fry* v. *Commission,* 1 Ct. Claims (W. Va.) 48; *Hershbarger* v. *Commission,* 1 Ct. Claims (W. Va.) 52.

In both of these cited claims substantial awards were made and subsequently honored and confirmed by the Legislature

(1943) and ordered paid. In the case of *Wells* v. *County Court of Marion County,* 85 W. Va. 663, 102 S. E. 472, it was held:

> "The law imposes upon a county court or other public authority in maintaining public roads and bridges, the duty to so guard all dangerous places by suitable railings or barriers as to render them reasonably safe for travel thereon by day or night."

We can percieve no reason for changing the rule or holding laid down in the cited cases when we come to consider the instant claims, assuming, of course, that the place of the accident was highly dangerous as hereafter pointed out, and consequently feel that we need not give further consideration to the matter of whether the road commission had a duty to erect guardrails and barriers when necessary and when required for the safety of the traveling public.

Was the place where the accident happened dangerous and did it require the erection and construction of suitable guardrails and barriers? We are of the opinion that it was, and that guardrails and barriers ought to have been erected or installed on the highway. The testimony shows the road to be steep, approximately eighteen feet wide from the mountainside to the embankment or cliff across the highway; that there was a reverse or "S" curve at the point of the accident, (record p. 37); that the paved part of the road was fourteen feet wide (record p. 42), with a berm of three feet (record p. 43). Beyond the paving and on the side of the road where the accident happened the berm narrowed as one approached the point in the road where the automobile went over the cliff, graduating from a width of approximately six and one-half feet to three feet in width, and this fact of itself, in our opinion, presented a hazard to one using the road, and especially so on a dark, misty night, and as there were no lines indicating the center line of the paved portion of the highway, as well as no warning signs or markers of any kind, the hazard became doubly dangerous when considered in connection with the attendant conditions existing at the time. Coupled with these facts was the further fact, highly

important in our judgment, of the reverse curve which existed at the point of the accident, and the very nature of which added to the danger and made an accident highly probably even to one acquainted with these conditions and exercising the degree of care required of a traveler on the road in question at the time and place of the accident. Undoubtedly the commission or the state road authorities in charge of this highway considered it dangerous, as preparations had evidently been made some time before the accident to erect barriers or railings thereon. The uncontradicted testimony reveals (record p. 31) that wire in rolls, seemingly of the kind used for barrier purposes, had been left or deposited on the highway at or near the point of the accident for a long period of time prior to January 1941. The wire was not used until after the accident happened; its use before the accident may have saved the lives of these young people and rendered the road safe for travel; the authorities would have at least complied with the rule making the road reasonably safe for travel both by day or night. Added to all these facts was our own view of the highway and attendant conditions which forced us to the conclusion that the road was dangerous and one that required guardrails or barriers to render it reasonably safe for the traveling public. We repeat, it was a primary road and much traveled.

The state maintains that decedents were guilty of contributory negligence; that they had driven over the road earlier in the day while on the way to Montgomery and therefore must have been acquainted with existing conditions. However, it must be noted that when on the way to Montgomery they must have been driving on the side of the road against the mountain or hillside and may or may not have noticed the danger incident to using the road when traveling in the opposite direction. Whether they, or any of them, had ever used the road before is not definitely shown. It is admitted by stipulation that the decedents had not been drinking, and so far as we are able to determine from the testimony were not guilty of reckless or careless driving. Visibility must necessarily have been bad, considering the weather conditions,

and while the driver of the automobile could perhaps see some distance ahead, the question of the effect on the happening of the accident by the presence of the reverse or offset curve is all important and may or could, under all the circumstances, have confused any driver, even though he was reasonably careful, and thus have caused the automobile to leave the highway at the place as shown in the testimony.

With the absence of barriers, markers, lines or warnings of any kind we may reasonably well be confused as to whether or not there was contributory negligence sufficient to bar an award, and the minds of men may reasonably differ on these matters after a mature consideration of all the testimony and facts as presented. Under these circumstances, considering all the facts, we are of the opinion that an award of $3500.00 should be made in the instant claim, and consequently a similar award of $3500.00 in each of the other five claims, and recommend that an appropriation accordingly be made by the Legislature and the amounts in question be paid to the several claimants respectively, upon the execution of a full and complete release to the state and the state road commission for all damages occasioned by reason of the accident in question.

An award is therefore made in the sum of thirty-five hundred dollars ($3500.00) to each of the aforesaid claimants, in accordance with the majority opinion.

Judge Bland dissents and will file a dissenting opinion.

ROBERT L. BLAND, JUDGE, dissenting.

Since I do not concur in the above awards in the aggregate sum of $21,000.00 it becomes my mandatory duty to state the reasons for my nonconcurrence. If it be said that a dissent is but an "idle gesture" I answer that it should not be so treated when it deals with a proposed appalling appropriation of the public revenue. The requirement in the court act of a dissenting opinion is a wise provision. It is intended to give notice to the Legislature that the members

of the court who have investigated the claim in question are not in agreement as to the proper recommendation to be made for its disposition and thus afford the Legislature an opportunity to make reexamination of the claim before making what might prove to be an improper appropriation for its payment.

It is true that the Legislature of 1943 paid slight heed to the arduous work of the court of claims—its special instrumentality—but ratified and approved, apparently without examination or scrutiny, awards totaling more than one hundred thousand dollars, except in the case of two claims for indemnity on account of alleged negligence of county school board officials, which had later been disapproved by majority members of the court. Seemingly it should be the duty of the Legislature to carefully scrutinize and examine all awards made by the court of claims—however carefully and painstakingly they may have been made—before making appropriations for their payment. The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, are preserved by the clerk and are made available to the Legislature or any committee thereof for the reexamination of the claim. (Court act, section 24). It is the court's duty to make thorough investigation of claims asserted against the state and make recommendations concerning them. These recommendations are not conclusive. The responsibility for making appropriations rests with the Legislature. Our awards do not have the effect of judgments obtained in courts of law. They are merely recommendations, after careful investigation and study, subject to ratification or rejection by the Legislature.

There is a limitation upon the right and power of the Legislature to make appropriations for payment of the public funds of the state.

The Legislature is without power to levy taxes or appropriate public revenues for purely private purposes, but it has power to make an appropriation to a private person in

discharge of a moral obligation of the state, and an appropriation for such purpose is for a public, and not a private, purpose. *Woodall* v. *Darst*, 71 W. Va. 350

I do not believe that the claims in the instant cases are founded on justice or supported by moral obligation, or that the state is responsible for the unfortunate and pathetic mishap which resulted in the six deaths for which the awards are made by majority members of the court. I do not see the picture of the accident in the light in which it is reflected by the majority opinion.

The theory on which these claims are prosecuted is alleged negligence on the part of the state road commission in failing to have necessary warning signs of danger on the highway.

The proof offered in support of the claims fails to show that the said highway on which the fatal accident happened was not reasonably safe for travel thereon by day or by night. On the contrary the evidence conclusivelly shows, I think, that the road at the time of said accident was safe for those who comply with the law and use reasonable precautions.

The accident occurred on a mountainside in the nighttime. There was no eye witness to it. The exact cause of the accident is highly problematic and conjectural. No one can say just how it happened, but certain deductions may reasonably be made from circumstances attending it.

As is disclosed by the record, the occupants of the automobile, ranging in age from sixteen to twenty-one or twenty-two years, were returning from Montgomery to Oak Hill. Up about six or seven miles the road follows the river, then makes a sharp left-hand turn and proceeds over a mountain. On the right of this curve there was a steep embankment. This first curve was successfully negotiated. However, there was another small turn after the main turn was passed. Claimants

contend that this little turn, which they describe as a "double S" curve, was lower in elevation than the rest of the road. It was at this point that the automobile was precipitated over the embankment, resulting in the death of all six occupants of the vehicle.

It is contended that the condition of the road at the point of this last mentioned curve was responsible for the accident. I am not prepared to concede this to be a fact.

The accident happened about 10:45 o'clock on the night of January 26, 1941. It is shown that there was no guardrail, curve sign or road marking of any kind at or near the point where the fatal automobile left the road.

After the occurrence of the accident trooper J. M. Ballengee, a member of the department of public safety, made an investigation of the accident and an examination of the highway at and near the point where it occurred. From information given by him to A. L. McMillion, assistant maintenance engineer, district one of the state road commission, the latter caused a further investigation and survey to be made under his direction and supervision. A plat or map showing this actual survey was introduced in evidence upon the hearing of the claims.

Trooper Ballengee testified on behalf of the claimants and Mr. McMillion was introduced and testified as a witness on behalf of the state. The testimony of trooper Ballengee was not of material aid in determining the cause of the accident. He testified very clearly as to the point where the automobile was precipitated over the embankment. He gave it as his opinion that the automobile was driven straight over the embankment at the point of a small curve and that the road dips slightly right at that particular place "not very much, but there was a slight dip in the road there." He stated the width of the road at that point to be eighteen feet. He further stated that cars could get over the road all right at the point of the accident.

Trooper Ballengee testified that he made examination of the tire marks found on the highway and that the tread of the tires was well defined. He stated that the tire marks started at a certain point "and angled off into this small curve." He located on a photograph the point on the road from which the tire mark started before angling off into the small curve where the vehicle went over the embankment and identified such point by placing his initials on the picture. From the same information communicated by him to engineer McMillion the latter caused a survey of these tire marks to be made and delineated on a plat. This plat shows the path of the outside wheels of the automobile as pointed out by trooper Ballengee. It further shows that the automobile left the paved portion of the highway on the embankment side of the road and ran on the berm for a distance of twenty feet when the car turned over the embankment at the point where the small curve started to reverse. It may be that the driver of the car lost control of the wheel at the point twenty feet distant from this small curve where it left the paved portion of the road and ran on the berm until it went over the embankment at the small curve. The survey shows that at the point where the car left the outer edge of the road the pavement was fourteen feet in width and the berm at that point on the embankment side of the road was six and a half feet in width, while on the mountainside the berm was approximately three feet in width. Thus it is made clear that the automobile started to leave the highway at a point where it was twenty-three and one-half feet wide. After rounding the first large curve where the road leaves the river the automobile traveled a distance of fifty-two feet to the point where it started to leave the road at which point it was twenty-three and one-half feet in width. It is shown that the road had an average grade of seven per cent and was of sufficient width to enable automobiles to travel thereon in safety. There was no occasion for a warning sign of danger to be placed at or near the point where the car started to leave the paved portion of the road. So far as the evidence discloses the highway was in good condition. Naturally any road that traverses a mountainside is

attended by more or less danger. Persons using such a road are charged with the duty of exercising care and caution.

In re claim NO. 13, *Rachel C. Lambert, Admx.* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 186, we held:

> "Where the evidence in the case shows the highway on which the accident happened was improved and eighteen feet wide, with no obstruction and no defect in the highway, and the claimant's decedent was killed by reason of the car in which he was riding leaving the said highway and striking a depression or hole in the berm, then there is no cause of action against the state road commission and the claim will be denied and dismissed."

In re claim NO. 118, *Marguerite Smith* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 258, we held:

> "When an adult woman of good intelligence, while driving her husband's automobile on a state highway passes a hole on one side of said highway caused by a break or slip on the rock base of said highway, which hole she could or should have seen by the use of ordinary care, and on the same day, in the daytime thereof, while driving said automobile in the opposite direction drives it into said hole and the said automobile is precipitated over an embankment and she sustains personal injuries in consequence of said accident, she will be held to be guilty of contributory negligence barring a claim for an award for damages occasioned by said accident."

Under the act creating the court of claims, negligence on the part of the state agency involved must be fully shown before an award will be made. *Moore* v. *Road Commission,* 1 Ct. Claims (W. Va.) 93; *Miller* v. *Road Commission,* 1 Ct. Claims (W. Va.) 97.

I do not see that claimants have established a case of negligence on the part of the state road commission entitling them to awards. It appears from the evidence that the highway on which the accident happened was an improved primary

road of good grade and in generally good condition. It is shown that it was extensively used and it does not appear that an accident had theretofore occurred thereon. Too much emphasis, I think, is placed upon the alleged defective condition of the road at the particular point where the automobile went over the embankment and it is not proved to my satisfaction that the condition of the road at that point was the proximate cause of the accident. On the contrary, I believe that the loss of control of the automobile by the driver thereof when the machine left the road where it was twenty-three and one-half feet in width was responsible for the accident. I think, moreover, that the occupants of the car were guilty of contributory negligence. Since they were returning from Montgomery to Oak Hill, it would seem that they had previously traveled the road from Oak Hill to Montgomery. It is not shown that the road was actually out of repair at the immediate point where the car went over the embankment. The fact that the road at the particular point where the automobile went over the embankment sloped more, that is that the elevation was turning more to the right side of the road, does not establish negligence on the part of the road commission in maintaining the road at that point. It was proper for the curve to have the elevation in that direction. The road sloped in the direction of the embankment in order to accommodate traffic. As very clearly indicated by engineer McMillion, the elevation of any curve is supposed to have a superelevation so as to make it easy for the traffic in the curve. The condition of the slope or elevation in the curve at the point where the automobile went over the embankment was in line with engineering principles. All curves are elevated.

The absence of warning signs of danger on this mountainside road does not establish negligence on the part of the state road commission warranting or justifying the awards made in these cases. The very fact that the road was on a mountainside was sufficient to put the occupants of the car on notice and cause them to use care and caution as they proceeded thereon. Weather conditions also rendered it expedient for them to pay particular attention to the road. The

fact that a roll of wire had been placed alongside of the highway is not significant or a circumstance tending to show negligence. It frequently happens that wire and other equipment for use in road repair and maintenance are placed at intervals on the roadside for purposes of convenient access and use. A white line on the road is only intended to indicate the side of the road to be used and the presence of a white line on the road in question would not have prevented the accident under the circumstances disclosed by the evidence. I know of no obligation that rests upon the road commission to build and maintain retaining walls on mountainside roads. Such policy would be prohibitive. All that the state is required to do, in my opinion, is to make roads reasonably safe for public use and that seems to have been done on route 61. The state road commission is vested with certain discretion as to when and where it will make repairs on a state controlled highway.

As observed by Judge Elswick in the opinion *in re* claim No. 12, *Harper* v. *Road Commission,* 1 Ct. Claims (W. Va.) 12, "The State is not an insurer as to the condition of its roads." And, as we have heretofore stated, "The mere fact of injury received on a state highway raises no presumption of negligence on the part of the state road commission."

While it is true that since our determination of claim No. 17, *Charles Golden Fry* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 48, the court of claims has held:

> "1. When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night.
>
> "2. When the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negli-

> gence will be considered in determining whether or not an award should be made, and, if made, the amount thereof."

I am of opinion that such holding should be disapproved and reversed. We based our opinion in that and subsequent cases on *Wells* v. *County Court,* 85 W. Va. 663, 102 S. E. 472, in which it was held:

> "The law imposes upon a county court or other public authority in maintaining public roads and bridges, the duty to so guard all dangerous places by suitable railings or barriers as to render them reasonably safe for travel thereon by day or by night."

Such holding of the Appellate Court in that case was based upon an existing statute imposing liability upon county courts. Acts of the first extraordinary session of the Legislature of 1933 imposes no such liability on the state road commission. Section 35, article 6 of the constitution forbids the enactment of such a statute. The state road commission of West Virginia is a direct governmental agency of the state, and as such is not subject to an action for tort. *Mahone* v. *State Road Commission,* 99 W. Va. 397, 129 S. E. 320. A state cannot be sued without its consent, and is immune from suability for torts of its agents and officials. *Wilson* v. *State Highway Commissioner,* (Va.) 43 S. E. (2d Ed.) 746. The immunity of a state from liability for torts of its servants and agents rests on public policy. *Id.* The state cannot waive its constitutional immunity from suit. Chapter 20 of the acts of the Legislature of 1941, creating the court of claims made no change in this fundamental law. The jurisdiction conferred by the act upon the court of claims to consider claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies which the state as a sovereign commonwealth should in equity and good conscience discharge and pay, does not increase or enlarge the liability of the state, but merely provides a forum wherein claims against the state may be adjudicated. This was so held by court of claims of the state of Illinois in construing a statute almost identical with our court of claims act.

The express purpose of the court act is to provide a simple and expeditious method for the consideration of claims against the state that, because of the provisions of section 35, article 6 of the constitution of the state, and of statutory restrictions, inhibitions or limitations cannot be determined in a court of law or equity. The constitutional immunity of the state from suit should at all times be borne in mind. The court is not invested with and does not exercise the judicial power of the state in the sense of article VIII of the constitution of the state. Its duties are limited to the investigation of claims filed against the state which cannot be maintained in courts of law or equity and recommending the disposition thereof to the Legislature. The court is, therefore, distinctly an investigating and advisory commission. It deals only with claims against the state which as a sovereign commonwealth it should in equity and good conscience discharge and pay. It was not the intention of the Legislature, I think, that the court of claims should make awards except in cases where claims should be ascertained to be just and proper within the contemplation and meaning of the court act. And in the application of this statute it should be the obligation of the court to consider its objects and purposes, "and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the Legislature intended to enact."

I do not believe that the claims are claims for which awards should be made. I do not think that the awards made are just and proper or that the court of claims had authority to make them. The claims are not shown to be supported by either legal or equitable obligation. They grew out of an unfortunate automobile accident. Such an accident is liable to occur at any time on any road when three boys and three girls, filled with the exuberance and gayety of youth, while riding in an automobile fail to observe necessary care and precaution for their safety.

I would deny the awards and dismiss the claims.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

A majority of the court having heretofore decided that the several claims presented in the above entitled matter should be allowed, and an award of $3500.00 having been made in each instance, the state, through the attorney general's office, filed its petition and brief for a rehearing of the cases, which said rehearing was granted and the facts in connection with the cases again argued, briefs submitted and the matter again placed in the hands of the court for its determination.

Giving full credit to the very able brief filed by the state and considering fully the law as outlined in the several cases submitted in the state's brief, a majority of the court are still of the opinion and so hold that an award should be made in favor of the claimants On consideration of the case of *Wessels* v. *Stevens County (Washington)* 188 Pacific, page 490, which is particularly relied upon by the state, we find that the court in its decision uses this very significant language in its headnote quoted in the respondent's brief:

> "A County was not negligent in not maintaining a warning sign or barrier at a 100 degree curve . . . the curve not presenting any *extraordinary condition or unusual hazard; . . .*" (Italics supplied.)

The majority of the court maintains, as set forth in our previous opinion, that the reverse or S curve involved in the instant claims, presented in our opinion an *extraordinary condition* and an *unusual hazard* and that protection should have been afforded under the circumstances to a driver or user of the road in question. This was not done, notwithstanding the hazardous condition; no markers were present on the road, no barriers or posts had been erected to properly protect a driver or pedestrian from accident at this particularly hazardous point.

We are, therefore, of the opinion that as the particular place where the accident happened was one of unusual hazard, and again considering the condition of the weather on the night of the accident and all the attendant circumstances, that the

claimants are entitled to recovery. The majority of the court reaffirm their previous opinion and allowance, to wit, thirty-five hundred dollars ($3500.00) in each case.

ROBERT L. BLAND, JUDGE, dissenting.

Upon the rehearing of these claims I again find myself to be at variance with my colleagues. The opinion of the majority members of the court leaves undisturbed the far-reaching rule laid down in the original majority opinion, namely:

> "When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed on it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night."

I cannot subscribe to that proposition. I know of no statute in West Virginia that imposes such duty upon the state road commission. The state road commission is a legislative corporation established as a part of the government of the state. It is, indeed, one of the principal governmental agencies of the state. If such a duty as the majority members maintain exists upon the part of the road commission it would necessarily follow that there should be some remedy to enforce the performance of such duty. No action for actual defects in highways could be maintained at common law except as given by statute.

We must at all times bear in mind that section 35 of article VI of the constitution of West Virginia declares:

> "The state of West Virginia shall never be made defendant in any court of law or equity."

The Legislature may impose upon the state liability for the acts of its agents if it is not prohibited by the constitution from doing so. 26 R. C. L. 66.

In 25 Ruling Case Law, at section 50, page 413, we read:

> "The immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be construed as to place the state within the reach of the process of the court."

In *Kinnare, Admr.* v. *The City of Chicago, et al.*, 171 Ill. 332, at p. 335, it is observed:

> "The State acts in its sovereign capacity and does not submit its action to the jurisdiction of courts and is not liable for the torts of or negligence of its agents, . . ."

Mr. Justic Miller, in the case of *Gibbons* v. *United States*, 8 Wall 269, at p. 274, says:

> "No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents."

And Judge Story says, in his work on *Agency*, section 319:

> ". . . the government . . . does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; . . ."

It has been declared that the state government cannot be made amenable to judicial process, except by her own consent.

In maintaining the road on which the deaths occurred the state road commission is acting within its governmental powers and engaged in the exercise of a governmental function.

The attorney general argues that the original majority opinion is not supported by the law, but is out of line with public policy and the law in the state of West Virginia. He maintains that it has never seriously been contended in West Vir-

ginia, previously, that the state road commission has a duty to place barriers or guardrails alongside the paved portion of our highways located, as they are, in hilly or mountainous terrain and containing literally hundreds of sharp and winding curves. He further contends that there is no liability of the nature sought to be enforced in this proceeding against the state road commission, and that the court of claims is not authorized to make an award founded on claims such as are sought to be enforced in these cases. I think, therefore, that his very able brief is entitled to be seriously considered. He cites code, 14-2-1, as amended by chapter 20, acts of the Legislature of 1941, which section reads:

> "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

He calls our attention to section 12 of said article 2, relating to the general powers of the court, the first sentence of which is a repetition or restatement of the declared purpose for the creation of the court, reading as follows:

> "The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or of some statutory restrictions, inhibitions or limitations, could be *maintained in the regular courts* of the state." (Italics supplied.)

I have been inclined for some time to think that where no liability exists upon which the state could be sued at law or in equity, if it were suable, the court of claims has no jurisdiction to make an award. This is the holding of the Illinois court of claims. The statute creating the court of claims of Illinois and the statute creating the court of claims of West Virginia are very similar.

No action on behalf of the claimants in these cases could be maintained against the state in its regular courts in view of the constitutional immunity of the state from suit and the state's inherent exemption from liability as a sovereign commonwealth. The state is not liable for accidents occurring on its highways. There is no duty imposed by statute on the road commission to guard all dangerous places on the public roads and bridges by suitable railings or barriers. In *Mahone* v. *State Road Commission,* 99 W. Va. 397, it is held:

> "The State Road Commission of West Virginia is a direct governmental agency of the State, and as such is not subject to an action for tort."

And in the opinion in *Clayton* v. *County Court,* 96 W. Va. 333, it is said:

> ". . . The liability of the county court was purely statutory, created by the statute, and otherwise would not exist. At common law the county courts would not have been liable. *Parsons* v. *County Court,* 92 W. Va. 495. . . ."

There is, according to my view, no legal or equitable obligation of the state to pay the claims for which these awards have been made.

Chapter 20 of the acts of the Legislature of 1941, creating the court of claims, was introduced in and passed by the Legislature as,

> "AN ACT to amend article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one as amended, by repealing . . . section three, article three, chapter twelve, thereof, all relating to claims and proceedings against the state, its officers and agencies."

In 59 Corpus Juris, page 282, under the title of "Claims against State," it is said:

> "A claim against the state is a demand by some one other than the state, against it for money or property."

Corpus Juris further says:

> " 'A legal claim' against the state is one recognized or authorized by the law of the state, or which might be enforced at law if the state were a private corporation.
>
> "Within the meaning of statutory or constitutional provisions relating to their presentation and allowances,"

continues this excellent authority,

> "the term 'claims against the state' refers to 'a legal claim', a claim as of right, and generally it is further limited to claims arising out of contract, where the relation of debtor and creditor exists."

I do not think that the awards are based upon claims which the state as a sovereign commonwealth should discharge and pay. It was never within the contemplation of the Legislature, in creating the court of claims and giving it jurisdiction to consider claims ex contractu and ex delicto, to make the state liable in damages for accidents occurring upon mountainous highways on which guardrails and barriers had not been erected. The court act authorizes us to consider actions ex contractu and ex delicto, but imposes no liability against the state where none would exist independently of the act. At most this act provides a remedy for the consideration of actions recognized at common law or against the sovereign or created by statute. It creates no cause of action. It provides a remedy for existing causes but imposes no new liability. It does not waive any defense.

In *Wessels* v. *Stevens County,* 110 Wash. 196; 188 Pac. 490, cited by the attorney general, the Supreme Court of the state of Washington held:

"A county was not negligent in not maintaining a warning sign or barrier at a 100 degree curve in a 14-foot highway below which was a deep canon, the curve not presenting any extraordinary condition or unusual hazard; there being hundreds of just such curves upon the highways of the state."

I quote as follows from the opinion in that case:

"The accident, which caused the death of the deceased, occurred on what is known as the hill road between Spokane and Colville. It was a good gravel road, and one of the principal thoroughfares between these two cities. On the evening of January 5, 1918, the deceased was traveling over the highway in an automobile driven by one Loyal Clark. At the point where the accident occurred the road makes a sharp or abrupt curve around the brow of the hill. Below the road at this point is a valley or canon several hundred feet wide. The decline to the valley below is precipitous. The turn is described as a 100 degree curve. The roadway at this point was approximately 14 feet wide. The accident occurred about 6 o'clock in the evening; it being then dark. The deceased was riding in the front seat with the driver of the car. As the automobile was rounding the curve it passed outside of the outer beaten track to the brink of the decline and rolled down the hill. The deceased went down the hill with the car, and sustained the injuries from which he died a few days later. The lights on the automobile were good, and focused upon the road about 40 feet in front of the car. It was traveling 8 or 10 miles per hour at the time and could be stopped at that speed within its length. The road approaching the brow of the hill, over which the automobile passed just prior to the accident, was practically level and straight.

"[1] The negligence alleged was the failure to have any warning sign or barrier at the curve. It is the admitted rule that a county is required to keep its highways in a reasonably safe condition for ordinary travel. The evidence shows that a large number of automobiles passed over this road every week. There is no map or drawing in the record showing the exact situation, but there are a number of pho-

tographs, by which, taken in connection with the testimony, the condition of the road and the curve are made reasonably apparent. One of these photographs, referred to as 'Exhibit 5,' shows the highway at the curve, the point of the hill on the upper side, and a man standing at the brink of the decline looking over the valley. The evidence shows that the point where the man is standing is where the automobile went over. At this point the distance between the outside traveled track of the roadway and the place where the man is standing is a number of feet. The appellant admits that if this were a hillside road, there would be no cause of action.

"[2] Whether the county was negligent in not maintaining a warning sign or barrier depends upon whether the road at the curve presented an extraordinary condition or unusual hazard. There are probably hundreds of just such curves upon the highways of this state, and if it were held that the county failed in the performance of its duty by not having a warning sign or barrier here, the same would be true of every other similar situation.

"In *Leber* v. *King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267, it is said:

" 'Here we have a road graded and in repair, 15 feet wide, which is wide enough for all ordinary travel unless it be in the populous centers of the state. We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones. The unusual danger noticed by the books

> is a danger in the highway itself. It may become a question for the jury. Such was the condition in the *Neel* case. [*Neel* v. *King County*, 53 Wash. 490, 102 Pac. 396.]
>
> "It is true the accident in that case happened upon a hillside road, but the principle is applicable to the present case, because there was no unusual danger or extraordinary hazard at this curve as compared with other similar curves. The case of *Beach* v. *Seattle*, 85 Wash. 379, 148 Pac. 39 is not controlling. There the accident happened in a thickly populated city, at the end of a paved street, which was crossed by a gulch. The automobile went down the street and into the gulch. The incandescent light on a pole nearby tended to obscure the gulch and give it the appearance of the continuation of the street in an unpaved condition."

Because I believe that the adherence of the majority members upon rehearing to the rule announced in the *syllabus* of the original majority opinion to be wrong, and am of opinion that it is an incorrect statement of the law and that such holding is contrary to public policy, I now respectfully record this dissent.

(No. 217—Claim denied.)

JAMES R. BROCKUS, Claimant,

v.

DEPARTMENT OF PUBLIC SAFETY, Respondent.

Opinion filed July 29, 1943

When it appears from the evidence upon the hearing of a claim filed by a former member of the department of public safety who had been granted an indefinite leave of absence, without pay, privilege or prerogative, for salary alleged to be due him for the unexpired term of his said enlistment, that such claimant had very defective hearing, failing sight, very bad hemorrhoids, a broken arch in the left foot, and was not physically qualified to serve in the department of public safety, and performed no duties or served any part of the last year of the term of his enlistment, and that such disabilities did not arise from and were not incident to his service in the department of public safety, the court of claims will not make recommendation to the Legislature for an appropriation for the payment of such claimed salary.

Messrs. *Lee, Blessing & Steed (R. Dennis Steed)*, for the claimant;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

ROBERT L. BLAND, JUDGE.

In 1934 Colonel P. D. Shingleton was superintendent of the department of public safety of West Virginia. On the tenth of August of that year claimant, James R. Brockus, enlisted as a member of the department for a term of two years. He had previously served as a member of the department under several successive prior enlistments since 1920 when he retired from the United States Army. Upon said last mentioned enlistment, as was the case on former enlistments, he was appointed captain of a company or platoon. His salary

as such officer was fixed by statute at $2400.00 per year. After taking the oath and executing the bond prescribed by law, claimant entered upon the discharge of his official duties and served under and by virtue of his said enlistment and appointment until August 9, 1935, when Colonel Shingleton, superintendent of the department, made and entered an order granting him an indefinite leave of absence, without pay, privilege or prerogative, a copy of which was duly transmitted to him. Thereafter, to wit, on August 10, 1936, the date of the expiration of the term for which claimant had enlisted as aforesaid, superintendent Shingleton made and entered a further order, a copy of which was duly served upon claimant, discharging him as a member of the department of public safety by reason of the expiration of his enlistment.

No part of the salary for the second year of the term of claimant's enlistment was paid to him. By his claim in this proceeding he seeks to recover salary for said year. Such payment is resisted by the department of public safety. Various questions were raised upon the hearing, but in our judgment the claim is not one for which an award should be made by the court of claims. After the indefinite leave of absence above mentioned had been made, and notice thereof given to claimant, he addressed a letter to the superintendent of the department of public safety, under date of August 10, 1935, in which he said:

> "Your order placing me on indefinite leave, without pay, received this morning. This appears to be an unusual method of eliminating an officer from the department. If my services have been unsatisfactory, or if I have committed an offense to justify such action, it would appear that the correct way to go about the matter would be to discharge me outright."

We are constrained to agree with this proposition. To say the least the circumstances attending the dismissal of claimant from service in the department were irregular and contrary to the course prescribed by statute. The superintendent of the department of public safety is vested by statute with au-

thority to suspend a member of the department for the good of the service. Article 2, section 19 of chapter 15 of the code provides that the superintendent may suspend or remove from the service any member of the department of public safety for any of the following causes, to wit: Refusing to obey the order of his superior officers; neglect of duty; drunkenness; immorality; inefficiency; abuse of his authority; interfering with the lawful right of any person; participation in political primaries, conventions or elections, or any other cause that may in the opinion of the superintendent be necessary *for the good of the service.*

It does not appear from the record, however, that any formal charges were preferred against claimant, although when asked "Did you at any time during such period of enlistment and appointment receive any notice from the superintendent of any charges made or filed against you, written or oral?" he replied: "There was charges filed but as to the date I do not recall just at this time." Claimant expressed the opinion that such charges were preferred and that he had knowledge of them. When interrogated as to what they charged he answered "They stipulated certain immoral acts and other offenses committed back in 1921 or 22." He further stated that it was possible that such charges were preferred in the summer of 1935. He observed: "I recall the superintendent visiting Fairmont, and he showed me these charges filed by a former lieutenant, and as to the date I am not sure of that, it might have been after this enlistment in 1934." In any event there was no hearing afforded claimant upon any charges in the manner prescribed by the above cited statute. Presumably, from the facts disclosed by the record the superintendent of the department was of opinion that claimant should be relieved for "the good of the service." This is made more apparent by the circumstances hereinafter detailed. In his letter of August 10, 1934, addressed to superintendent Shingleton, hereinbefore mentioned, claimant said: "Having been advised that I was to leave the department on August 10, after eighteen years service, I made application for disability retirement on July 22, 1935, under the act of March 9, 1935." It thus appears that

as early as July 22, 1935, prior to the above mentioned order granting him an indefinite leave of absence, without pay, claimant knew that he was to retire from the service on the said tenth of August 1935. On July 17, 1935, Superintendent Shingleton had notified claimant that he had been given a leave of absence for fifteen days, and had directed him to turn over to Lieutenant Skeen command of Company A, and all uniforms and equipment issued. By special order No. 35, made on August 1, 1935, claimant was granted a further leave of absence of nine days from August 2, 1935 until August 10, 1935.

After claimant had made application for disability retirement his case was considered by a board of commissioners, composed of Honorable Harold A. Ritz and Honorable John L. Hatfield. Claimant appeared before the board and made this statement: "I had a physical examination on July 12, 1935, and such examination showed I had hemorrhoids, broken arch in left foot and deafness in left ear." Further physical examination of claimant was ordered by the board. It was made by Dr. Schoolfield, of Charleston, West Virginia. This examination revealed that claimant had very defective hearing, failing sight and very bad hemorrhoids, and was in no condition to serve in the department of public safety. This physician certified to the board of commissioners that to the best of his judgment and belief claimant was not physically qualified for service in the department. The said board refused claimant's application for disability retirement, finding that the physical disability of claimant was not service connected.

We are impressed by the thought that notwithstanding the various questions presented by the record in support of claimant's contention, and in opposition thereto, that a member of the department ascertained to be physically unfit for service therein should not be continued in such service. This conviction in the mind of superintendent Shingleton was evidently responsible for the first leave of absence of fifteen days,

the extension thereof for a period of nine days, and the indefinite leave without pay.

Upon the whole record, as we view it, claimant was not physically qualified to render service in the department of public safety for the second year of his last enlistment therein. We cannot, therefore, recommend to the Legislature an appropriation for the payment of the salary claimed by him for that year, and an order will be entered by a majority of the court dismissing the claim.

(No. 269—Claimant awarded $62.50.)

EARL NULL, Claimant,

v.

BOARD OF CONTROL, Respondent.

Opinion filed July 29, 1943

When, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy.

Appearances:

Claimant, *Earl Null,* in his own right;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

Claimant asks for an award of the sum of $62.50. The evidence presented to the court established the fact that claimant was employed as a guard at the West Virginia penitentiary from February 1, 1934 until March 8, 1943, and received no pay for two weeks' vacation during the year 1943, earned during the year 1942, which, at his salary of $125.00 per month, prorated, entitled him to the sum of $62.50. In our opinion the case is controlled by the opinion of this court rendered in the case of *Max G. Lynch* v. *State Board of Control,* case NO. 191, in which an award was made. Liability of the state to pay this claim is admitted by respondent and its payment approved by the attorney general.

An award of sixty-two dollars and fifty cents ($62.50) is made to claimant.

(No. 275—Claimant awarded $62.50.)

RAY ARBOGAST, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 29, 1943

When upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy.

Appearances:

Claimant, *Ray Arbogast,* in his own right;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

Claimant asks an award of the sum of $62.50. This claim, NO. 275, and claim NO. 269, *Earl Null,* claimant, were heard together, the same facts and the same question were involved; the same evidence was presented, the same admission was made by the respondent and the same approval given by the attorney general, and the court is of the opinion that this case is likewise controlled by the opinion of this court rendered in the case of *Max G. Lynch* v. *State Board of Control,* case NO. 191.

Therefore, an award of sixty-two dollars and fifty cents ($62.50) is made to claimant.

(No. 250—Claimant awarded $22.50.)

ELIZABETH DIXIE, Claimant,

v.

BUILDING & GROUNDS DEPARTMENT, Respondent.

Opinion filed July 29, 1943

When a state department fails to avail itself of the mandatory provisions of the workmen's compensation act, and subsequent to the effective date of the said act an employee of the said department is injured while so employed, under circumstances which would have entitled her to compensation had the said department complied with the act in question, then an award will be recommended in an amount to reasonably cover the damages occasioned by her injuries.

Appearances:

Claimant, *Elizabeth Dixie*, in her own behalf;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, while employed as an elevator operator in the capitol building, was hurt some time in February 1940, by having her thumb cut in the sliding doors of the elevator, thereby suffering the injuries in question and obliging her to incur medical and hospital expenses in the amount of the claim, namely $22.50. The building and grounds department which had supervision of the operation of the elevator in question had not at the time of claimant's injury availed itself of the provisions of the workmen's compensation act previously passed and adopted in 1937, and by the provisions of which act it became mandatory upon the said department to subscribe to and comply with the provisions of the act in question.

If this had been done, the claimant would, undoubtedly, have been paid and reimbursed from the compensation fund accordingly.

In accordance with the thought and tenor of the decision as heretofore expressed by our Court of Appeals in the case of *Archibald* v. *Workmen's Compensation Commission*, 77 W. Va. at page 450, the question of claimant's alleged negligence or carelessness is not material or pertinent to our decision. The department involved should have availed itself of the provisions of the law and if it had done so the claimant, under the testimony as submitted, would have been entitled to compensation.

Considering the fact that claimant was deprived of her right to any compensation for the injuries received by the department's failure to comply with the provisions of section 2511 (Michie's code) of the workmen's compensation act, we feel that she is entitled to an award at the hands of this court and an award in the sum of twenty-two dollars and fifty cents ($22.50) is hereby made accordingly.

(No. 280—Claimant awarded $43.31.)

FIRESTONE TIRE & RUBBER COMPANY, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed July 30, 1943

An award will be made by this court to a claimant for the payment of an unpaid debt regularly incurred by a state government agency, when presented after the biennium has passed in which such claim should have been paid.

Appearances:

Wm. H. Duval, for the claimant;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

Claimant asks for an award of the sum of $43.31 in payment for five tires and two tubes shipped to said respondent from claimant's store in Charleston, West Virginia, upon regular purchase orders NOS. SP 1264 and SP 1430, which were delivered to said store on August 27, 1940 and January 15, 1941 respectively. Statement for said tires and tubes was not received by said respondent until in May 1943, at which time the excess of its biennial appropriation for the biennium ending June 30, 1941 had reverted to the general revenue fund and consequently there were no funds legally available for its payment.

Evidence proving this claim having been presented to the court, and allowance of the award recommended by respondent, and approved by the attorney general, an award is accordingly made to respondent for the sum of forty-three dollars and thirty-one cents ($43.31).

(No. 264 Claimants awarded $39.91)

GEORGE S. BASSITT & SON, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 30, 1943

When agents of the state road commission engaged in spreading cinders on a state highway, to promote the safety and public use thereof under icy and slippery weather conditions, negligently place and leave large and heavy clinkers with such cinders, and one of said clinkers is dislodged by passing traffic and cast with such force against a plate glass window in the store of merchants whose place of business abuts on said highway and breaks such plate glass window, an award will be made for the cost of replacing it.

A. E. Bassitt, for claimants;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

ROBERT L. BLAND, JUDGE.

Claimants conduct a general mercantile business in the town of St. Albans, Kanawha county, West Virginia, through which state route No. 60 extends, and is there known and called Main street. Their place of business is just adjacent to the highway. Their show window extends back approximately nine feet from the curb. In this window there was a large plate glass, about six and one-half feet high, and seven feet wide. On the seventh of January 1943, a passing automobile caused a clinker, about the size of a hen egg, to become dislodged from cinders previously spread upon the highway, and cast with force against said plate glass window. The glass was demolished and had to be replaced at a cost of $39.91. Claimants contend that the accident was due to the negligence of state road commission agents and employees in the performance of work on the highway. The evidence shows that shortly

before the occurrence of the accident the highway was icy and slippery, and in order to promote the safety and public use of the road, employees of the state road commission spread cinders on the road. In these cinders were a number of large, heavy clinkers, which were not removed and remained there after the road had been cleared. Just below the show window was found one of these clinkers, which was exhibited to the court. It is obvious that a clinker broke the plate glass, and that it was placed on the highway by agents of respondent.

An award is, therefore, made in favor of claimants, George S. Bassitt & Son, in the sum of thirty-nine dollars and ninety-one cents ($39.91).

(No. 258—Advisory opinion.)

AMERICAN INSURANCE AGENCY, a corporation claimant,

v.

STATE CONSERVATION COMMISSION at the relation of EDGAR B. SIMS, Auditor, Respondent.

Opinion filed August 2, 1943

Advisory opinion by CHARLES J. SCHUCK, JUDGE.

To the Auditor of the State of West Virginia:

Some time ago you submitted to this court for an advisory opinion the following proposition, together with an inquiry as to whether or not you, as auditor, could legally honor for payment the invoice therewith attached, namely:

"The attached invoice in the amount of $895.06, from the American Insurance Agency, Inc., to the Conser-

vation Commission of the State of West Virginia, is a yearly premium for public liability and property damage insurance on a fleet of automobiles owned by the Conservation Commission. The insurance policy, No. UNS 463856 A, is enclosed so you may readily determine the extent of the coverage.

"Can the Auditor pay this invoice as representing a claim against the State?"

We have given the matter very careful consideration and examined the authorities submitted by counsel representing various state departments, as well as the conclusion heretofore reached by the attorney general's office, by Honorable Ira J. Partlow, acting attorney general, on the same subject matter, and set forth in a communication to you dated July 7, 1943.

We appreciate fully that the conservation department, as a matter of practical business, may have felt justified in contracting for the insurance in question, and yet we are constrained to hold that only where legislative authority is expressly authorized or given, or clearly implied, can a department contract a legal obligation for which the state, through its proper channels, should or must pay. We have considered the reasoning of the cases submitted in the memorandum of the acting purchasing agent, and while it would seem that these authorities justify the department in question in contracting for certain kinds of insurance, yet a careful reading of the decision of our own Supreme Court in the case of *Board of Education of the County of Raliegh* v. *Commercial Casualty Company*, 116 W. Va. 503, lays down the unqualified rule that unless authority is expressly authorized by statute or can be justified within the clear and plain implications of the statute dealing with the subject matter, that there is no authority giving to the departments the right to contract for the insurance involved in the invoice heretofore transmitted to your department or office for approval. Of course, no such authority is given in any statute either to the department in question nor yet to the other departments.

We are, therefore, constrained to follow the opinion heretofore rendered to your office by the acting attorney general, and herein referred to, and to hold that in the absence of statutory authority authorizing the carrying by the department in question of the public liability insurance referred to that the contract with the said insurance company was without authority or warrant of law, and, consequently, presents a claim not enforceable.

The invoice concerned is herewith returned to your office.

(No. 252—Claim denied.)

S. E. NEESE, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed August 27, 1943

Where it appears from the evidence that claimant a former employee of the state, failed to present his claim as a set off or credit in his settlement made with the state, at a time when he was heavily in debt to the state for funds misappropriated and wrongfully used by him, it will be presumed that such claim presented some time later to this court was without merit and an award will be denied.

Appearances:

S. E. Neese, the claimant, in person;

Eston B. Stephenson, Esq., special assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, S. E. Neese, was employed by the state conservation commission as superintendent of Watoga Park in 1937 which employment ceased in September 1941, at which time it was discovered that there were irregularities in the accounts of said claimant which were afterward settled by his payment to the state of approximately $2000.00 the amount which the state claimed due it at the time of his dismissal.

The record reveals that claimant's services were unsatisfactory; that amounts were withheld by him obtained from rentals and privileges in the park which properly belonged to the state and which had not been accounted for by him at the time.

The claim that is presented to us for our consideration contains items of payment for services to workmen in the park which the claimant alleges that he was obliged to personally pay, as the appropriation to the state department in question had been exhausted at the time, as well as other items of expressage and personal items for food which he claims that he was obliged to expend during his incumbency as such superintendent. The claim embodies items arising from February 29, 1940, to August 15, 1941. The claimant was dismissed as the park superintendent in September 1941. The settlement with the state department involved took place some ten months after his dismissal, the amount in question to be exact, being $2117.07. The claimant failed to present any part of the claim as now presented here, to the department at the time negotiations for a settlement with it were pending, which fact of itself is quite unusual, but which the claimant seeks to justify on the grounds that he had been informed by one Wilson, a district superintendent, that there were no funds available for the payment of the wages and the other items which he, the claimant, maintained that he had paid.

Whether the foregoing statements be true or not, the claimant himself would not have been barred from presenting these items at the time of settlement with the state, when, as the

testimony shows, he was driven to dire means to make good the amount claimed from him by the state conservation department, the fact being that this amount was eventually paid partly by a cashier's check and, so far as we are able to ascertain, the balance in cash later. We cannot understand why claimant did not under the circumstances insist on being given credit for his alleged payments, and we feel that his failure so to do necessarily militates against him in the consideration of the merits of the claim now before us. As heretofore indicated, he maintains that there was no appropriation made for the payment of these items, but yet the uncontradicted testimony reveals that the appropriation made for the biennium had not been exhausted at the time in question, and the items could have been paid out of the funds then available from the appropriation made for the state conservation commission. Furthermore, it is also important to note that the men to whom he claims to have made payment at the time when funds were not available were, during all this period, on the payroll of the department and drawing their wages and salaries throughout the greater portion of the period both before and after the time of his dismissal. All of which tends to show that there is no merit in the claimant's position that the funds had been exhausted, so far as the appropriation to the department in question was concerned.

Considering, therefore, all the testimony as submitted to us, we feel that the claimant has failed to present a case entitling him to an award and we find accordingly, namely, that an award will be denied.

(No. 271, 272, 273—Claims denied.)

B. F. MORTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

W. E. SIZEMORE, as SIZEMORE BROS., assignee of G. S. JOHNSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

A. B. & J. G. MULLINS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 27, 1943.

Opinion on rehearing filed July 10, 1944

1. Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power; and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent. *Rosendorf* v. *Poling*, 48 W. Va. 621.

2. When upon the hearing of demands seeking awards for the price of lumber claimed to have been purchased for the use of the state road commission by a superintendent of a prison labor camp, the evidence shows that such lumber was actually furnished to the state by another person who had been given purchase orders therefor in the usual and customary manner in which such purchases were made by the state, and had been paid in full for such lumber, awards will be denied to such demandants.

S. W. Bryant, Esq., for the claimants;

Eston B. Stephenson, Esq., special assistant to the attorney general, for the state.

ROBERT L. BLAND, JUDGE.

By agreement of counsel for claimants and the special assistant attorney general these claims were heard together and the matters arising upon them respectively will be considered in a single opinion.

The claims are prosecuted in this court on the theory that in the year 1934 one T. S. Ray, then superintendent of a prison labor camp in Clay county, West Virginia, purchased from claimants B. F. Morton, G. S. Johnson, assignor of Sizemore Brothers, and A. B. & J. G. Mullins, certain lumber for the use and benefit of the state road commission, that the state accepted and received the benefit of said lumber and never made payment therefor, and that in equity and good conscience it should make such payments. The state, on the other hand, takes the position that the lumber for which awards are sought was sold to the state, not by Morton, Johnson and Mullins, but by one N. Kinniston, to whom payment in full was made for such lumber.

Claimant B. F. Morton seeks an award of $75.00, which amount he claims to be the balance due on account of 10,000 feet of bridge flooring sold by him to the road commission, at $20.00 per thousand feet. Claimant, W. E. Sizemore, as Sizemore Bros., assignee of G. S. Johnson, seeks an award for 4363 feet of oak lumber at $18.00 per thousand feet and 1894 feet of oak lumber at $20.00 per thousand feet, making a total of $116.41. Claimants A. B. & J. G. Mullins, seek an award of $780.00, claimed to be the balance due them on account of 30,000 feet of oak lumber sold to the state at $20.00 per thousand feet. Each claimant also seeks interest on the amount claimed to be due for which an award should be made. Interest, however, could not be allowed under the court act if awards were made.

The same witnesses testified in support of each claim insofar as it was intended to show that a contract between claim-

ants and the state existed. We do not think, however, that such evidence shows that T. S. Ray was acting on behalf of the state or that he had authority to purchase said lumber and make the state liable for its payment. At most it only appears from the record that Ray was superintendent of prison labor in Clay county. There is not even a presumption that he was agent of the state to purchase the lumber in question. There is no proof to show the existence of such agency. The most careful and analytical consideration of the evidence fails to show that claimants have established that T. S. Ray was the agent of the state for the purpose of purchasing lumber, or that he did actually as such alleged agent purchase said lumber, for which claimants seek awards, for the state. One dealing with an agent of the state is bound to know the extent of the authority of such agent. Where a person deals with an agent, it is his duty to ascertain the extent of his agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power; and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent. *Rosendorf v. Poling,* 48 W. Va. 621. The general rule is that one dealing with an agent is bound at his peril to know the agent's authority. *Uniontown Grocery Company v. Dawson,* 68 W. Va. 322.

Claimants introduced J. M. Lorentz, who was maintenance superintendent for Clay county in 1934, as a witness in support of their claims. His testimony throws much light upon the situation. He testified that G. S. Johnson, assignor of Sizemore Bros., had an order from N. Kinniston; that Ray looked after her business; that along about that time she did quite a lumber business with the state, and that it was "hard to beat her out of an order"; that the purchase order for the lumber in question was from said N. Kinniston; that she paid Johnson $20.00 per thousand and sold the lumber to the state for $30.00 per thousand and that later she and Ray intermarried.

When Claimant Morton claimed to have contracted with Ray for the lumber the Kinniston woman was with him. (Transcript, p. 11). Later when he was trying to get payment for the lumber he found Ray and the Kinniston woman together at Charleston. (Transcript, p. 12). She took part in the negotiations. (Transcript, p. 11). When Ray talked with Morton about buying lumber "there was a lady with him, when he was up there a time or two." (Transcript, p. 11). She was present when the order was given for the lumber.

It is made clear from the evidence that a close relationship existed between Ray and the Kinniston woman prior to their marriage, that they were frequently together, and that in the case of the claim of B. F. Morton two separate payments were made to him, not by the state road commission, but by the personal check of said Ray, amounting in the aggregate to $150.00. We are impressed by the thought that the association of Ray and the Kinniston woman was of such a nature and character as to put claimants upon notice in their dealings with them.

The evidence submitted in opposition to the claims shows conclusively that the lumber for which the three claimants seek awards was sold by the said N. Kinniston to the state and that she was paid in full therefor. As we view the situation no question of fraud arises between the state and the claimants. If any fraud were perpetrated it was by N. Kinniston. At the time that the lumber was sold the statute expressly provided how bids should be submitted and contracts entered into for the purchase of said lumber. This method seems to have been observed by the Kinniston woman. She submitted her bids and received purchase orders. She furnished the lumber to the state and was paid in full for the contract price thereof. It is reasonably apparent that the lumber of claimants was sold to the Kinniston woman and that she in turn sold it to the state. She received from the state the price which it contracted to pay her for said lumber, but failed to make settlement with those from whom she purchased it.

We see no reason, therefore, why the state should pay twice for the same lumber.

The very purpose of the creation of the court of claims was to provide a method for the careful investigation of claims asserted against the state to the end that proper recommendation should be made to the Legislature concerning them. If we should make awards in favor of these claimants for the amounts asked by them we would establish a precedent that would "lay down the bars" and afford opportunity for all manner of claims to be filed in this court. We can extend our sympathy to the claimants in the unfortunate predicament in which they find themselves on account of the transaction which they had for the sale of their lumber, but under the evidence offered in support of said claims we cannot see that they are entitled to call upon the state for the payments which should have been made by the Kinniston woman. The claimants should have been governed by the law if they intended to sell their lumber to the state. They should have submitted bids and received orders of purchase from the state. The evidence does not show that the claimants, or either of them, made any inquiry for the purpose of ascertaining whether or not Ray had authority to make purchase of lumber for the state and bind the state for payment. The transaction in each case was loosely and indifferently conducted.

Recommendations for the payment of public revenues are not properly to be indiscriminately made. If the court of claims were to do so its usefulness as a special instrumentality of the Legislature would soon be at an end.

Majority members of the court are of opinion that claimants did not, in fact, sell their lumber to the state, that they have wholly failed to establish the agency of Mr. Ray to purchase said lumber, and that the claims should be denied and dismissed.

An order will, therefore, be made by a majority of the court denying the three above captioned claims and dismissing the same from the docket of the court.

Judge Schuck reserves the right to file a dissenting opinion.

CHARLES J. SCHUCK, JUDGE, dissenting.

Under the facts as shown by the record and as governed by the law, I find myself in disagreement with the opinion rendered by the majority and feel that to carry out the conclusion therein set forth would be a miscarriage of justice.

A reading of the record reveals that Ray was the agent of the state road commission and as such agent had the right to contract for lumber to be used in the construction and maintenance of bridges along the state roads and highways in Clay county. The state at no place in the record repudiates the relation with Ray as its agent in the purchase of the lumber in question.

The majority opinion is based upon the proposition of law that one deals with an agent at his own peril. This proposition in my judgment, has no application whatever to the facts as shown in the hearing of these claims. Ray had the right to make the contracts in question; he was not exceeding his authority in making them; his agency has not been denied nor have his powers of contract been disputed in any way so far as this record reveals. In fact, it was these very contracts that he had made with these claimants, that brought about the delivery of the lumber in question necessary to carry on the projects of road improvement in which the state, through the state road commission, was then engaged. These were *executed* contracts and the work of the agent, Ray, accepted by the state and consequently binding upon it. The question here is plainly not *what* power did Ray possess, but rather did the state accept and receive the benefit of the contracts made with these claimants. The law which the majority

seeks to impose in this matter contemplates a case in which, by reason of the agent exceeding his authority, no contract exists that will bind the principal. Such is the sum and substance of the decision in *Rosendorf* v. *Poling*, 48 W. Va. 621, and used as the basis for the majority opinion. There the agent sought to make a contract beyond his powers which was repudiated by his principal, and which repudiation was sustained by the court. That law is not applicable to these claims. The agent Ray did *not* exceed his authority. He had the right to make the contracts in question, as he did make them, and in all justice and equity the state has the obligation to pay these claimants what is fairly due them for the materials and the lumber they furnished and which the state accepted and is using.

The majority opinion indicates that Ray was not acting on behalf of the state. In the name of common sense for whom was he acting—wasn't it by reason of his acts that the state obtained the lumber, used it in the construction of the bridges and roadways, and has been receiving the benefit of the material since that time? It is not true that Ray was merely the superintendent of prison labor in Clay county. He had full authority for contracting for the lumber which was used on the bridges and roadways by the state road commission. These facts are not denied and stand out boldly when one fairly reads the record as made in the presentation of these claims.

I repeat, these were all executed contracts. Whatever was done by the agent was accepted by the principal and therefore there is no application of the theory that one deals with an agent at his own risk, and to now allow the state to enjoy the benefits of these claimants' labor and material which they furnished, without compensation is to my mind unwarranted and highly improper. The state especially should not be allowed to have the benefit of an unjust and illegal enrichment without paying for the material furnished. That there was fraud perpetrated upon the state in these transactions, there can be no question, but it was perpetrated *not* by these claim-

ants, but by the state's own agent, Ray himself; and we are well aware of the fact, that the fraud of the agent after obtaining the contracts in question cannot be chargeable in any manner to innocent persons with whom he contracted, but the damage, if any, must be borne by his principal.

Whatever was done by Ray after obtaining these orders cannot affect the rights of these claimants; and, by the way, since some question has been raised as to whether or not these small sawmill owners who are here involved, strictly complied with the law in the matter of submitting their offers to sell, notwithstanding the fact that the material was accepted, and used, by the state, let me say that in one instance, at least, as revealed by the testimony, namely that of Mullen, a bid was submitted through the accredited agent, Ray himself.

If after obtaining these bids and before the lumber was delivered, Ray planned some fraud with Mrs. Kinniston, and raised the price of the lumber, it was a fraud perpetrated upon the state by Ray himself, and as for these innocent claimants they cannot be held liable, for, so far as the evidence is concerned they had no connection whatsoever with such acts. The testimony reveals that they dealt with Ray in making these contracts and no one else. The undisputed testimony shows that Ray was the accredited agent of the state. The testimony fails to show the slightest repudiation of Ray's powers. The testimony shows that these were executed contracts and not governed in any sense by the law sought to be applied in the majority opinion.

The testimony further shows that this lumber was accepted by the state and has been used during all that period for the benefit of its roads and in the construction and maintenance of the bridges in question. The testimony shows (Lorentz record p. 40) that Ray was the agent and was carrying on the work of the road improvement in Clay county at the time.

Considering all these circumstances and facts and the law applicable, thereto, I would find that the claimants had sustained their claims and were entitled to awards accordingly.

ROBERT L. BLAND, JUDGE, upon petition for rehearing.

After these claims had been denied and dismissed by majority members, and the filing of a dissenting opinion by the presiding judge, claimants presented their petition praying for a rehearing of the claims. Although this petition tendered nothing more than slight ground for such rehearing, it was nevertheless, granted. And now after careful reexamination of the original record and due consideration of the record upon rehearing majority members of the court find themselves unable to recommend to the Legislature the payment of the claims involved in these cases.

As shown in the original majority opinion the claims are prosecuted upon the theory that the lumber for which claimants seek awards was purchased by the state of West Virginia by and through its agent, T. S. Ray. Upon the original hearing and upon the rehearing the state contested the right of claimants to awards. We fail to perceive where the state at any time recognized the alleged agency of Ray. The claims have at all times been contested. We are unable to find anything in the original record or the record on rehearing even tending to establish that Ray was agent of the state vested with power and authority to purchase the lumber for which these claims are made. The evidence does show very clearly, however, that N. Kinniston had orders from the state for lumber to be supplied by her. It further shows that she was paid for lumber which in every respect corresponded with the lumber which claimants say was purchased by Ray.

J. M. Lorentz who, at the time the lumber was furnished for which claimants seek payment, was county maintenance superintendent for Clay county, West Virginia, was introduced as a witness on behalf of claimants. He stated that T. S. Ray

was acting superintendent of the prison labor operating in Clay county. When asked if he knew anything about Ray having purchased timber he answered in the affirmative; and when requested to tell what he knew about the G. S. Johnson lumber, answered: "Well, Mr. Johnson had an order from—I presume it was from N. Kinniston, but I think Mr. Ray looked after Miss Kinniston's business, seemed to at least. . . ." Johnson was the assignor of Sizemore Brothers.

Claimant Morton said that N. Kinniston was present with Ray when he cotracted for the sale of his lumber. She and Ray discussed with him the bill of lumber which they desired him to cut. She and Ray together were buying his lumber. Transcript, pages 11 and 12. Ray made two payments on account of the purchase, one of $50.00 and the other of $100.00, each by his personal check. The road commission at no time recognized any obligation on its part to pay for any part of the lumber embraced in these claims to any person other than N. Kinniston. The conviction is inescapable that it was she who purchased the lumber for which these awards are now asked to be made. Subsequently she and Ray intermarried. At last account he was in Siberia and she had but recently removed from Louisville, Kentucky, for parts unknown.

The record wholly fails to establish the agency of Ray to purchase lumber and bind the state for its payment. At most he was but an employe or servant of the state. His duties were those incident to the position of acting superintendent of prison labor. Nowhere in the record does it appear that he had power or authority to buy lumber for the road commission.

> "Acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its law." *State* v. *Chilton,* 49 W. Va. 453.

In the same case it is held:

> "A state is not bound by the unauthorized acts of public officers. Their misconduct is no estoppel against the state."

How, therefore, could a mere employee or servant of the state bind it for the payment of these claims? In the case of *Daugherty* v. *Board of Education,* 86 W. Va. 522, it is held:

> "One dealing with an officer or official body is bound to take knowledge of his or its authority."

The orders heretofore entered in these cases denying awards and dismissing the claims are now ratified and confirmed by majority members of the court.

CHARLES J. SCHUCK, JUDGE, dissenting.

For the reasons heretofore assigned in my dissenting opinion and which reasons I feel have been strengthened by the record upon rehearing, I would approve the claims as filed, believing that to do otherwise is to work an injustice on these claimants and deprive them of money rightfully due for the lumber obtained by the state and used by it for its benefit.

(No. 282-S—Claimant awarded $114.69.)

G. H. GOFF, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 18, 1943

ROBERT L. BLAND, JUDGE.

The highway accident which is the basis of this claim occurred on March 27, 1943, at Borderland, on U. S. route 52, in Mingo county, West Virginia. About 9:20 o'clock A. M. on that day a passenger bus traveling east on the highway stopped at a side road to discharge passengers. Claimant G. H. Goff driving his Chevrolet coupe bearing West Virginia license NO. 174-283, and traveling west, stopped to turn into a side road, when a state road commission truck NO. 330-531, operated by Clyde Weller, following about one hundred feet behind, ran into the rear of claimant's automobile, knocking it into the bus, which was about four feet from the outer edge of the shoulder of the road. Claimant's vehicle was, in consequence of the collision, badly damaged, to repair which he was obliged to and did pay the Economy Garage at Huntington, West Virginia, the sum of $114.69, as shown by an itemized statement and affidavit made by H. Steinbrecker, proprietor of the garage, and filed with the record herein. The road commission concedes that its truck was obviously at fault and concurs in the claim, which is approved by the special assistant to the attorney general as a claim which, in view of the purposes of the court act, should be paid.

An award is, therefore, accordingly made in favor of claimant G. H. Goff for the sum of one hundred fourteen dollars and sixty-nine cents, ($114.69) subject to the approval and ratification by the Legislature.

(No. 283-S—Claimants awarded $117.12)

CATHERINE D. ELY and FARM BUREAU MUTUAL AUTO INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 18, 1943

ROBERT L. BLAND, JUDGE.

The claim in this case is for the amount of $117.12 and grows out of a highway accident.

On June 17, 1943, Leonard M. Ely was driving a Chevrolet coupe, bearing license NO. 11-636, owned by claimant Catherine D. Ely, on West Virginia route NO. 7, in Monongalia county, West Virginia. At Richard, state road commission truck NO. 43-092, operated by Walter Maynard, entered upon said state route NO. 7 from a side road and struck claimant's car from the side, causing the damage and for which the claim is made. From an itemized statement of the damage furnished by McMillion Motors, Inc., it is shown that the amount of the claim, namely $117.12, was required to make necessary repairs. Claimant's car was covered by a policy of property damage liability issued by Farm Bureau Mutual Auto Insurance Company which is a co-claimant with the said Catherine D. Ely.

The district road engineer approves the claim, the state road commission concurs therein and the special assistant to the attorney general approves the claim as one that, in view of the purposes of the court act, should be paid.

We have carefully considered the case upon the record submitted and are of the opinion that it should be entered

as an approved claim and an award is, therefore, accordingly made in favor of the claimants, Catherine D. Ely and Farm Bureau Mutual Auto Insurance Company, for said sum of one hundred seventeen dollars and twelve cents ($117.12) in full satisfaction of all damages sustained as a result of said accident.

(No. 284-S—Claimant awarded $29.84.)

LOGAN BAKING CORPORATION, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 18, 1943

G. H. A. KUNST, JUDGE.

On March 10, 1943, in the city of Mann, Logan county, West Virginia, driver of respondent's truck NO. 250-77, in starting truck, negligently permitted it to back into claimant's parked Ford car, causing damages to same, which cost $29.84 to repair, for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award is made to claimant for twenty-nine dollars and eighty-four cents ($29.84).

(No. 286-S—Claimant awarded $59.53.)

G. B. VARNER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 18, 1943

G. H. A. KUNST, JUDGE.

Claimant's one and one-half ton truck, loaded with six tons of lime, broke through state bridge crossing French creek, Pleasant county, West Virginia, May 27, 1943.

The accident was due to rotton bridge sills and there was no warning as to condition of bridge and its carrying capacity.

Claim is for the cost of repairing truck and the value of the lime lost, which amounted to $59.53.

Respondent recommends and the attorney general approves its payment.

An award of fifty-nine dollars and fifty-three cents ($59.53) is made to claimant.

(No. 287-S—Claimant awarded $7.65.)

H. L. RUDOLPH, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed October 18, 1943

CHARLES J. SCHUCK, JUDGE.

On July 10, 1941 at Glendale in Marshall county a state road commission truck, driven by an employee of the state road commission, negligently collided with claimant's automobile, injuring the left rear fender of said automobile and causing damage to the extent of $7.65.

Respondent recommends payment of this amount and the attorney general, through his special assistant, concurs in the said recommendation.

We therefore make an award accordingly to the said H. L. Rudolph in the amount of seven dollars and sixty-five cents ($7.65).

(No. 288-S—Claimant awarded $17.85.)

BERT ICE, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed October 18, 1943

CHARLES J. SCHUCK, JUDGE.

On May 8, 1943 near Wallace on route 20 in Harrison county state road commission truck NO. P-30-175 while rounding a curve was driven too far to the left, putting it on the wrong side of the road, and while so driven in said wrongful place, it collided with claimant's automobile, coming in the opposite direction, causing damages to the extent of $17.85.

Respondent recommends the payment of this amount and payment is approved by the attorney general.

Award is therefore made in favor of the claimant, Bert Ice, in the sum of seventeen dollars and eighty-five cents ($17.85).

(No. 289-S—Claimant awarded $8.00.)

RUBEN ROSE, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed October 18, 1943

CHARLES J. SCHUCK, JUDGE.

On the thirtieth day of June 1943, while cleaning a ditch-line west of Panther Station in McDowell county, a state road grader loosened the ground and embankment of the said road causing a rock to roll down upon the premises and property of the claimant and destroying a stand of honeybees then on the premises of the said claimant, and owned by him. The damages or loss alleged is in the amount of $8.00.

Respondent recommends an award in the aforesaid amount and the attorney general, through his special assistant, agrees to said recommendation.

Award is therefore made in the sum of eight dollars ($8.00) to be paid to the claimant, Ruben Rose.

(No. 139—Claim denied.)

O. D. LAMBERT, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed October 19, 1943

Unless the authorities in charge of the boys' industrial school at Pruntytown are guilty of such negligence or breach of duty as contributes directly to the escape of one of the boys, the state or the board of control in charge of the school, cannot be held liable for a tort committed by the boy while such escapee.

Appearances:

W. M. Watkins, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

The claim in this matter presents a very novel as well as interesting question involving the treatment of inmates in a reformatory and the extent to which the state would be liable, if at all, for the torts of an escapee from such reformatory. The claimant was a resident of Taylor county, West Virginia, living in close proximity to the boy's reformatory at Pruntytown. On Sunday the eighth day of March 1942, the claimant was attending services at the Pruntytown Baptist Church and had traveled from his home to the church in his automobile. During the services the automobile was parked on the church property and while so parked was stolen by one Eugene Money, then a lawfully committed inmate of the state industrial school for boys and who had on the day in question escaped from the said institution and stolen claim-

ant's automobile. Money drove the said automobile to Clay county, in West Virginia, and in so doing ruined the motor in said car and causing it to be abandoned after which claimant was obliged to pay for having the automobile returned to his home, all of which together with the loss of the spare wheel and tire and the labor required in repairing the car entailed an expense of $171.74, for which claim is made against the state board of control.

On the afternoon of the day of his escape Money pretending to be ill was allowed to remain in the dormitory where he had been sleeping, while the other boys were taken to their evening meal. There were approximately eighty-five boys kept in this dormitory at the time of the escape. The evidence shows that the escape was made by Money's tieing together certain bed sheets and passing out of a window through a comparatively small opening, and dropping to the ground approximately 35 feet below. The main door or gate leading to the dormitory from the halls of the building in question was securely locked and did not afford any means of escape. One keeper or commander was in charge of the dormitory at the time of the escape. Under these circumstances the question presented here is whether or not those in charge of the school in question were guilty of such negligence as would make the state liable for the tort committed by Money and for the damages that followed his illegal and felonious act in stealing the automobile in question. Money was afterward tried in the circuit court of Taylor county for the felonious act of stealing and taking away the car and upon his plea of guilty was subsequently committed to the state penitentiary.

Were the authorities guilty of such negligence as to make the state liable in damages for Money's act?

Under the laws of our state, chapter 28, (Michie's code section 2701), the state board of control is given authority to make such rules and regulations for the management and conduct of the industrial school together with the instructions and discip-

line dealing with the manner and disposition of the boys of the school as may be deemed proper. In turn, of course, the superintendent and attendants of the school combine to carry out the instructions with reference to the management of the institution and the boys confined therein, and no doubt seek to carry out those ideas which will best bring about the reformation of the boys sent to or confined in the institution in question. In fact the testimony shows that at the time the escape in question took place the school was being operated in compliance with the recommendations of the national bureau of child welfare; that two or three inspections of the institution had been made by federal inspectors and consultants previous to the time of the escape in question and that the management of the school was following the recommendations that had been made by such federal consultants and seeking to carry into effect the recommendations which no doubt had for their purpose the ultimate reformation of boys sent to the institution.

While the decisions concerned with the care, custody, and management of inmates of this type are few so far as they relate to liability for the acts of escapees are concerned, it would seem that unless the authorities directly participated in the escape by a breach of duty apparent at the time, that neither the state nor the department involved would be liable.

The testimony reveals that the officer in charge of the dormitory in question relied on the statements of Money that he was ill and allowed him to retire to his bed and miss his evening meal while the other boys were being taken to the dining room. The only avenue of escape was that effected by Money himself. The testimony reveals that no such escape had been effected from this particular room at any time before, in the history of the school. The window in question through which he escaped was small containing an opening of 12 by 24 inches; it would hardly be expected that one of Money's size, weighing about 145 pounds would attempt an escape in the manner in which it was accomplished and furthermore the window in question being located approximately 35 feet

above the ground would seem to make an escape highly improbable. Under all the circumstances can it be maintained that the officer in charge was guilty of a breach of duty and so negligent as to make the state board of control liable for the tort that was committed by Money after his escape. We do not think so. We have in mind, of course, that Money had made several escapes before but not from the room in question and not at a time when he was surrounded by the same restraining influence or conditions as were present at the time that he effected his escape on the day in question.

No doubt there are many who feel that the same restraining instrumentalities should be used at the state industrial school that may be used in our penal institutions; that the window in question, or the windows generally, of the dormitory should have been sufficiently barred to prevent such an escape and that all necessary means should be employed to confine the boys to the institution to which they were committed by reason of their acts, crimes, or incorrigibility. However, it must be borne in mind that we are dealing with a reformatory, an institution in which incorrigible boys are placed with the hope that the application of the modern methods now employed will ultimately bring about the necessary reformation and the restoration to good citizenship of the boy or boys involved. Escapes will take place by reason of the more lenient methods now employed as compared to the sterner and more strict discipline used in the past, but may it not be well argued that the methods which are now sanctioned by all authorities have in the final analysis brought about greater reformation and consequently are more beneficial to the state and nation as a whole than those that were employed in the past and which perhaps may have prevented, if still in use, the escape in question.

In *Kuhns* v. *Fair* decided October 20, 1942, by our State Court of Appeals (W. Va.) 22 S. E. (2d) 455, the Court held:

> "The warden of the State penitentiary is the lawful custodian of the convicts therein confined under

> the direction of the Board of Control and is not personally liable for a tort committed by a convict, unless he directly participated in its commission by a breach of duty."

The Kuhns case *supra* arose by reason of a collision between the plaintiff's automobile and a prison truck being operated by a convict outside the prison walls and while engaged in operating the said truck for the benefit of the state. Applying the rule laid down in this case it would seem that unless there is a direct breach of duty on the part of the authorities who are in control of the convict no recovery can be had. Obviously the master and servant rule does not apply.

Taking into consideration the circumstances and conditions surrounding the commission of the offense being considered by us we fail to find such negligence on the part of the superintendent or his attendants at the institution as would justify our holding the state department involved guilty of such negligence as would warrant the making of an award. We do not subscribe to the rule that the state department involved can at all times escape liability, but do insist that lack of reasonable care must be shown in each instance and that the negligence must be so extreme as to be directly the cause for the commission of the tort and thus place the responsibility squarely on the shoulders of the authorities involved. We therefore refuse an award.

(No. 228—Claimant awarded $35.00.)

MRS. ROBERT JOHNSON, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed October 19, 1943

A case in which the claim is found to be just and proper under the peculiar facts supporting it, and for which an award will be made.

Claimant, *Mrs. Robert Johnson,* in her own behalf;

Eston B. Stephenson, Esq., special assistant to the attorney general, for the state.

ROBERT L. BLAND, JUDGE.

This case is submitted to and heard by the court upon an agreed stipulation of facts.

It is provided by statute in West Virginia that all male persons convicted of felony and sentenced to imprisonment or confinement in the penitentiary, or so many thereof as may be required by the state road commissioner, shall, as incident to such sentence or confinement, constitute the state road force, and as such may be employed under the supervision of the state road commissioner in building, surfacing and maintaining roads under the supervision of the state road commissioner, code chapter 17, article 5, section 1.

The warden of the penitentiary prepares for the state road commissioner a monthly report which shows the names of not less than five hundred inmates of the penitentiary who are suitable for road work. From said list the road commissioner selects the number needed for road work. *Supra,* sec. 2.

On May 27, 1942, there were a hundred and seventy of these convicts at road camp NO. 76, Keyser, West Virginia. On the night of that date, six of the prisoners escaped from the camp and made their way into the state of Maryland. One of the men was apprehended at Hagerstown in that state, three in Virginia, one in West Virginia, and one is serving a term of imprisonment in the Ohio State penitentiary at Columbus. One of these escaped convicts subsequently confessed to the burglary hereinafter mentioned.

Claimant resides at Pinto, Maryland, where she is postmistress and conducts a grocery. On the same night that these prisoners effected their escape from the West Virginia road camp, claimant's said store was entered and burglarized. Groceries, tobacco and candy were stolen. The front window was broken. To reimburse her for the amount expended for repair of said window and for the articles stolen, claimant seeks an award of $35.00.

It is shown by respondent that the road camp was an armed camp under the surveillance of twenty guards. The facts show that at the time that the prisoners escaped they were in the road camp jail, a small house prepared at each road camp where prisoners are confined as punishment for infractions of the rules. They obtained a hack saw blade and sawed their way out through the roof of this jail. If the camp had in fact, as claimed, been "well guarded" it occurs to us that the escape could easily have been prevented by the twenty guards on duty at the time of the escape.

Officers of the road camp visited claimant at her place of business in Maryland, satisfied themselves of the justness of her claim, and assured her that it would be paid.

Upon due consideration of all of the facts of this case we are of opinion that the claim in question is just and proper and one which, under the peculiar circumstances, should be paid. We deem it unnecessary to advert to the general law

respecting liability of a sovereign commonwealth for depredations committed by its convicted felons. It is sufficient, however, to say that in our judgment the claim in question is, under the peculiar facts supporting it, such a claim as the Legislature contemplated should be paid by the state when it created the court of claims.

An award will, therefore, be made in favor of the claimant for the said sum of thirty-five dollars ($35.00) and an order will be made accordingly.

(No. 260—Claimant awarded $3000.00.)

FRANK T. MARSHALL, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed November 17, 1943

A case in which the evidence shows that the driver of a state road truck, owned and operated by the state, was negligent in its operation, and which negligence caused the accident or collision complained of and therefore made the state road commission liable in damages for the injuries to claimant.

Appearances:

George S. Wallace, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

Frank T. Marshall, the claimant, engaged in the wholesale merchandise business, was severely, and perhaps permanently, injured by a collision with a state owned and operated road truck, while he was proceeding south toward the city of Huntington in his truck on route NO. 2, commonly known as the Ohio River Road. The accident occurred on the eighth day of October 1942 at about 8:30 o'clock in the morning, and at or about what is known as Clutts store, near Greenbottom in Cabell county, West Virginia. The highway was dry, and while there seems to be some question as to fog affecting visibility on different parts of the road, an examination of the record fairly discloses that there was no fog to obstruct the view of a driver going north or south on the highway at the time and place of the accident. In fact, the driver of the state truck himself testified (record p. 58) that there was no fog at the place of the accident at the time of its happening. The

testimony further shows that the highway is practically level for a considerable distance both north and south of where the collision took place. The witness Ellis, a state trooper, testified (record p. 80) that one could see 200 or 300 feet "or maybe further." The state truck was loaded with stone, and truck and load together made a weight of approximately 5 tons, while claimant's truck, together with his load, weighed between 1½ and 2 tons. The highway was 16 feet wide at the place of collision and had a berm and accessible driveway on both sides thereof, varying in width from 8 to 12 feet.

The claimant testified that he was driving at a lawful and reasonable rate of speed; that the state truck, going in the opposite direction, and without any apparent reason or warning to him, was driven to the left of the highway and directly in front of claimant's truck and so near to his own truck that it was impossible to stop, thus causing the collision by which his truck was demolished and causing as well the injuries to him of which he complains.

The state truck driver disputes and contradicts this testimony and maintains that claimant's truck was driven on his (claimant's) left side of the road and directly in the path of the oncoming state truck.

Under all of these circumstances we are obliged to look for aid to the relative position of the trucks immediately after the collision for an answer to the question of which one of the drivers was negligent, and consequently whether or not an award should be made.

The trooper in question, immediately upon his arrival at the scene of the accident, noted the position of the trucks (which had as yet not been moved) and has presented to this court what is known as state's exhibit No. 1, showing that the heavier state road truck was entirely off the highway to the left thereof; in other words on the opposite side from which the state truck was being driven at the time, and that it was

facing south, whereas claimant's truck was found to be on the highway on the right or proper side and turned north, or likewise opposite in the direction from which he was driving at the time. Taking into consideration the relative situation of the vehicles, their relative weights, and the positions immediately after the accident took place, it would appear that the state truck was driven to the left of the road or the opposite side from which it was traveling at the time, and it would appear further that the state truck driver's natural inclination to avoid the collision would have been to drive to his right, on which there was a sufficient berm and driveway, in attempting to get out of the way of claimant's car, if the latter car had been on the wrong side of the road and traveling south on the left side instead of the right side of the highway. These facts, considered in the light of the further fact that there was no interference with the visibility of the drivers, and that the state truck driver could see several hundred feet ahead, and that there was no obstruction of any kind, constrain us to adopt the opinion that the state truck driver was negligent and that his negligence caused the accident and the injuries to the claimant of which he complains.

This conclusion is further sustained by the witness Gill who testifies that he was sitting on the steps of the Clutts store at the time, watching the state trucks drive by, and that these trucks were not very far apart, and that he thought there was a state truck immediately ahead of the truck involved in the collision, and that he "imagines" there were more than two or three such trucks ahead of the said state truck (record p. 103). If this testimony can be relied on it would necessarily preclude the idea that the claimant could have driven to his left side of the highway and been seen only 25 feet away for the first time just previous to the collision. Gill was presented as a witness by the state.

Having determined that the driver of the state truck was negligent, and that, consequently, the state is liable, the question now presents itself as to how seriously the claimant was

injured. Immediately after the collision he was removed to the Huntington Memorial hospital, at Huntington, where he was treated for his injuries by Dr. H. D. Hatfield. Dr. Hatfield testifies that at the time claimant was admitted to the hospital on October 8, he had a concussion of the brain and contusions of his entire body; that he was complaining a great deal of pain in the abdomen, and that this pain perhaps had been caused by tearing loose some adhesions from two previous operations, claimant having been theretofore operated on for gall bladder trouble. It was found further that claimant had a compound fracture of the left knee, and that his condition was such that he could not be operated on for a period of two weeks after his admission to the hospital; that his left leg is now about one and a half inches smaller than his right limb; that he has not regained muscular control of the said limb; that he has not been well since the accident and has lost considerable weight; that he suffers continuously from nausea and is not able to take food, and that thereby it is the doctor's opinion that he has been unable to rebuild his strength and regain his physical condition back to the point where it was before he sustained his injuries and that in his judgment the claimant has a permanent disability of his left limb, and that by reason of the tearing loose of the adhesions, following his first and second operations his stomach is not permitted to function properly and must be emptied at times to relieve the pain and nauseous condition; that he was confined in the hospital for approximately three weeks and that it took about six months for the patella to heal and that in the opinion of the doctor it will never again be normal. The claimant's medical and hospital bills amount to approximately $500.00. He is sixty-three years of age, and taking all of these facts into consideration, together with the damages to his truck, we are of opinion that an award of three thousand dollars ($3000.00) should be made, and recommend the same to the Legislature accordingly.

(No. 222—Claim denied)

NEW RIVER AND POCAHONTAS CONSOLIDATED COAL COMPANY, a corporation, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 18, 1943

The state court of claims is without authority to make an award reimbursing a coal company which had voluntarily advanced money prior to May 16, 1933, the effective date of chapter 40 of the acts of the first extraordinary session of the Legislature of 1933, for the payment of labor, materials and supplies (used along with county funds) in the construction of a county-district road in West Virginia, notwithstanding that such county-district road for which such moneys were expended has since become an integral part of the state system of highways; and a claim asserted against the state for such reimbursement will be denied and dismmissed.

Koontz & Koontz, W. W. Goldsmith; Mahan, Bacon & White; and *Howard B. Lee,* for claimant.

William S. Wysong, Attorney General, *Ira J. Partlow,* Assistant Attorney General, and *Eston B. Stephenson,* Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding the New River and Pocahontas Consolidated Coal Company, a corporation, has presented to this court for consideration and adjudication a claim against the state for $181,536.78. It is contended that the entire claim—with the exception of two items thereof aggregating $2,206.04 representing two estimates for work done on other roads—is for money paid for labor, materials and supplies (used along with county funds) in constructing that part of what is now route NO. 41, in Fayette county, between Clifftop and Layland. Claimant admits that the labor was done and the materials and supplies furnished during the calendar years 1927, 1928

and 1929, while county-district roads were still being built by county courts and before they were transferred to the state road commission by statute.

State route NO. 41 is a hard-surfaced highway throughout its entire length, and the only modern south highway crossing the Midland Trail between Rainelle on the east and Gauley Bridge on the west, a distance of approximately fifty-five miles. The route begins at Beckley, in Raleigh county, and runs through Summersville to Craigsville, in Nicholas county. It connects at Beckley with federal highways NOS. 19 and 21 and state routes NOS. 3 and 16, and crosses the Midland Trail (federal highway NO. 60) near Clifftop, in Fayette county. At Summersville it connects with federal highway NO. 19 and state route NO. 39. At Craigsville it connects with state routes NOS. 20 and 43. Babcock State Park and the Negro 4-H Camp are on this highway.

Claimant says that it expended its money in good faith and for the public good, in the construction of that part of the road between Clifftop and Layland, and that its claim, in equity and good conscience, should be discharged and paid by the state.

The claim has been very carefully and resourcefully prepared and most ably presented. Let us, therefore, examine the circumstances and conditions under which it arises in order that we may understand more clearly why claimant should have expended so large an amount of money in the construction of a county-district road, exclusively under the supervision, control, construction and maintenance of the county court of Fayette county. What reason or reasons were responsible for the magnanimity and generosity of claimant in paying out so vast a sum of money for the benefit and convenience of Fayette county when a county court could not expend any money or incur any obligation or indebtedness which was not expressly authorized by law to be expended or incurred? Code, 1923, chapter 28A, section 12. We quote from claimant's petition as follows:

"To understand the reasons why the Coal Company thus advanced money to build a county-district road requires a review of the road building history of Fayette County. For many years the principal industry in Fayette County has been coal mining. In the development of that industry, various branch line railroads were built into the coal fields and numerous coal mines were opened along these branch lines. At substantially all such mines, towns were built to house the coal mine employees. Some of these towns were of considerable size, with hundreds of families. The only means of ingress and egress to the majority of such towns, for both persons and property, was by railroad. Service was infrequent on branch lines and movement of persons, mail or property to or from the county seat or the State Capitol, or elsewhere, required changes at junction points with attendant delays and inconveniences. At about the same time, automobiles, buses and trucks became the popular mode of travel and transportation. Citizens of isolated towns demanded roads. As early as 1916, Fayette County embarked upon an ambitious road building program. From time to time bond issues and succeeding bond issues to the limit allowed by law were voted in all of the magisterial districts, but the money was insufficient and the parts of roads built with it often ended in wild country and for practical purposes were little, if any, better than no roads at all. To complete the roads with funds available from annual levies would have required many years. The need for roads was so great and the demands therefor were so insistent, that some means to build them had to be found.

"With the knowledge and tacit approval of individual members of the County Court, the County Road Engineer made private arrangements with banks, coal companies and individuals to advance money needed to pay for road construction work, whether done by jail labor or by contractors, upon assignments of estimates, bills and invoices, and to withhold presenting any claims to the County Court until some future date. The money was to be advanced without regard to whether the estimates, bills and invoices were or were not lawful claims against the

County under Sec. 12, Chap. 28A, Code of 1923. The money advanced by the Claimant was advanced pursuant to a preexisting understanding and arrangement with the individual members of the County Court of Fayette County, but not officially as a court. Such understanding and arrangement also contemplated dedication by Claimant of rights of way over its lands free of charge."

In 1924 the county court appointed one George H. Siems as county road engineer and conferred upon him wide authority and extensive powers. By a subsequent order the said Siems was constituted ex officio road supervisor of the county. With the consent of the county court he was given authority to establish a county system of maintenance for all roads within the county. He was given supervision of convict labor for roads within the county and directed to use such convict labor for the construction and maintenance of such roads as he deemed necessary. In December 1925, said county road engineer submitted to the county court a plan entitled "Proposed County System of Roads." This plan prescribed two main county roads numbered, respectively, 1 and 2. Route NO. 1 commenced at Deepwater by way of Page Mountain, Kincaid, Wriston to Oak Hill. Route NO. 2, otherwise known as New River Highway, began at the state highway at Glen Jean via Thurmond, Stone Cliff, Quinnimont, Layland, Danese to the Midland Trail at Clifftop.

The county court deeming the roads embraced in routes 1 and 2 as the most important connecting roads in the county, the county road engineer was ordered to make necessary alignment, earth work, structures and right of way surveys and prepare necessary plans therefor; to acquire a forty foot unobstructed right of way, with additional width to construct slopes for cuts and embankments. It was provided that the said two routes comprising the main system of roads in the county as prescribed by the plan submitted by the county road engineer to the county court, should have a grade width of not less than 25 feet and a surface width of not less than 15 feet. The grade was not to exceed 8% and the degree of

curvature was not to be in excess of 45 degrees. All of this was done before state route NO. 41 had been officially designated and when the construction and maintenance of county roads was exclusively within the province of the county court of Fayette county. Thus it will be seen that at the time that claimant made its expenditures for which it now seeks reimbursement the county-district road between Clifftop and Layland had not been officially designated as any part of state route NO. 41. This section of road was not taken over by the state road commission until July 1, 1933, under chapter 40, acts extraordinary session of the Legislature of 1933.

Claimant admits in its petition that "At the outset, it was definitely understood that the monies so advanced would be in excess of the contractual capacity of the county court, and therefore would not constitute any legal debt or obligation of the county or of any magisterial district therein"; and, further, that at the end of each month as the work progressed the county road engineer "prepared a statement showing the amounts that had accrued during the month for wages of skilled labor and the cost of equipment, materials and supplies. These statements were examined by the county court and approved, but such approval was not in writing. Written approval by the county road engineer was, however, placed on the statements at the direction of the county court and signed by said engineer. The money to pay the amounts shown on the statements was thereafter placed in the hands of the said county road engineer by New River and Pocahontas Consolidated Coal Company and he disbursed it to the several persons entitled to receive it."

Claimant's petition further avers:

> "In January, 1927, New River and Pocahontas Consolidated Coal Company began to buy estimates and bills included in this claim. In June, 1927, it signed a contract to build a portion of Route 41. In May, 1928, it signed a similar contract with another contractor. These contracts were on the usual forms used

> for county road contracts, the specifications for the work were prepared by the County Road Engineer and the contracts were approved by the County Court and the County Road Engineer and were actually signed in the office of the Prosecuting Attorney in the presence of the members of the County Court, but the county was not a formal party thereto. This practice was not confined to the one instance. During the same period, other roads were constructed under other contracts signed by other contractors and other coal companies. As stated above, such other coal companies have been repaid what they advanced and New River and Pocahontas Consolidated Coal Company is the only coal company that has not been repaid. The contractors did their work under the supervision and control of the County Road Engineer. All estimates were submitted to the County Court and checked by the County Road Engineer and approved in writing by him at the direction of the Court."

It is plainly manifest upon its own showing that claimant was a party to an understanding or arrangement with the county court and the county road engineer that amounted to a total disregard of the statute restricting the expenditures of the county's money for road purposes to what was potentially available for lawful disposition by the court. It expected to be reimbursed ultimately for the amount of its expenditures by the county, not the state. In making the expenditures in question it knew that the money might never be repaid. In paying out its money it took a gambler's chance upon its repayment. The claim is not now and never was an obligation of the state. The state was not a party to the arrangement under which the money was advanced. At the time of the outlay of the money by claimant it was never anticipated that it should be repaid by the state. It looked alone to the county to reimburse it as the county had reimbursed other coal companies and banks which had advanced moneys under the county's plan for road building. Claimant cannot consistently invoke the rule of equity and good conscience in this court. He who seeks equity must do equity. Claimant was under no legal obligation to expend its money for the building of this

county-district road. In doing so it was a mere volunteer. Equity follows the law. Apparently the idea of reimbursement by the state never occurred to claimant until after the decision of the Supreme Court of West Virginia in the case of *Love v. New River and Pocahontas Consolidated Coal Company,* 119 W. Va. 222, 193 S. E. 59. That case involved certain county drafts held by claimant. The payment of these drafts had been enjoined by the circuit court of Fayette county. While it is true that upon the particular facts involved and showing made in the case the appellate court reversed the decree of the lower court enjoining the payment of the Harvel drafts and approved the action of the court in dissolving the injunction against the payment of the Gentry drafts (all of which drafts were held and owned by claimant), no such drafts are involved in this proceeding. In the opinion in the *Love* case, Judge Hatcher says:

> "For several years prior to 1928, the county court had entertained an ambitious road-building scheme, far beyond its current resources. In consummating this scheme, the court had permitted several parties, including the Company, to advance money for road building with the expectation that the court would make repayments later whenever its resources should permit. The origin of this arrangement is nebulous and at best it was only *a gentlemen's agreement.* If such, it involved the levies of future years, and its illegality under Code 1923, Chapter 28A, Section 12, is conceded by the Company, and an unpaid balance of more than $185,000.00 advanced by it under the arrangement is regarded as 'gone with the wind.' "

Can it be said that upon the facts submitted to us in support of this claim for $181,536.78, the state would be liable therefor, if suable, at law or in equity? It is my personal view—but not now expressed as the judgment of the court—that where no liability exists upon which the state can be sued, at law or in equity, if it were suable, the court of claims has no jurisdiction to make an award, except possibly in cases submitted under the "shortened procedure" provision of the

court act wherein the state agency involved concurs in the claim and it is approved by the attorney general as one that should be paid. The determination of that question, however, is not essential to the disposition of the claim under consideration.

It appears from the record that at the time of the expenditure of its money claimant owned a large acreage of coal and mineral land and operated mines in close proximity to the Clifftop-Layland road. The distance between Clifftop and Layland is approximately twelve miles. The road extends through claimant's land for a distance of about three and one-half miles. Much of the work done with claimant's money was on its own land. Claimant had agreed to dedicate the road right-of-way under the terms of the "gentlemen's agreement." The section of the road between Clifftop and Layland became a part of state route NO. 41 in 1933, as above stated. Since that time the state has used the road in question continuously as a part of state route NO. 41. The statute made it the duty of the county court to procure rights of way. The order of the county court cited directed the county road engineer to obtain all necessary rights of way.

The attorney general has moved to dismiss the claim on the ground of want of jurisdiction in the state court of claims to entertain the same and upon other grounds unnecessary to be considered, in view of our determination of the claim.

One F. O. Trump instituted an action of trespass on the case in the circuit court of Jefferson county against the state road commission. He sought damages claimed to have resulted from the alteration of the grade of a state highway in that county. The circuit court sustained a demurrer to the plaintiff's declaration. Certain questions of law arising thereon were certified to the Supreme Court. The case was decided there on November 26, 1935. It is reported in 116 W. Va. 625, 182 S. E. 760. The fourth question certified reads:

"Is the State Road Commission liable for the cost of acquiring rights of way for a state road and damages to land caused by its construction, repair, and maintenance thereof, acquired or damaged prior to May 16, 1933?"

The Supreme Court answered the question in the following syllabus:

"Prior to the effective date (May 16, 1933) of Chapter 40, acts of the First Extraordinary Session of 1933, the right of action, under Code, 17-4-4, for damages to land growing out of the construction, alteration, or repair of a state road, arose, if at all, exclusively against the county court of the county in which the land lay."

Judge Kenna, in delivering the opinion in that case, said:

"Going at once to the certified question which, in our opinion, disposes of the case here, we find that the fourth question propounded is, in effect, whether the State Road Commission is liable for the damages declared on incurred by the plaintiff prior to the effective date of Chapter 40 of the Acts of the First Extraordinary Session of the Legislature of 1933, sometimes referred to as the secondary road law. It is not necessary, we believe, for us to decide, in this case, whether the act last referred to effected a change in existing law with reference to the right to sue the State Road Commission in an action of tort. The right of action here, according to the question certified, arose prior to the effective date of that act. Therefore, at the time the right of action arose, under the authority of *Kinney* v. *County Court,* 110 W. Va. 17, 156 S. E. 748, and other West Virginia cases readily available, the right of action lay, if at all, against the county court of Jefferson County exclusively. See, also, *Hatcher* v. *County Court,* 115 W. Va. 95; 174 S. E. 690. We, therefore, hold that the action of the Circuit Court of Jefferson county in sustaining the demurrer to the plaintiff's declaration must be affirmed solely on this ground."

We are of opinion that the claim in question is controlled by the above cited case.

We, therefore, hold that the state court of claims is without authority to make an award reimbursing a coal company which had voluntarily advanced money prior to May 16, 1933, the effective date of chapter 40 of the acts of the first extraordinary session of the Legislature of 1933, for the payment of labor, materials and supplies (used along with county funds) in the construction of a county-district road in West Virginia, notwithstanding that such county-district road for which such moneys were expended has since become an integral part of the state system of highways; and a claim asserted against the state for such reimbursement will be denied and dismissed.

To make an award in this case, if we had jurisdiction to do so, would create a dangerous precedent. If the remaining fifty-four counties of the state should adopt the same method of road building as shown in this case to have been followed in Fayette county, and file like claims in this court for reimbursement, such a course of procedure could easily result in the bankruptcy of the state.

An award is denied and the claim dismissed.

(No. 172—Claim dismissed)

EDWARD UTZ, Claimant,

v.

THE BOARD OF EDUCATION OF THE COUNTY OF BROOKE, a corporation, Respondent.

Opinion filed December 13, 1943

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct Claims (W. Va.) 366.

James R. Wilkin and *Handlan, Garden & Matthews,* for Claimant,

Eston B. Stephenson, assistant to the Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The above claim was filed with the clerk of this court on September 1, 1942.

The petition alleges that claimant is the father and natural guardian of one John Charles Utz, an infant of the age of approximately six years, and that said John Charles Utz was seriously and permanently injured on the fourth day of September 1941, on a public highway of Brooke county known as the Follansbee-Eldersville road, while being transported in a school bus operated by one Henry Clemens, an employee of and bus driver for the board of education of Brooke county, West Virginia, from the school at Follansbee to his home where he resided with claimant, his father. It is charged that such injuries resulted from the negligent operation of said school bus, and that claimant has been forced and obliged to expend, pay out and become obligated for the expenses of

hospital, surgical and medical treatment and attendance of his said son, and as well also for medicines and other expenses made necessary thereby, and that by reason of said injuries claimant has been deprived and is reasonably certain to be deprived in the future of the services, normal company and society of the said John Charles Utz.

Claimant charges that the board of education of the county of Brooke is an agency of the state of West Virginia, and that his claim is one which the state, as a sovereign commonwealth, should, in equity and in good conscience discharge and pay.

Claimant therefore seeks to maintain his claim against the state in the sum of $10,000.00.

A majority of the court determined that the court is without *prima facie* jurisdiction to entertain said claim, declined to docket the same for hearing and dismissed it. Before an opinion had been prepared setting forth the reasons for such action on the part of majority members of the court a petition for rehearing was filed, and a very able argument was made before the court in support of said petition. Majority members of the court now find that the petition for rehearing shows no reason warranting a change of their original opinion that the court is without *prima facie* jurisdiction to entertain the claim. The claim is not one against an administrative agency of the state government. The case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct. Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct. Claims (W. Va.) 366.

A rehearing is denied.

(No. 173—Claim dismissed)

JOHN CHARLES UTZ, an infant, by Edward Utz, his next friend, Claimant,

v.

THE BOARD OF EDUCATION OF THE COUNTY OF BROOKE, a corporation, Respondent.

Opinion filed December 13, 1943

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct Claims (W. Va.) 366.

James R. Wilkin and *Handlan, Garden & Matthews,* for Claimant,

Eston B. Stephenson, assistant to the Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The above claim was filed with the clerk of this court on September 1, 1942.

The petition alleges that claimant, an infant of approximately six years, was seriously and permanently injured on the fourth day of September 1941, on a state controlled highway known as the Follansbee-Eldersville road, in Brooke county, West Virginia, while being transported from the school at Follansbee to his home, in a school bus operated by Henry Clemens, an employee of and school bus driver for the board of education of said county of Brooke. It is charged that such injuries were the direct and proximate result of the negligent operation of said school bus, and that the claim is one which the state, as a sovereign commonwealth, should in equity and in good conscience discharge and pay.

Claimant therefore seeks to maintain his claim against the state in the sum of $20,000.00.

A majority of the court determined that the court is without *prima facie* jurisdiction to entertain said claim, declined to docket the same for hearing and dismissed it. Before an opinion had been prepared setting forth the reasons for such action on the part of majority members of the court a petition for rehearing was filed, and a very able argument was made before the court in support of said petition. Majority members of the court now find that the petition for rehearing shows no reason warranting a change of their original opinion that the court is without *prima facie* jurisdiction to entertain the claim. The claim is not one against an administrative agency of the state government. The case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct. Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct Claims (W. Va.) 366.

A rehearing is denied.

(No. 174—Claim dismissed)

MARGARETTA MARSH, Claimant,

v.

THE BOARD OF EDUCATION OF BROOKE COUNTY, a corporation, Respondent.

Opinion filed December 13, 1943

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct Claims (W. Va.) 366.

Samuel Freifield and *Handlan, Garden & Matthews,* for Claimant,

Eston B. Stephenson, assistant to the Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The above claim was filed with the clerk of this court on September 1, 1942.

The petition alleges that claimant is the mother and natural guardian of one Jack Marsh, an infant of the age of approximately seventeen years, and that said Jack Marsh was seriously and permanently injured on the fourth day of September 1941, on a public highway of Brooke county, known as the Follansbee-Eldersville road, while being transported in a school bus operated by one Henry Clemens, an employee of and bus driver for the board of education of Brooke county, West Virginia, from the school at Follansbee to his home, where he resided with claimant, his mother. It is charged that such injuries resulted from the negligent operation of said school bus, and that claimant has been forced and obliged to expend, pay out and become obligated for the expenses of

hospital, surgical and medical treatment and attendance of her said son, and as well also for medicines and other expenses made necessary thereby, and that by reason of said injuries claimant has been deprived and is reasonably certain to be deprived in the future of the services, normal company and society of the said Jack Marsh.

Claimant charges that the board of education of the county of Brooke is an agency of the state of West Virginia, and that her claim is one which the state, as a sovereign commonwealth, should, in equity and in good conscience discharge and pay.

Claimant therefore seeks to maintain her claim against the state in the sum of $10,000.00.

A majority of the court determined that the court is without *prima facie* jurisdiction to entertain said claim, declined to docket the same for hearing and dismissed it. Before an opinion had been prepared setting forth the reasons for such action on the part of majority members of the court a petition for rehearing was filed, and a very able argument was made before the court in support of said petition. Majority members of the court now find that the petition for rehearing shows no reason warranting a change of their original opinion that the court is without *prima facie* jurisdiction to entertain the claim. The claim is not one against an administrative agency of the state government. The case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct. Claims (W. Va.) 205, and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct. Claims (W. Va.) 366.

A rehearing is denied.

(No. 175—Claim dismissed)

JACK MARSH, an infant, by Margaretta Marsh, his next friend, Claimant,

v.

THE BOARD OF EDUCATION OF BROOKE COUNTY, a corporation, Respondent.

Opinion filed December 13, 1943

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County*, 1 Ct Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County*, 1 Ct Claims (W. Va.) 366.

Samuel Freifield and *Handlan, Garden & Matthews*, for Claimant,

Eston B. Stephenson, assistant to the Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The above claim was filed with the clerk of this court on September 1, 1942.

The petition alleges that claimant, an infant of approximately seventeen years, was seriously and permanently injured on the fourth day of September 1941, on a state controlled highway, known as the Follansbee-Eldersville road, in Brooke county, West Virginia, while being transported from the school at Follansbee to his home, in a school bus operated by Henry Clemens, an employee of and school bus driver for the board of education of the said county of Brooke. It is charged that such injuries were the direct and proximate result of the negligent operation of said school bus, and that

the claim is one which the state, as a sovereign commonwealth, should, in equity and in good conscience, discharge and pay.

Claimant therefore seeks to maintain his claim against the state in the sum of $20,000.00.

A majority of the court determined that the court is without *prima facie* jurisdiction to entertain said claim, declined to docket the same for hearing and dismissed it. Before an opinion had been prepared setting forth the reasons for such action on the part of the majority members of the court a petition for rehearing was filed, and a very able argument was made before the court in support of said petition. Majority members of the court now find that the petition for rehearing shows no reason warranting a change of their original opinion that the court is without *prima facie* jurisdiction to entertain the claim. The claim is not one against an administrative agency of the state government. The case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County*, 1 Ct. Claims (W. Va.) 205, and *Mary Dillon* v. *The Board of Education of Summers County*, 1 Ct. Claims (W. Va.) 366.

A rehearing is denied.

(No. 239—Claimant awarded $2568.03)

CHARLEY SARGENT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed December 14, 1943

1. When the evidence shows that a claimant who had been awarded a contract by the state for the construction of a road project was required to place gravel on the road of greater thickness than provided for by the specifications, an award will be made to cover the amount due for such extra thickness.

2. When a controversy arises between a contractor for the construction of a state road project and the state road commission as to whether material used in the gravel surfacing of a road shall be paid for by weight or on the number of cubic yards of surfacing material, compacted by manipulation and traffic, in place on the road, the method set forth in the specifications will prevail.

3. An award will be made in favor of a contractor for the construction of a state road project for the outlay made by him in leasing scales to weigh gravel material to be placed thereon, when he had reason to rely on the fact that a unit of weight would be adopted by which to estimate the weight per cubic yard of such gravel material.

Claimant, on his own behalf;

Arden Trickett, Esq., for respondent.

ROBERT L. BLAND, JUDGE.

On November 20, 1934, the state road commission received sealed proposals for building and completing, according to plans and specifications prepared therefor, a certain road in Tyler county, West Virginia, known as project NO. 3389—P.W.S.—828, being approximately 27,984 feet in length. Claimant Charley Sargent was the successful bidder. He entered into a contract with the state under date of November 28, 1934, for the completion of the project in accordance with

the plans and specifications provided therefor. The work was to begin on or before December 1, 1934, and be completed on or before June 1, 1935. It was agreed that time should be of the essence of the contract. The work to be done under the terms of the contract contemplated approximately 200 cubic yards of excavation according to plans, including refilling, at $1.00 per cubic yard, 5000 cubic yards of gravel bottom course, complete in place, at $4.10 per cubic yard, 5000 cubic yards of gravel top course, complete in place, at $4.10 per cubic yard, 800 lineal feet 8 inch perforated corrugated metal pipe underdrain, complete in place, at .75 per lineal foot, 150 cubic yards loose stone for underdrains, delivered in place at $2.00 per cubic yard and 28,228 lineal feet of prepared subgrade and shoulders at .05 per lineal foot. Thus it will be seen that said contract provided different items for different types of work.

The contractor agreed that he was fully informed as to all conditions affecting the work to be done, as well as to the labor and materials to be furnished for the completion of the contract, and that such information was received by personal investigation and research and not wholly from the estimates of the engineers, and that he would not make claim against the state by reason of estimates, tests or representations theretofore made by any officer or agent of the state.

It was provided that the work to be done under the contract should be performed in accordance with the true intent and meaning of the plans and specifications, made parts of the contract.

The project was accepted by the road commission and the contractor released from further responsibility under the terms of the contract on November 25, 1935.

The full length of the road when completed was 27,295 lineal feet with a width of 18 feet.

The final estimate shows that the road commission paid claimant $40,634.04 for work done and performed by him under said contract.

On January 11, 1943, seven years, one month and sixteen days after the completion of the project, said Sargent filed a claim in this court against the state for additional compensation to which he insists he is entitled to be paid, and for which he now seeks an award, on account of said road project in the principal sum of $9,710.00, made up of the following items, to-wit:

1.	Payment for 553.18 cubic yards of gravel at $4.10 per cubic yard	$2,368.03
2.	Reimbursement for 6,605.35 tons of gravel at .50 per ton	3,302.67
3.	Reimbursement for the cost of erecting scales	300.00
4.	Reimbursement for extra maintenance	3,840.00

Claimant also maintains that he is entitled to be paid interest at the rate of 6% annually on the above aggregate amounts from January 1, 1936.

We shall consider the amount claimed under the first item, namely, $2,368.03. It may be stated, however, at this juncture that there is an error of $100.00 in the amount of this claim. It is apparent that 553.18 cubic yards at $4.10 per cubic yard would amount to $2,268.03 instead of the sum of $2,368.03 as asserted by claimant.

The specifications provided that the yardage should be paid for on the number of cubic yards of surface material, compacted by manipulation and traffic, in place on the road. It appears from the evidence that when claimant concluded that he had placed a sufficient quantity of gravel on the top and bottom courses to make six inches in thickness, when compacted, that the inspector on the project disagreed with him

and insisted that he should place still more and additional gravel thereon which he accordingly did. Subsequently a core drill test disclosed that claimant had not only placed the required six inches of thickness on the road when compacted as required by the specifications but had in addition thereto placed three-eighths inch on its entire width of eighteen feet and length of 27,295 lineal feet. These tests showed that claimant had actually placed 553.18 cubic yards on the road over and above the thickness of six inches required by the specifications, and 553.18 cubic yards at $4.10 per cubic yard would amount to $2,268.03.

L. B. White, assistant to the state construction engineer, one of whose duties is to pass on final payments to contractors, and who is shown by the evidence to have reviewed every final payment made by the state road commission since 1930, introduced as a witness on behalf of the state, testified that claimant was paid for 9,098.33 cubic yards, the actual planned thickness of the road at six inches, and also 266.54 cubic yards additional which he said was on account of the extra thickness, making a total of 9,364.84 cubic yards. At $4.10 per cubic yard 9,364.84 cubic yards would amount to $38,395.85. Claimant admits having been paid for 9,364.84 cubic yards, but he says that 266.84 cubic yards thereof was for sand and extra gravel. He states that 123.22 yards represented sand delivered to the job by him under authorization of H. McGraw, district engineer, in a letter addressed to him under date of September 12, 1935, and that 133.29 yards was for extra gravel used in widening places where the road was over eighteen feet, in approaches coming into the road and at a point where the subgrade was soft.

The final estimate shows that claimant was paid for the bottom course the sum of $18,651.60 and for the top course the sum of $19,744.25. These two payments would include the actual planned thickness of six inches for the two courses, and in addition thereto 266.84 cubic yards, the amount for which claimant says he was paid for the additional sand delivered

and extra gravel used in widening the road, and approaches coming therein and in filling a soft place in the road. Claimant says, however, that although he has been paid for the 266.84 cubic yards aforesaid, he has received no payment whatever for the additional thickness over and above the planned depth of six inches.

Mr. White explains the manner of payment as follows: "Well, from the theoretical thickness, actual thickness called for in the plans, we computed the yardage. Then we took the actual tonnage that Mr. Sargent said he placed on the road after the controversy arose as to whether it was actually six inches thick or not. That was taken from the records furnished by the contractor. From those records I arrived at the actual weight, and reduced it back to cubic yards, which made 266 cubic yards." Assuming, therefore, that it was the purpose of the road commission in paying the final estimate to include therein compensation to claimant at the contract price for the additional gravel placed by him on the road over and above the planned thickness of six inches, it would appear from the testimony of Mr. White that claimant was not really paid for the actual additional number of cubic yards of gravel placed by him on the road. As a matter of fact he would only have been paid for additional gravel at the rate of 266 cubic yards on a tonnage or weight basis. Mr. White divided the actual tonnage furnished him by claimant as having been placed on the road by 2,949.44. The actual quantity of gravel placed on the road by claimant over and above the planned depth of six inches amounted to 553.18 cubic yards. This difference in the two calculations is obvious. The plans did not provide for payment by weight. Settlement was made with claimant for the top and bottom courses, independently of the additional gravel placed on the road above the thickness of six inches, on the basis called for by the specifications. The specifications provided: "If called for on the plans, payment for both top and bottom courses shall be based on either railroad weight or boat weight." The specifications for the project did not provide for such payment. The road commission paid

claimant on road bed measurement. According to Mr. White's testimony, in making settlement, both road bed and weight measurements were used. From the testimony of Mr. White it would appear at most that claimant was only paid for 266 cubic yards of thickness when he was entitled to be paid for 553.18 cubic yards. It will be observed that there is a distinct conflict between the statement of Mr. White and the statement of claimant. It would appear that claimant would be entitled to be paid upon the basis of the additional cubic yards of thickness placed by him on the road above six inches found by the core drill tests. Mr. White further testified: "Well, his yardage was computed on the actual planned depths in place which would produce on both top and bottom courses a total of 9,098.33 cubic yards. Now in addition to that we have paid Mr. Sargent for 266.44 cubic yards over and above the planned depths." Such payment, if made, would not constitute settlement for 553.18 cubic yards according to road bed measurement.

The testimony of claimant was very positive to the effect that he had actually been paid for 266.84 cubic yards of gravel, for the placing of which he had been duly authorized, but that such payment constituted no part of the compensation to which he was entitled for additional thickness of gravel above six inches. As above stated, he maintained that 123.22 yards was payment for one purpose and 133.29 was in payment for other purposes. He said such payments were made under the authorization of a letter written to him by H. McGraw, district engineer. The letter in question reads in part as follows:

"This will be your instruction and authorization for placing additional fine material in the amount of 200 tons on those sections of your project, as directed by our inspector, who will appear on the job Monday, September 16." Claimant testified that he actually placed on the project 199.05 instead of 200 tons. This authorization would not account for the entire 266 cubic yards placed by claimant on the project, but it

does show a modification of the specifications authorized by the district engineer. It does appear, however, very clearly from the final estimate that claimant was paid for 266 cubic yards of additional material, and that such additional payment corresponds substantially with the number of cubic yards for which he claims he was entitled to be paid under due authorization. He says that the entire quantity was authorized. This would seem to be so, for otherwise the road commission would not have paid that amount to him. He says also that the transaction was fully discussed at a hearing before Mortimer Smith, chief engineer, attended by himself, Mr. White, Mr. Blackwood, construction engineer, H. McGraw, district engineer, and Mr. Dick. Since the payment was made to him his statements would seem to find corroboration in the circumstances disclosed by the evidence. Without modification the specifications would clearly control the basis of payment, but it will hardly be questioned that a district engineer in charge of construction would not have the right to make necessary modifications when the exigency of the situation called therefor. We are of opinion, under all the facts disclosed by the testimony, that claimant has not been paid for the 553.18 cubic yards of additional material placed upon the road above the planned thickness of six inches, and that he is entitled to be paid therefor.

When the evidence shows that a claimant who had been awarded a contract by the state for the construction of a road project was required to place gravel on the road of greater thickness than provided for by the specifications, an award will be made to cover the amount due for such extra thickness.

Items two and four may be properly considered together. By item two claimant seeks reimbursement for 6,605.35 tons of gravel at .50 per ton in the sum of $3,302.67. By item four he seeks reimbursement for extra maintenance in the sum of $3,840.00. We are not impressed by the thought that either of these items is entitled to serious consideration for allowance. Claimant seems to have had a controversy with the

road commission in respect to the type of gravel to be placed upon the road project and for which he should be paid under the terms of the contract. When the sample of gravel material intended to be used by him was sent to the testing department at Morgantown for approval it was rejected and he was required to use material provided for by numbers 5 and 8 prescribed by the standard specifications of the road commission and shown on the plans. He says that he was therefore obliged to pay fifty cents more per ton for the material he was required to use than the specifications called for. He maintains that there is an error in the plans. He further says that before the contract was let for the project the road commission contemplated the construction of a black top road, but before it was actually awarded this plan was changed and the contract was actually let for the construction of a traffic bound gravel road, omitting the black top thereon. We do not perceive any reason for misapprehension of the plain meaning of the plans. The claim for extra maintenance cannot be seriously considered. The specifications and plans call for acceptance of the contract when the gravel placed on the road was properly compacted.

When a controversy arises between a contractor for the construction of a state road project and the state road commission as to whether material used in the gravel surfacing of a road shall be paid for by weight or on the number of cubic yards of surfacing material, compacted by manipulation and traffic, in place on the road, the method set forth in the specifications will prevail.

The item of $300.00 for erecting scales is seemingly possessed of merit. The day before the contract was let claimant noticed that the plans did not state how the gravel material was to be measured. He understood that under the standard specifications gravel surfacing would be measured in the roadbed if not otherwise mentioned on the plans or arrangements made to use weight measure. He thereupon consulted W. O. Wiles, who at the time was assistant engineer in charge of

construction, and asked him how it was proposed to measure the gravel to be used on the project. Claimant testified that he was informed by Mr. Wiles that the material could not be accurately measured on the road, and that he believed that the same figure would be used that had been used on two projects on route 18 in Doddridge county. That figure was 2870, that is 2870 pounds would determine one cubic yard. Claimant says that with that information he submitted his bid to do the work and was awarded the contract therefor. Harry McGraw, district engineer, addressed a letter to claimant asking to be advised whether in preparing his contract he had used a unit of weight by which to estimate the weight per cubic yard of gravel material to be used on the project. Claimant advised McGraw that he would use the above figure of 2870 and thereupon leased scales to be used in weighing the gravel material that was to be placed on the road. Claimant testified that the road commission kept a man at the scales all the time for the purpose of verifying weights, and there is no contradiction of such testimony found in the record. Although claimant was awarded the contract for the completion of the project according to the plans and specifications made therefor, we are constrained to conclude that in view of the correspondence that was had between himself and Mr. McGraw he was entitled to assume that it would be necessary to weigh the gravel material that was placed on the road and is entitled to be reimbursed for his outlay on account of the scales, notwithstanding the fact that final settlement was on a roadbed basis.

An award will be made in favor of a contractor for the construction of a state road project for the outlay made by him in leasing scales to weigh gravel material to be placed thereon, when he had reason to rely on the fact that a unit of weight would be adopted by which to estimate the weight per cubic yard of such gravel material.

No interest can be allowed on the award hereinafter made. The court act expressly provides that interest shall not be

allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

Objection was made to claimant's testimony as to what he was told by Mr. Wiles, since the latter was dead at the time of the hearing. In its examination and investigation of claims filed against the state, the court of claims is not bound by the usual common law or statutory rules of evidence. The court is an investigating body and may accept and weigh in accordance with its evidential value any information that will assist the court in determining the factual basis of the claim.

This has been a troublesome case in which to make a determination. It has been very carefully considered. The manner in which it was presented by claimant on his own behalf without the assistance of counsel added to the labor of the court. We believe, however, that the award hereinafter made is fair, reasonable and just to both the claimant and the state.

For the reasons hereinbefore set out an award is made in favor of claimant Charley Sargent for two thousand five hundred sixty-eight dollars and three cents ($2,568.03), embracing an allowance of $2,268.03 for extra gravel placed upon the road over and above its planned depth of six inches, and the sum of $300.00 to cover the outlay of claimant in leasing scales for use on the project.

(No. 136—Claim denied)

MARY FORD, widow of M. J. FORD, deceased, WILLIAM L. FORD, HELEN FORD, and ELEANOR VIRGINIA FORD, heirs at law of M. J. FORD, deceased, Claimants,

v.

COUNTY COURT OF RANDOLPH COUNTY, Respondent.

Opinion filed December 14, 1943

This court under section 14, chapter 20 of the acts of 1941, does not have jurisdiction to consider a claim for refundment of an overpayment of taxes erroneously assessed, continuing for a period of twenty-two years, when an adequate remedy in the courts of the state has been disregarded yearly during such period.

Messrs. *A. C. Schiffler, Leo A. Coleman* and *Fred H. Brinkman*, for claimants;

Eston B. Stephenson, Esq., special assistant Attorney General, for respondent.

G. H. A. KUNST, JUDGE.

This claim was submitted upon a stipulation that the allegations of the petition of claimants together with the receipts for taxes paid should constitute an agreed statement of facts for the consideration of the court.

These tax receipts show that for twenty-two years, from 1909 to 1930 inclusive, the owner of land, under whom they claim, was erroneously assessed with one hundred and sixty acres of land, situated in Roaring Creek district of Randolph county, West Virginia, instead of one hundred acres, the correct acreage owned by him and properly assessed in the year 1908.

The overpayment of taxes for twenty-two years, as shown by the petition, amounts to $235.55, for which amount neither the landowner nor claimants ever received any refund and for which amount an award is asked.

The state constitution made it the landowner's duty to have his land entered on the land books of the county.

The law required him, each year, under oath, to correctly list his real estate and truthfully answer, under penalty of forfeiture, the inquiries of the assessor as to the correctness of his assessment for the current and previous year.

Each year he was notified by his tax receipt of the error.

From 1909, each year, after reasonable notice, he had adequate and complete remedy in an application to the board of review and equalization, and if taxes had been paid, had same refunded, or relief from payment. If relief refused, he could appeal to the circuit court and in proper case have its judgment reviewed by the Supreme Court.

In 1911 an additional remedy by application to the county court was given him.

This enactment made possible an application for relief in the fall, when the landowner paid his taxes and would be notified by his tax receipt of the error, giving him thus additional time after the adjournment of the board of review and equalization, and opportunity for relief there had been lost.

Fraud or other adventitious circumstances are not shown, whereby resort to such remedies was prevented, and by his failure to do so, he waived his right to relief and no other remedy was offered him.

The statutes and their interpretation by the Supreme Court have determined that this and similar claims shall not be

permitted to disturb the fiscal affairs of the state. *West Virginia National Bank* v. *Spencer,* 71 W. Va. 678, 77 S. E. 270; *Island Creek Fuel Co.* v. *Harshberger,* 73 W. Va. 397, 80 S. E. 504.

Claimants stand in no better position than their ancestor, from whom this land was inherited, and as adequate relief was offered him yearly, in the courts of the state, during the entire period of this erroneous assessment, section 14, chapter 20 of the acts of 1941, excludes consideration of this claim from this court's jurisdiction, and it is accordingly dismissed and an award refused.

ROBERT L. BLAND, Judge, concurring.

The state constitution makes it the mandatory duty of a landowner to have his property entered on the land books and assessed for purposes of taxation. West Virginia State Constitution, article XIII, sec. 6. This duty undoubtedly requires a taxpayer not only to have his land assessed but as an incident thereto to have it assessed correctly as to acreage when the exact acreage is known. This constitutional duty exists not only for the benefit of the state to insure the collection of its revenues but for the protection of the taxpayer as well to prevent the forfeiture of untaxed real estate.

Even under the most liberal application of the doctrine of equity and good conscience, one who has neglected a duty imposed by the constitution and has failed to avail himself of an adequate remedy provided by law, year after year, for twenty-two years, with the facts clearly before him at all times, cannot now be heard to complain. Claimants are placed in no better position than their ancestor so far as the equities or the right of recovery is concerned.

(No. 291-S—Claimant awarded $144.74)

F. M. SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

This is an uncontested claim against the state for $144.74, growing out of an accident for which the driver of a state road commission truck admits that he was responsible. The head of the state agency concerned concurs in the claim, and its payment is approved by the attorney general's office.

From the record of the claim, made by the state road commission and filed with the clerk of this court on September 15, 1943, it appears that state road commission truck NO. 330-80, while being operated on the Belleville road, in Wood county, West Virginia, on July 6, 1943, swung to the left diagonally across said road in order to back and turn around, and in doing so collided with claimant's Oldsmobile automobile which had been following the state truck. The result was that claimant's vehicle was actually damaged to the extent of $144.74 as shown by an itemized statement made by White Motor Sales, of Parkersburg, filed with and made a part of the record.

W. H. Schimmel, district engineer, after investigating the circumstances attending the accident, made a report to respondent to the effect that the driver of the state truck was responsible for the occurrence of the accident.

In view of the road commission's concurrence in the claim, the report of the district engineer aforesaid as to responsibility for the damages for which an award is sought, and the approval of the claim by the special assistant attorney general as being

a claim which within the meaning of the court of claims act should be paid, an award is now made in favor of claimant F. M. Smith for the said sum of one hundred forty-four dollars and seventy-four cents ($144.74).

(No. 292-S—Claimant awarded $60.00)

L. D. RIAL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

The claim in this case is for the value of a seven months' old thoroughbred Guernsey heifer calf. It is contended by claimant that the animal was killed in blasting operations conducted by the state road commission on state route 2, project 147-B, south of New Martinsville, in Wetzel county, West Virginia, sometime during the week of August 30-September 6, 1943. It appears from the record of the claim, prepared by respondent and filed with the clerk on September 17, 1943, that during that period employees of the state road commission used a quantity of dynamite for blasting purposes in the vicinity of claimant's pasture land along the highway. Claimant had five head of cattle on the land. On August thirtieth he gave salt to these cattle and found them in good condition. When he returned on September sixth to salt them he found the Guernsey heifer missing. It was of thoroughbred stock and weighed approximately five hundred pounds. Upon investigation he found the calf to be dead. It was lying approximately 188 feet east of the place where the blasting had

been done. Near the calf was a stone 1½" x 3" x 5", weighing approximately two pounds which had hair on it. There was also found other stone and concrete pieces lying near the dead calf. Claimant fixes a value of $60.00 on the calf. Joe Yoho, safety director, who made an investigation of the claim, in a report to the road commission advised payment of the claim. The head of the department concerned concurs in the claim. The special assistant to the attorney general approves the claim as one which, within the meaning of the court act, should be paid by the state.

The record shows that the calf was actually hit by a stone from the blasting on the road.

In view of the showing made by the record, the concurrence in the claim by the state road commissioner, and its approval for payment as a proper claim against the state by the special assistant to the attorney general, an award is now made in favor of claimant L. D. Rial for the sum of sixty dollars ($60.00), subject to the approval and ratification thereof by the Legislature.

(No. 293-S—Claimant awarded $52.59)

A. C. POLAND, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

In this case claimant A. C. Poland seeks an award of $52.59 to reimburse him for that amount paid for the repair of his 1937 Chevrolet automobile after a collision between it and state road truck NO. 538-98, about two miles south of Fort Hill, in Hampshire county, West Virginia, on the twenty-third day of June, 1943. The record of the claim was prepared by the state road commission and filed with the clerk on September 23, 1943. This record shows that the head of the department concerned concurs in the claim and that the special assistant to the attorney general approves it as one that should be paid by the state within the meaning of the court act. It further appears from this record that state road commission truck NO. 538-98, at the time engaged in work on the road, did not perceive the approach of claimant's vehicle, which was following it on the road, and backed the truck into it, causing the damage for which an award is sought.

In view of the showing made by the record, the concurrence in the claim by the state road commissioner, and its approval for payment as a proper claim against the state by the special assistant to the attorney general, an award is now made in favor of claimant A. C. Poland for the sum of fifty-two dollars and fifty-nine cents ($52.59), subject to the approval and ratification thereof by the Legislature.

(No. 295-S—Claimant awarded $71.02)

HUGH W. MAY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

From the record of this case prepared by the state road commission and filed with the clerk September 29, 1943, it appears that on August 6, 1943, an accident occurred between state road commission car A-29-1, driven by Sylvester Mazella, and an automobile owned by claimant and driven by his wife, on Hale street, in the city of Charleston, West Virginia, in which the latter's vehicle was damaged to the extent that repairs were obliged to be made thereon for which claimant paid, as shown by itemized statement, filed with the record, the sum of $71.02. The state road truck entered the line of traffic from the curb, where it was parked, without warning. It is shown that claimant's car was being carefully driven and that the driver thereof had no opportunity to avoid the collision which occurred.

The head of the department concerned concurs in the claim, and the special assistant to the attorney general approves it as a claim against the state which should be paid within the meaning and contemplation of the court act.

In view of the concurrence and approval aforesaid an award is now made in favor of claimant Hugh W. May in the sum of seventy-one dollars and two cents ($71.02).

(No. 296-S—Claimant awarded $47.99)

MRS. S. E. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

In a collision between state road truck NO. 430-94, operated by Clarence Edwards, and a truck owned by claimant, on August 20, 1943, on secondary road NO. 31 (Jarvisville road), in Harrison county, West Virginia, the latter's vehicle sustained damages to its left fender, left front head light, left front grille and radiator. To reimburse her for such damages, claimed to have been caused by the negligent operation of the state road commission truck, claimant seeks an award of $47.99. The state road commissioner, the head of the department concerned, concurs in the claim. The special assistant attorney general approves the claim as one which, within the meaning of the court act, should be paid by the state.

In view of the concurrence in the claim by the state road commission and its approval for payment as herein shown, an award is now made in favor of claimant Mrs. S. E. Bennett for the said sum of forty-seven dollars and ninety-nine cents ($47.99), subject to the approval and ratification of the Legislature.

(No. 297-S—Claimant awarded $139.95)

HELEN ROPER COULTER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1944

ROBERT L. BLAND, JUDGE.

This is a claim submitted to this court by the state road commission under section 17 of the court act. It was filed with the clerk on October 13, 1943. On March 24, 1941, employees of the state road commission, while engaged in blasting operations on project FA-111-2, U. S. route 340, near the home of claimant, in Jefferson county, West Virginia, threw an "exploder lead wire" across a power line, causing a short circuit, which destroyed a Zenith Console radio in claimant's home, of the value of $139.95. After an investigation of the accident R. C. Quinn, district road engineer, recommended to respondent the payment of the claim. Its payment is also concurred in by respondent, and the claim is approved by the special assistant to the attorney general as one which within the meaning of the court act should be paid.

An award is now made in favor of claimant Helen Roper Coulter for the sum of one hundred thirty-nine dollars and ninety-five cents ($139.95), subject to approval and ratification by the Legislature.

(No. 300-S—Claimant awarded $71.66)

C. F. SHAFER, M. D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

Claimant's car, parked on Main street in Grafton, West Virginia, was struck by state road tar distributing truck NO. 430-13 on June 30, 1943. The accident was caused by the negligence of the truck driver.

The cost of repairs was $71.66, for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award is made to claimant for seventy-one dollars and sixty-six cents ($71.66).

(No. 302-S—Claimant awarded $18.01)

L. B. HILL, Claimant

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

On August 7, 1943, while going up grade, in Morgantown, West Virginia, claimant's Studebaker car was struck by state

road tar distributing truck, which drifted backward while emergency brake was being operated to stop truck, after its motor had stopped running. The amount of claim is $18.01, the actual cost of repair, payment of which is recommended by respondent and approved by the attorney general.

An award of eighteen dollars and one cent ($18.01) is made to claimant.

(No. 305-S—Claimant awarded $55.00)

THE SANITARY BAKING COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

On October 2, 1943, at State Quarry, one mile south of Smithfield, West Virginia, claimant's bakery truck was struck in one-way traffic by prison labor power shovel P-25-10, by reason of operator of shovel failing to receive watchman's signal of approaching car.

The claim is for $55.00 the cost of repair, payment of which is recommended by respondent and approved by the attorney general.

An award of fifty-five dollars ($55.00) is made to claimant.

(No. 306-S—Claimant awarded $25.70)

ROBERT TOMLINSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

On September 27, 1943, at Glendale, West Virginia, claimant's Packard sedan was struck by prison labor truck NO. P30-116, while passing through one-way traffic lane, due to negligence of flagman in signalling, causing damage of $25.70 to car for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award of twenty-five dollars and seventy cents ($25.70) is made to claimant.

(No. 307-S—Claimant awarded $356.63)

POCAHONTAS AMUSEMENT CORPORATION, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

Claimant's porcelain marquee in front of its theatre in Welch, West Virginia, on the twenty-ninth day of June 1943, was,

through the negligence of truck driver of state road truck NO. 1030-45, struck by concrete mixer in truck, which extended eighteen inches from body of truck. The agreed compromise settlement was for $356.63.

Respondent recommends and the attorney general approves its payment.

An award is made to claimant for the sum of three hundred fifty-six dollars and sixty-three cents ($356.63).

(No. 308-S—Claimant awarded $9.20)

LEWIS STEWART, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

G. H. A. KUNST, JUDGE.

On September 28, 1943, on state road project 147-B, on ROUTE 2, near New Martinsville, West Virginia, claimant's car was struck by road shovel 625-7, due to negligence of flagman in permitting car to enter a one-way traffic zone and in not notifying shovel operator of the approaching car. Cost of repairing car was $9.20, the amount of the claim.

Respondent recommends and the attorney general approves its payment.

An award of nine dollars and twenty cents ($9.20) is made to claimant.

(No. 309-S—Claimant awarded $20.40)

C. B. SNAITH, and BOB ROGERS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

CHARLES J. SCHUCK, JUDGE.

The record, as submitted, shows that the two claimants were the owners of a certain taxicab or car parked on the state highway one mile north of New Era in Jackson county, West Virginia. That while so parked a state road grader, operated by the state road commission hooked its grader blade into the door of the said taxicab damaging the said cab in the amount of $20.40. It appears from the record to have been solely the negligence of the operator of the state road truck that caused the damages in question.

The state road commission does not contest the claimants' right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of twenty dollars and forty cents ($20.40), but that no payment should be made to claimants until the state road commission has obtained a release from the said claimants, severally and jointly as the owners of the said taxicab.

(No. 312-S—Claimant awarded $153.87)

W. O. STUTER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

CHARLES J. SCHUCK, JUDGE.

The record reveals that while claimant was driving his car about one-half mile west of Smithfield, Wetzel county, West Virginia, on state route 20, while the road was slippery a state road truck, operated by the state road commission's employee, skidded and slid across the road into claimant's automobile which he, the claimant, had driven into the adjoining ditch in order to avoid the accident in question. The record reveals that there was no negligence whatsoever on the part of claimant, but that the driver of the state road truck was negligent considering the circumstances and conditions under which the accident happened. The collision took place on the fourteenth day of October, 1943. The record reveals that the claim is in the amount of $153.87.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of one hundred fifty-three dollars and eighty-seven cents ($153.87).

(No. 312½-S—Claimant awarded $9.00)

DR. ALLEN M. DYER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1944

CHARLES J. SCHUCK, JUDGE.

This claim is in the amount of $9.00 for medical services rendered at the time of the collision and accident as set forth in claim NO. 312-S, said medical services having been rendered to the occupants of the state road truck injured at the time of the collision by the said state road truck and the car of W. O. Stuter, the claimant in the aforesaid companion claim, NO. 312-S, as shown by the record thereof.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of nine dollars ($9.00).

(No. 313-S—Claimant awarded $98.94)

EDWARD L. WOLFE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1944

CHARLES J. SCHUCK, JUDGE.

On October 3, 1943, at Reader, Wetzel county, West Virginia, claimant's Pontiac automobile was injured by a state road commission truck driven by a prisoner instructed to operate the same, causing damages to claimant's car in the amount of $98.94. From the record it appears that claimant's car was parked at or near what is known as camp NO. 80 at Reader and that the state road truck operated as aforesaid, carelessly and negligently backed into claimant's car without any fault on his, claimant's, part causing the damages in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of ninety-eight dollars and ninety-four cents ($98.94).

(No. 317-S—Claimant awarded $100.00)

MARYLAND NEW RIVER COAL COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1944

CHARLES J. SCHUCK, JUDGE.

This claim arises for damages caused to a house and an electric transformer, as well as for labor replacing the transformer; the said house and transformer were the property of the said claimant and were located on what is known as secondary road NO. 85-2 in Fayette county, West Virginia. The record reveals that the properties in question were injured by the manner of carrying on the blasting operations on said secondary road NO. 85-2 by the state road commission. The amount set forth in the claim evidences a compromise settlement between the claimant and the state road commission for the damages in question.

The state road commission therefore does not contest claimant's right to an award for the amount of $100.00, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of one hundred dollars ($100.00).

(No. 318-S—Claimant awarded $71.62)

GEORGE M. WEST, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1944

CHARLES J. SCHUCK, JUDGE.

The claimant, George M. West, while in the act of delivering a load of sand, cement and sewer pipe was obliged to cross a wooden truss bridge on secondary road 20-27 in Harrison county, West Virginia, and while so engaged, and while on the said bridge, it collapsed causing damages to the claimant's truck, as well as the material loaded thereon, at the time of breaking through the bridge in question. There were no "load limit" signs posted on the bridge and no warning of any kind given to claimant that the bridge in question would not support or sustain the load of the said truck and materials thereon at the time. Damages are claimed in the amount of $71.62, embracing not only the repair to the truck, but the loss of material as well; in fact the claim was first presented for a much larger amount but seemingly by agreement has been reduced to a total of $71.62. From the record it would appear that the claimant's truck was licensed to carry the load it was carrying, and no negligence can be imputed to him in this respect. The matter therefore is reduced to the liability of the state for having a weak and insecure bridge or the failure to post notices of the maximum load allowed on it at any time.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of seventy-one dollars and sixty-two cents ($71.62).

(No. 319-S—Claimant awarded $21.50)

E. L. STONE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1944

CHARLES J. SCHUCK, JUDGE.

The claimant, E. L. Stone, of Wheeling, West Virginia, seeks reimbursement in the sum of $21.50, which amount he was obliged to pay for repairs to his automobile, damaged by a state road truck. The record, as submitted, reveals that claimant's car was stopped, waiting for a signal to pass through one-way traffic zone where the state road commission employees were engaged in doing road work on state route NO. 2 in Wheeling, West Virginia. The accident occurred on October 28, 1943 and was caused by the state road truck being negligently backed into the claimant's car causing the damages in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of twenty-one dollars and fifty cents ($21.50).

(No. 320-S—Claimant awarded $23.16)

SHAKER SADD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant's automobile was run into and damaged by a state road truck while the former car was parked on North Kanawha street, Buckhannon, on the eighteenth day of November 1943. The record reveals that the driver of the state road truck was negligent, and he, himself, acknowledges his negligence in a written statement filed in the record of the claim. The damages sustained amounted to $23.16.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount, and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of twenty-three dollars and sixteen cents ($23.16).

(No. 310—Advisory Opinion.)

DOUGAN, BRETZ & CALDWELL, agents of AETNA CASUALTY & SURETY COMPANY, claimant; WEST VIRGINIA BOARD OF CONTROL, petitioner.

v.

STATE OF WEST VIRGINIA, at the relation of EDGAR B. SIMS, Auditor, respondent.

Opinion filed January 13, 1944

Advisory opinion by CHARLES J. SCHUCK, JUDGE.

To the Board of Control of West Virginia:

In connection with the above entitled claim, the inquiry contained in the following question heretofore submitted *in re* claim NO. 258, *American Insurance Agency,* is now submitted to this court by the board of control of West Virginia, for an advisory opinion, to-wit:

> "Can the state properly pay insurance premiums on cars owned by the state, inasmuch as there is a question as to whether any enforceable liability accrues against the state in case of property damage or personal injury."

While not appearing specifically in the body of the inquiry it nevertheless contemplates the insurance protecting state employees against public liability for acts arising in the course of their employment as such and resulting in injuries to property or persons. This matter was heretofore submitted to this court for an advisory opinion, and the court unanimously held in effect that, in the absence of any authorization either specifically given by statute or by implication, under the act

creating the court of claims, the court would be without authority to consider a claim of the nature now presented and submitted in connection with the request for the court's opinion.

As yet no authority whatever, of course, has been given by the Legislature to any state department to contract for the insurance in question, and the only other authority could be that by implication the power had been delegated to the court of claims to allow and honor these insurance contracts.

We are of the opinion, after a very careful consideration of the act, creating the court of claims, as well as its various provisions, that while allowing us to consider certain claims arising *ex contractu* and *ex delicto* it does not expressly or by implication allow us to consider and honor claims for the amounts of insurance premiums on policies issued for the sole purpose of protecting state employees against public liability for property damage or personal injuries arising through any negligent act on the part of said state employees while so engaged.

We accordingly again hold that until the Legislature gives the authority to the court of claims to consider and allow the claims in question that we would be overreaching the powers as at present conferred on the court by allowing the claim in question, and we further hold that the auditor is acting within his rights in refusing to honor claims or warrants for such premiums.

(No. 298—Claim denied)

ARTENIS G. MORTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 28, 1944

An award will be refused where alleged negligence of respondent is not proved, and when claimant, knowing the conditions and existence of a danger, voluntarily and unnecessarily exposed herself to it, when an ordinarily prudent person would not have incurred the risk of injury, which such conduct involved.

Appearances:

Thomas S. Moore, for the claimant;

Eston B. Stephenson, special assistant Attorney General for the state.

G. H. A. KUNST, JUDGE.

At about nine-thirty o'clock of the morning of the tenth day of August 1943, claimant, Artenis G. Morton, aged twenty-three, unmarried, was injured by falling through an opening in bridge flooring of a bridge under the control and jurisdiction of the state road commission, respondent herein. This bridge is located at Coal Fork, in Kanawha county, West Virginia and crosses Campbell's creek. She fell a distance of ten or twelve feet to the creek bed, and for the injuries she sustained asks an award of $4800.00. On one end of the bridge, which is herein called the county road end, are residences, and on the other end are a store and the post office.

State road commission employees were, and had been for several weeks, engaged in relaying the floor of this bridge, having removed the old flooring from the county road end.

A walkway, consisting of three boards, three inches thick by twelve inches wide, elevated about two and one-half feet above the floor of the bridge, extended across the left side of the bridge, which was eighty to eighty-five feet in length, for the convenience of pedestrians to cross the bridge, many crossing each day. Barricades at both ends of the roadway stopped vehicular traffic. The new flooring had been laid about twenty feet from the county road end of the bridge. An open space about two and one-half feet long was left uncovered, so that the walkway would not interfere with the work of reflooring, and this opening was closed during the day by the workmen upon the approach of pedestrians, by placing one end of a board twelve inches wide, three inches thick, upon the new floor of the bridge and the other end upon the walkway, thus covering the opening in the floor and the workmen would hold the board while pedestrians walked this inclined board onto the boardwalk.

When the flooring had been extended over the opening, the boardwalk was cut off a sufficient length to permit the flooring work to be continued, and at night the flooring was extended to cover the opening.

Miss Morton had crossed the bridge, going to the store, upon the inclined plank and walkway and after about thirty minutes was returning, carrying a poke filled with groceries; she was accompanied by her sister, a girl of eight years of age, and Helen Wright, thirteen years of age. When they reached the opening in the floor they found that the board crossing the opening was not in place. Helen took the groceries and she and the other girl crossed by holding to the side railing and walking a lower side railing and stepping off on the floor without waiting for the board to be placed. Miss Morton attempted to cross without the board and fell through the opening.

The pedestrians, who crossed this bridge over this walkway, were lawfully there, and because of this fact the state road

commission employees were keeping this walkway in a reasonably safe condition and in so doing performing the duty imposed upon them and consequently not guilty of negligence.

Miss Morton having crossed this bridge over this opening over this board and walkway but a short time before, and, by the evidence of one witness, several times previous, which she denied, saw and knew of this opening and the method used to cover it and to cross it, and with the six workmen then on the bridge, distant but a few feet, ready and willing to assist her, instead of waiting for the board to be placed, instead of asking that it be replaced, instead of asking for help or waiting until the opening was closed, she, knowing and appreciating (or she should have known and appreciated) the existence of danger from which injury might be reasonably anticipated, and not exercising the ordinary care of a prudent person to avoid such injury, attempted to cross and by her voluntary act in so exposing herself to such danger, was guilty of negligence from which her injury resulted.

The court is of opinion that no award be made.

(No. 314—Claimant awarded $750.00)

BEE LESTER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 1, 1944

A compromise settlement made by the state road commission of a claim filed against that state agency in the court of claims for damages for personal injuries sustained by claimant when he was struck by a disconnected wheel and axle from a one and one-half ton state truck being towed from one point to another point on a state highway, subject to the ratification and approval of the court of claims, will be approved and an award made for the amount of such compromise settlement when the evidence offered upon the hearing of the claim shows such settlement to have been proper and advisable in the premises.

S. N. Friedberg, Esq., for claimant;

Eston B. Stephenson, special assistant Attorney General for the state.

ROBERT L. BLAND, JUDGE.

On the twenty-fourth of November 1943, claimant Bee Lester, of Goodman, Mingo county, West Virginia, filed a petition with the clerk of the court of claims wherein he alleged that on the 28th day of October 1943, he was walking on the sidewalk adjacent and parallel with route 52, in a westerly direction, at or near the intersection of Hill street and West Third avenue, in West Williamson, West Virginia, between the hours of one and two o'clock P. M. of that day, and that a Chevrolet one and one-half ton state road truck, in charge and under the control of John Soward, an employee of the state road commission, was being pulled by another state road truck driven by one John Nance, also an employee of the state road commission; that said first mentioned truck so driven by said Soward, while hauling dirt, gravel, rock and other substances

on the new road at the bottle neck on West Third avenue, had broken an axle and was unable to proceed under its own power and that at the direction of Clarence Hicks, foreman of maintenance for respondent, said disabled truck, with said broken axle, was directed to be towed to the state road garage in West Williamson. It is further averred that just before said truck approached a point near where claimant was walking on the sidewalk said trucks came around a steep curve and went down a steep grade at a rate of speed in excess of fifteen miles an hour, and without due regard for the safety and welfare of pedestrians, and without having control and care of said trucks, the rear right dual wheels of the disabled truck came off the said truck with its axle extended and ran wild down Third avenue upon the sidewalk and struck claimant, inflicting serious and grievious injuries and thereby causing him to sustain a fractured skull, concussion of the brain and other contusions and lacerations in and about the body.

This case was placed upon the trial calendar of the present term for investigation on the eighteenth of January 1944. After the state road commission had made investigation of the accident, and the circumstances attending it, it concluded that the claim in question was possessed of merit and opened negotiations for its settlement by way of compromise adjustment. It agreed to pay to claimant in full settlement of his injuries the sum of $750.00 subject to approval and ratification by this court. This amount claimant agreed to accept.

On the said eighteenth day of January 1944, the case came on to be heard before the court. Evidence was adduced supporting the allegations of claimant's petition and certain facts were stipulated.

It appears that state road commission truck NO. 230-57 had a broken axle and it was deemed necessary to send it to the state garage at Williamson, a distance of about one mile, to be repaired. State road commission truck NO. 230-84, driven

by John Nance, started to tow the disabled truck to the garage. The condition of the weather was wet and cloudy and visibility was poor. Claimant was walking on the sidewalk, in a westerly direction, going towards Chattaroy and Huntington. He was accompanied by his son who was pushing a cart on the right side of the highway. They had gone around a curve and were descending an incline. Another boy was approaching from the opposite direction. Just before he met claimant and his son the two state road commission trucks came around this curve, traveling in the same direction that claimant was proceeding. The little boy observed that the rear right dual wheels of the disabled truck had become disconnected and were rolling wildly along the highway. This fact was unknown to the road employees in charge of the two trucks. The little boy saw the wheels going up on the sidewalk and desiring to warn claimant of his danger yelled to him to jump out of the way. At the same time he jumped out of the way and the wheels missed him by a few inches. Claimant turned around to see what the boy was yelling about and almost in that moment the axle from the wheels which were moving very fast hit him, knocking him up in the air and he fell flat on the pavement and the upper part of his body rolled over on the grass. After striking claimant the wheels continued to run on the highway and struck a car. The road trucks did not stop until they proceeded to a point below Kazee's service station.

Claimant was found to be badly injured and was taken to the Williamson Memorial hospital. On examination he was found to be in shock, with a large hematoma in the left occipital area, with bleeding from the left ear. X-ray examination of the skull showed a fracture of the left parietal region. There can be no doubt about the fact that he was seriously injured and his hearing badly impaired. He remained in the hospital until November 4, 1943, when he returned to his home to further recuperate. It was manifestly an act of negligence to permit the disabled truck to go upon the highway. In view of the condition in which it was found to be the lives of all

persons using the highway at the time were in danger. Proper precautions for the safety of the traveling public were not employed. By its willingness to settle claimant's demand the road commission has admitted its responsibility for the injuries which he received. The compromise settlement is fully sustained by the agreed facts.

In claims no. 95, 120 and 121, *Wayne Damron* and *Calvert Fire Insurance Company* v. *State Road Commission, Zillie Damron* v. *State Road Commission and Rebecca Damron* v. *State Road Commission,* 1 Ct Claims (W. Va.) 236, we held:

> "When, pending the hearing and investigation of claims against the state, duly filed in the court of claims and placed upon its trial calendar, all growing out of the same facts, such claimants and the state agency concerned effect a compromise adjustment and settlement of such claims, subject to the approval and ratification of the court of claims, and evidence offered in support of such claims and compromise settlement thereof shows the advisability and propriety of such compromise settlement, awards will be made for the payment of such claims in accordance with and pursuant to such agreed terms of settlement."

The settlement made by the road commission with claimant will be ratified and confirmed. All of the evidence discloses the wisdom and advisability of making such settlement.

An award is therefore made in favor of claimant Bee Lester in the sum of seven hundred and fifty dollars ($750.00), subject to ratification by the Legislature.

(No. 315—Claim denied)

E. E. McCLURE, Claimant,

v.

BOARD OF CONTROL and DEPARTMENT OF BUILDING AND GROUNDS, Respondents.

Opinion filed February 15, 1944

Choice of several safe ways of descent from one floor of a building to another being available to claimant, an award will not be granted where a dark stairway is chosen in preference to ways known to be safe, and when an ordinarily prudent man would not have incurred the danger of injury known, or which could have been reasonably anticipated from such choice, alleged negligence of respondents not having been shown.

Appearances:

Messrs. *Lilly & Lilly (A. A. Lilly* Esq. and *R. G. Lilly* Esq.) for claimant;

Eston B. Stephenson, special assistant Attorney General for the state.

G. H. A. KUNST, JUDGE.

Claimant E. E. McClure of Charleston, West Virginia, in the employ of said state as a proofreader, was sixty-seven years of age, afflicted with rheumatism for the past nine years, and had his right foot injured by the loss of the big toe; his "eyesight all right, but not seeing so well at night," although he had used glasses for fifteen years, and walked with the aid of a rubber-tipped cane. He had been employed at every session of the Legislature of the state for the past forty years. During the session of the Legislature for the year 1943 and for the previous three or four sessions his particular duty had been to proofread and correct the journal of the House of Delegates each day and have it ready for the clerk to read

when the session opened the next day. He did this work in a small room on the second floor of the Capitol building, numbered 224, between the offices of the clerk of the House and the speaker of the House.

In going down the dark stairway of the main unit of the building at about four-thirty o'clock in the evening of the twelfth day of March 1943, which was a rainy, cloudy day, he walked on the left hand side of the steps and held with his left hand to the railing and used his cane in his right hand as a support. He descended steps until he reached the newel post, which was located two steps above, and sixteen inches from the bottom of the steps at a platform five feet nine inches in width and from which there were five steps to the first floor. These steps were of marble, fifteen inches in tread and with six inches rise.

When in his descent he reached the newel post on a different level from the platform and the railing not extending farther, he thought he was at the end of the stairway, and, stepping, he fell onto the platform below and across it, down the five steps to the floor below, and sustained injuries for which he asks an award of $15,000.00. He was found by a Charleston policeman who assisted him to a cab and was taken to his home.

He alleges in his petition, that his fall was caused by negligence of respondents' employees in not keeping the stairway in question properly lighted, which lights would have shown the position of the newel post to be on a different level from the platform and that the bannister was not extended to the platform. In his statement that the stairway was dark, he is corroborated by the testimony of the policeman, but both testified that a very small amount of light came to the stairway from the large chandelier at the end of the corridor, the only light which they both say was lighted, and that all other lights above and near this stairway, and across the main corridor from it, were not lighted.

Evidence of the employees of respondent, entrusted with the responsibility for the operation and care of the lights and electrical equipment and lighting of the entire building, told of their presence in the building, of their careful inspection of same, and patrol of corridors and stairways their great efforts particularly directed to keep on all lights because of the presence of the Legislature in the building; of putting in new light bulbs all over the building before the session of the Legislature commenced; that if electric light bulbs burned out on this particular stairway and its vicinity, leaving it in darkness on this particular occasion, that they were not notified of such fact and did not discover it and had no knowledge of the fact then or at a later time, and that Mr. McClure's fall was not reported to them until long after; at the time this proceeding was commenced, although Mr. McClure returned to the building and performed his work the next day.

The court viewed the scene of accident and lights were made as nearly as possible to conform to the statements of Mr. McClure and the policeman. The court is of opinion that the stairway, although then dimly lighted, was not so dark but that an ordinarily prudent person could have descended it with safety. When Mr. McClure approached this stairway, having the warning of darkness, which courts have held is "nature's own warning, to arouse the natural instinct of self protection," he had several choices of safe ways to descend to the first floor or to return to the room he had left and telephone the custodian of building and grounds of the unlighted condition of the stairway, and then to wait until the official had had a reasonable time in which to remedy this unlighted condition and when so remedied and with stairway properly lighted, the other alleged condition of danger, the shortened railing and the difference in level of newel post, would have been obviated; to use the safe stairway he was accustomed to use; to use one of the safe self-operating elevators which he had been shown how to use, or could easily have learned how, from posted instructions.

The court being of opinion that respondents, not having had knowledge of this unlighted condition of the stairway at such time, and not having had notice of same, nor having had opportunity and reasonable time to remedy it, and no higher degree of care being reuired for one impaired in physical capacity than for one in perfect physical condition, such respondents were not guilty of negligence; that claimant voluntarily exposed himself unnecessarily to a known and appreciated danger, or in the exercise of ordinary care he should have known and appreciated it, and where under the same, or similar circumstances, an ordinarily prudent person would not have incurred the risk of injury which such conduct involved.

Wherefore an award is not granted.

(No. 322—Claimant awarded $250.00)

R. CLARENCE PIERSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 15, 1944

A case in which it is held that the state was not responsible in damages for injuries to one of its road foremen caused by a personal assault on him by one of his fellow employees; however, a claim for which the amount of lost services is allowed.

Appearances:

E. L. Eakle, Esq. for the claimant;

Eston B. Stephenson, Esq., special assistant Attorney General for the state.

CHARLES J. SCHUCK, JUDGE.

While acting as road foreman in Clay county, West Virginia, for the state road commission, the claimant, Clarence Pierson, was assaulted by one of his fellow workmen, being struck by a shovel in the hands of said workman, the incident occuring on or about January 3, 1936. A review of the testimony as submitted, indicates that the assault was made without any justification whatsoever, and seemingly without any provocation. In fact the only evidence is that the claimant, as foreman, had ordered the ditch beside the road to be made a little deeper and had himself stepped into the ditch to help with the work when he was assaulted by the workman, Howard Young. Claimant's injuries required both hospital and medical attention. In fact, he could not resume his work for a period of approximately two months. In due course of time, complainant brought an action in tort against his assailant and recovered approximately $675.00, of which he, personally,

has received $300.00. He lost two months' work amounting to $250.00.

Under all the circumstances as presented, considering the fact that an attempt was made to show that the assailant was of a vicious nature and had made other assaults, which contention in our opinion was not supported by the testimony, we find that the state could not possibly have forseen the likelihood of the assault at the time that Young, the assailant, was given the job with the road department and was engaged as aforesaid. Neither the state, nor the state department involved, could in any manner be held responsible for the personal actions of Young and, as stated, could not contemplate or forsee that he would make an unprovoked assault upon the road foreman. There is no evidence in this case to show that the state or department in question, or any of its officials, knew anything about the assailant's disposition, nor as to any vicious nature or the probability of his making an assault upon any of his fellow workmen.

We feel, therefore, that an award cannot be made for the injuries sustained; however, since it has been the policy in the past, and was at the time of claimant's injury, of the state road department to pay workmen for loss of time sustained by reason of injuries of any kind received while engaged in their usual work, we feel that the amount that claimant would have received from the state for services rendered during the period that he was unable to work should be given him, and an award of two hundred and fifty ($250.00) dollars is recommended accordingly.

(No. 323—Claim denied)

J. W. HARTIGAN, M. D., Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed February 15, 1944

1. An award will not be made for the value of surgical instruments belonging to the superintendent of a state emergency hospital, misplaced or lost at a time when such superintendent was responsible for the security and safekeeping of such instruments.

2. Claimant must prove his claim by a preponderance or greater weight of the evidence, and no award can be made in the absence of such proof.

R. Dennis Steed, Esq., for claimant;

Ralph M. Hiner, assistant Attorney General, and *Eston B. Stephenson*, special assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this case claimant J. W. Hartigan, M. D., of Morgantown, West Virginia, seeks an award of $9,740.00 as hereinafter more particularly set forth.

Testifying in support of the claim Dr. Hartigan said that on the night of April 15, 1941, His Excellency, the Honorable Matthew M. Neely, Governor of West Virginia, communicated with him by telephone at his home in Morgantown and stated that he wanted him to go to McKendree, in Fayette county, to be the chief surgeon at McKendree emergency hospital; that he went to Charleston on the sixteenth of April, remaining over night in that city, and on the following morning had a conference with the Governor at his office in the Capitol, at which time he announced his willingness to go to the hospital whenever the Governor was ready to send him there. On the same day he was the luncheon guest of the Governor

at the Executive Mansion, where they were joined by the Honorable Walter R. Thurmond, at that time president of the board of control, which exercises supervision over certain state institutions.

Claimant further stated that at the direction of Governor Neely he was taken to the McKendree institution by Mr. Thurmond, and at once entered upon the discharge of his duties, and remained at the hospital for a period of six months, during all of which time his name appeared on the pay roll of the hospital as its superintendent, and that for his services in that capacity he was paid the sum of $2000.00, the salary of the superintendent having been fixed by the board of control at $4000.00 per annum.

Claimant admitted that after a service of six months at the hospital he was relieved from further duty there by Governor Neely. In other words he was dismissed by the Governor. This dismissal was in the form of a letter. After he received this letter, which was delivered to him at his home in Morgantown, by the sheriff of Monongalia county and a state trooper, he did not return to the McKendree institution or render any further service there.

The claim now prosecuted by Dr. Hartigan is itemized as follows: Personal surgical instruments lost at the hospital, $40.00; salary as chief surgeon for six months from and after April 16, 1941, $1800.00; maintenance of wife at hotel in city of Beckley, $900.00; salary as superintendent for twenty-one months from October 16, 1941, $7,000.00.

Dr. Hartigan submitted his case on his own testimony. No corroborative evidence was offered.

Mr. Thurmond, called as a witness on behalf of the board of control, testified that at the time claimant went to the McKendree hospital he was president of the board of control. He stated that on the twenty-eighth of March, 1941, he notified Governor Neely that the McKendree hospital was without a

superintendent. He further testified that on April 14, while he was making an official visit to the girls' industrial home at Salem and remaining there over night the Governor of the state called him about 9:00 o'clock and said: "I have decided to appoint our mutual friend, Dr. Hartigan, to the place at McKendree." He said that he met the Governor and Dr. Hartigan at the Executive Mansion about 12:30 o'clock on April 16, and at the direction of the Governor took claimant on that day to McKendree and installed him as superintendent of McKendree emergency hospital. They arrived at the institution about 5:30 P. M. on that day, just before dinner. Dr. Hartigan stated that the trip was made on the morning of the seventeenth. There is a discrepancy in the two statements. Mr. Thurmond said that he testified with reference to the record of the board of control.

Governor Neely, also called as a witness on behalf of respondent, testified: "I am certain of what I asked him to go for. The capacity in which I asked him to go there was that of superintendent. I had no authority, so far as I know, to appoint him chief surgeon there or in any other hospital in the state." And he stated that his recollection was that when he offered the position to Dr. Hartigan he informed him that the superintendent's salary was $4,000.00 a year.

Mr. Thurmond, while a member of the board of control, acquired particular knowledge of and familiarized himself with the different institutions of the state. He testified that the principal surgical institutions were the three miners' hospitals, one located at Welch, one at McKendree, and one at Fairmont, and that in each one of them the man who was superintendent did practically all of the surgery and a tremendous amount of it. He said that no superintendent was paid additional compensation as a surgeon. He further testified that there was no one at these institutions designated as chief surgeon.

We think that it is clearly shown by the evidence that Dr. Hartigan was appointed superintendent of McKendree emergency hospital, and that he was never at any time designated

as chief surgeon of that institution. What work he did as surgeon there was incidental to his duties as superintendent.

We have already stated that Dr. Hartigan remained at the hospital for a period of six months in the capacity of superintendent and that for his services he was paid $2000.00. But in his present claim he asks for $40.00 to compensate him for certain surgical instruments belonging to him and taken to the hospital when he went there but which were misplaced or lost. Concerning them claimant testified: "I couldn't find these when I went after them." When he took the instruments to the hospital they were in his custody and under his control. An award will not be made for the value of surgical instruments belonging to the superintendent of a state emergency hospital, misplaced or lost at a time when such superintendent was responsible for the security and safekeeping of such instruments.

The claim for salary as chief surgeon for six months from and after April 16, 1941, amounting to $1800.00 cannot be sustained. As disclosed by the evidence Dr. Hartigan was not employed or engaged as chief surgeon and there was no position or office at the institution designated or known as chief surgeon. Claimant was paid as superintendent for that period the sum of $2,000.00. Nor can we perceive any basis for an award for maintenance of claimant's wife at a hotel in the city of Beckley in the sum of $900.00. Claimant himself testified that she was not at a hotel in Beckley during the six months period of his incumbency as superintendent of the hospital. Mr. Thurmond testified that there was no agreement that Mrs. Hartigan's maintenance at such hotel would be paid by the board of control. He told claimant that the living quarters at the hospital (where Mrs. Hartigan could have remained if she wished to do so) were not particularly commodious and expressed doubt whether Mrs. Hartigan would be satisfied there. Claimant replied that it was not his intention to have his wife with him during the time that he remained at the institution. During the entire period of claimant's stay at the

McKendree emergency hospital she remained at her home in Morgantown.

Dr. Hartigan's claim for salary as superintendent of the hospital for twenty-one months from October 16, 1941, in the sum of $7,000.00, is without merit. During that period he rendered no service to the institution. He was not there. His tenure as superintendent had been terminated by the Governor. He served in the capacity of superintendent for six months from April 16, 1941, and his salary of $2,000.00 was paid to him. At the end of that period he was removed as superintendent by the Governor. He served during the will and pleasure of the Governor. No commission had been given him. The Governor had the lawful right to remove him at any time. Chapter 6, article 6, section 4, of the code of West Virginia, provides as follows:

> "Any person who has been, or may hereafter be appointed by the governor to any office or position of trust under the laws of this State, whether his tenure of office is fixed by law or not, may be removed by the governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the governor to assign any cause for such removal."

The burden of proof to establish the correctness and merit of his claim rested upon Dr. Hartigan. He has not met that burden. A claimant must prove his claim by a preponderance or greater weight of the evidence, and no award can be made in the absence of such proof.

We are of opinion that no award in this case can properly be allowed.

An award is, therefore, denied and the claim dismissed.

(No. 197—Claimant awarded $51.76)

JAMES M. FLETCHER, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed February 16, 1944

For reasons set forth in the opinion, an award is allowed in this claim and the case distinguished from the opinion filed in *Lambert* v. *State Board of Control*, case No. 139.

Appearances:

W. Merle Watkins, Esq., for the claimant;

Eston B. Stephenson, special assistant Attorney General for the state.

CHARLES J. SCHUCK, JUDGE.

The testimony in support of this claim presents facts quite unusual and differing materially as to their weight and importance from the facts and matters heretofore considered by this court in several other claims of a somewhat similar nature and arising from the criminal and tortious acts of escapees from the reformatory or industrial school for boys at Pruntytown.

George Fetty, when a boy thirteen years of age, was committed to the industrial school for boys, charged with the offense of breaking and entering and robbery. He was committed in December 1936; he was paroled in December 1938, after having been in the institution for approximately two years. He was returned for a violation of the parole in February 1941, and was then approximately eighteen years and eight months of age. Thereafter he escaped three times from the institution, on August 30, 1941; December 21, 1941; and again on January 30, 1942. From this last escape he returned

voluntarily and upon his promise seemingly to obey the rules and change his conduct, he was again received, and while given no special privileges he was under no special restraint and was given the ordinary supervision exercised over all the boys, and allowed privileges including the use of the recreation grounds at the same time and under the same conditions as the other boys confined in the institution. It was while enjoying the privilege of being on the recreation ground or center on Sunday afternoon, June 21, 1942, that he made his fourth escape, and while such escapee stole the automobile of the claimant and caused the damages thereto for which this claim is presented and now under consideration by this court. Under these circumstances we are called upon to decide whether or not an award should be made in favor of the claimant in the amount of $51.76 as heretfore filed. The recreation ground from which the last escape was made by Fetty is a large field or playground immediately adjoining state route 68, and is unenclosed except for the ground banks or slopes around approximately one-half or two-thirds of the tract.

In the claim of *O. D. Lambert* v. *Board of Control*, case NO. 139, we held in refusing an award, that the authorities in charge of the industrial school must be guilty of such negligence or breach of duty as would contribute directly to an escape of one of the boys before an award could be made for damages resulting from the criminal or tortious act of such escapee. In that case we also said (see opinion last paragraph, page 5) "we do not subscribe to the rule that the state department involved can at all times escape liability, but do insist that the lack of reasonable care must be shown in each instance, and that the negligence must be so extreme as to be directly the cause for the commission of the tort . . ."

Applying these conclusions to the facts presented in the instant case we are of the opinion that the proper supervision was not exercised over the custody of the boy in question; that the circumstances surrounding his incarceration were such as to make him the object of special restraint; that his record while an inmate of the institution was so very bad that

the authorities must have concluded that he no longer could be the subject of reformation and that by giving him the same rights and privileges as enjoyed by the other boys, and allowing him to be on the unenclosed recreation ground at the time and under the circumstances presented, thus allowing another escape to be made by him, were such acts as contributed to the commission of the *tort*, and for which the state department involved should be held responsible.

Writers and authorities on juvenile delinquency indicate that there are juveniles possessed of a nature so vicious, whether acquired by heredity or environment, that reformation seems to be impossible, and that when a subject of this kind or type is being dealt with experience has shown that the authorities having custody of such juvenile must necessarily exercise a higher degree of supervision in order to control the delinquent's acts and prevent him from being harmful to others. It is our opinion that Fetty falls in this class and that accordingly a higher degree of supervision should have been exercised by the authorities at Pruntytown than would be used or exercised in controlling the actions of a less harmful or obedient inmate. Lack of discipline and control in this case, in our opinion, was the cause of the escape and consequently brought about the commission of the *tort*, namely the stealing of the automobile and the injuries to it by the escapee in question. Under all of the circumstances, we favor an award and accordingly recommend that the claimant, Fletcher, should be compensated in the amount of fifty-one dollars and seventy-six cents ($51.76).

ROBERT L. BLAND, JUDGE, dissenting.

The amount of the award made by a majority of the court in this case is small, but the principle involved is important.

The West Virginia industrial school for boys is one of the penal institutions of the state. In the conduct and maintenance of the institution the state is engaged in the exercise of a

governmental function. The state is not liable, in the absence of a statute making it so, to respond in damages for loss of property occasioned by the wrongful conduct of an inmate of the school. There is no statute in West Virginia making the state liable in damages for the claim upon which the award is based.

(No. 294-S—Claimant awarded $74.45)

PRODUCERS GAS COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

G. H. A. KUNST, JUDGE.

Opinion filed February 16, 1944

Claimant seeks a refund of $74.45, which amount represents overpayment by it of its business and occupational taxes for the years 1937 and 1938, as shown by investigation report of auditor for that tax division. A request for refund of the excess tax was made by claimant on its 1937 tax return and on its 1938 return, at the time each was filed.

The state tax commissioner recommends and the attorney general approves the payment of said amount. An award is made to claimant for the sum of seventy-four dollars and forty-five cents ($74.45).

(No. 328-S—Claimant awarded $4.59.)

CHARLES L. LITTLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed July 10, 1944

ROBERT L. BLAND, JUDGE.

On the morning of October 20, 1943, state road commission truck NO. 430-79, operated by Emmett Dunlap, was traveling north on a street in the town of Bridgeport, in Harrison county, West Virginia, said street being a state controlled highway. Claimant's Plymouth automobile, bearing state license NO. 159-780, was following the state truck. The latter stopped suddenly and started back, and in doing so struck claimant's car, causing damage thereto, for which a claim was filed in the sum of $4.59. The record shows that the driver of the state truck was responsible for the accident. The state road commissioner having concurred in the claim, and the attorney general having approved the same as a claim that, in view of the purpose of the court act should be paid, an award is now made in favor of claimant, Charles L. Little, for the said sum of four dollars and fifty-nine cents ($4.59).

(No. 330-S—Claimant awarded $35.70.)

B. W. RIGGS FUNERAL HOME, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

ROBERT L. BLAND, JUDGE.

The claim involved in this case was submitted on January 25, 1944, under section 17 of the court act, the record thereof having been prepared by respondent. It grows out of an accident which occurred December 21, 1943 on a state highway. Harry R. Bell, Jr., a safety director, states that the division of prison labor of the state road commission was widening a small stretch of road in the city limits of Glendale on route 2, in Marshal county, West Virginia, to conform with the balance of the completed project, the normal road width being 44 feet and at the place of the accident 36 feet, with ditches dug on each side of the road for widening purposes, and that truckloads of slag had been dumped on the bed of the road preparatory to being placed in the ditches. Work having been completed for the day, bomb flares had been placed on the slag.

It is shown by the record that at approximately nine o'clock P. M. Eston C. Riggs was conveying a patient in claimant's ambulance to a Wheeling hospital. As he approached the road project, driving at about 40 miles an hour, oncoming cars on the left blinded him and he quite naturally drove toward the right curb of the road, where he struck the slag placed in the roadbed. As a result of the collision the fenders, running board and both right wheels were damaged to the extent that claimant was required to pay the sum of $35.70 for the necessary repair of the ambulance.

The driver of the ambulance and Eugene Roberts say there were no lights visible on the slag. Respondent admits that the prison labor division of the road commission was at fault for the occurrence of the accident.

The head of the department concerned, having concurred in the claim, and the attorney general having approved it as a claim that, in view of the purpose of the court act, should be paid, an award will be, and is now hereby made in favor of claimant, B. W. Riggs Funeral Home, for thirty-five dollars and seventy cents ($35.70).

(No. 331-S—Claimant awarded $10.00.)

TERESA SCHMIDT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

ROBERT L. BLAND, JUDGE.

The record of the claim in this case was prepared by the state road commission and filed in this court on February 9, 1944. The claim is in the sum of $10.00. The state road commissioner concurs in it, and the attorney general approves it as one that, in view of the purpose of the court act, should be paid.

It appears from the record that on October 28, 1943, when she stepped into an open drop inlet on secondary road NO. 1, known as the Boggs Run road, in Marshall county, West Virginia, approximately one mile east of the Boggs Run intersection road and route NO. 2 at Benwood, and 1000 feet west of the Keller gasoline filling station, and within 200 feet of

her home, claimant sustained an injury to her right knee and suffered minor skin abrasions of both extremities, on account of which she incurred liability to pay a physician's bill of $10.00 for professional services rendered. Claimant was walking on the road enroute to her home on Boggs Run. At the point where the accident occurred claimant met an automobile and stepped to the left side of the road and into the open sewer inlet which was filled with leaves, thus obscuring her vision and preventing her from seeing the danger. This exposed inlet was upon the paved portion of the highway and amounted to a dangerous trap unseen by a passerby.

In view of the concurrence in and approval of the claim as above stated, an award is now made in favor of claimant, Teresa Schmidt, in the sum of ten dollars ($10.00).

(No. 334-S—Claimant awarded $18.36.)

RALPH DOOLITTLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

G. H. A. KUNST, JUDGE.

On April 14, 1943, in Fairmont, West Virginia, the driver of state road commission truck NO. 430-32 by negligence in driving collided with claimant's Buick sedan, causing damage to same which cost $18.36 to repair.

Respondent recommends and the attorney general approves payment of the above amount for which claim is made.

An award is made to claimant for the sum of eighteen dollars and thirty-six cents ($18.36).

(No. 335-S—Claimant awarded $6.12.)

GRACE VAN HORN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

G. H. A. KUNST, JUDGE.

On October 25, 1943, state road commission truck NO. 430-87, while going up hill on U. S. route 19-50 in Clarksburg, West Virginia, ran out of gas and drifted back about ten feet before driver could stop it, striking claimant's car, causing damages costing $6.12 to repair. Payment of claim made for this amount is recommended by respondent and approved by the attorney general.

An award is made to claimant for the sum of six dollars and twelve cents ($6.12).

(No. 336-S—Claimant awarded $60.00.)

C. E. BURGESS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

G. H. A. KUNST, JUDGE.

At 11:45 o'clock, P. M., on August 21, 1943, on a street in Charleston, West Virginia, the driver of state road commission truck X-30-2, by negligence in passing a taxicab, struck

claimant's parked car, causing damage to same, which cost $60.00 to repair.

Respondent recommends and the attorney general approves payment of the above amount for which claim is made.

An award is made to claimant for the sum of sixty dollars ($60.00).

(No. 338-S—Claimant awarded $80.24.)

THOMAS A. RATHBONE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1944

G. H. A. KUNST, JUDGE.

On November 27, 1943, in Pine Grove, Wetzel county, West Virginia, the driver of state road commission truck NO. P-30-73 negligently backed into a street, striking claimant's approaching Plymouth car, causing damage to same, which cost $80.24 to repair.

Respondent recommends and the attorney general approves payment of the above amount for which claim is made.

An award is made to claimant for the sum of eighty dollars and twenty-four cents ($80.24).

(No. 301—Claim denied.)

DONALD GILL, an infant, by DOROTHY GILL, his mother and next friend, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

An award will not be granted claimant, asking damages against respondent for alleged negligence in the erection of an insufficient and inadequate barrier, or safeguard on top of a wall extending along a sidewalk under its jurisdiction, where an unattended child of tender years had fallen from the barrier seventeen feet to the base of the wall and sustained injuries, when the barrier is proven sufficient to meet the legal requirements of ordinary care.

Appearances:

Carl B. Galbraith, Esq, for claimant;

Eston B. Stephenson, Esq., and *Ralph M. Hiner,* Esq., special assistants to the attorney general, for respondent.

G. H. A. KUNST, JUDGE.

Near one o'clock on the afternoon of July 8, 1943, Donald Gill, a child two years and ten months of age, fell from a metal fence, or barrier, on one side of a sidewalk in the city of Wheeling, a distance of about seventeen feet, on boards, rubbish and concrete blocks at the base of a concrete wall and sustained serious injury, alleged to be the result of negligence on the part of respondent in not having provided an adequate and sufficient barrier, for which injury, an award for damages in the sum of $50,000.00 is asked. This concrete wall extended along the sidewalk about the frontage of a city lot, approximately fifteen feet in height, upon which had been erected this metal fence, formed of two parallel

horizontal pipes about two inches in diameter, supported by upright pipes of like size, at intervals of seven feet, sunk into the top of the concrete wall.

The sidewalk was along route No. 40, the national highway. The distance from the wall to the first pipe was eighteen inches and the same distance between the pipes. This fence had been erected by respondent as a barrier and protection from the difference in level at the foot of the wall and the sidewalk and it and the sidewalk and highway were under its control and jurisdiction.

The grandmother of the child, in whose care he was, had, at his request, given him five cents to purchase candy at the store next door, on the same side of the street and separated by a building from the lot fronted by the wall and fence where the accident occurred.

Donald purchased an ice-cream cone, then joined two boys at the fence, who were standing on the sidewalk watching the unloading of potatoes by four boys to each car, from two freight cars, standing on a railroad track by the side of a platform extending along what is called the High Grade Packing Company building, which faced the street. He was sitting on the lower pipe of the barrier eating his cone, when he fell. He was carried by Daniel Coffee, one of the boys employed in unloading potatoes, to the platform apparently very seriously injured and from there taken in an ambulance to the North Wheeling hospital, where he was treated for a fractured skull, and there remained until July nineteenth.

At the present time he suffers from head pains and is in a very nervous condition. Dr. Warner testified that in his opinion, there had been partial recovery and "that the probability is that his symptoms will gradually clear up over the period of a year or two." Claimant introduced much evidence as to the nature of the injury, and its treatment by the physicians.

He is now at the home of his grandfather and grandmother, with whom he and his mother make their home, his father being with the armed forces. The mother is employed in a packing plant; the grandfather is employed and the elderly grandmother has the care of the home and is fully occupied with household duties.

The allegation in claimant's petition that the portion of the sidewalk where this accident occurred was a playground is not established by the evidence, children only casually playing there.

In providing a safeguard from danger of this particular place, reasonable and ordinary care was required of respondent and the circumstances of such place was applicable to the precaution which it was required to take. To relieve from liability it was not necessary to make the premises "child proof" by providing all possible safeguards against the entry of children. Full duty is performed when such safeguards are provided as will reasonably prevent injury to a child of ordinary and normal habits of training; there is no liability for injury to a child who has overcome such an obstacle and succeeded in reaching a place of danger. 45 Corpus Juris S. 185, page 782.

The excavation protected by this wall and fence, constituted no hazard to an adult or anyone *sui juris,* only extraordinary inadvertence would subject them to any danger; only a child of tender years not having attained an age and experience where his actions would be governed by reason and knowledge could have been in any danger.

In the opinion of the court, the hazards and dangers of the other side of the walk next to and adjoining the great national highway, a street of the city, with innumerable vehicles of every kind and description moving at very considerable speed in both directions far overshadowed and exceeded the perils

of the excavation wall, guarded by this strong and secure barrier.

No law has been enacted requiring a barrier to be erected between this side of the walk and the street as it is not contemplated that children of tender years unattended will use the sidewalk as a playground or be subjected to any hazard from proper use of same.

How unfortunate that this little boy was denied by necessary circumstances from having the protection of his parents, whose watchfulness, care and attendance in the exercise of their natural and legal duty would have prevented this most unfortunate occurrence!

Lack of care in inadequacy and insufficiency of safeguard necessary to establish negligence of respondent, not having been shown by the evidence, an award cannot be made to claimant.

(No. 337-S—Claimant awarded $100.00.)

LESTER BLAND, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Lester Bland, seeks damages in the amount of $100.00 by reason of injuries to his car or automobile occasioned by a collision with state road truck #830-64, which accident happened at Judy Gap, Pendleton county, West Virginia, on February 11, 1944, and from the record as submitted it appears that respondent's truck was negligently operated and ran into claimant's car near an intersection on US-33, seriously damaging claimant's car without any fault on his part.

The state road commission does not contest claimant's right to an award, but concurs in the sum of $100.00 and the claim is further approved by the special assistant to the attorney general. After carefully considering the case upon the record as submitted, we are of the opinion that it should be entered as an approved claim and accordingly make an award in the sum of one hundred dollars ($100.00).

(No. 342-S—Claimant awarded $47.18.)

FRANK T. GREGG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Frank T. Gregg, seeks reimbursement in the sum of $47.18 for damages to claimant's car occasioned by state road truck 430-66 colliding therewith on route NO. 7 in Monongalia county, West Virginia. From the record as submitted it would seem that the collision was caused by the negligence of the driver of the state truck and trailer. The accident occurred on July 8, 1943.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of forty-seven dollars and eighteen cents ($47.18).

(No. 343-S—Claimant awarded $117.75.)

CARL RENTSCHLER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Carl Rentschler, seeks to be reimbursed in the sum of $117.75 as damages, occasioned by a collision between a state road truck and an automobile owned and operated by the claimant. From the record as submitted it is shown that the state road truck in question was parked on state route NO. 2, Brooke county, West Virginia, at about 11:30 at night on February 2, 1944, during the time of a heavy snowstorm. There were no lights or warning signals of any kind on the truck and from the statement as submitted by the claimant it was impossible to see the state road truck in question. Under the circumstances it would seem that the operator of the state road truck was negligent in not displaying proper warning signals, considering the time of the night and the conditions under which the accident happened.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of one hundred seventeen dollars and seventy-five cents ($117.75).

(No. 344-S—Claimant awarded $110.09.))

WILSIE JOHNSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Wilsie Johnson, asks compensation in the amount of $110.09 for damages to a car, occasioned by route NO. 73 near Boothville, in Marion county, West Virginia, being in bad repair and causing damages in the amount aforesaid to the automobile of claimant. It seems that the coal trucks passing over the highway in question cause it to become out of repair and consequently making it dangerous and hazardous for use of drivers of automobiles. The accident happened on February 19, 1944.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of one hundred ten dollars and nine cents ($110.09).

(No. 347-S—Claimant awarded $34.43.)

HELEN SMOCK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Helen Smock, filed her claim against the state road commission in the sum of $34.43 for damages caused to her truck through the operation of a state-owned shovel operated and being used in and near the Carolina mines in Marion county, West Virginia, on January 13, 1944. From the record it appears that while claimant's truck was being loaded the dipper of the shovel was carelessly operated and the back end of the shovel struck the truck causing the damages in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of thirty-four dollars and forty-three cents ($34.43).

(No. 348-S—Claimant awarded $33.66.)

FLORENCE E. PETRY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Florence E. Petry, seeks reimbursement for damages in the amount of $33.66 caused by a collision between claimant's car and state car bearing license NO. 82 and operated by the state. The accident took place on January 8, 1944 at Chelyan, Kanawha county, West Virginia. The road was icy and the state car skidded from its driving lane over and upon the left side of the road colliding with claimant's car and causing the damages in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of thirty-three dollars and sixty-six cents ($33.66).

(No. 332-S—Claimant awarded $47.53.)

WILLIS LANTZ, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Willis Lantz, seeks reimbursement for damages in the amount of $47.53, occasioned by injuries to claimant's reaper and caused by some employees of the state road commission negligently allowing certain stakes, driven in the ground on claimant's farm and used in connection with a survey being made by the state road commission and which stakes were not removed and allowed to protrude in such a manner as to likely cause injury to any farm machinery used in harvesting the crop on claimant's farm. To have allowed the stakes in question to have remained or to have failed to drive them into the ground without any part protruding therefrom, was of itself negligent. The claimant seemingly without knowledge of the presence of the stakes in question on his farm and premesis, went in, over and upon the particular section in which the said stakes were allowed to remain as aforesaid, to harvest his wheat crop with the use of a reaper and while so engaged the said reaper came in contact with a stake or stakes protruding from the ground as aforesaid and used in the survey theretofore made by the state road commission and causing serious damage to the said reaper in the amount claimed.

The state road commission does not contest the claimant's right to an award and the claim is further approved by the special assistant to the attorney general as one that should be paid. After a careful consideration of the case upon the record as submitted, we are of the opinion that it should be entered as an approved claim and an award is made in the amount of forty-seven dollars and fifty-three cents ($47.53).

(No. 354-S—Claimant awarded $39.96.)

HENRY L. HELDRETH and
UNITED STATES CASUALTY CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

The facts upon which claimant Henry L. Heldreth's demand is based are as follows: State road truck NO. 430-87 while being operated on U. S. 19 and 50 on and about the 25th day of October, 1943, and while driving upgrade the driver attempted to change from second gear to first gear, stalling the motor and causing the truck to drift backward; another truck owned by the Consolidated Supply Company was following and the driver of the second truck, seeking to avoid a collision, started his truck backward colliding with claimant's car. According to the statement as submitted, the damages amounted to $79.92, but seemingly by agreement 50% of this amount, to wit, $39.96, is to be paid by the state.

The claim is approved by the state road commission in the amount of $39.96 and the claim is further approved by the special assistant to the attorney general. We have carefully considered the case upon the record as submitted and are of the opinion that it should be entered as an approved claim and an award is accordingly made in the sum of thirty-nine dollars and ninety-six cents ($39.96) with the further provision that when the claim is paid a receipt in full for money shall be signed and executed both by the claimant, Henry L. Heldreth and the United States Casualty Company, which seemingly had insured claimant's car against injury and damage.

(No. 355-S—Claimant awarded $188.22.)

STANDARD ADVERTISING CORPORATION, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, The Standard Advertising Corporation, of Clarksburg, West Virginia, asks damages in the amount of $188.22 for injuries to its truck occasioned by being struck by a state road commission truck in Clarksburg, on or about January 25, 1944. From the record as submitted, it appears that the state road truck was defective so far as its mechanism was concerned and that by reason of the breaking of a cylinder and the truck being out of repair, it was impossible to stop it in time to prevent the collision with claimant's truck. The state road commission truck was in the rear of claimant's truck and consequently the collision occurred through no fault of the claimant.

The state road commission does not contest the claimant's right to an award for the amount aforesaid, but concurs in the claim; the claim is also approved by the special assistant to the attorney general as one that should be paid. After carefully considering the record as submitted, we are of the opinion that it should be entered as an approved claim and an award is made in the sum of one hundred eighty-eight dollars and twenty-two cents ($188.22).

(No. 357-S—Claimant awarded $34.68.)

J. M. DOWNS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, J. M. Downs, seeks reimbursement for damages in the amount of $34.68, caused by a collision between a state road truck and claimant's automobile. The accident happened in Marion county on route 250 on December 10, 1943. From the record, as submitted, it appears that the mechanism on the state road truck was defective causing the said truck to be suddenly thrown out of gear and driven forward colliding with claimant's automobile passing at the time.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for the amount aforesaid. We have carefully considered the case as submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of thirty-four dollars and sixty-eight cents ($34.68).

(No. 358-S—Claimant awarded $160.00.)

THE BALTIMORE & OHIO RAILROAD COMPANY,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

ROBERT L. BLAND, JUDGE.

This claim is in the sum of $160.00. It is for cost of repairs to stock pens of The Baltimore & Ohio Railroad Company at West Romney, Hampshire county, West Virginia. On the 12th of February, 1944, state road commission employees permitted the fire which they were using to heat asphalt to ignite the stock pens and caused damage thereto necessitating such repairs. The claim is concurred in by the head of the state agency concerned. Its payment is approved by W. Bryan Spillers, assistant attorney general. The claim is also approved by E. M. Worthington, district engineer.

In view of the facts disclosed by the record an award is made in favor of claimant, The Baltimore & Ohio Railroad Company, for one hundred and sixty dollars ($160.00).

(No. 362-S—Claimant awarded $25.00.)

E. S. BAYLOUS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

ROBERT L. BLAND, JUDGE.

The claim involved in this case is submitted to the court upon a record prepared by the state road commission and filed with the clerk on 16th of May, 1944, under the provision of section 17 of the court act. The head of the agency concerned concurs in the claim. The assistant attorney general has approved it as one which, within the meaning of the court act, should be paid by the state.

It appears from this record that between noon and 1:20 o'clock P. M. on the 25th day of November, 1943, claimant was walking on the walkway over Peach Creek bridge on a state controlled highway in Logan county, West Virginia, "when he caught the toe of his shoe in a hole of a board of said sidewalk, causing him to fall and injure his knee and wrist." The special investigator of the road commission, who investigated the facts of the case and the condition of the bridge at the time of the accident, made a report to the road commission recommending a settlement in the sum of $25.00 for the payment of a doctor's bill incurred for necessary treatment on account of injuries sustained by the fall. A report made by an inspecting engineer of the road commission to respondent, and on file in the office of that department, shows that he recommended that necessary repairs should be made to the floor of the bridge.

Under all circumstances attending the claim and the recommendations, concurrence and approval aforesaid, we are of opinion that the claim should be approved and an award made therefor.

An award is therefore made in favor of claimant, E. S. Bayious, for the sum of twenty-five dollars ($25.00).

(No. 368-S—Claimant awarded $19.80.)

IGNACY GRISUR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

ROBERT L. BLAND, JUDGE.

This claim is in the sum of $19.80. It grows out of a collision between one of respondent's trucks and an automobile owned and driven by claimant. On November 20th, 1943, state road commission truck NO. 630-36, was being driven by Allen Stevens, from Washington Pike, a State controlled highway in Brooke county. At the same time claimant was travelling on the highway in his Oldsmobile automobile, bearing West Virginia license 125-7A. It was following the truck. When it attempted to pass the truck the state vehicle drew to the side of the highway near a filling station. The driver of the state vehicle failed to give proper warning signal when he made a quick turn to the left of the road and as a result the two vehicles collided. Claimant's automobile was damaged to the extent that he was obliged to pay the amount of this claim for necessary repairs.

The head of the agency concerned concurs in the claim. Its payment is approved by W. Bryan Spillers, assistant attorney general.

An award is made in favor of claimant, Ignacy Grisur, for the sum of nineteen dollars and eighty cents ($19.80).

(No. 369-S—Claimant awarded $7.94.)

ROY UNDERWOOD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

G. H. A. KUNST, JUDGE.

On November 11th, 1943, on state route NO. 50, in Harrison county, near overhead Bristol bridge, employees, while spreading cinders from truck, negligently threw a shovelful against windshield of claimant's car while passing, breaking same and it costing $7.94 to replace.

Respondent recommends and attorney general approves its payment.

An award of seven dollars and ninety-four cents ($7.94) is made to claimant.

(No. 370-S—Claimant awarded $50.00.)

L. W. BEANE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

G. H. A. KUNST, JUDGE.

On December 28th, 1943, on route NO. 10, a road under respondent's jurisdiction, west of Rockview in Wyoming county,

West Virginia, respondent's truck, through its driver's negligence, struck claimant's car and caused damage amounting to $50.00.

Respondent recommends and the attorney general approves its payment.

An award for fifty dollars ($50.00) is made to claimant.

(No. 371-S—Claimant awarded $48.26.)

JUNIOR WOLF, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

G. H. A. KUNST, JUDGE.

On January 19, 1944, state road truck NO. 838-3 while cindering a road under its jurisdiction in Randolph county, in foggy weather, negligently struck claimant's car causing damage which cost $48.26 to repair.

Respondent recommends and the attorney general approves its payment.

An award of forty-eight dollars and twenty-six cents ($48.26) is made to claimant.

(No. 375-S—Claimant awarded $8.16.)

FRED W. DAVISSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1944

G. H. A. KUNST, JUDGE.

In January, 1943, state road truck NO. 430-131, on a road in Preston county, under respondent's jurisdiction, while plowing snow, negligently struck claimant's Chevrolet car, while parked on the side of the road to put on chains, causing the damage of $8.16 to claimant's car.

Respondent recommends and the attorney general approves its payment.

An award of eight dollars and sixteen cents ($8.16) is made to claimant.

(No. 194—Claim denied.)

JENNIE CANTER SANDRIDGE, executrix of the estate of LEE J. SANDRIDGE, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 13, 1944

No negligence of respondent having been shown, no award is made and the case is dismissed.

Appearances:

Lee J. Sandridge, Esq., and *F. N. Alderson*, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the attorney general for the state.

G. H. A. KUNST, JUDGE.

This case was on the docket of the court at the October term 1942, and set for hearing November 20, 1942, at the court house at Clarksburg, West Virginia.

At that time claimant did not have his witnesses present and moved for a continuance. The state's witnesses being present, it was stipulated that respondent should introduce its evidence and that claimant should introduce his evidence at the next term of the court.

The evidence of respondent's witnesses, John P. Marshall and Charles H. Davis, was: That at about five o'clock on the evening of Monday, the 28th day of October 1940, on state highway NO. 20, under the control and jurisdiction of respondent, at Quiet Dell, on a bridge near Quadrille Inn, in Harrison county, about three miles from Clarksburg, West Virginia, the truck of claimant, loaded with heavy logs and driven by Virl Stemple, ran into the rear end of a truck, with lime spreader attached, belonging to respondent; that Marshall was driving respondent's truck and Davis was sitting on the lime spreader controlling its discharge of lime dust, which was being placed on the middle section of the road; that the shock of the collision threw Davis into the radiator of claimant's truck and severely injured him; and that the truck of respondent was being driven in a lawful manner at a speed of about eighteen miles an hour and did not suddenly stop on the bridge as alleged in claimant's petition and stated by Virl Stemple in his signed statement, but was continuing at the same speed when struck by claimant's truck and that the collision was due to the negligence of claimant's driver.

Evidence of Norris Greitzner, an insurance adjuster, was that he had made an adjustment, based on another adjuster's

report, for the Buckeye Union Casualty Company of Columbus, Ohio, in which claimant held a policy for personal property and personal injury damage, with Mr. Davis and respondent, and that the insurance company had paid in connection with personal injury to Mr. Davis the sum of $1535.50, and to respondent for injury to its truck and lime spreader, the sum of $45.78.

Respondent introduced the evidence of M. F. Jordon, a member of the state department of public safety for Harrison county, who made an investigation of the case soon after it occurred, took the signed statements of all the witnesses and showed the location of trucks on the bridge after the collision and filed his report as an exhibit with his evidence.

At the January term, 1944, of the court, F. N. Alderson, an attorney, appeared and announced claimant's death, and filed a copy of an order of the county court of Barbour county appointing decedent's wife, Jennie Canter Sandridge, as executrix of his estate, and upon the attorney's motion the case was revived and ordered to be carried on in the name of said executrix as claimant, and said attorney moved for a continuance, but failing to show grounds for continuance, the case having been set for hearing at four previous terms and there having already been four continuances granted to claimant and full opportunity given claimant to introduce his evidence, the case was submitted without argument or briefs.

No evidence of negligence of respondent having been shown, no award is made and the case is dismissed.

(No. 213—Arthur B. Perdue awarded $3000.00; No. 214—Dollie E. Perdue awarded $1500.00.)

ARTHUR B. PERDUE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

DOLLIE E. PERDUE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1944

An award will be granted claimants where by failure of respondent to exercise the care required of it and the abuse of the discretion vested in it, obstructions were created and existed for a considerable time in a public road under its jurisdiction creating a public nuisance by which negligence claimants in an automobile were precipitated down a mountainside and sustained injuries and the automobile destroyed.

Appearances:

James S. Kahle, Esq., for claimants,

Eston B. Stephenson, Esq., special assistant to the attorney general for the state.

G. H. A. KUNST, JUDGE.

By stipulation these two cases were heard together, the evidence being the same in each, except as to injuries suffered by claimants and treatment for same, and damages.

Arthur B. Perdue, forty-five years of age, with Dollie E. Perdue, his wife, twenty-eight years of age, started driving in his car, a 1934 Plymouth Coupe, from Bluefield, West Virginia, by way of Pocahontas and Maybury to Coaldale to visit his mother. At about seven o'clock on the drizzly, rainy eve-

ning of Sunday, January 23, 1937, at a point just north of and above Barlow Tipple, south of Maybury in McDowell county, on a secondary road, known as the Peeled Chestnut Mountain Road, under the control and jurisdiction of respondent, an accident occurred, which claimants allege was due to the negligence of respondent and from which they suffered injuries for which is asked awards of $10,000.00 for Arthur B. Perdue and $5,000.00 for his wife, Dollie E. Perdue, against respondent.

Perdue states, that as he drove north, with car lights fully on, down this mountain road which has a grade of four or five degrees, going very slowly, a car came around the curve, going so rapidly that it passed as he dimmed his lights and applied brake and stopped his car the right front wheel of which, dropped into a hole, broken in the asphalt pavement of the road and caused his car to roll over and over with himself and wife inside, down the hillside, having a grade of about forty-five degrees one hundred and ten feet to a ditch beside the railroad track of the Norfolk and Western Railway. Perdue was found unconscious and he and his wife were taken to the Bluefield Sanatorium where they remained until the 15th day of July, 1937, when he returned to his work as motor-car operator for the Norfolk and Western Railway Company in the Bluefield yards of said company, in whose employ he had been for about nineteen years.

The preponderance of evidence is, that this road had been decreased in width from twenty feet of roadway, consisting of fourteen feet of asphalt pavement with three feet of berm on each side, to a width of from ten to eleven feet by testimony of witnesses and by actual measurement of one witness to ten feet, eight inches, which made a road too narrow for two vehicles to safely pass. That after a period of continuous excessive rainfall, a slide from the hillside filled the ditch with muck, dirt, rock and shrubbery extending to a considerable depth and width over the berm and asphalt pavement, dammed the water flowing in the ditch for a long distance above, causing it to overflow the road, to wash a deep gully

down the hillside, to wash away the berm and undermine and break the asphalt pavement from eighteen to twenty-four inches in depth and extending in length from thirty to thirty-six inches. This left a sheer, abrupt hole perpendicular with the surface of the road and several feet in depth; portions of the asphalt pavement could be seen lying in the gully below the break in the pavement.

The place of this accident was at a section of the narrow mountain road, composed of three short connecting curves, the middle one of which reverses the direction of the other two. This break in the asphalt pavement was at the center of the middle curve. That such a condition constituted an extraordinary and unusual hazard, particularly since the evidence shows, that the roadway was elsewhere along its entire extent, approximately twenty feet in width, made up of fourteen feet of asphalt pavement, with three feet of berm on each side. No signal or sign apprised the traveler of this dangerous pitfall, also a slight elevation before reaching it and a dip in the road at that point, caused lights of a car to over-shoot and thus conceal this danger spot.

That such condition at this point had existed for from three to six weeks before the accident herein considered, during which time three similar accidents had occurred. The obstruction which existed at the place of this accident and which caused same and which was left and permitted to exist for such length of time constituted a public nuisance by general law and as defined and declared by sec. 1651 (1) of the code of 1937 and 1939, among which are listed landslides and "any other thing which will prevent the easy, safe and convenient use of a public road for public travel placed and left within the limits of such road." Acts 1921 c. 112, Sec. 184, 185; Code 1923 c. 43, Sec. 184, 185; 1925 c. 17, Sec. 185. *Clay County Court* v. *Adams,* 109 W. Va. 421-429, 155 S. E. 174.

That respondent's officials and agents in failing to discover such conditions and permitting same to exist and continue,

especially after such repeated and emphatic notifications of their existence by the continued accidents here, failed to exercise the care required of them and rendered respondent guilty of negligence and that by reason of such negligence the discretion vested in it was abused and injury sustained by claimants for which awards are made.

The court of claims' jurisdiction is limited to claims against the state and its agencies.

Two well established legal doctrines determine their immunity from liability.

1st. That sovereignty must not be violated — that since they only perform governmental functions and are given discretion in such performance no liability arises by reason of their misfeasance, or nonfeasance unless assumed by statute.

2nd. That they are not liable for the misfeasance or nonfeasance of the agents representing them, who are held to owe a duty to the public and not to an individual.

No liability was imposed by common law. No statute of this state imposes liability, such liability has not been assumed by the state.

The constitution prohibits suits against the state.

A statute expressly provides that the state shall not be made defendant in any proceeding to recover damages because of defective construction or condition of any state road or bridge.

Hence if there were no restrictions, inhibitions or limitations, constitutional or statutory, of suit against the state or its agencies there could be no recovery in the courts because no liability exists and the court of claims would have no jurisdiction of any claims ex delicto and particularly of this

claim and this is the argument advanced in opposition to the granting of an award, and if such is the correct construction of the act creating the court of claims the jurisdiction conferred as to ex delicto claims is futile and the court of claims has a most limited jurisdiction.

Sec. 12 of the Court Act states that:

> "The Court shall, *in accordance with this article,* consider claims which, but for the constitutional immunity of the state from suit, or of some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state." (Italics ours.)

Because of no assumption of liability by the state by statute, no liability exists against the state for the nonfeasance or misfeasance of the state or its agencies.

Inclusion in this statement of its jurisdiction the phrase, *in accordance with this article,* calls attention to the fact that this statement is only a part of the exposition of jurisdiction intended and contemplated by the act, for if this were all, the court of claims could not even consider a claim ex delicto. Such a statement, taken alone, would not need any construction or interpretation, its meaning would be literally that; for no claim could be made in the courts of the state if there were no liability. When the act is considered in its entirety and the other provisions of the act as to its jurisdiction are read with this provision, in order to get the true purpose and intent of the Legislature, the act has an entirely different meaning, for it expressly provides that the court shall have jurisdiction of claims ex delicto.

The great weight of authority generally and the law of this state is that no liability exists against a state or its agencies for the misfeasance of its agents unless the state has by statute assumed such liability.

No legislative act of this state has assumed such liability, hence there is no liability imposed by the law of the state or the decisions of its courts for the court of claims as an investigating instrumentality of the Legislature to report. To make an award liability is not essential as in a judgment or decree. The act expressly states that no liability is imposed upon the state or its agencies by a determination of the court of claims approving a claim and recommending an award, unless the Legislature has previously made an appropriation for the payment of a claim, subject only to the determination of the court.

The court is not invested with and cannot exercise any judicial power in the sense of article eight of the constitution and its determinations are not subject to an appeal or review by a court of law or equity, created by or pursuant to article eight of the constitution. Hence it is manifest that the Legislature reserves to itself the power or prerogative of determining whether or not it shall assume liability by making an appropriation for the payment of a claim, and the duty of the court of claims is to determine whether the claim is just and proper, and is one which the state should in equity and good conscience pay and so recommend by its award, that assumption of liability be made by the state by an appropriation of the Legislature for its payment.

Good authority asserts that the state and its agencies being corporations can commit tortious acts, that when they have failed to exercise the care required of them in the exercise of their duties; abused or failed to exercise the discretion accorded them in the exercise of their governmental functions and their errors of judgment been so great as to constitute negligence.

> "The state, or general government, may be guilty of individual wrongs, for while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits,

except with its own consent. But either the consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains, and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury." Cooley on Torts, Students' Edition by John Lewis (1907), Sec. 29, page 82.

"Although it is not liable therefor unless it has voluntarily assumed such liability, the state has capacity to commit tortious acts . . . where the state has failed to exercise the care required of it, and thereby an injury is sustained, it is guilty of an act of negligence." 59 Corpus Juris 193, 194, Sec. 336; *Cook* v. *State,* 201 N. Y. S. 834, 121 misc. 864; *Tiggerman* v. *State,* 228 N. Y. S. 576, 132 misc. 45.

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature; and, in the absence of a statute so providing, a state cannot be forced to compensate a private individual for damages to property from the construction or operation of public works, but the legislature may make an appropriation for this purpose." 59 Corpus Juris 194 Sec. 337.

"While highway officers have only such powers as are conferred by statute, yet, their functions being governmental, within the limits of the jurisdiction conferred on them by law, highway officers have a reasonable discretion; and courts will not interfere with them in the lawful exercise of such jurisdiction, unless it is abused; and it has been held that such discretion stops where absolute rights of property begin." 29 C. J. 574, Sec. 298; *McCord* v. *High,* 24 Iowa 326; *Cubit* v. *O'Dett,* 51 Mich. 347, 16 N. W. 679.

"In exercising their discretion they are not justified in acting . . . with a clear abuse of discretion or without any discretion at all." 29 Corpis Juris 574,

Sec. 298; *Wadsworth* v. *Middletown,* 94 Conn. 435, 441, 109 A 246, 248, 249; *Com.* v. *Day,* 69 Pa. Super 541.

"Where they have acted outside of any suggested benefit to public travel and destroyed property they cannot plead governmental immunity, their act is clearly illegal." *Wadsworth* v. *Middletown,* 94 Conn. 435, 441, 109 A 246, 248, 249.

". . . no action lies . . . for mere inadvertence or error of judgment, unless such error is so great as to constitute negligence, . . ." 29 Corpus Juris 591 Sec. 319; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821.

In *Chandler* v. *Davidson County,* 142 Tenn. 265, 273, 218 S. W. 222, it was held, that in acting for the state in constructing a road, the state had delegated its authority for that purpose, but the state had not authorized it to commit a nuisance, because such an act is not an attribute of sovereignty.

A corporation, public or private, can only act through or by its officers or agents. While a public corporation acting within the scope and limits of the governmental functions and powers granted, or entrusted to it is sovereign and possesses immunity from liability because of such sovereignty, when it acts in excess thereof and does not exercise the care required of it and is guilty of negligence, or has abused the discretion vested in it or exercised none at all, as the commission of a public nuisance, an illegal act, its action is outside of and beyond its governmental function and its immunity does not follow.

Sovereignty was not granted for that purpose, and hence liability is incurred, immunity only being commensurate with the authority granted.

Under what is by the court act, called the shortened procedure, all claims not exceeding one thousand dollars, con-

curred in by the state agency concerned, and approved by the attorney general as one that "in view of the purposes of this article" should be paid, the court shall consider the claim informally upon the record submitted; consisting of all papers, stipulations and evidential documents required by the rules of the court prepared by the state agency concerned. If the court determines that the claim should be entered as an approved claim and an award made it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid it shall reject the claim. The very great majority of the claims ex delicto which have been presented for consideration of the court were claims against the state road commission and arose from claims for damages occasioned by the negligence and misfeasance of the officers and agents of that state agency.

By this shortened procedure, the factual matters involved and the negligence alleged were admitted by the agency concerned and the claims approved by the attorney general as just and proper claims and determined by the court to be approved claims and awards made.

The same laws apply to claims under the shortened and to the claims under the regular procedure.

The only material difference between these claims and the procedure, being the amount of the claim and the admission of the misfeasance by the agency concerned in the shortened procedure and its determination by the court under the regular procedure. Hence here are many precedents and rulings determined by the court, and to adopt any other rule or contrary legal doctrine would overrule or reverse all of these decisions.

To overrule these decisions and precedents or to determine claims of one class governed by different laws from claims of the other class would be a total disregard of the law of *stare decisis;* would create the greatest confusion and bring an un-

certainty and indefinite status as to the laws regulating the action of the court as would be most destructive of its efficiency and usefulness and of its standing as a tribunal worthy of the respect of those having any relations with it.

What criterion determines a claim as just and proper and one which the state should in equity and good conscience pay?

For practically the lifetime of the state it was regarded as "equity and good conscience" that there should be an assumption of liability by the county courts of the state, they having the duty of constructing and keeping in repair the highways of the state, to compensate in damages any person suffering injury from their negligence in the performance of such duty.

In the majority of the states of the union such liability has been assumed by the state. Since the repeal of the statute assuming liability by the county courts, the Legislature has by appropriation assumed such liability and compensated the individual.

There could be no better criterion for the court in determining what is a just and proper claim which a state should in equity and good conscience pay than the Legislature's own conception and interpretation. Certainly the Legislature did not waive its constitutional and statutory immunity from suit to give the court of claims jurisdiction to hear and determine a just ex delicto claim, with no possibility of its making an appropriation in accord therewith.

A statute provides that "any person injured by the violation of a statute may recover from the offender such damages as he may sustain by reason of the violation." Code 1849 C. 148 Sec. 6; Code 1860 C. 148 Sec. 7; Code 1868 C. 103 Sec. 8; Code 1923 C. 103 Sec. 8; Code 1931 C. 55 Sec. 9.

Should the state have less regard for its obligation than the individual or be held to a less degree of responsibility?

> "Independently of express constitutional restrictions, the Legislature can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can recognize claims founded in equity and justice in the largest sense of those terms." *Richmond* v. *Pace,* 127 Va. 274, 103 S. E. 647.

The uncontradicted testimony shows that claimant, Arthur B. Perdue, suffered severe injuries entailing hospital and doctors' services amounting to $443.00; that he lost twenty-six weeks of work at the time he was earning $44.80 per week; that his automobile was wrecked and badly damaged; that he had an ambulance charge to pay, and these facts taken into consideration with the nature of his injuries, his pain and suffering, justify in our opinion an award of three thousand dollars ($3000.00).

The claimant Dollie E. Perdue had hospital and medical expenses amounting to $339.00; was unable to attend to her household duties for several months; sustained injuries that perhaps are permanent in their nature; suffered much pain and physical inconvenience for all of which we make an award of one thousand five hundred dollars ($1500.00) as hereinbefore stated.

ROBERT L. BLAND, Judge, dissenting.

I do not agree with the awards made in these cases or with the theory upon which they are predicated. The majority opinion is based upon a misconception of the spirit and purpose of the court act. It is unfortunate that the state should be convicted of "maintaining a public nuisance" in order to discover negligence to support its recommendations.

It is held that a statute is always construed in the light of its purpose. Chapter 20, of the acts of the Legislature of 1941, creating the court of claims, deals with claims and demands against the state, its officers and agents. A "claim," in its

ordinary sense, imports the assertion, demand or challenge of something as a right. 11 Corp. Jur. 816. The claims in these cases are not based upon *any right* that would entitle the claimants to awards. There is no liability of the state to compensate them for the personal injuries which they have sustained or the property loss suffered. To hold otherwise would be in derogation of common law. The state has not heretofore voluntarily assumed such liability.

In the opinion in the case of *Shipley* v. *County Court of Jefferson County,* 72 W. Va. 656, Judge Poffenbarger said:

> "At the common law, there was no liability for personal injury occasioned by defects in highways, for the duty of keeping them in repair was regarded as one due to the public and not to the individual, wherefore failure to perform this duty was a mere *nonfeasance* and not a *misfeasance* against the individual. Thomp. Neg. Sec. 5919."

No suit or claim on behalf of an individual can be maintained against the state for injuries occasioned by the negligence or misfeasance of its officers or agents, except when it has been voluntarily assumed by legislative enactment. *Lewis* v. *State,* 96 N. Y. 711. The great weight of authority supports this proposition.

Whilst our statute confers jurisdiction upon the court of claims to consider ex delicto claims such power is limited to that class of claims "which, but for the constitutional immunity of the state from suit, or of some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state." Sec. 12, Court Act. The claims for which awards are made in these cases do not fall within the jurisdiction of the court for the reason that they are not claims *which could be maintained* in the regular courts of the state. The majority opinion concedes this to be true and cites ample authority to support the well-established doctrine that a sovereign state is not liable for the negligence of its

officers or agents, unless such liability has been voluntarily assumed by statute. This has not been done in West Virginia.

The derogation of the sovereign power of a state by an act of the Legislature is not to be assumed. *Gilman* v. *Sheboygan,* 67 U. S. 2 Black 510. Statutes guaranteeing special privileges are to be construed strictly, and whatever is not given in unequivocal terms is withheld. *Moran* v. *Miami County,* 67 U. S. 2 Black 722. Statutes which strip a government of any portion of its prerogative should receive a strict interpretation. *Academy of Fine Arts* v. *Philadelphia County,* 22 Pa. 496. Statutes made in derogation of the common law are to be strictly construed. *Melody* v. *Reed,* 4 Mass. 471. Where a limited jurisdiction is given by the statute, the act should be construed strictly as to the extent of the jurisdiction, but liberally as to the mode of proceeding. *Russell* v. *Wheeler,* 1 Hemp. 3.

A statute authorizes the state of Massachusetts to be sued in its own courts. In the case of *Murdock Parlor Grate Co.* v. *Commonwealth of Massachusetts,* reported in 8 L. R. A., at page 399 it is held:

> "An action to recover damages for injuries resulting from the negligence of a servant of the Commonwealth in the performance of his duties is not a claim within the meaning of Acts 1887, Chapter 246, which authorizes the maintenance of a suit against the Commonwealth to recover 'all claims' against it whether at law or in equity."

The case is interesting and sheds light, I think, upon the proper construction to be given to our court act. The opinion in that case was written by Judge Devens. He says:

> "The object of the statute cannot have been to create a new class of claims for which a sovereignty has never been held responsible, and to impose a liability therefor, but to provide a convenient tribunal for the determination of claims of the character which

civilized governments have always recognized, although the satisfaction of them has been usually sought by direct appeal to the sovereign, or in our system of government, through the legislature."

Continuing, Judge Devens further observes:

"It is therefore to be considered whether a demand or claim for an injury done or tort committed by a public servant in the performance of his duties is one for which a liability has been held to have been incurred by the government, even if there existed no tribunal competent, judicially, to pass upon it.

"States have always found it necessary to take and use the property of their citizens for the purpose of their government; they have assumed various responsibilities on behalf of their citizens or others; they have also always been parties to contracts for the borrowing of money, the purchase of property, the employment of labor; and the duties arising from such acts have always been fully recognized, even if judicial tribunals have not always been provided to make proper compensation for, or adjustment or payment of, the demands arising from such acts. But we do not find that demands founded on the neglect or torts of ministerial officers engaged as servants in the performance of duties which the state as a sovereign has undertaken to perform, have ever been held to render it liable. Nor does this rest upon the narrow ground that there are no means by which such obligations can be enforced, but on the larger ground that no obligations arise therefrom."

In referring to the Massachusetts statute Judge Devens remarked:

"Had the Legislature intended to create such an obligation and voluntarily to assume in the administration of the State all the responsibility which an individual must incur in his private business, it certainly would have done so in express terms. An intent so to do, as it is in violation of the ordinary principles by which the administration of less im-

> portant bodies is ordinarily regulated, would not have been left to inference but would have been explicitly stated."

This is my opinion with respect to our court act. If the Legislature had intended to make the state liable to respond in damages for torts generally, it would have made the fact manifest in the act. It is, therefore, important that the situation should be clarified by amendment of the statute, in order that the court may not be left in doubt as to what is actually intended.

The administration of the state's system of highways is vested by general law in the state road commission. In the building, repair and maintenance of such highways it is engaged in the exercise and performance of governmental functions.

The eminent Judge Cooley once declared in a dissenting opinion:

> "I concur fully in the doctrine that a municipal corporation or body is not liable to any individual damnified by the exercise, or the failure to exercise, a legislative authority; and I also agree that the political divisions of the State, which have duties imposed upon them by general law without their assent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute. Upon these two points the authorities are generally agreed, and the result is well stated in the opinion of the Chief Justice." *Detroit* v. *Blakely,* 21 Mich. 84, 4 Am. Rep. 450.

The majority opinion in that case concludes as follows:

> "We think it will require legislative action to create any liability to private suit for non-repair of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions

of importance and of some nicety. They cannot be solved by courts."

I am unable to agree, as stated by the majority opinion, that the court of claims may make recommendations to the Legislature without respect to the jurisdiction conferred upon it by the court act. It is not the intention of the Legislature to invest the court of claims with unlimited jurisdiction to consider claims, as is evidenced by the various claims excluded by section 14 of the court act and those proceedings mentioned in section 3 of said act, which shall be brought and prosecuted only in the circuit court of Kanawha county. Where there is absence of jurisdiction the court of claims is without power to act; and, if it does so, such action is nugatory and void. To assume and exercise a jurisdiction not expressly conferred by statute would be a work of superarrogation on the part of the court. I think it is the duty of the court to advise the Legislature with respect to matters of law as well as matters of fact, but I do not understand that any obligation arises upon the court to make recommendations to the Legislature not embraced within the actual jurisdiction conferred upon the court.

I cannot bring myself to believe as a result of any examination of authorities that I have made, that it was ever the Legislative intent to impede, handicap or penalize the state in the performance of its governmental functions.

I am unable to perceive anything in the record that would warrant or justify the conclusion that in the instant cases the state road commission has abused a power vested in it or been guilty of maintaining a public nuisance. The statute cited in the majority opinion has no application to such a case.

I do not agree with the statement of facts contained in the majority opinion. Nor do I believe that a prepondrance of the evidence in the case which is entitled to any value, shows any negligence on the part of the state if it could be main-

tained that the state would under any circumstances be responsible for negligence in the premises. If this case shall be reexamined by a committee of the Legislature I would respectfully call attention to the very forceful testimony given by John V. Archer, who made an investigation of the accident and a report of the circumstances attending it, a short time after its occurrence. The oral testimony rests upon the uncertain memory of individuals who testified after a lapse of six or seven years. I believe that it is of the highest importance to the state that the Legislature should determine, definitely and for all time, whether or not it is its purpose to authorize and ratify awards such as have been made in these cases. It is my personal judgment that the records show that the injuries sustained were the result of the action of claimant, Arthur B. Perdue, driving over the embankment when he was blinded by an approaching automobile rounding the curve.

(No. 316—Claim denied.)

DORA HARMON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1944

The state does not guarantee the freedom from accident or safety of pedestrians on its public highways; and upon the facts disclosed by the record in the case, an award will be denied to the claimant.

Lilly & Lilly and *W. H. Damron,* Esq., for claimant.

Eston B. Stephenson, Esq., special assistant to the attorney general for the state.

ROBERT L. BLAND, JUDGE.

The claim involved in this case arises out of an accident which occurred on the berm of state route NO. 119, at Barnabus, in Logan county, West Virginia, on the night of June 22, 1943. Sometime prior to that date employees of the state road commission found it necessary to clean out a culvert on the berm of the highway just above the schoolhouse between the highway and the Chesapeake and Ohio railway at Barnabus which had become clogged or filled up. It had rained and the water from the culvert was over on the improved black top road. The highway at this point is of the standard width of eighteen feet. The head wall was removed and the culvert opened sufficiently to drain the accumulated water. Pending the replacement of the head wall of the culvert the rocks taken therefrom were used in building a protecting wall around it. This wall was intended to serve as a warning of danger to persons using the highway. The rocks were laid on three sides in triangular form, the embankment on the railroad, or left side of the berm, obviating the necessity of placing any part of the wall on that side. The weight of the evidence shows that between this pile or wall of rock around the culvert and

the edge of the black top highway there was a space of approximately two feet.

Before dark on that evening claimant, Dora Harmon, a midwife seventy years of age, went to the Soloman restaurant, where beer is sold, and where, she testified, she expected a man whom she identified as "Estepp" to call for her and accompany her to his home at Cinderella. While there, she further testified, one Tommy Williams, who resided at Hatfield Bottom, came to the restaurant and arranged with her to visit his wife, who was pregnant. She was also joined at the restaurant by P. B. Browning who, she said, was her first cousin. "Estepp" having failed to arrive at the restaurant by ten o'clock, claimant requested Browning to accompany her to the Williams home. They left the restaurant together when it closed for the day at ten o'clock P. M. and right above the storehouse crossed from one side to the other of the eighteen foot improved highway. Claimant walked on the left berm, while Browning remained on the black top surface. They engaged in conversation as they proceeded. Presently Browning perceived an automobile coming in the direction of Barnabus and left the highway, stepping upon the berm behind claimant. Explaining this action of Browning, she testified: "The car was way up the road. There is a long stretch of road, you can see way up the road, and Mr. Browning said he saw a car coming, and he stepped in behind me, off the hard road, stepped over to let the car pass." After the automobile passed Browning returned to the improved highway. When they had then proceeded about twenty-five or thirty feet they reached the above mentioned pile of rocks or rock wall which had been placed around the culvert after the head wall had been removed and the culvert cleaned out, and claimant tripped and fell upon the rocks. She affirmed: "I didn't see that pile of rocks and I just caught my foot under them and fell on top of the rocks and the rocks started sliding, I reckon. I went on right over in the culvert."

An ambulance was called and claimant was taken to the Mercy hospital at Logan, where it was found that she had

sustained a fracture of the surgical neck of the femur and suffered bruises about the body. She was admitted to the hospital June 23, 1943 and remained there until July 12, 1943. Upon her admission to the hospital she was placed in a body cast—what is called a hip spica—of the left hip, and experienced a great deal of suffering. After returning to her home she was confined to her bed for about six weeks. Although there has been improvement in her condition it is made clear that she has some permanent disability and some limitation of motion in her left knee and left hip. She uses crutches when walking.

Claimant now seeks an award against the state for $15,000.00. Her claim is based upon the alleged liability of the state to pay her damages in that amount on the ground of the negligence of the state road commission, its agents or employees. She contends that in removing the rocks from the culvert employes of the road commission negligently placed such rocks upon and along the berm of the road and close to the paved portion thereof, and negligently failed to place any lights or other warnings near said rocks, and negligently failed to place any barriers or other safeguards around said rocks, and that by reason of such alleged negligence she sustained her said accident.

We do not think that the facts established by the evidence and relied upon by the claimant entitle her to an award in any amount.

A state of the union is not liable to suit in its own courts or the courts of another state, without its consent. 23 Am. and Eng. Ency. Law, page 83. A state is not liable for the torts of its officers or agents in the discharge of their official duties, unless it has voluntarily assumed such liability and consented to be so liable: 36 Cyc. 881. It is well settled that in the absence of a statute voluntarily assuming such liability the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties, pertaining to the administration of the government of the

state. Story on Agency, section 31. In the case of *The City of Richmond* v. *Long's Administrators*, 17 Grattan 375, the Supreme Court of Virginia held:

> "Public officers of the government, in the performance of their public functions, are not liable for the misconduct, negligence or omissions of their official subordinates."

The state road commission is a department of the state government. It is held in *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S. E. 567, that the constitutional immunity of the state from suit extends to its governmental agencies. And it may be said that under general law the state is not to persons injured upon its public highways by reason of defects therein. No statute has been enacted by the Legislature making the state so liable. However, in 26 Ruling Case Law 66, it is said:

> "The power of the Legislature to make the state or one of its sub-divisions liable for injuries inflicted by it upon an individual is unquestioned even if there was no liability at common law."

The court of claims act does not impose liability upon the state where no liability existed prior to its enactment. And since our state has not by general law assumed liability for the negligence of its officers and agents, the recommendations of the court of claims to the Legislature must of necessity depend upon the facts of each case presented for detrmination. An individual does not, in the absence of a statute assuming liability on the part of the state for such negligence, have a right or be entitled to an award for injuries sustained through the negligence of the state where such negligence actually exists. If the Legislature shall intend to make the state liable for the negligence of its officers and agents in all cases it will be necessary for it to so provide by future enactments. The present court of claims act is not susceptible of such interpretation.

To make an award in this case, upon the facts disclosed by the record, would be equivalent to the bestowal of a charity, which we have no power to do. It would be a mere gratuity. The Legislature has no power to authorize and direct the application of the public money of the state to the payment of gratuities. Cooley Const. Lim., page 155. It is generally understood to be the law that the Legislature is without power to levy taxes or make appropriations of public monies for a purely private purpose. "The Legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public monies, and should provide for disbursing them only for public purposes." 1 Cooley Con. Lim., 184. A very enlightening West Virginia case dealing with this subject is that of *Woodall* v. *Darst, Auditor*, 71 W. Va. 350. In that case an appropriation made by the Legislature to an individual was held under the facts of the case to have been for a public purpose. The facts of that case and the facts of the case under consideration are easily distinguishable. In that case an appropriation was made by the Legislature for a member of the West Virginia National Guard injured while on duty going to state encampment at Parkersburg. It was held that a moral obligation rested upon the state to sustain the appropriation. In this case we fail to perceive that any moral obligation rests upon the Legislature to make an appropriation for the payment of the claim. To do so would involve the appropriation of the public money of the state for a purely private purpose.

That claimant met with an accident is unquestioned. Accidents frequently occur on the streets and highways. The mere happening of an accident would raise no presumption of negligence. That claimant suffered severe injuris on account of her accident is also unquestioned, but it does not follow under the circumstances of the case that she is entitled to an appropriation of the public money of the state to compensate her for her injuries and suffering. No legal or equitable right to an award is disclosed by the evidence. We have no power to make an award on purely sentimental grounds.

Claimant testified that it was very dark on the night of the accident, yet neither she nor Browning carried a lantern or flashlight when they left the restaurant. Both professed knowledge of the absence of lighting facilities in the village. Browning testified: "Well, it was not real dark. I think probably the moon shined ten or eleven o'clock a little bit, probably a half-moon, as well as I remember. It wasn't real dark nor it wasn't light." Although claimant testified, "There is a long stretch of road, you can see way up the road," she chose to leave that part of the highway appropriated to public travel and go upon the berm of the road. Her companion, Browning, remained on the highway, only stepping off onto the berm when he saw the approaching automobile. Browning told claimant that the car was coming, but she denies that she saw it. It is strange that the noise and headlights of the automobile did not attract her attention. What was she doing and where was she looking when the car passed? She testified that she fell on the pile of rocks just as the automobile passed. Browning testified that they proceeded twenty-five or thirty feet after the car passed before they reached the culvert. Certainly the claimant was required to exercise ordinary care and prudence wherever she walked. There is no law that required the road commission to place a barrier at the point of the accident. Neither is there a statute requiring it to place lights on the berm and off of the travelled part of the road. The erection of a stone wall of the height of two feet at the point of the culvert should be sufficient warning of any danger that might have existed there. In the case of *Rachel C. Lambert, Administratrix*, v. *State Roard Commission*, 1 Ct. Claims (W. Va.) p. 186, we said:

> "The road commission is not required to make the travelled part of the highway the whole width of the road as laid out. It has the power to determine how wide the road shall be extended and used for public travel. By placing the concrete on this road of the width of eighteen feet it fixed the limits of the road. It determined that part of the road appropriated to the use of automobiles, vehicles and public travel generally. The width of eighteen feet

> of hard-surface road would seemingly be sufficient to accomodate public travel with convenience and safety."

All of the evidence relating to the circumstances attending the accident is found in the testimony of claimant and that of her witness, Browning. There is conflict of statement in this testimony. Claimant asked the court to believe that she earned as much as $500.00 a year for her services as a midwife. That would mean, according to her testimony, fifty cases per annum. She testified that Tommy Williams engaged her to attend his wife, coming to the Soloman restaurant for that purpose. She was in the restaurant from before dark on a June evening until ten o'clock at night, the most of which time her witness, Browning, was there. He did not corroborate claimant's testimony in relation to the alleged visit to the restaurant of Williams. Williams was introduced as a witness on behalf of the state. He testified that he had been acquainted with claimant all his life. When asked if he went to Barnabus on or around June 22, 1943 and asked claimant to go out to see his wife, who was expecting a child, he answered: "I did not." He said that he did not at any time call claimant to go to his home to see his wife. On June 22, 1943 he was working on the night shift of the West Virginia Coal and Coke Company. He went to work at 6:30 o'clock in the evening and was working on the night of June twenty-second from that hour "up until about three in the morning." He further testified that after the accident claimant "called me in once and asked me would I swear for her." When asked what she wanted him to testify to, he replied: "That she was either coming to my house or going to my house or going from my house, I forget which." He denied that he had been at the restaurant at any time on June 22, 1943. The evidence upon which claimant asks this court to make a recommendation to the Legislature on her behalf is unsatisfactory.

We are of the opinion that the claim does not possess substantial merit, and that an award would operate as an injustice to the taxpayers of the state.

An award is, therefore, denied and the claim dismissed.

CHARLES J. SCHUCK, JUDGE, (concurring note.)

I agree with the conclusion reached in Judge Bland's opinion to the effect that an award should be denied, but I do so solely on the ground that the testimony taken as a whole failed to sustain claimant's contention of negligence on the part of the state road commission, and left some doubt as to the real cause of the accident.

I do not agree with the reasons set forth in the opinion upon which the conclusion seems to be premised, as to do so would in my judgment lead to endless confusion, and in effect and in fact be a direct contradiction of the opinions and findings involving many awards heretofore made by the court, approved by the Legislature, and ultimately paid and satisfied. This applies both to shortened procedure awards and claims heard in detail by the court.

The exhaustive opinion written by Judge Kunst in the Perdue claims and filed at the present term, and in which opinion I concurred, fully sets forth my views with reference to ex delicto claims against the state, and I am constrained to follow the line of reasoning therein advanced as indicating the true intent of the Legislature in creating the court of claims. The Perdue opinion is also, in my judgment, consistent with the former decisions rendered by this court in claims of similar nature.

G. H. A. KUNST, JUDGE, (concurring note.)

I concur with Judge Bland in his conclusion that an award be refused for failure to prove alleged negligence of respondent herein, but do not agree with his reasoning in conflict with my opinion in the Perdue case rendered at the present term of court.

(No. 349—Claim denied.)

J. SHIRLEY ROSS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1944

Where the testimony shows that the state or department involved has fully complied with the oral contract or understanding of employment, and has fully discharged all of its obligations assumed by it under such oral contract or understanding, an award will be refused.

Appearances:

Messrs. *Salisbury, Hackney & Lopinsky* (*D. L. Salisbury*) and *C. E. Kimbrough*, for the claimant.

Eston B. Stephenson, Esq., special assistant to the attorney general for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, a former employee of the state road commission, prosecutes his claim on the theory that he was not paid his salary and expenses in accordance with an unwritten contract or understanding had at the time such employment began, about April 1, 1941.

The claim as originally filed was in the amount of $569.00, and at the time of the hearing amended to include an additional $1800.00, to which claimant maintained he was entitled; the increase being computed at the rate of $100.00 per month, for the eighteen months he was so employed. As stated no written contract was entered into between claimant and the road commission, and we must therefore look solely to the testimony of the witnesses to ascertain the merit or lack of merit of

the claim as based on the alleged oral understanding. The item of $50.00 for expenses alleged to have been incurred "fact-finding" in the state library was stricken from the claim by the court without objection, on the ground that no state department was involved and that the state could not in any sense be held liable for the payment of the expense in question.

Considering, now, the question of the amount of the salary to be paid, claimant maintains that he was to be paid $250.00 per month for his services, plus expenses, which proposition is emphatically denied and contradicted as to the amount of the monthly salary by the commissioner, Ernest L. Bailey, with whom the alleged contract or understanding was made.

Without going into all the details of the testimony contradicting claimant on the amount of the salary, it is surpassingly strange that for eighteen months the claimant received and accepted a salary of $150.00 per month as fixed by the commissioner, cashed his checks in the aforesaid amount, thereby, to all appearances, agreeing, at least from month to month, with the salary as paid, and at no time made any claim in any monthly requisitions to the state for the alleged additional salary. True, he states that he made a claim to Bailey, but this statement is again repudiated by Bailey, with the explanation that at no time was claimant's salary to be increased, owing to the nature and lack of efficiency of claimant's work and efforts. The employment was at the will and pleasure of the parties concerned. It could be terminated at any time by either, yet, notwithstanding this fact claimant worked on for eighteen months without exercising any right to quit; received and accepted his monthly checks in the amount as fixed by the commissioner, and therefore under all the circumstances, and in view of all the testimony as received by us, is not entitled to the item of $1800.00 for additional salary.

As to the expense account of $519.00, the testimony shows that on many statements furnished by claimant from time to time, items were stricken out or deleted by those in author-

ity and changes frequently made when improper and incollectible items of expense had been included in the statements by claimant. Among these were entries for candies and flowers given without authority by claimant and charged in his expense account against the department involved; also the incurring of daily expenses in excess of those allowed and fixed and beyond which claimant could not go without making himself personally liable for the excess. However, no matter what the testimony or its value may be as offered by witnesses against claimant on the expense items, we are again confronted by his own acts in accepting from month to month payments of his expense accounts as changed by his superiors, and which acceptance under all the facts is binding on him and conclusive as to the amount or amounts of expenses involved. Accordingly, he has been paid in full. No proper items of expense are due or payable to him by reason of his employment in the road department.

We, therefore, refuse an award.

(No. 339—Claim denied.)

GEORGE L. BUCKLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1944

An award will not be made where alleged negligence of respondent is not proven.

Appearances:

George L. Buckley, claimant, in his own behalf.

W. Bryan Spillers, Esq., Assistant Attorney General for respondent.

G. H. A. KUNST, JUDGE.

At 10:30 o'clock A. M. on the 20th day of January, 1944 claimant's truck, a ton and one-half unloaded International van, was being driven by Roscoe Lamb, accompanied by his helper Lonnie Dean, on state road NO. 21, toward Charleston. Although the road was very icy when the truck left Parkersburg and continued in such condition, no chains were used. The visibility was good and no traffic obscured the vision or impeded the progress and driving of the truck. At a point about twenty miles from Charleston, upon rounding a curve in the road, a state road truck could, if the driver of the truck had been looking, been seen at a distance of seventy-five to one hundred yards parked on the left side of the road and headed in the direction of Charleston. Lamb did not observe the truck until he was within thirty-five or forty yards of it. The paved surface of the road was eighteen feet wide, with berm on the right side of the road on which Lamb was driving, five feet in width.

The state road truck occupied about two and one-half feet of berm and four feet of the left half of paved surface, leaving five feet of paved surface of road to the center, and thus giving Lamb, if he chose to use the berm, eighteen feet of road which could have been used by him in passing. When nearly opposite the state road truck, his truck skidded on the icy pavement and struck the state road truck. This truck had brought a load of rock to fill a hole, and its driver, who had been ahead with a flag to warn approaching traffic, had just returned to and entered the cab of his truck, upon being notified that rock had been unloaded. When claimant's truck struck rear of respondent's truck driving it forward several feet, the collision caused damage to claimant's truck, for the repairing of which and loss of time in getting same repaired, he asks an award against respondent of $292.00.

No negligence of respondent having been shown, the alleged failure of state road employees to display on the road signs showing men working, would not have prevented the collision and so far as the evidence shows the collision was due solely to the failure of claimant's driver to exercise the requisite degree of care in driving the truck, which he states could have been stopped, at the speed he was driving, within twenty-five feet. An award is denied and the case is dismissed.

(No. 340—Claim denied)

S. H. WORRELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 25, 1944

Upon failure of claimant to prove by a preponderance of evidence his claim that certain personal property belonging to him was stolen by convicts from the state penitentiary, engaged in performing special labor under the direction of the prison labor division of the state road commission in time of flash-flood, in a proceeding in the court of claims to obtain an award for the value of such alleged stolen property, an award will be denied when it appears from the record that all proper precautionary measures were employed to guard such convicts and no negligence or dereliction of duty is shown on the part of the officials having them in charge.

Claimant, in his own behalf;

W. Bryan Spillers, assistant Attorney General, for Respondent.

ROBERT L. BLAND, JUDGE.

In the late summer of 1943 an unprecedented flash-flood swept the Little Kanawha valley of central West Virginia with tempestuous fury. It was especially severe and disastrous at Burnsville, in Braxton county, and in the vicinity contiguous thereto. There was great damage to and destruction of property and many lives were lost. After the subsidence of the storm it was found that the homes and streets of Burnsville were so greatly damaged by muck, mud and debris, and conditions generally were so unsanitary that assistance was sought to aid in the work of rehabilitation. In some of the houses the water was more than six feet high. The conditions were appalling. A group of convicts from the state penitentiary at Moundsville at the time working at a prison

labor camp of the state road commission at Buckhannon in Upshur county, was sent to Burnsville to aid in the work of cleaning up the damage wrought by the flood.

Claimant, a retired Methodist minister, with his wife and household goods, arrived in Burnsville on the 6th of August, 1943, to take up his residence in Burnsville. He had come from a farm about five miles from Point Pleasant, Mason county. The household effects were brought from that point to Burnsville by a transfer company. On arrival in Burnsville these household goods were temporarily placed in storage on the first floor of the Burnsville Grocery Company until such time as the residential property which he had secured could be made ready for occupancy. The flood had been in that building. Subsequently claimant's household goods and other personal effects were removed to the house which he intended to occupy as a residence and placed in a room on the second floor of the building. He then cleaned out the house as well as he could; but his daughter who resides at Cowen, in Webster county, having told him it was not a sanitary place to live, he and his wife went to reside with her until everything was put in better condition in Burnsville. When they returned to Burnsville on the 22nd day of August, 1943, they found that the doors of their home had been opened and the house ransacked. Claimant then discovered that various household articles and other personal effects were missing, including about $27.00 in money, a watch, ten cans of salmon, a string of pearls, box of soap, and numerous other articles. Naturally suspicion rested upon the convicts although no one was able to establish their guilt.

The convicts were daily brought from Buckhannon to Burnsville and returned to Buckhannon in the evening until a small trailer camp located in the outskirts of Burnsville was provided for them. On these trips to and from Buckhannon the convicts carried with them only their jackets and were under the close surveillance of the guards who accompanied them. It would seem unlikely that they could have carried articles

of bulk or heavy weight, such as boxes of soap and salmon, without discovery.

Claimant has, however, filed a claim against the state for the sum of $251.20 for the value of the property which he claims to have lost. This claim is contested by the state. Before going to Mason county to live claimant had resided at Cross Lanes, West Virginia. His household goods, including all the articles embraced in this claim, were packed and transported to Mason county from Cross Lanes. "The most of the stuff," testified the claimant, "had not been unpacked from the time we moved away from Cross Lanes. . . ." The property was then removed by a transfer company to Burnsville. At the latter place they were twice handled. They were first placed in a grocery establishment and finally removed to the place intended to be occupied as a residence. At the latter place the doors were not locked but insecurely barred. It is strange that claimant should have left money there knowing the condition of the house when he left it.

After claimant discovered the loss of his property he reported the fact to the prison camp. The convicts were then "shaken down" at the Buckhannon camp. There was found in the possession of one of them—a colored prisoner about thirty years of age—a watch, radio, electric iron, electric toaster and possibly several other small articles, none of which is embraced in the claim filed, and all of which were restored to claimant. None of the other articles mentioned and set forth in the claim were found either at the Buckhannon camp or the Burnsville camp. Witnesses for the state testified that claimant did not identify with absolute certainty all of the property actually turned over to him. The convict from whose custody the articles were taken which were restored to claimant said he found a watch along the river where it had been washed out in some rubbish, and the other articles in a sack under a bush; that he supposed someone else had put them there to take away and that he "just picked up the sack and everything." In this connection it may be

observed that claimant testified that a neighbor informed him that on the supposed date of the theft of his property she had seen a man coming out of his house "shaking a bag." But it was not shown that he wore the garb or uniform of a convict. There is no positive evidence in the record to prove that convicts stole any of the missing articles embraced in the claim filed by claimant. The circumstantial evidence relied upon is insufficient to justify an award in his favor.

The convicts cleaned the streets, as well as the homes, when they were asked to do so. They were instructed not to enter any house unless requested to do so. It is not shown that any one of them entered claimant's residence during his absence. They were in charge of a superintendent, one guard and three or four maintenance foremen during all of the time that they were at Burnsville. They worked in groups and were at all times under the closest observation and care. The evidence shows that there were thirty-two trusted convicts, known as honor men, selected for the clean-up work. There were four times as many guards supervising their work and watching over them as usually employed in the ordinary state road prison labor camp.

Claimant is a kindly, conscientious and upright gentleman and was very careful in the statements he made. We can sympathize with him in the loss he has sustained, but are unable under the evidence to recommend to the Legislature an appropriation for the payment of it.

An award will be denied and the claim dismissed.

(No. 329—Claimant awarded $4000.00)

PAULINE GOLDEN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 27, 1944

Where the evidence clearly shows that a pedestrian on a highway was injured by the faulty and defective equipment of a passing state road truck, which defect should have been known, or could have been known through the proper inspection of the truck by the employees of the road commission previous to the time of its use on the highway; and no negligence on the part of the pedestrian is shown, but that on the contrary she was exercising the required and necessary degree of care as such pedestrian, an award will be made in her favor.

Appearances:

Dayton R. Stemple, Esq., for the claimant;

W. Bryan Spillers, Esq., assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, Pauline Golden, thirty-eight years of age and engaged in conducting a farm in Barbour county, West Virginia, was severely and permanently injured by being struck by a tail gate falling or swinging from a passing state road truck while she was a pedestrian on the highway known as Fisher's Mill Road, which highway is under the control of the state road commission. The testimony shows that claimant walking on the proper side of the highway, between five and six o'clock in the evening on September 15, 1943, and in the lawful use of said highway, noticing a state truck approaching stepped off the highway to allow it to pass and while so doing she was struck by the tail gate, knocked to the side of the road and so severely injured as to require

hospital and medical treatment and care. Her injuries consisted of a long, ragged, deep cut on the right upper arm, approximately ten inches long which has left a permanent scar and according to the testimony, has permanently impaired the use of her arm. Her side was bruised and her back injured; her forehead cut, and while of a nervous nature previous to the time of the injury, the physician testifies that this nervousness has increased since the time of the injury and that while claimant has shown improvement, her injuries are nevertheless of a permanent nature and prevent her from carrying on the work on her farm that she had theretofore been able to do. She still complains of pain in both her arm and head at the present time. She has been obliged to obtain help to operate her farm and to do much of the work that she did herself previous to the time of the accident. Her father, who lives with her, is eighty-three years of age and is unable to do any of the work. She has also been obliged to have a hired girl work for her part of the time at the rate of ten dollars per week and has expended bills for medical and hospital treatment, and other expenses totaling approximately $300.00.

The testimony shows that the tail gate in question was improperly and insecurely fastened, that both pins or latches holding it in place, together with the chain serving the same purpose, seemingly became loose or pulled out just as the truck was passing the claimant causing the tail gate to swing across the highway and striking her, inflicting the injuries as aforesaid. The testimony, in our judgment, clearly shows that the faulty equipment or defect of the tail gate allowed it to swing to the side of the road and strike claimant. The driver of the truck testifies (record p. 23) "Well, the tail gate was what you call down—it was laying back on a level with the rest of the bed, held by latches at the bottom and chains attached to the sides of the bed that would hold the tail gate up on a level with the bottom of the bed; and the latch that held the tail gate to its place at the bottom come loose and dropped down, and that give the tail gate a chance to fall off, and these chains that held it on a level, one of

them came loose that held the lefthand end, and that left the tail gate swing by the other chain, which swung around past the side of the truck." In view of this testimony we are of the opinion that an examination of this truck and its equipment previous to its use on the day in question would have revealed its faulty condition and defect and put the employees in charge of its operation on notice to have the necessary repairs made. There was nothing that occurred at the time of the accident so far as the operation of the truck was concerned that would cause the latches to pull out or become loose nor to cause the chains in question that held up the tail gate to likewise pull out or become loose and thus cause the tail gate to swing beyond the body of the truck itself and thereby be the means of striking a passing pedestrian. These defects ought to have been known at the time the truck was being operated and care taken to avoid injury to persons on the highway.

Under all of the circumstances and testimony in this case, we are constrained to find that the claimant is permanently injured, with her earning power on her farm considerably permanently impaired, and that she will never again be able to do the work that she did previous to the time of her accident; that she is still suffering pain in her head and arm. Taking all the testimony therefore in consideration, we are of the opinion that an award of four thousand dollars ($4000.00) should be made and this amount is recommended accordingly.

ROBERT L. BLAND, Judge, concurring.

Without adopting the above syllabus, to which I do not agree, I would favor an award in this case upon the ground of social justice. However, I do not see sufficient evidence in the record upon which to make an award of $4,000.00. Such award, in my judgment, should not exceed $2,500.00.

(No. 363-S—Claimant awarded $50.00)

MABSCOTT SUPPLY COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1944

ROBERT L. BLAND, JUDGE.

The claim involved in this case is for the sum of $50.00. It is concurred in by the state road commission, and approved by the assistant attorney general as a claim which, within the meaning of the court act, should be paid by the state. From the affidavit made by one Charles Hurt, it is made to appear that on December 13, 1943, he was driving state road truck NO. 1038-13, distributing cinders on route 19-21, near Prince Hill, Raleigh county, West Virginia, when it collided with a Ford truck owned by claimant, properly parked on the side of the road, and causing damage thereto, to repair which he incurred a cost of $82.58. However, he carried insurance on the truck, but the policy contained a deductable clause in the amount of $50.00. He was paid $32.58, leaving a balance of $50.00 as necessary for him to pay for the repair of his vehicle. The reason assigned by the road commission for concurring in the claim is as follows:

> "We contributed to the accident by operating truck on ice-covered road without chains."

In view of the concurrence and approval aforesaid, award is made in favor of claimant, Mabscott Supply Company, for fifty dollars ($50.00.)

(No. 341—Claim dismissed)

EDWARD PRUITT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 31, 1944

By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the court of claims shall not extend to an injury to or death of an inmate of a state penal institution.

Claimant, in his own behalf;

Ira J. Partlow, Acting Attorney General, and *W. Bryan Spillers*, assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant, Edward Pruitt, represents that on January 16, 1942, while working in the prison labor division of the state road commission on the state highway at Point Mountain in Webster county, West Virginia, he sustained an injury which caused the loss of his right arm, without fault on his part. At the time of the accident he was in prison labor camp NO. 75, of which one Ray Phillips was foreman. Bernard Givens was grade foreman on construction work being done on the road.

Claimant alleges that he was duly assigned to the work of oiler on P25-3, power shovel, operated by the road commission on said road project and had been placed there as such oiler by those in charge of the labor work. The day was cold and it became necessary to move the shovel in order to make an approach to run traffic around on the lower side

of the road. In doing this it was necessary for claimant to get out of the shovel and latch what was designated as the "dog," or in other words to unlock the track under the shovel in order that it could be moved, and in doing so he was compelled to turn sideways so as to pass between the drum hoist and the motor, and just as he turned sideways to effect this passage, the shovel rocked and threw his right arm into the "hoist drum." Claimant's sleeve caught in the brake-band rigging and the hoist drum and wrapped his arm around the hoist drum shaft and pulled his arm completely off and out from the socket at his shoulder.

Prior to the accident claimant had been an able-bodied man and is now handicapped for life. The case presented is pathetic.

The jurisdiction of the court to entertain the claim is challenged by a special plea filed by the attorney general's office. By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the court of claims shall not extend to an injury to or death of an inmate of a state penal institution. Claimant was constructively in the state penitentiary, although since has been released. The statutory provision is binding upon us. We have no power or authority to consider the claim, and for that reason it was not placed upon the trial calendar for investigation and hearing.

(No. 356—Claim dismissed)

HOMER BAISDEN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 31, 1944

By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the court of claims shall not extend to any injury to or death of an inmate of a state penal institution.

W. H. D. Preece, Esq., for claimant.

W. Bryan Spillers, assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant, Homer Baisden, on November 23, 1942, was an inmate of the West Virginia penitentiary, and was working on the construction of a stone building for a state prison labor camp at or near Buckhannon, West Virginia; said building being intended for a garage, supply house and office for said state prison labor camp. The petition filed in the court of claims on April 20, 1944, alleges that on the date aforesaid, in his work and on said building, he was required to and was lifting a large stone approximately 41″ x 8½″ in diameter, and that in lifting said stone and using a defective scaffold said scaffold broke and said stone was caused to fall onto the body of the claimant, thereby breaking, mashing and crushing his body, right hip and pelvis; that said scaffold was furnished by the state prison labor camp supervisors, under whom he was working, that his injuries were caused as the direct and

proximate result of the carelessness of his overseers, the state prison labor camp officials in whose charge he was kept.

The petition further avers that as a result of claimant's injuries he was hospitalized at the St. Joseph's hospital, Buckhannon, West Virginia, and was forced to remain in said hospital as a result of said injuries for a period of fifty-three days, and that while in said hospital he was under the care of Dr. Forman of said institution; that as a result of his said injuries he was forced to undergo and endure great pain and suffering, and that he was and is permanently injured, and his earning capacity lessened.

Claimant avers that he was parolled from the West Virginia penitentiary on July 1, 1943, and that as a result of his said injuries he is greatly and materially handicapped in performing labor and earning a living; that he is a young man thirty-five years of age, married, and has a family, and that, as aforesaid, his injuries are the direct and proximate result of the carelessness and negligence of the state of West Virginia, its agents and employees, and that as a result thereof he is entitled to have paid to him by the state of West Virginia a reasonable sum as compensation for his injuries.

Claimant therefore seeks an award of $5,000.00.

It is provided by paragraph 2 of section 14 of the court act that the jurisdiction of the court of claims shall not extend to an injury to or death of an inmate of a state penal institution. Since it firmly appears that at the time of the accident claimant was an inmate of the West Virginia penitentiary, we are without power or authority to consider or act upon his claim. For such reason the court determined that it was without jurisdiction to do so.

(No. 193—Claimant awarded $2070.97)

SAM G. POLINO & COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 31, 1944

Appearances:

A. E. Fiorentino, Esq., for the claimant;

Arden Trickett, Esq., state right-of-way agent, state road commission, for the state.

CHARLES J. SCHUCK, JUDGE.

On July 23, 1943, the Monongah Construction Company entered into a contract with the state road commission to surface and stone base a certain project known as NO. 3493-810; the road involved leading from Belington to Nestorville, in Barbour county, West Virginia; and covering a distance of approximately eleven miles. The contract, among other things, called for twenty-four thousand cubic yards of unclassified excavation; five hundred cubic yards of excavation for structures and approximately fourteen thousand four hundred cubic yards of knapped stone as the base course complete in place. The unclassified excavation was to be paid for at the rate of 40 cents per cubic yard. The excavation of the five hundred cubic yards for structures, including refilling, was to be paid at $1.50 per cubic yard. The fourteen thousand four hundred cubic yards of broken stone were to be supplied and put in place at the rate of $3.90 per cubic yard. Fourteen thousand four hundred cubic yards of knapped stone, complete in place, were to be supplied and placed at

$3.95 per cubic yard; and forty-three thousand gallons cold surface application, asphalt applied, one-third gallon per square yard, was to be supplied at 10.3 cents per gallon; sixty-five thousand gallons of cold surface tar application at 12 cents per gallon; four thousand two hundred tons cover coat of limestone chips, complete in place, at $4.50 per ton and four cubic yards of class B concrete at $25.00 a yard; three thousand feet eight-inch perforated corrugated metal pipe, complete in place, at $1.00 a foot; one hundred linear feet of pipe culvert, complete in place, at $2.00 a foot; four hundred and twenty cubic yards of loose stone for underdrains, delivered in place, for $4.00 a cubic yard; making approximately a total price or cost of $160,000. The contract was originally awarded to the Monongah Construction Company and afterward assigned to the claimant here. The work was to start in July of 1934, but seemingly delayed until September of that year before work actually began. It was completed sometime in 1935.

The testimony shows that during the course of carrying on the project, which, as indicated, was rather extensive and entailed a large amount of excavating and material, there were many difficulties and disputes between the contracting firm and the road officials and supervisors, during which time some of the material was condemned and the contracting concern ordered to replace it; for certain reasons the excavating could not be carried out as originally planned and as shown on the plans and specifications, and the contracting firm alleges it was put to additional costs and expenses in carrying out the contract as changed and not provided for in the plans and specifications or the original contract itself.

Concerning these many disputes, the testimony is very conflicting. The claimant company maintains that it was obliged to do considerable extra work and furnish extra material not contemplated in any way by the contract. This contention, of course, is denied by the state department and we are there-

fore obliged to carefully examine the record in order that we may be able to separate the good from the bad, the wheat from the chaff, and the essential from the nonessential. The claim, as prosecuted here, is in the amount of $33,617.50. The record is very long and voluminous and we have given much time to the consideration of the various questions presented and the problems involved, and repeat that we have sought to eliminate the unimportant and highly conflicting testimony from that which we consider pertinent and conclusive in the endeavor to settle the issues that were presented at the time of the hearing.

By reason of the conflicting and uncertain testimony with reference to the many items for extra work, we have concluded to eliminate from our consideration all such items except two, which we feel are supported by a fair and impartial analysis of the testimony and should be paid.

The question of the widening of the berm beyond that contemplated in the contract and the plans and specifications, seems to be definitely settled; and the testimony, as shown by claimant's witnesses and supported to a degree by the state's witnesses, tends to show that there were 45,306 cubic yards of extra berm construction for which claimant was at no time paid and to which item he is entitled to remuneration at the rate of $.0424 per yard. There are admissions by the state's witnesses that this extra berm construction was found necessary under the circumstances and conditions presented in carrying on the project, the only question being as to the amount of yardage involved and whether or not payment had been made. There is also testimony tending to show that by reason of the widening of the berm, the contracting firm was saved other expenses such as extra hauling, which would have been necessary had the berm not been widened to the width eventually established; however, when this matter is taken into consideration with the extra excavating that was found necessary, the claimant would be entitled in our opinion

either to the extras on the excavations or in the matter of widening the berm. We have taken the item with reference to the increased berm as being in our opinion equitable and just to all parties concerned. The rock formation required to be removed for subgrade purposes likewise seems not to have been fully contemplated by the contract or the plans and specifications, and yet we feel that the contracting concern is being rewarded in this extra item by the increasing of the width of the berm where the extra excavation was and could be deposited with the least expense to claimant, as well as to the state. We therefore allow as one of the items the matter for the extra berm (record p.p. 25-26, record p. 114) of 45,306 cubic yards at $.0424 per yard or $1920.97. The other item which is allowed is the matter of 150 feet of pipe at $1.00 extra, amounting to $150.00 (record p. 81), making a total allowance of $2070.97, for which an award will be recommended. In the matter of the item for extra pipe, the record nowhere reveals a contradiction of the witnesses for claimant that this extra item was furnished, that the pipe was used in connection with the completion of the project, and that the item as such was not contemplated by the contract; and therefore an award is made accordingly in the sum of $150.00. In view of all the testimony and our consideration of this record, we recommend an award in the amount of two thousand seventy dollars and ninety-seven cents ($2070.97).

ROBERT L. BLAND, JUDGE, dissenting.

In my judgment no additional compensation should be allowed for berm width over and above six feet on either side of the eighteen foot road, for the reason that all such additional width was contemplated and provided for by the specifications and settlement therefor was included in the final estimates. The six feet berm widths specified on the typical cross sections were merely minimum widths.

The specifications provided as follows:

> "The bidder is required to examine carefully the site of, and the proposal, plans, specifications and contract forms for the work contemplated; it will be assumed that the bidder has investigated and is satisfied as to the conditions to be encountered for performing the work as scheduled or as at any time altered without resulting in increases or decreases of more than the restricting percentage hereinafter stipulated, and as to the character, quality and quantities of work to be performed and materials to be furnished including increases and decreases, and as to the requirements of these specifications, special provisions and contract. It is mutually agreed that submission of a proposal shall be considered prima facie evidence that the bidder is satisfied as to all the conditions and contingencies."

Paragraph 4 of the contract under which the work was done reads:

> "(4) The contractor further agrees that he is fully informed as to all conditions affecting the work to be done, as well as to the labor and materials to be furnished for the completion of this contract, and that such information was secured by personal investigation and research and not wholly from the estimates of the Engineer; and that he will make no claim against the said State by reason of estimates, tests or representations heretofore made by any officer or agent of the State."

It was the duty of Monongah Construction Company before submitting its proposal to the state road commission to go upon the ground of the proposed project and familiarize itself with all of the conditions found to exist there, and with the knowledge thus acquired to submit its bid for the work to be done. This is not only required by the specifications, which form a part of the contract, but is embodied in the contract itself. It must be assumed, therefore, that Monongah Con-

struction Company did go upon the premises and examine the topography of the proposed road and familiarize itself with all the conditions that should confront it if it should be awarded the contract to complete the project. With the knowledge thus acquired it submitted its bid to the state road commission and agreed to do all that was required by the plans and specifications for the sum of $159,499.00.

I may add that I find no warrant in the record to sustain the award made for the 150 feet of pipe. There is quite a difference between making a claim and proving it. Apparently little attention was paid by Monongah Construction Company or Sam G. Polino & Company, its assignee, to the specifications. It is as important to protect the interests of the state as the interests of the claimant.

I would disallow both of the items for which the awards are made.

(No. 359-S—Claimant awarded $601.75)

(No. 360-S—Claimant awarded $747.44)

(No. 361-S—Claimant awarded $602.78)

J. G. FREDEKING, et als, partners, d/b/a FREDEKING & FREDEKING, Claimants,

v.

STATE TAX DEPARTMENT, Respondent.

J. G. FREDEKING and T. H. PRICE, et als, partners, d/b/a T. H. PRICE OIL COMPANY, Claimants,

v.

STATE TAX DEPARTMENT, Respondent.

J. G. FREDEKING, et als, partners, d/b/a SERVICE OIL & GAS COMPANY, Claimants,

v.

STATE TAX DEPARTMENT, Respondent.

Opinion filed August 1, 1944

CHARLES J. SCHUCK, JUDGE.

The Standard Oil Company of New Jersey and J. G. Fredeking, Hinton, West Virginia, entered into several contracts, all of which are exactly alike, except as to the places in which the operations under the contracts were to be carried on. For the purpose of operating under the several contracts in the

different territories J. G. Fredeking created several different partnerships, three in number, and these partnerships are the claimants for refunds of taxes, allegedly improperly paid, in three different claims presented to this court for consideration.

An examination of the records submitted, including the contracts mentioned, has raised the question as to whether or not the several partnerships were in fact employees of the Standard Oil Company or whether they were independent concerns acting as independent agents and consequently liable to the tax which, as indicated, had been paid.

For some time these questions were under consideration in the state tax department, and after a very thorough examination of the facts as presented and the law relating thereto, the tax department concluded that the relationship of employer and employee existed as between the Oil Company and the several partnerships, and that the partnerships were accordingly entitled to a refund in the amounts set forth in their respective petitions filed in this court. A very able and elaborate statement or brief is filed in each case by the tax department sustaining its contention that the refunds should be allowed.

In view of the questions presented and the issues involved, we have examined the contracts in question and the tax statutes relating to the matter as submitted, and their application thereto, and agree with the conclusions reached by the state tax commissioner. The state tax department recommends the payment of the several claims and the attorney general approves the same in the amount of each claim, respectively.

We are therefore of the opinion that in claim NO. 359-S, J. G. Fredeking, et als, partners doing business as Fredeking and Fredeking, claimants are entitled to a refund in the sum of

six hundred one dollars and seventy-five cents ($601.75) and we make an award accordingly.

In claim NO. 360-S, J. G. Fredeking and T. H. Price, partners doing business as T. H. Price Oil Company, claimants are entitled to a refund of $747.44, and an award is made accordingly in the amount of seven hundred forty-seven dollars and forty-four cents ($747.44).

In claim NO. 361-S, J. G. Fredeking and others doing business as the Service Oil & Gas Company, claimants are entitled to a refund of $602.78 and an award is made in their favor in the sum of six hundred two dollars and seventy-eight cents ($602.78), accordingly.

(No. 333-S—Claimant awarded $169.79)

S. E. BURNS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1944

ROBERT L. BLAND, JUDGE.

This case involves a claim for the sum of $169.79. The record thereof was prepared by respondent and filed with the clerk on February 2, 1944. The state road commissioner, head of the department concerned, concurs in the claim. Its payment is approved by an assistant attorney general.

The facts disclosed by the record are substantially as follows: On January 24, 1944 on the Unis-Frankford road in Greenbrier county, West Virginia, being a state-controlled highway a collision occurred between an automobile owned by claimant and state road commission truck NO. 930-74 operated by Berdie Bostic. The state truck was being driven at a speed of from 15 to 20 miles an hour. The road was narrow being only about 9 feet in width. The accident was the result of short-sight distance. While the two vehicles rounded a curve in the road the driver of the state road truck lost control of the truck in failing to slow down while attempting to make the turn. The impact of the two vehicles caused claimant's car to go over a bank. To repair the damage caused to claimant's car by the accident he was obliged to pay the amount of the claim above mentioned. Claimant was without fault. The state road commission admits responsibility for the accident.

From the showing made by the record the claim is one for which an appropriation should be made.

An award is, therefore, made in favor of claimant S. E. Burns for the sum of one hundred sixty-nine dollars and seventy-nine cents ($169.79)

(No. 373-S—Claimant awarded $900.00)

JOHN J. SWINT, Bishop of the Diocese of West Virginia, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1944

ROBERT L. BLAND, JUDGE.

This case is heard and a determination thereof made upon a record prepared by the state road commission and duly filed with the clerk of this court as provided by section 17 of the court act.

The claim submitted is for damages to the basement of the Sacred Heart of Mary Church, located at the intersection of a state-controlled road and avenue "F" at Weirton, in Hancock county, West Virginia. The title to said church property is vested in the Bishop of the Roman Catholic Church of the Diocese of West Virginia, in whose name and on behalf of whom the claim is asserted.

Prior to July 9, 1943, and in the course of the building and improvement of the state-controlled road aforesaid, the state road commission moved the wall around the basement window of the church edifice and collected dirt, debris, and building materials near the intake of the sewers on the northeast and southeast corners of the intersection.

On July 9, 1943, a hard rainstorm occurred at Weirton. The storm waters washed the accumulated dirt, debris, and building materials into the intakes of the sewers and filled and clogged them. The waters were consequently diverted and caused to run into the basement of the church, thus resulting in the damage for which this claim is made.

An examination of the basement made after the storm had abated revealed that it was filled with water, dirt, debris, and building material and damaged beyond repair. It was found necessary to place and install an entirely new floor. Contractors submitted estimates for the cost and expense of work actually required. One of these estimates fixed the amount at $2705.39, and another at $1690.46. The church authorities were finally able to repair the damage sustained to the extent of having a new floor placed in the basement at a cost of $900.00. This amount covered only a part of the damage which had been caused to the basement.

After careful examination and consideration of all of the facts in connection with the actual cause of the damage, which seems very clearly from the record to have been the result of the removal of the wall around the windows, the district engineer and the county maintenance engineer both recommended an allowance of that sum.

The state road commission concurs in the payment of this amount. The assistant attorney general approves an award of that sum.

In view of the recommendations, concurrence, and approval aforesaid, an award is now made in favor of claimant John J. Swint, Bishop of the Diocese of West Virginia, for the said sum of nine hundred dollars ($900.00).

(No. 381-S—Claimant awarded $22.04)

GRAYSON D. THORNTON, Claimant,

v.

STATE LIQUOR CONTROL COMMISSION, Respondent.

Opinion filed October 9, 1944

ROBERT L. BLAND, JUDGE.

On April 3, 1943 claimant was a superintendent of a warehouse in Charleston, West Virginia, of the state liquor commission. On that date his personal automobile was being used in the city of Charleston for business of the commission. He had sent one Clark Neal, a supply manager, out in the car to locate an employee of the commission who was acting in the capacity of guard, but not supposed to report for duty until a subsequent date. He was needed over the weekend. The driver of the automobile stopped the car on Donnally street, opened the door about 12 inches to look back and the car was then hit by another vehicle, causing damages for which the claim is made. To repair such damages claimant was obliged to pay $22.04. The head of the department concerned concurs in the claim. An assistant attorney general, whose responsibility it is to represent the state in claims asserted against it in this court, approves the claim as one which within the meaning of the court act should be paid.

In view of the concurrence in and approval of the claim as aforesaid an award is made in favor of claimant Grayson D. Thornton for twenty-two dollars and four cents ($22.04).

(No. 382-S—Claimant awarded $20.40)

JAMES M. CAMPBELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1944

ROBERT L. BLAND, JUDGE.

Claimant's Chrysler automobile was parked for a funeral on Spruce street, in Morgantown, West Virginia, on April 21, 1944. State road commission truck NO. 430-30 passed it and a sign projecting from the bed of the road truck sideswiped claimant's car, causing damages thereto for which claim is made in the sum of $20.40, the amount of repair bill.

The claim is concurred in by the head of the department concerned and its payment is approved by an assistant attorney general.

An award is made in favor of claimant James M. Campbell for the said sum of twenty dollars and forty cents ($20.40).

(No. 384-S—Claimant awarded $133.57)

O. R. SHREVE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1944

ROBERT L. BLAND, JUDGE.

This claim is in the sum of $133.57. It grows out of an accident which the claimant sustained while driving his Plymouth sedan automobile on West Virginia route NO. 4, project 3565, in Lewis county on June 28, 1944. An investigation of the accident made by Laco M. Wolf, investigator for the state road commission, revealed that claimant's vehicle skidded on the wet slippery pavement of the road, due to an excess of bituminous material which caused the accident. The car was badly damaged. In order to repair it claimant was obliged to and did pay to the Capitol City Body Works, Inc. and the Pritchard Motor Company, both of Charleston, the said sum of $133.57, for which the claim is made. The state road commissioner concurs in the claim. An assistant attorney general approves it as a proper claim against the state for payment.

In view of the concurrence and approval of the claim and the facts shown by the record, prepared by respondent and filed with the clerk July 14, 1944, an award is made in favor of claimant O. R. Shreve for one hundred thirty-three dollars and fifty-seven cents ($133.57).

(No. 290—Claim denied)

AGNES MARIE SIMS, Administratrix of the estate of Everet Brady Sims, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1944

A claim for damages filed by the personal representative of a boy four and one-half years of age, who walked upon and fell from a state-owned bridge, while it was closed for necessary repairs, then being made thereon, and sustained injuries which resulted in his death will be denied, when it appears from the evidence that such bridge was duly barricaded and ample precautions observed to prevent accident thereon.

Appearances:

Groves F. Hedges, Esq., for claimant;

Eston B. Stephenson, Esq., special assistant to the attorney general for the state.

G. H. A. KUNST, JUDGE.

From July, 1942, until the 28th day of November, 1942, employees of the state road commission, respondent herein, were employed in reflooring and painting what is called Neal Run Bridge, about two and one-half miles from Parkersburg in Wood county, West Virginia. This is a structure six hundred and twenty-seven feet long and twenty-one feet in width, with a roadway fifteen and one-half feet in width and a walkway five and one-half feet in width. It crosses Neal Run and connects and is a part of the state road system under the jurisdiction and control of respondent. The road at the western end of the bridge is called Camden avenue and there are several cross streets. This is a residential section, consisting of twelve or more houses. In the families living in this immediate locality, there were about thirty children; three small ones,

not *sui juris*, one five years of age, two about four, and one nine, and the rest considerably older, many of them attending high school.

When the repair work on the bridge was started, a "road closed" sign was placed on the north side of the pavement of the road approximately one-fourth of a mile west of the west end of the bridge and a similar sign similarly placed, at similar distance at the east end of the bridge. At each end of the bridge, across the roadway, a barricade about fourteen feet in length and about four and one-half feet in height, made by nailing three two by six inch boards to three braced upright, heavy, pieces. The first board was about eighteen inches from the ground and with spaces about eight inches or more between the boards. Boards were fastened across the walkway and affixed to the barricades were "road closed" signs. At night lighted torches were placed at each end of the bridge.

At the time of the accident herein mentioned the old flooring had all been removed, which left eight steel I beam girders five inches wide on top surface exposed, parallel and properly spaced extending the length of the bridge and upon which the new floor was being placed and which now extended from the east end of the bridge to within approximately one hundred and sixty feet of the west end. Pedestrians had placed a two by twelve inch board across the stream and when the water was not over the board, or the banks were not excessively slippery and muddy, were using this as a substitute for the bridge in crossing the stream. But when water covered the board, they, men and women, used the bridge in its unfloored condition and it was also used by school children, when the board of education stopped bus service and required school children within two miles of school houses to walk. Men working on the bridge carried books and other equipment for them and assisted children across. Boys riding bicycles had crossed by walking on the flange of one girder and running the bicycle on another. A great many people, adults and children crossed the bridge during the long period it was unfloored. Some boards were laid upon the I beams for work-

men in walking and carrying boards but part of it was apparently not covered and timid persons would hold to the railing on side of bridge and walk on the flange of girder to the refloored portion of bridge.

Mrs. Agnes Marie Sims, a widow, forty years of age, who made a living by washing and paper hanging and with state aid for her little girl, with her family consisting of a boy fifteen years of age, named Brooks Lagnor, whom she had reared from a child; a daughter two years of age, and a boy Everett Brady Sims about four and one-half years of age, and Harry Sims, a boarder, a cousin of her deceased husband, lived in a house on Camden avenue about six hundred and fifty feet from the west end of the bridge.

At about 12:40 o'clock, P. M. of the 28th day of November, 1942, she permitted her son, Brady, to go out in the back yard to play. This back yard opened onto Camden avenue. At about one twenty o'clock P. M., Cleto Janutolo, foreman, William Miller and Raymond Beal, employees, of respondent went to the west end of the bridge to find the right sized board to fit in flooring. Two small boys were playing on the concrete near the barrier at the west end of the bridge. Having examined some boards piled on one side, at the end of the bridge, they were returning without the board when about one hundred and forty feet from the west end of bridge they heard a noise like a board striking the ground below the bridge. Miller went to investigate. He found that the small Sims boy, Brady, had fallen from the bridge, a distance of about twenty feet on broken concrete chunks in the creek bed. Beal went to a house to telephone for an ambulance. Miller carried the child to the home of Mrs. Chester Smith, a short distance from the bridge. He was fatally hurt, still living, but unconscious. Mrs. Smith bathed his face and when the ambulance came he was taken to Camden hospital and died about an hour later.

Mrs. Sims, his administratrix, alleging negligence of the state road commission, respondent, caused his death, asks an award of $10,000.00 from this court.

The extent of danger incident to the use by pedestrians of this unfloored bridge at the western end is not well shown by the evidence, the nature and condition of ground, under same, its slope and distance from bridge girders can only be approximated. Witness Miller says: "It is low on the ground." At about eighty feet from the west end, the place where Brady Sims fell, the top of girders were about twenty feet from the ground. Witness Cottle stated that: "The ground level sloped down from the west abutment fairly flat."

That this unfloored bridge was not a dangerous factor, instrumentality or agency, such as gasoline, electricity, dynamite, powder, or other explosives and respondent and its employees did not owe to trespassing young children the high degree of care which is required in the possession and storage of such articles, and the law applicable in such cases, cited in brief for claimant, is not applicable here. What danger existed was patent, not latent; it constituted no trap, no pitfall, no lurking danger, no danger that could not be seen and appreciated by all persons *sui juris*—and so far as the evidence shows not trespassed upon in any way by anyone, not *sui juris*, except by the unfortunate youngster, Brady Sims.

The bridge had, by the action of respondent in placing barriers and notices of the road being closed and lighted by torches at night, ceased to be in use for all vehicular and pedestrian travel and fully informed all *sui juris* persons of that fact, and the evidence shows that it was so known by them, and any use by them of it constituted them as trespassers. There was no tacit consent, no passive acquiesence by the employees of respondent, no toleration of the trespass by children that could be interpreted into an inference of permission—it seemingly being the element that distinguishes the licensee from the trespasser. Evidence of claimant's own witnesses shows: That the workmen on the bridge had warned each one of the children in the vicinity to stay away from the bridge; that it was their custom and repeated practice to tell them not to go upon it and to drive and put them off; that Mr. Sprouse's grandson, one of the three *non juris* children mentioned, was

not allowed near the bridge; that Jesse Wilson would not allow his children to play around the bridge; that Mrs. Smith's little girl and her sister's little girl, when she and her sister came to play with other children in Mrs. Smith's basement and yard and on the concrete at the end of the bridge, were never unattended and were always in the care of older children.

It is not shown that the bridge with its girders exposed was used as a playground, or that it could have been so used, and little danger is shown by boys climbing in and out and over the barrier at the end of bridge, that the basement and the yard of Mrs. Smith near the bridge and the concrete at the west end of the bridge was not a regular playground but there was only a casual and intermittent use of these premises for play by neighborhood children. The evidence does not show that the boys who sat on the end of the steel girders when the workmen had left the bridge were in any danger, so far as the evidence discloses their feet could have been on the ground.

Much emphaasis is placed by counsel for claimant on the fact that the barrier at the west end of bridge did not sufficiently safeguard the danger of this unfloored bridge from the trespassing of young children and that a high, wide and solidly built barrier should have fenced the opening on the west end of bridge and that a guard should have been placed there. The evidence shows that had this barrier been of solid structure, extending the full height and width of the bridge and along its sides, it would have still been possible for children to get upon the bridge by going down to the run and coming up under the bridge to climb upon the I beam girders at the end, or by climbing up a ladder over the top.

Courts have held that it is not required that premises should be "... child proof...." 45 Corpus Juris 782, and cases there cited. "But to hold that the fence must have been such that a boy could not climb over it, would be to impose upon defendant the duty of extraordinary care and the liability of an

insurer, and no court has yet extended the rule further than to require ordinary precautions to prevent injury in such cases, . . ." *McLendon* v. *Hampton Cotton Mills*, 109 S. C. 238, 243, 95 S. E. 781. The courts have well said that no one yet has been able to build a fence which a boy cannot surmount. The law is that although these children Billy Lowery and Brady Sims had no legal right to go upon this bridge and were therefore trespassers, the fact that Brady Sims was a child of tender years did not alter the rule governing the rights of trespassers and because he was an infant of tender years did not raise a duty where none otherwise existed.

Respondent's duty to him as such trespasser was not to wantonly injure him, but respondent, as the evidence shows before and at the time when this sad happening occurred, gave to him the same care as if its duty had been to an invitee; five men fully instructed to keep children off the bridge, and constantly and repeatedly carrying out this instruction were working on this bridge and some one of them did drive these two boys from the bridge, taking hold of them to do so, immediately before the child, Brady Sims, fell through the bridge.

There is no evidence that respondent or its workmen had knowledge of or could have anticipated the presence of this child upon the bridge at this time, consequently no negligence appears on the part of respondent, and an award is refused and the case dismissed.

(No. 386-S—Claimant awarded $15.00)

LEWIS STILLMACK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 10, 1944

ROBERT L. BLAND, JUDGE.

Claimant's Chevrolet automobile was parked on a state-controlled road at Panther, McDowell county, West Virginia, on the 25th of September 1944, when state road truck NO. 1030-7 in backing failed to cut sufficiently and struck claimant's car, causing damages thereto which it is agreed will cost $15.00 to repair. The head of the department concerned concurs in the claim for this amount and its payment is approved by an assistant attorney general.

Upon the facts disclosed by the record an award is now made in favor of claimant Lewis Stillmack for the sum of fifteen dollars ($15.00).

(No. 387-S—Claimant awarded $53.00)

L. C. HILEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 10, 1944

ROBERT L. BLAND, JUDGE.

At a point near Newman, in Doddridge county, West Virginia, where state road commission truck NO. 430-136 was patching a public road on August 11, 1943 claimant's car was passing the truck when the latter turned left to make a turn in the road and caught claimant's car with bumper and left fender, causing damages thereto which Kennedy Motor Company estimates will cost $53.00 to repair as shown by an itemized statement filed as a part of the record. The state road commission recommends the payment of the claim in that amount and its payment is approved by an assistant attorney general.

Upon the facts shown by the record an award is now made in favor of claimant L. C. Hiley for the sum of fifty-three dollars ($53.00).

(No. 388-S—Claimant awarded $147.50)

ELMER CROW, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 10, 1944

ROBERT L. BLAND, JUDGE.

The record of the claim involved in this case was prepared by the state road commission and filed with the clerk August 6, 1944. The claim is in the sum of $147.50. Its payment is recommended by a district engineer and also a maintenance engineer. The state road commissioner concurs in the claim. An assistant attorney general approves it as one which the state should pay.

On August 10, 1944 claimant was riding a horse which broke through the wooden floor of Meighn Bridge on Fish creek, secondary road NO. 4, in Marshall county, West Virginia. Claimant was thrown in such manner that he landed on the tip of his left shoulder. He was hospitalized and on account of his accident lost much time from his regular employment. Respondent admits that the bridge had been unsafe for public travel thereon.

In view of the showing made by the record of the case an award is made in favor of claimant Elmer Crow for one hundred forty-seven dollars and fifty cents ($147.50).

(No. 391-S—Claimant awarded $385.76)

MARGARET FAHEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 10, 1944

ROBERT L. BLAND, JUDGE.

The record of the claim involved herein was prepared by the state road commission and filed with the clerk on August 21, 1944. The claim is in the sum of $385.76. Paul Nichols, an equipment superintendent of the state road commission in district 6 had been called out for work at the district shop of Elm Grove at approximately 11 o'clock P. M. on June 22, 1944, and was returning to his home from his work at 1:20 o'clock A. M. on June 23, 1944. He was driving state road commission Chevrolet automobile NO. 629-13. Having fallen asleep on the road the automobile which he was driving ran into a parked De Sota coupe automobile, owned by the claimant, Margaret Fahey, bearing West Virginia license NO. 338-502 on state route NO. 2, Wheeling avenue, Glendale, West Virginia. The estimated damage done to the state vehicle was $150.00, while it required $385.76 to repair claimant's car as shown by an itemized statement made a part of the record. The payment of that sum to the claimant is recommended by Ray Cavendish, district engineer and by the county maintenance engineer. The head of the department concerned concurs in the claim. It is approved by an assistant attorney general as a claim which within the meaning of the court act should be paid by the state.

Section 17 of the court act provides a "shortened procedure" for the consideration of claims filed in this court against the state. This procedure, however, applies only to a claim possessing all of the following characteristics: (1) The claim does not arise under an appropriation for the current fiscal year; (2) The state agency concerned concurs in the claim; (3) The

amount claimed does not exceed one thousand dollars; (4) The claim has been approved by the attorney general as one that, in view of the provisions of this article, should be paid. All such claims are considered informally by the court upon records prepared and filed with the clerk by the heads of the state department involved. It does not necessarily follow that because a claim has been submitted to the court for consideration under the shortened procedure provision of the statute and concurred in by the head of the agency involved and approved by the attorney general that an award will be made. No provision is made by the statute for the recommendation of payment of such claims by subordinate officers of the state. It is only by the concurrence in the claim of the head of the department concerned and the approval provided by the statute to be given to the claim by the attorney general that such a claim may be so considered. The court is limited in its consideration of all such claims by the record prepared and filed by the head of the state department concerned. It is highly important that all such records should be full and complete in order that the court may determine the merits of claims from the facts appearing in the records and be justified and warranted in making awards upon the basis of such facts.

In the instant case the facts show that a state employee went to sleep while on duty and as a result of such indiccretion and irresponsibility a serious accident occurred on a public road of the state, causing damage to the state property of $150.00 and to the property of an innocent individual lawfully upon the highway to the extent of $385.76. He himself could be proceeded against for the enforcement of such liability and perhaps should be in all fairness to the state. However if the road commission permits an irresponsible person to drive its motor vehicles upon a state highway either in daylight or at nighttime and an innocent person's property is wrecked and damaged in consequence of his conduct, it would hardly be argued that the state should not make reparation.

An award is now made in favor of claimant Margaret Fahey for three hundred eighty-five dollars and seventy-six cents

($385.76), the record of the case clearly showing that she is entitled to an appropriation for that amount.

(No. 394-S—Claimant awarded $30.00)

V. K. BUCK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 10, 1944

ROBERT L. BLAND, JUDGE.

From the record prepared in this case by the state road commission and filed with the clerk on August 28, 1944, it appears that on July 18, 1944 on route 21 between Ripley and Niger Hill, in Jackson county, West Virginia, at about 8:30 A. M. Evert Kays, operator of a state road commission truck was going north and was passing claimant V. K. Buck, of Ripley, who was driving a cow and calf in the same direction that the truck was proceeding. Claimant was leading the cow with a halter. His daughter was helping him drive the calf which was loose. When the state road truck approached on the right it frightened the calf and it ran in front of the truck and was killed. Upon investigation of the accident it was found that the state road truck had bad brakes and could not stop on that account. F. M. Ferrel, safety director, ascertained the state truck to be at fault for the accident and recommended a settlement in favor of claimant of $30.00. It is estimated that the calf weighed 250 pounds and was worth from $30.00 to $35.00. The head of the department concerned concurs in the claim filed in the sum of $30.00 and its payment is approved by an assistant attorney general.

An award is made in favor of claimant V. K. Buck for the said sum of thirty dollars ($30.00).

(No. 398-S—Claimant awarded $243.71)

C. T. CLARK, M.D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 11, 1944

G. H. A. KUNST, JUDGE.

On June 12, 1944, while respondent's truck 1030-70 was transporting laborers to Hanover headquarters in Wyoming county, West Virginia, on route 52, its driver negligently attempted to cross the road, and obstructed traffic lane at a curve and was struck by claimant's 1942 Chevrolet car, traveling at a speed of about forty miles an hour. The collision caused damage to the car, which cost $243.71 to repair and for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award for two hundred forty-three dollars and seventy-one cents ($243.71) is made to claimant.

(No. 399-S—Claimant awarded $255.86)

WHEELING PUBLIC SERVICE COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 11, 1944

G. H. A. KUNST, JUDGE.

On the 3 day of July, 1944, the operator of respondent's shovel 625-13 negligently left the shovel parked in an unsafe position at the intersection of S bridge at Peter's Run, in Ohio county, West Virginia. The brakes of the shovel became released and the shovel ran downhill two hundred feet striking claimant's bus which was parked waiting for passengers.

Claim is made for $255.86, the cost of repairing the damage to the bus.

Respondent recommends and the attorney general approves its payment.

An award is made for two hundred fifty-five dollars and eighty-six cents ($255.86) is made to claimant.

(No. 400-S—Claimant awarded $255.00)

ADAM KUZNIOR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 11, 1944

G. H. A. KUNST, JUDGE.

Respondent's bulldozer 431-35, on May 3, 1944, on a secondary road 19-4, near station 7+50, in Harrison county, West Virginia, while in operation, was negligently permitted to slip out of gear and ran backward down a steep grade into claimant's house, causing damage, the cost of repairing which amounted to $255.00, for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award of two hundred fifty-five dollars ($255.00) is made to claimant.

(No. 401-S—Claimant awarded $49.98)

DAVID W. WOOD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 11, 1944

G. H. A. KUNST, JUDGE.

On January 4, 1944, respondent's truck c-30-2 in Charleston, West Virginia, was negligently backed out of Richard street into Wilson street striking the right side of claimant's Mercury car traveling at a speed of about twenty miles an hour along Wilson street.

Claim is made for $49.98, the cost of repairing the car. Respondent recommends and the attorney general approves its payment.

An award of forty-nine dollars and ninety-eight cents ($49.98) is made to claimant.

(No. 395-S—Claimant awarded $20.00)

ALBERT WORKMAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 11, 1944

G. H. A. KUNST, JUDGE.

On May 30, 1944, while claimant's car was standing on Clear Fork road about four miles east of Clear creek in Raleigh county, West Virginia, having been stopped by a flagman and claimant admonished for driving past a "workmen working" sign, at a speed of about thirty miles an hour, having passed respondent's truck 1038-1 loaded with stone, the truck backed into car causing damage to car estimated at $20.00 for which claim is made.

Respondent recommends and the attorney general approves its payment.

An award of twenty dollars ($20.00) is made to claimant.

(No. 364, 365, 366—Claims denied)

JULIA W. SCOTT, Administratrix, of the estate of CHARLES P. SCOTT, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

JULIA W. SCOTT. Claimant,

v.

STATE ROAD COMMISSION, Respondent.

JAMES C. SCOTT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 12, 1944

A case in which the testimony shows the claimants' automobile was operated at a high and dangerous rate of speed under adverse weather conditions, thereby constituting such negligence as would bar an award.

Messrs. *Mohler, Peters & Snyder,* (Charles G. Peters, Esq.), for the claimant;

W. Bryan Spillers, Esq., assistant attorney general for the state.

CHARLES J. SCHUCK, JUDGE.

This and two other claims, namely one of Julia W. Scott in her own right, and James C. Scott, her son, are brought against the state road commission in the amounts of $10,000.00, $15,000.00, and $5,000.00 damages respectively. The three claims were heard together, the same evidence or testimony being presented and applied to the said claims respectively, and the decision herein by the court will accordingly apply in all of the said claims.

Plaintiff's husband, Charles P. Scott, the claimant Julia W. Scott and James C. Scott, her son, were driving in an auto-

mobile on the 25th day of October, 1943, in the late afternoon of the said day over and on the public road or highway between the town of Deepwater and the city of Oak Hill in Fayette county, West Virginia, which said highway is known and designated as West Virginia route 61. The highway is improved, having a width of approximately 16 feet and at and near the place of the accident berms on either side of the said improved highway varying in width from three to four feet and at places nearly as wide as eight or ten feet. While driving along said highway and approaching the bridge which crosses Loop creek at and near the unincorporated town of Robson, the said automobile then and there driven by the claimant, James C. Scott, a young man of twenty-four years of age, and now in the armed forces was driven over the embankment or approach to the end of the said bridge causing the automobile to turn over, the said Charles P. Scott to be then and there killed, and the claimant, Julia W. Scott, and claimant, James C. Scott, to suffer serious bodily injuries which required medical and hospital treatment and for which these actions are brought in this court. The accident took place at about 6:30 on the evening of October 25, 1943, at a time when it was raining or misty, all of which conditions were known by the two living claimants and undoubtedly by the deceased Charles P. Scott. Claimants maintain that by reason of the growth of brush along the road leading to the said bridge and by reason of the height and thickness of the said brush, it was impossible to see the approach to said bridge and that the driver, the said James C. Scott, could not see the approach but thought that the road continued straight ahead without the angle approach, which was noticed too late for him to negotiate the turn onto the bridge causing the automobile to go over the embankment at the end of the bridge and bringing about the accident in question. Witnesses were introduced to sustain claimants' contention, and in view of the seriousness of the claims and the amounts involved, the court determined to and did in July make a very careful investigation and took a personal view of the road and bridge and the attendant surrounding conditions. We are, therefore, in our judgment, in a position to fully determine the effect and weight to be given

to the testimony introduced by both the claimants and the department involved and to apply the results of the said view in determining whether or not claimants are entitled to awards.

One important fact presents itself in determining whether or not the brush, or growth, in question, was sufficient to obscure any view of the bridge, so far as any traveler on the road approaching it, at a reasonable rate of speed, under the existing conditions, was concerned. Immediately in front of the brush in question and on the same side, however, and near to the bridge, there were two mail boxes used as receptacles for the deposit of daily newspapers by the persons who lived in that vicinity. There is no evidence to show that these mail boxes could not have been seen at the time of the accident; on the contrary, it may well be assumed that they could, and that if such was the case there is no question in our minds from the view that we took, considering the season of the year in which the accident happened, namely, in the middle of the fall of 1943, that anyone approaching the bridge and driving at the proper rate of speed could have seen the bridge for at least 250 to 300 feet removed from the approach and in the direction from which the car was traveling at the time. There is testimony that the bridge can be seen at a distance of over 400 feet when traveling from the direction that claimants' car was moving at the time of the accident.

Claimants introduced as a witness, one W. R. Seal, a state trooper, who testified (record pp. 39-42):

> "Q. At the time of the accident about how far would you say a person driving from Oak Hill could first see the bridge, coming around the curve before you get to the bridge?
>
> A. Well, he could see it for probably 150 feet. That is only a guess, but he could see it at least 150 feet before he would get to it."

If all this be true, considering the fact that it was raining and that any driver under the circumstances would be obliged

to exercise certain care for his own protection as well as of those riding in the car, then we maintain that the accident could not have happened from the causes alleged in claimants' petition but that it was caused by the careless and negligent driving of the automobile and that the high rate of speed at which it was being driven, made it impossible to negotiate the curve or approach to the bridge in question, and thus caused the automobile to leave the highway, go over the embankment, and causing the death of one of its occupants and the injuries to the other two.

Another factor that presents itself prominently in the consideration of this case is that at least the driver of the car and the claimant, Mrs. Julia W. Scott, were fairly well acquainted with the road, as well as with the approach to the bridge in question. The claimant James C. Scott testifies that he passed over the road several years before and that he had also passed over it going in an opposite direction on the morning of the accident. His mother, Mrs. Julia W. Scott, in her testimony says (record p. 97) that just a week or so previous to the accident she and her said son had passed over the road going to Oak Hill on one day and returning home the next. Their trips to Oak Hill were occasioned by reason of the fact that a daughter of the claimant Mrs. Scott lived there, (a sister of the claimant, James C. Scott) and that they had passed over the road in making the visits to the said daughter's home. Under these circumstances and conditions, these claimants had, or ought to have had, a fair knowledge of any dangerous conditions that might exist with reference to passing over the said road in question and were charged with the duty of using such care and caution, and have the car running at such rate of speed at the time, especially so, as it was raining, that the approach to the bridge could be made safely and without any harm to the occupants of the car. We are of the opinion that the car was being operated at a high, improper and dangerous rate of speed. To repeat, the claimant James C. Scott says that he was running at 30 miles per hour, or perhaps a little better; a violation of the speed limit where the accident occurred and consequently such negligence as would ordinarily

bar a recovery, *Ambrose* v. *Young,* 100 W. Va. 452, 130 S. E. 810, the said Trooper Seal having testified (record p. 40) that the speed limit where the accident occurred is 15 miles per hour. When we take into consideration the further fact of the location of the car with reference to the approach of the bridge, after the happening of the accident, and find that it was from 75 to 100 feet down the creek and away from the bridge and that the claimant, Julia W. Scott, was thrown from the automobile, a distance of about 50 feet from the bridge, then we are driven to the conclusion that, if the automobile had been traveling at the proper and lawful rate of speed, under all the attendant circumstances, it would have been impossible for it to have gone a distance indicated, after going over the embankment.

Under all the circumstances, the negligence of the driver was likewise the negligence of the other occupants of the car, since nowhere is it shown that any protest was made by them, or either of them, to the driver, concerning the operation of the car and its speed at any time previous to the happening of the accident. See *Oney* v. *Binford,* 116 W. Va. 242, 180 S. E. 11.

It is contended that there were no warning signs along the road at and near the place of the accident, but we fail to comprehend how the presence of these signs could have in any way prevented the accident. Claimants knew or ought to have known the road, its condition and dangers if any, and the presence or absence of warning signs, could not seemingly, under the circumstances in our opinion, have influenced the driver in the operation of the automobile. It was raining and was beginning to get dark; proper care and caution were required whether signs were present or not.

We are of the opinion, therefore, that the negligence of the occupants of the car was the approximate cause of the accident and that their negligence was such as to bar a recovery and consequently an award is denied.

(No. 350—Claim denied)

ELMER CLYDE BALL, Claimant,

v.

DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed October 12, 1944

Where one purchases a team of horses from one of the state departments at a public sale without any guarantee of any kind being given him as to the soundness and physical condition of the horses, and after he has seen them and made his own investigation at the time of the sale, he assumes all risk and cannot recover against the department in question for any defects appearing after the consummation of the sale.

Appearances:

Elmer Clyde Ball, the claimant, appearing in his own behalf;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, Elmer Clyde Ball, prosecutes a claim in an amount approximating $125.00 against the department in question on the ground that on or about the 4th day of May, 1943, the said department at a public auction sold an unsound horse to him as one of a pair of horses for which he paid $250.00, including a double set of harness. Claimant maintains that the horse, a mare, was unsound in that, during the heated season, she evidenced a skin disease which made it impossible to work her at that particular season of the year and that consequently he was deprived of the mare's services and should be reimbursed for half of his purchase price.

The testimony shows that the team of horses was bought at a public sale conducted by the department in question, seem-

ingly for the purpose of disposing of the livestock at a camp on Turtle Creek in Boone County. Claimant admits that he had seen the team of horses before although he had not been near enough to make a careful examination, but on the day of the sale he was close to the horses and did see them and so far as he could ascertain the horses were in good condition. No guarantee, written or otherwise, was given by the department in question, nor by the auctioneer who conducted the sale acting as the agent for the said department, and nowhere does the testimony tend to show that in any way had the department bound itself to guarantee the horses in question as good and sound and workable in all respects. Claimant evidently took the horses as he saw them, paid the amount he bid, and a month or so later maintains that the skin disease appeared and that this was the first that he knew of such condition existing so far as the mare was concerned. Under the testimony, as shown by the record, the department made the sale and the claimant the purchase without any guarantee of any kind passing between them. The claimant therefore assumed whatever risk there may have been so far as the physical condition of the horses in question was concerned. The evidence does not even show that he made any particular inquiry with reference to their physical condition.

Under these circumstances and the testimony as submitted, we deny an award.

(No. 367—Claim denied)

LEWIS WOOFTER and DOLLIE HALL WOOFTER, his wife,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 12, 1944

The duty of the state or highway commission in the matter of the removal of obstruction caused by snow or ice is a qualified one, and if ordinary care is used by the state or its department in charge of the roads at such times or in the winter months, and an accident happens nevertheless by reason of such snow or ice the state is not liable.

Appearances:

Herbert M. Blair, Esq., for the claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

On January 3, 1944, claimant together with his wife, also a claimant, and 15 year old daughter left their home in Weston, West Virginia, to drive in their automobile to Auburn, in Ritchie county, for the purpose of visiting relatives in the latter place. They drove from Weston to Linn in Gilmer county and then to what is known as Cox's Mills from which point they turned on a secondary road in the direction of Auburn in Ritchie county. Leaving Gilmer county and about 150 feet after crossing into said Ritchie county, claimant maintains (record p. 11) that he could feel from the action of the car that there was ice on the road which couldn't be seen, however, it was slick and smooth and by reason of the said icy condition on the said highway claimant's automobile began to skid and slide and some distance down the hill from where they had crossed into Ritchie county, the automobile went over an embankment causing the injures to claimants as set forth in their petition, and injuring and damaging said automobile.

Claimants maintain that the state road commission was at fault in not having the highway in Ritchie county cleared of the ice and snow, which they contend had been caused by a fall of snow some days previous, followed by rain and freezing weather causing the ice on the road and making it dangerous for public travel. No defect in the road or highway in question is alleged, save, of course, the matter of the accumulation of the ice and claimants prosecute their claims solely on the ground that the state road commission and its employees were derelict in the duty they owed to the traveling public in failing to clear the road in question of the ice that had formed by reason of the weather conditions prevailing at the time. True the petition further alleges that there were no guardrails at and near the embankment where the automobile left the road, but an analysis of claimants' petition, as well as of the testimony submitted during the hearing, plainly indicates that the absence of guardrails at the place in question had nothing to do with the happening of the accident nor did their absence in any manner seemingly aggravate the extent of the injuries to claimants or to the automobile being driven by them.

Under these conditions and circumstances, assuming that claimants sustained the injuries both to themselves and their automobile, was the state road commission liable and should an award be made under the facts and testimony adduced, to the claimants? The accumulation of the ice forming on said highway on the Ritchie county secondary route NO. 7, between Auburn, Ritchie county and the Gilmer county line, took place sometime between ten o'clock on the night of January 2, 1944, and early on the morning of January 3, 1944.

At common law a state or highway commission was not accountable for injuries sustained by reason of defects in a highway; and especially so, do the authorities seem to hold, with but few exceptions, that in no instance can a state or highway commission or a department thereof be held accountable for injuries sustained by reason of an accident caused by ice or snow on any of its highways. Ordinary care is undoubtedly the limit of responsibility on the part of a state or highway commission where injuries are caused by icy conditions on the highways; and the question, therefore, presented

to us for our consideration and determination is whether, under all the circumstances and testimony adduced in this case, the state used ordinary care in its supervision of the highway in question and in keeping it in proper condition for public travel.

As heretofore stated there were no defects in the highway so far as the testimony shows or the petition alleges save the matter of the accumulation of ice after a freeze already referred to. The matter of guardrails is eliminated from our consideration of the merits of the claims by reason of the fact, that the undisputed testimony is that the road at the place or near where the accident happened, that is where the automobile left the road, had a berm on each side about 7 feet in width making the road approximately 28 feet wide. With such width on which to travel and considering that it was a secondary road, of which there are about 700 miles in Ritchie county, the state cannot be expected to erect barriers or guardrails where no apparent danger exists and where the use of proper care and caution would make travel safe under ordinary conditions. To be obliged to maintain such guardrails on all roads of this character, as wide as it is and without apparent danger, would almost bankrupt the state and make it impossible to keep any of its roads, primary or otherwise, in proper, passable condition. A duty of such magnitude is not imposed on any state so far as the maintenance and upkeep of its highways are concerned.

The duty of the state road commission or its employees was undoubtedly a qualified one, under the circumstances. There was no statutory obligation on the road commission for the removal of ice and snow and only reasonable care is required to keep a road fit for travel during the winter months. This is especially true with secondary roads or those lightly traveled.

The testimony shows that the road employees, at least several of them, located in Ritchie county were engaged on this particular morning in making a survey of the primary roads, the roads over which there would be the most travel to ascertain their condition and to determine what if anything, would be necessary on the part of the road employees to make the

said primary roads safe for travel at the time indicated. Testimony further shows that one of the employees who was prevented from coming to work that morning by reason of the rain, shortly after hearing of the accident went to the scene and began flagging whatever traffic there might be on this hill road in order that no other accidents would occur there that morning. He had telephoned to the headquarters at Harrisville from Auburn for cinders previous to the time he had gone to the hill in question. He remained at and near the scene of the accident flagging and caring for traffic for several hours, or until the ice had disappeared, about twelve noon or one o'clock on the day of the accident.

While it is unfortunate that the accident occurred, yet it would appear from all of the testimony, and we so hold, that the state road commission or its employees and superintendent in charge of maintaining the roads in Ritchie county were not guilty of any negligence and that consequently the state would not be liable in damages under the claims as filed and the testimony as submitted in the hearing of the said claims. It cannot be expected, of course, that in a county the size of Ritchie, with the many miles of primary roads and secondary roads to control and survey, that the state could have a sufficient number of employees to go over all these roads in a few hours time after a snowfall or the accumulation of ice caused by freezing weather the night before. Weather conditions, by reason of which the ice had been caused, were such that it had rained a day or so before January 3 and then frozen the night before, and this accident happened about ten o'clock on the morning of the third. No report had been made at the highway headquarters or to anyone else until after the happening of the accident and it could not be expected that within the few hours time, the road employees would be able to survey all of the roads in Ritchie county and have them in proper and safe condition. Again it must be stated that to do so would entail a cost so tremendous that it would be prohibitive, and the state could not afford the expense and maintenance of roads with such duties imposed. We therefore refuse awards as to each claim.

(No. 263—Claimant awarded $110.37)

THE DARLING SHOPS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 12, 1944

Appearances:

Messrs. *Brown, Jackson & Knight*, (John D. Morrison, Esq.) for the claimant.

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, a corporation, dealing in women's dress goods and having a store or place of business at 342 West Main street in the city of Clarksburg, West Virginia, asserts its claim against the said state road commission for damages in the amount of $110.37 resulting from having two plate glass windows in its storeroom, at the aforesaid address, shattered and broken by loose stones flying or being propelled against the said windows by passing automobiles; which said stones it is alleged were negligently left on the highway in front of claimant's store by the said road commission at the time that changes or repairs were being made to the said highway. The testimony shows, agreed to by stipulation, that during the month of February, 1943, the said state road commission, by and through its agents, servants and employees was engaged in the removal and/or replacement of certain streetcar rails then situate on the said West Main street in the said city, part of which rails were immediately in front of the premises where the claimant operates a retail store. That during the said removal or replacement of said rails, the said commission allowed said stones and rocks

to remain lying on said street and that thereafter on two occasions, namely on the 8th day of February, and the 10 day of February, 1943, passing automobiles struck and propelled said stones or rocks, hurling them against the said plate glass windows causing them to be shattered and broken and causing the damages aforesaid. Claimant alleges that it was negligence on the part of the state road commission, its agents and servants, to allow the said stones or rocks to remain on the highway in question, at the time and after the improvements and alterations were being made to the said highway and that said negligence was the approximate cause of the accidents in question and consequently liable for damages in the aforesaid amount.

The stipulation sustains claimant's contention as to the facts. We have heretofore held in claim No. 264, *George S. Bassett & Son* v. *State Road Commission,* that under similar circumstances it was negligence on the part of the state road commission to allow the stones or rocks to remain on the highway at the time and after the improvement or change to the highway was being made or had been made, and that after such improvement all rocks and stones should have been removed to prevent any accident either to those using the highway, passing pedestrians or adjacent property owners. Failure to do so was negligence on the part of the employees or agents of the department involved, for which the state should compensate those suffering damages thereby.

Under all the circumstances and facts as shown we are of the opinion that the claimant is entitled to recover and an award is made accordingly in the amount of one hundred ten dollars and thirty-seven cents ($110.37).

(No. 372—Claim denied)

V. E. MACE, M.D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1944

Where proximate cause of an injury to an automobile from stone on highway is due to lack of care of the driver, no ward for damages will be made in favor of claimant against respondent for alleged negligence not proven.

Appearances:

V. E. Mace, M. D., in person;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

On the morning of March 12, 1944, about six-thirty o'clock, V. E. Mace, a physician of Charleston, West Virginia, accompanied by his secretary and her mother, while driving in an automobile at a speed of about thirty miles an hour, from Charleston to Mullens, over route 19, near Cotton Hill, in Fayette county, West Virginia, had his car injured by being driven into and over a large stone in the road and claimant asks an award of $101.74, for the cost of repairing damages to the car. The boy operating the car is now in the United States Navy and cannot appear as a witness.

At the place where the accident occurred, during rainy and freezing weather, rocks fall on the road from the cliff on the side of the road, and because of this, a road sign, twenty-four by twenty-four inches, painted yellow and with an inscription "Caution—Falling Rocks" in large black letters is placed

about two hundred feet distant on the side of the road approaching this area from either direction. This fact is established by state's witnesses, although it is denied by claimant's witnesses, who failed to see the sign as they neared the rocks.

The road superintendent having in charge this portion of the road continuously patrolled it and in bad weather removed stones several times a day and at night placed a guard here. At the time of the accident it was raining hard. There is a slight curve in the road not far from the danger area but there is a view of about a thousand feet, and while on this morning the visibility was poor, the evidence shows that large rocks could have been seen in time to stop the car. The paved road opposite the cliff is eighteen feet in width and has a shoulder, or berm of twenty feet making a roadway thirty-eight feet in width, and large falling stones do not roll but a short distance from base of cliff and it is possible with ordinary care to avoid striking them.

The court is of opinion that if reasonable care had been exercised by the driver of the car, this danger could have been seen and the injury to the car avoided, and for this reason no award is made.

(No. 376—Claim denied)

HAZEN H. FAIR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1944

Where alleged negligence of respondent causing injury to claimant's property is not proven, an award will not be made.

Appearances:

John K. Chase, Esq., for the claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

On the 16th day of August, 1941, Hazen H. Fair, a trucking contractor, had six trucks engaged in hauling coal from Hitchum Coal Company's plant in Benwood, West Virginia, to industrial plants in Moundsville, West Virginia. While Levi Conner, one of his operators was driving a 1941 Chevrolet one and one-half ton empty dump truck along state route NO. 2, commonly known as the Narrows Hill Road, about 3:30 o'clock in the afternoon, the truck bed was struck by a cut stone, approximately two feet by nine or ten inches square, which had rolled from the hillside, and broke through the steel bottom of truck, damaging the truck bed beyond repair. Claimant alleges accident was caused by negligence of respondent's workmen engaged in building a retaining wall above the cliff over which the stone rolled and for which damages he asks for an award of $373.00 against the respond-

ent; the driver of truck is in the armed forces and could not be introduced as a witness. Claimant was the only witness in his behalf and his testimony concerning the accident was largely based upon what he had been told by his driver. The evidence of state's witnesses, employees of respondent, supported by copies of their daily reports, shows that no work was being done by respondent at that time and date at this point, although claimant stated that on that afternoon he went to hilltop and that a number of men were then there employed in dressing stone and building a wall.

Evidence does not show negligence of respondent and no award is made.

(No. 353—Claim denied)

LUSINDA VARNEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1944

Where alleged negligence of respondent causing injury to claimant is not proven, no award will be made.

Appearances:

W. H. D. Preece, Esq., and Messrs. *Hall & Benson (Larry W. Andrews,* Esq.,), for claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

About 9:15 o'clock on the morning of the 27th day of March, 1943, a bus of the Logan-Williamson Bus Company, driven by Raymond Preston, on U. S. route NO. 52, headed in the direction of Williamson, had stopped to discharge passengers on the right side of the road, before making a highway crossing into Borderland, Wayne county, West Virginia.

An automobile, owned and driven by Granville Goff, in opposite direction from the bus, suddenly stopped and a three ton White road dump truck of respondent, driven by Clyde Waller, following, struck the automobile, which caused it to roll across the road a distance of about twenty feet and to strike the bus.

Claimant alleges that respondent's truck was being driven at an unlawful rate of speed and that negligence of its driver was

the proximate cause of the collision of truck and automobile, and of it with the bus, which threw claimant from her seat in the bus and caused injuries for which she asks for an award of $7,500.00 against respondent.

At the time of the accident, it was raining, the road was wet and slippery, visibility was good, the truck was being driven at a speed of about twenty or twenty-five miles an hour, when within approximately one hundred feet of the Goff car, a signal for left turn was given by the driver of the car who, instead of following his given signal, stopped his car. The driver of the truck, when the car stopped, by putting on brakes was unable to stop but succeeded in reducing speed of truck to nine or ten miles an hour and the force of the collision of truck with car was sufficient to move car across the road into the front of bus, breaking a fog lamp.

Evidence of two witnesses, bus passengers and the driver of bus, was that the jar of car striking bus was so slight that it was not noticed by them and that they did not see any one in any way affected by it. That the seats and nothing in bus were moved or displaced and that no one in bus, including claimant, in any way complained of injury or inconvenience by reason of the collision. That the bus driver had no knowledge of and was not notified of any injury to claimant until four days later.

The evidence indicated that the accident was caused by the driver of car not having driven in accordance with his given left-turn signal.

The testimony of the doctor to whom the claimant was going for treatment for menopause was that he thought her condition was aggravated since his last examination and which was probably caused by the accident, but that he thought that claimant had sustained no permanent injury.

No negligence of respondent having been proven, no award is made.

(No. 351—Claim dismissed)

JESSE WRIGHT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1944

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Grover C. Belknap, Esq., for claimant;

W. Bryan Spillers, Esq., assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

Jesse Wright, the claimant in this case, is a negro octogenarian of Braxton county, West Virginia. He is a thrifty, upright man and a good citizen. Since the death of his wife 14 years ago he has resided alone on a farm of about eighty-seven and one-half acres of land which he owns on Grannies creek, approximately two miles from the town of Sutton, the county seat, on United States route NO. 19. On the 16th day of April, 1940, he entered into an agreement in writing with the state road commission by the terms of which he gave the commission an option to purchase, within the term of one year, a right of way through a designated part of his land for the purpose of constructing, building and maintaining thereon a state road or highway at the price of $400.00. At that time the existing state road ran around the hill on the upper side of his residence. He was advised that the road commission decided to make a change in the location of this road and that the center line of the new road would pass through about the middle of his dwelling house and extend from the line of his land near-

est to Sutton to the property of a neighbor by the name of Berry, as shown by the survey. Instead of building the road as thus surveyed and for the distance designated when the option was executed the road commission went 60 or 70 feet away from that proposed route and constructed the road on an entirely new and different location along Grannies creek for the entire length of his property, being practically twice the distance which he had been informed that the route would embrace according to the original survey. It also changed the course of Grannies creek. To do this it channeled out large sections of claimant's land, using the soil thus obtained in grading a new road.

The evidence disclosed that the road commission has occupied the very best part of claimant's land being the bottom land of the farm. By reason of the improvements made claimant's access to all of that part of his farm lying to the north or northwest of Grannies creek has been cut off from access thereto. It is obvious to the court that the state has not only taken his land for public purposes without paying him just compensation therefor but that he has been seriously and grievously damaged. It is unnecessary, we think, to make further statement of the facts. His claim is one of the most meritorious yet presented to the court of claims for consideration. The members of the court are unanimous in their judgment that claimant's case is possessed of exceeding merit. According to the evidence he has been grievously and unjustly imposed upon. We believe, however that the court is without power to make an award and that its jurisdiction to do so is excluded by subsection 7, section 14 of the court act. It is expressly provided that the jurisdiction of the court shall not extend to any claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. We feel that the court is bound by *Hardy* v. *Simpson*, 116 W. Va. 440, 191 S. E. 47, and *Riggs* v. *Commissioner*, 120 W. Va. 298, 197 S. E. 813. In the case of *F. F. Cottle* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 84, we laid down this rule:

> "The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of a claimant in the courts of the state."

If we are without jurisdiction to consider a claim and act upon it, however meritorious in our opinion the claim may be, we are helpless in the premises.

In this case we are satisfied that a great wrong has been done to the claimant. His land has been appropriated and used for public purposes. He has, as the record clearly shows, been damaged. He fixes the amount of his damage at $1000.00. If we had the power to do so we would unquestionably make a substantial award in his favor.

However, because we are of the opinion that our jurisdiction of the claim is excluded by the statute in view of the holding of our Supreme Court of Appeals in the two cases above cited, an award is denied and the claim dismissed.

We are not aware of any reason that would preclude the presentation to the Legislature of a special bill for the relief of claimant.

G. H. A. KUNST, Judge, concurring.

I concur in the finding that the court has no jurisdiction in this case, but am of opinion that no matters should have been considered on the hearing other than pertaining to the plea to the jurisdiction and do not think any opinion as to the merits of the claim should be expressed by the court.

(No. 352—Claim dismissed)

JESSIE WILLIAMS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1944

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Grover C. Belknap, Esq., for claimant;

W. Bryan Spillers, Esq., assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Jessie Williams is the owner of a lot or parcel of land containing one and one-sixth acres situate on Grannies creek, contiguous to United States route 19, about one mile north of Sutton, in Braxton county, West Virginia. On this lot she has erected a comfortable modern one-story dwelling house, at an initial cost of about $1650.00. As now improved it is valued by claimant at about $2500.00. It is located on the rear of the lot. Immediately in front of this residence is a very pretty lawn. The property abuts on one side on a secondary road. The land from the lawn to Grannies creek is loose, sandy fertile soil.

In making improvements on route 19 the state road commission made a change in the course of Grannies creek. At a certain point not far distant from claimant's property there was a bend in the creek, making a sharp turn. In order to straighten the stream at this point and take the sharp turn out and thereby make the creek almost a straight line the

road commission caused a culvert to be constructed, which would take the water from the stream at the point of the culvert instead of letting it run in its natural and original course. At the end of the culvert adjacent to claimant's property a large section of earth was channeled out. The water from the culvert was cast in a body where the earth had been removed and created a large pool. Every time that there is a freshet or high water portions of claimant's property would be washed away. As a result of this condition practically everything growing on claimant's garden was destroyed at one of these times. The evidence shows that a strip between 75 and 100 feet long and possibly at the deepest place about 12 or 15 feet on claimant's property has been wholly washed away. When the last flood in that vicinity occurred the high bank next to the property was washed away, thereby further endangering the property of claimant. This flood washed a section of ground away from the culvert at the point of what was the high bank. Claimant's premises lay just a little bit lower than this bank next to the channel. By washing it out a small flood will possibly get a little more of the soil from her property. After the water passes through the culvert it washes on through and upon the premises of claimant. The high ground was removed by the road commission. The water will probably keep washing away the soil.

The evidence shows that claimant has already suffered substantial damages and that such damages will continue from time to time unless a wall of concrete or stone shall be built to protect the property.

Claimant's damages up to the present time are variously estimated. Substantial witnesses from Braxton county place such damages from $600.00 to $1000.00 and say that they are continuing in character.

The members of the court are unanimous in the opinion that the claim is meritorious and would, if it were in their power, make an award therefor, but believe that the court is without power to make such award and that its jurisdiction

to do so is excluded by subsection 7, section 14 of the court act. It is expressly provided that the jurisdiction of the court shall not extend to any claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. We feel, however, that the court is bound by *Hardy* v. *Simpson,* 116 W. Va. 440, 191 S. E. 47, and *Riggs* v. *Commissioner,* 120 W. Va. 298, 197 S. E. 813. In the case of *F. F. Cottle* v. *State Road Commission,* 1 Ct. of Claims (W. Va.) 84, we laid down this rule:

> "The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of a claimant in the courts of the state."

Counsel for claimant, at present a member of the State Senate and an astute lawyer, will, we think, readily understand the court's limitations. If we may assume jurisdiction in one instance not conferred by a statute there would be nothing to preclude us from doing so in all cases. We can only make an award in those cases in which power is expressly conferred upon us to do so. We know of no reason that would preclude the presentation to the Legislature of a special relief bill in the instant case.

Only for the reason that we do not have power to make an award, an award in the case is now denied and the claim dismissed.

G. H. A. KUNST, Judge, concurring.

I concur in the finding that the court has no jurisdiction in this case, but am of opinion that no matters should have been considered on the hearing other than pertaining to the plea to the jurisdiction and do not think any opinion as to the merits of the claim should be expressed by the court.

(No. 380—Claimant awarded $30.25)

PAUL MALLOW AND BEULA MALLOW, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1944

An award will be granted when a fence, forming the boundary between land of claimants and right of way of respondent on claimants' land and keep up and maintained by them for over twenty-five years and not constituting an obstruction to the right of way, is without notice to claimants deliberately destroyed by employees of respondent without legal justification.

Appearances:

Beula Mallow, for claimants;

W. Bryan Spillers, Esq., assistant attorney general, for respondent.

G. H. A. KUNST, JUDGE.

Claimants allege that respondent, without notice or asserting that a fence on their land bounding the right of way of respondent obstructed same or constituted a nuisance, deliberately destroyed it and they ask an award of $30.25, the cost of replacing the fence.

Witnesses, officials of respondent, state that a search of the records of the office of the clerk of the County Court of Pendleton county, West Virginia, in which said land and right of way are located, made by witnesses, assisted by the clerk of said court, showed that in the year 1859 this road was established in accord with the statute, but that no report was found, giving its location and width, which report was thought by the clerk to have been destroyed by a fire which burned the court house. The court record found, determines the fact that this right of way of respondent was not acquired by dedication or

prescription and consequently the presumption does not arise that its width was fifteen feet on each side from center of traveled way.

It was proven that the fence had been in existence for twenty-five years and probably a much longer time and during that period kept up and maintained by claimants and former owners of the land. The plats filed as exhibits by respondent and evidence of its witnesses show the right of way here and its extensions to be twelve to fifteen feet in width; that the fence extends for over nine tenths of its length along and near the bank of a creek; which bank is acute and its top forty to sixty feet from the bed of the creek, making it very improbable that the right of way extended beyond the fence and not feasible to extend its width on that side. It is not shown that the opposite side of the road is fenced but it is shown that the width of the road could be increased to the statutory requirements on that side.

It might have been possible to determine the established width of this road by the records of the court as to the width of rights of way through adjoining tracts of land, or by surveys of claimants' land and land on opposite side of the right of way, but no such evidence was produced. However, it is proven by evidence of claimants and also by respondent's witnesses that the fence was and now is on the land of claimants and does not constitute an obstruction to the right of way. It is admitted that notice was not served on claimants to remove fence as an obstruction and that previous use of a grader by respondent on the road, by piling dirt on the fence, had narrowed the traveled way and the weight of dirt had probably been the cause of the bank of creek giving way at one point back to the traveled way necessitating destruction of fence in order to use a grader and the placing of large stones on creek bank to hold the berm of roadway at place where broken.

The promise of one of respondent's officials, but not kept, that the fence would be replaced evidenced that there was

no legal justification for the destruction of fence. An award is made to claimants for thirty dollars and twenty-five cents ($30.25), the amount shown to have been the cost of rebuilding the fence.

ROBERT L. BLAND, Judge, dissenting.

The state court of claims was called into existence by the Legislature of 1941 as an experiment. It is now in its probationary state, or formative period, and is not yet an established institution. It is especially important to guard carefully against the creation of dangerous precedents for the recommendation of appropriations of the public revenues. There should be no award in a case where the right of the state or any of its agencies to exercise an essential governmental function is challenged. While the amount of the award in this case is small, the principle involved is great, and far-reaching in its scope and effect. The road commission, as an administrative department of the state, is given certain discretion in the performance of the duties imposed upon it by law, such as the duties incident to the repair and maintenance of the public highways and roads under its exclusive control and supervision. If it sees that encroachments on its road rights-of-way obstruct or impede the public use and travel thereon, who can say that it does not have the power to remove such obstructions and use such roads to the full width of the rights-of-way, if it be necessary to do so? Abutting property owners cannot direct the commission how or in what manner it shall discharge the duties imposed upon it by legislative authority. To do so would result in chaos and cause endless confusion and trouble.

The property of claimants lies on one side of what is known as the Reed Creek secondary road, 1.35 miles southwest of United States route NO. 220, in Pendleton county. This road was established in 1859 and has ever since been maintained at public expense. The record does not disclose the width of the road at the time it was established, but it does show that it appears from record book A in the office of the clerk of the

county court of Pendleton county, that viewers were appointed to lay out the road in the year 1859, and that there is likewise a reference to the filing of their report, but the report itself has not been found. It is thought to have been destroyed when the courthouse was burned in 1924.

Reed creek runs through the land of claimants on the west side of the road and close to the traveled part of it. The fence enclosing the property was constructed between the creek and the outer edge of the traveled portion of the road and very near to the edge of the road. It is shown by the testimony of E. K. Bowman, a highway engineer of the road commission, that the traveled portion of the road is from 10 to 12 feet in width. This witness made a survey of the road showing its location, the location of a fence which is claimed to have been destroyed by respondent and a new fence thereafter built by claimants. A plat of his work was filed with his testimony. When asked if it was the claim of the state that the old fence maintained by claimants was on the right-of-way as established prior to the time that he made his survey, he answered: "Yes, sir, the fence was close enough that if you put a grader in there you couldn't get a grader down without getting into it." George D. Moyers, supervisor of roads for Pendleton county, and a witness introduced on behalf of the state, testified that he was familiar with the claim made that a portion of the fence of claimants was allegedly destroyed or damaged by the road commission and testified that the mail carrier and the school bus man had reported to him that the condition of the road was dangerous. He further testified that the creek runs right close to the road "And it had undermined the fence and the posts fell over and washed back pretty well—well, I would say to one track of the road. Then we went in there and we tried to get this old fence out which was covered up by the washout of the run. After we couldn't get the fence out, we built the berm back up, slipped some big rocks down to widen the road to eliminate the dangerous part of it, and then after this was done these folks, Miss Mallow and her brother Paul, came and built a fence right along on the berm

that we built which sets the fence about three feet closer to the run."

It seems clear to my mind that the fence of claimants which they charged to have been torn down or covered up by dirt removed from the road was actually built and maintained on the road right-of-way.

In *County Court of Raleigh County* v. *Minter,* 103 W. Va. 386, it is held in point 2 of the *syllabus* as follows:

> "Under sections 3 and 130, chapter 43, Code, making all county-district roads, however established, thirty feet in width measured fifteen feet on either side from the 'center of the traveled way,' the dedication in such case, in the absence of proof to the contrary, will be presumed to have been of a right-of-way thirty feet wide."

Such presumption is not overcome in this case by any evidence found in the record. The statute cited expressly provides that in the absence of any other mark or record, the center of the traveled way shall be taken as the center of the road. It not infrequently happens that boundary fences are built upon road rights-of-way, but when the public use requires it they may be compelled to be removed.

"Any encroachment on a public street or highway is a 'purpresture,' and, if the public use is impeded or rendered less commodious, such encroachment is generally not only a purpresture, but also technically a 'public nuisance' regardless of the degree of interference with the common enjoyment." *Southeastern Pipe Line Company* v. *Garrett, Solicitor General,* (Ga.) 16 S. E., 2nd Ed. 753.

"Where a road is established solely by an implied dedication or by prescription, its width is not extended by statute beyond fences on each side of the way constantly maintained by the owner of the land through the period of user." *Reip* v. *County Court of Calhoun County,* 110 W. Va. 7, 156 S. E. 754.

The declaration in that case alleged ownership by the plaintiff of a farm for many years; that about 30 years prior to the suit, without obtaining any right whatsoever from him, the county court constructed and had since maintained a roadway through his land, and that he limited the width of the way to 20 feet by fences on either side of the way, from the time it was opened until December, 1928, when the county court again, without permission from him, tore down the fences on both sides of the road and widened the way to 30 feet. The case was heard and decided upon a demurrer interposed to the declaration. It went to the Court of Appeals and was there decided as above indicated.

The situation here presented is entirely different from the facts of that case, and the presumption is that the Reed Creek road has a width of 30 feet.

In re claim of *Clark* v. *Road Commission,* 1 Ct. Claims (W. Va.) 232, we stated in the opinion on page 233, as follows:

> "All claims asserted against the state or any of its agencies must be established by satisfactory proof before awards may properly be made for the payment of them."

Beula Mallow, one of the claimants, was the only witness who testified in support of the claim in this case. When asked to state what she had to say in relation to the claim, she answered: "There really isn't much to it except the fact that this fence was destroyed, covered up, on or after April 28, 1943, which amounts to $30.25 to get it repaired." The proof relied upon by claimants wholly fails, in my judgment, to show that their claim is a meritorious one against the state. The evidence clearly reveals that the fence in question actually occupied a part of the road right-of-way.

I would deny an award and dismiss the claim.

(No. 385-S—Claimant awarded $302.17)

LUTHER C. DULANEY d/b/a Dulaney Motor Company,
Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 23, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Luther C. Dulaney, is engaged in the business of handling and selling automobiles in the city of Wheeling, West Virginia, and as such was required to file with the state tax commissioner its business and occupation tax report, under the so-called gross sales act; and in the year 1937 paid a total tax of $1036.59 as its gross sales tax due and payable to the state. An examination later by the representative of the state tax commissioner's office revealed that the tax had been overpaid and that claimant was entitled to a refund of $302.17. Application was duly and legally made to the state tax commissioner's office for the said refund and the matter is submitted to this court for its consideration.

The state tax commissioner agrees that the claimant is entitled to the refund aforesaid and the attorney general's office, through the assistant attorney general, approves the claim as one in which a refund should be made to the claimant in the amount aforesaid. Accordingly we make an award to the said claimant, Luther C. Dulaney, doing business as the Dulaney Motor Company in the amount of three hundred two dollars and seventeen cents ($302.17).

In view of the fact that the claim is presented in the name of the Dulaney Motor Company which is the business name used by the owner, Luther C. Dulaney, receipt should be executed accordingly if and when the legislature authorizes the payment of the claim by an appropriation to be made in accordance with the facts herein set forth.

(No. 390-S—Claimant awarded $948.67)

TELEWELD, INC., Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 23, 1944

Appearances:

Claimant, appears in its own behalf by its Treasurer.

W. Bryan Spillers, Esq., assistant attorney general, for the state tax commissioner.

CHARLES J. SCHUCK, JUDGE.

Teleweld, Inc., a corporation of the state of Illinois, was employed by the Baltimore & Ohio Railroad Company, during the years 1936 to 1941 inclusive, excepting, however, the year 1938, in welding railends, frogs and crossings for the said railroad company and was so engaged during the said period in the state of West Virginia; and consequently was charged with a tax on its gross proceeds under Item E (Contract Classification as provided for in the Business and Occupation Tax Statute of our State) and during the period so engaged paid to the state tax commissioner's office a total of $1771.09. After the payment of the said tax it was discovered that the income should have been reported under Item H (Service Classification) and the tax paid at the rate of $1.00 per $100.00 instead of $2.00 per $100.00, as provided in Item E classification. The agreement between claimant and the Baltimore & Ohio Railroad Company, reveals that the work performed was a maintenance service, rather than a construction contract and that consequently the claimant was charged with an excessive tax.

Application was duly and lawfully made by the claimant to the state tax commissioner's office for the refund accordingly.

It appears from an examination of the record as filed, that claimant overpaid the state in the amount of $948.67 for which an award is asked in this court.

The state tax commissioner, as well as the chief auditor of the business and occupation tax division agree that the claimant overpaid its taxes in the aforesaid amount and the matter is now submitted under section 17, article 2, chapter 14, of the state court of claims law. The attorney general's office, through the assistant to the attorney general, upon examination of the claim approves it as one that should be paid and we agree with the conclusions reached both by the state tax commissioner and the attorney general in the matter of the refund of the overpaid taxes. Accordingly an award is made to the claimant in the amount of nine hundred forty-eight dollars and sixty-seven cents ($948.67).

(No. 410-S—Claimant awarded $146.93)

V. E. CASSADY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 24, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, V. E. Cassaday, a resident of Petersburg, West Virginia, seeks reimbursement in the sum of $146.93 as damages to his car or automobile caused by a state road tractor or grader colliding therewith while his car was parked on the highway known as North Main street in the said town of Petersburg.

The record as submitted reveals that the said state road tractor while approaching claimant's car on an elevated curve caused the tractor to suddenly skid sideways on the low side of the curve crushing claimant's car against the sidewalk. No negligence is imputed to claimant.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of one hundred forty-six dollars and ninety-three cents ($146.93).

(No. 411-S—Claimant awarded $80.60)

DEWEY GRAY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 24, 1944

CHARLES J. SCHUCK, JUDGE.

Claimant, Dewey Gray or *Grey*, of Cowen, West Virginia, seeks reimbursement in the sum of $80.60, which amount he was obliged to pay for repairs to his automobile damaged by state road truck NO. 730-50. From the record as filed, it appears that on September 20, 1944, while claimant's car was parked in front of a filling station in Cowen, the state road truck, driven by a state road employee, in approaching the said parked automobile slipped or skidded into claimant's car causing the damage which entailed expenditures of the amount in question. It appears that the driver of the state road truck attempted to stop his truck, but was prevented from doing so as he states, on account of the condition of the road. No negligence of any kind is imputed to claimant.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of eighty dollars and sixty cents ($80.60).

(No. 412-S—Claimant awarded $24.94)

A. C. BARKER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 24, 1944

ROBERT L. BLAND, JUDGE.

On September 24, 1944, state road commission truck NO. 430-131 was traveling west on the Fairmont-Grafton turnoff in Marion county, West Virginia. It was going to turn into Joe Harry street. The driver of the road commission truck gave the proper arm signal for a lefthand turn, when an automobile traveling in the opposite direction forced his truck to a complete stop. After the car had passed the state road commission truck the driver of the truck realized that the truck was too far forward, and attempted to back it, and in doing so it struck claimant's car which had pulled directly behind and to the right of the state vehicle. Claimant's car, being directly behind and to the right of the truck, the driver of the truck was afforded no opportunity to observe the claimant's car through the rear-view window.

In order to repair his truck claimant was obliged to pay $24.94, as shown by itemized receipted bill therefor, made a part of the record.

The claim is concurred in by the head of the department concerned and its payment is approved by an assistant attorney general. An award is made in favor of claimant, A. C. Barker, for the sum of twenty-four dollars and ninety-four cents ($24.94).

(No. 413-S—Claimant awarded $8.16)

MARY HARRIS REYNOLDS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 24, 1944

ROBERT L. BLAND, JUDGE

The claim involved is for the sum of $8.16. It is submitted to the court by the state road commission, under the provisions of section 17 of the court act. The record of the claim, prepared by the road commission, was filed with the clerk on October 17, 1944. From this record it appears that on September 16, 1944, state road commission truck NO. 430-88, operated by James C. Casto, was in a privately-owned lot of Consolidated Supply Company, in the city of Charleston, West Virginia, gathering cinders. As the state road commission driver was backing into the loadway position his foot slipped off the brake of the truck and the truck collided with a parked automobile owned by the claimant, causing such damage thereto as necessitated the payment by her of the sum of her claim to have it repaired.

The claim is concurred in by the head of the department concerned and its payment is approved by an assistant attorney general and an award is made in favor of claimant, Mary Harris Reynolds, for the said sum of eight dollars and sixteen cents ($8.16).

(No. 417-S—Claimant awarded $5.00)

T. O. EVERHART, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 25, 1944

ROBERT L. BLAND, JUDGE.

The record of the claim in this case was prepared by the road commission and filed with the clerk October 17, 1944. The facts disclosed by this record are meagre. It does appear, however, that while employees of the road commission were blasting rock on a state-controlled road near claimant's home in 1938, a rock hit his property, causing damage thereto to the extent of $5.00. It is suggested that records should be more completely prepared than has been done in this case. However, since the state road commission has concurred in the claim and it has been approved for payment by an assistant attorney general, the court may reasonably assume that they have thoroughly investigated the facts and circumstances in relation to the claim not shown in the record; and an award will therefore now be made in favor of the claimant, T. O. Everhart, for the said sum of five dollars ($5.00).

(No. 416-S—Claimant awarded $10.00)

BENTON SIMMS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 25, 1944

ROBERT L. BLAND, JUDGE

The claim in this case is for the sum of $10.00. It arises out of an accident involving state road commission truck NO. 730-29, on July 7, 1944. The car owned by claimant was parked at Richard, near Morgantown, in Monongalia county, West Virginia, when it was struck by a road commission truck and damaged to the extent of the claim for which an award is sought. The claim is considered informally on the record prepared by the state road commission and filed with the clerk on October 17, 1944. The state road commissioner concurs in the claim and its payment is approved by an assistant attorney general.

An award is made in favor of claimant, Benton Simms, for the sum of ten dollars ($10.00).

(No. 415-S—Claimant awarded $25.00)

ROY L. GROSE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 25, 1944

ROBERT L. BLAND, JUDGE

The claim in this case is informally heard upon a record prepared by the state road commission and filed with the clerk October 17, 1944. On April 26, 1944, when a state road commission truck was moving into a road under the control of the state road commission from loading position behind a large shovel, the driver did not see the approach of an automobile owned by the claimant which was attempting to pass the shovel. As a result a collision occurred. The claimant's vehicle was damaged. To compensate him for this damage the state road commission concurs in the claim to the extent of $25.00, and its payent is approved by an assistant attorney general.

It is suggested for the benefit and convenience of the court that all records submitted under section 17 of the court act should give more facts and details than are found in the record in this case. An award is made in favor of claimant, Roy L. Grose, for the sum of twenty-five dollars ($25.00).

(No. 403-S—Claimant awarded $102.84)

C. R. HILL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 25, 1944

ROBERT L. BLAND, JUDGE.

On July 27, 1944, about noon, claimant's Buick automobile was parked in front of the Mankin Lumber Company on Center avenue—a state highway—in the town of Oak Hill, Fayette county, West Virginia, when state road commission dump truck NO. 938-51, driven by Oather Moran, an employee of the state road commission, then in line of duty, backed into the left side of claimant's car, damaging it considerably. An award of $102.84 is sought to repair this damage.

The state road commission concurs in the claim. It is approved for payment by an assistant attorney general.

An award is now made in favor of claimant, C. R. Hill, for said sum of one hundred two dollars and eighty-four cents ($102.84).

(No. 346—Claim denied)

HERBERT FISHER, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed October 25, 1944

Appearances:

Herbert Fisher, in his own behalf;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, a farmer living near Kenna, Jackson county, claims damages in the amount of $63.64, for injury to an automobile taken or stolen from his premises by two boys, escapees from the West Virginia industrial school for boys at Pruntytown, West Virginia. The testimony discloses that these boys escaped from the institution at Pruntytown and had made their way to the highway in front of the claimant's residence or farm and there took the car in question and were making their escape in it when apprehended by claimant and his father who pursued them in a farm truck having learned of the theft of the car almost immediately after it had happened. This took place on or about the 27th day of January, 1944. The boys in question were thirteen or fourteen years of age and in their attempt to escape in the car, after being pursued, wrecked it causing the damages alleged. Of course, the all-important question concerning the claim is whether or not the department through its superintendent and agents at Pruntytown, was, or were, in any way negligent and if so, whether such negligence contributed directly to the escape of the boys.

The testimony of the superintendent of the institution shows that it is conducted in accordance with the modern rules and regulations as maintained both by the federal and different state authorities for the conducting of a reformatory institution such as the one at Pruntytown. The one boy had escaped on a previous occasion but he, himself, had voluntarily returned to the institution, having just gone over the hill from the school in the escape and evidently changing his mind and returning to it on the same day. The other boy had likewise escaped and had also returned to the institution. The boys in question had never given the superintendent or guards any difficulty or trouble on the school grounds or at any place in the institution; and since the said escapees had been, as the superintendent puts it "among the best kids we have got," they settled down and one of the boys did unusually well at school. The other was a border line case and seemingly more attention was paid by the authorities accordingly.

The testimony further shows that under all the circumstances no closer supervision could have been exercised over these boys than that which was used in the institution while they were there, and before the escape which led them to take or steal claimant's automobile. To repeat again, the superintendent testified they were unusually "good kids" from the standpoint of their conduct at the institution.

Under all these circumstances, we can find no negligence on the part of the department in question and in line with our previous holdings in such cases, we deny an award.

ROBERT L. BLAND, Judge, concurring.

I concur in the conclusion reached by Judge Schuck that there should be a denial of an award for this claim, but I do not adopt the reasons assigned by him in his opinion for such denial.

In the conduct and management of the West Virginia industrial school for boys the state exercises a governmental function. It has not by general law assumed liability for the negligence of its officers and agents in charge of that institution, or for that matter for the negligence of the officers or agents of any of the public institutions of the state. It is said that in the performance of governmental duties, the state is not amenable to individuals. I cannot escape the conviction, so well expressed by another, that "all who demand money from the treasury must show that the claim is warranted by law."

G. H. A. KUNST, Judge, concurring.

I concur in the finding of no award herein, but upon the legal principle that a defendant's negligence is too remote to constitute the proximate cause, where an independent illegal act of a third person intervenes, which, because it is criminal, defendant is not bound to anticipate, and without which such injury would not have been sustained. I consider that this legal principle applies in similar cases heretofore considered by the court.

(No. 345-S—Claimant awarded $32.56)

FIRESTONE TIRE AND RUBBER COMPANY, Claimant,

v.

STATE DEPARTMENT OF MINES, Respondent.

Opinion filed October 26, 1944

G. H. A. KUNST, JUDGE.

This claim is for payment for four tires and tubes delivered to respondent's agent, L. S. McGee, at Shinnston, West Virginia, by claimant, October 10, 1941, under purchase order NO. 1427. dated September 27, 1941.

The invoice was sent to the office at Shinnston and not brought to the attention of respondent at Charleston, West Virginia, for payment. Because of the fiscal year ending on June 30, 1942, the requisition was cancelled on June 15, 1942, so that it would not be carried into the next year. Proof of the delivery of this material is established by the evidence of McGee, but was delayed by reason of his having left the employ of respondent.

Payment of the claim for $32.56 is recommended by respondent and approved by the attorney general and an award of thirty-two dollars and fifty-six cents ($32.56) is made to claimant.

(No. 392—Claim denied)

BLANCHE WILSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 26, 1944

Where alleged inadequacy of a sewer maintained by respondent to carry off storm water from a road, resulted in overflowing water which caused damage to claimant's property is not proven, an award will be refused.

Ralph S. Wilson, for claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

G. H. A. KUNST, JUDGE.

Claimant, owning a house, situated at NO. 3510 Camden avenue, on U. S. route NO. 21, in South Parkersburg, West Virginia, unincorporated, being under the jurisdiction of respondent, alleged, that during a heavy storm on the 23rd day of May, 1943, because of inadequacy of the sewer, which is located at the lowest part of a vertical curve in the roadway, became clogged and the water overflowed and washed away a wall and entered the basement of her property, situated opposite to the catch basin of the sewer and caused damage amounting to $108.16, for which she asks an award.

It was proven that a catch basin covered by two gratings, eighteen by twenty-four inches, having openings one by one and one-half inches, two feet deep, received the water from this drainage area, which was conveyed from the basin through a sewer pipe, twelve inches in diameter, a distance of approximately twenty-five feet to a storm sewer; that the difference

in level from the bottom of the catch basin to the storm sewer was from eight to ten feet; that the sewer was adequate to carry all the water during ordinary and severe rainstorms, but that the overflow of water during the storm of this date was caused by stoppage of the openings in the grate bars of the covering of the catch basin.

The witness Boone, who removed the debris, consisting of rags, boxes, pieces of crates, sticks, sand and almost every kind of trash washed from the higher levels, which covered and clogged the openings of the grate bars, a few minutes after the overflow and resulting damage, testified that the sewer was adequate and sufficient and that upon such removal all overflow ceased and the sewer carried away almost immediately the accumulated water, and that a gaspipe in the sewer did not cause the overflow.

It was shown that the employees of respondent had no notice of any obstruction in the catch basin and that with the large number of such basins in Wood county it would have been impossible to have a man stationed at each during severe storms. An award is denied.

(No. 321—Claim dismissed)

ALTHA E. (DILLON) SOLOMON and F. P. SOLOMON, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 14, 1944

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

E. S. Bock, Esq., for claimants;

Ira J. Partlow, acting attorney general and *W. Bryan Spillers*, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

An award for $7000.00 against the state is sought in this case.

It is alleged in the petition of claimants that on the 28th day of August, 1936, claimant, Altha E. (Dillon) Solomon, wife of F. P. Solomon, was the owner of lots NOS. 1, 2, 3 and 4 of block 24 of Patton's Division of Amandaville, in Jefferson district, Kanawha county, West Virginia, and that said lots had a frontage of 160 feet, more or less, on the Kanawha and James River turnpike, now the Charleston-Huntington highway known as U. S. route NO. 60, in the city of St. Albans, in said Kanawha county, with a depth extending southward from said highway a distance of approximately 160 feet. Said lots were situated on a hillside and were improved by two frame dwelling houses, a large two-story house, in which claimants resided, situated on the easterly half of the parcel of land composed of said lots, and a one-story house situated on the westerly side of said parcel of land, which claimants let out to

rent. The body of the first mentioned house was fifty feet from the front property line and the second house was about forty-one feet from the front property line of said parcel. The land sloped from said residences to the old Kanawha and James River turnpike on a comparatively gentle grade. This slope was and had been for many years well sodded and had remained in the same condition undisturbed in any way by natural or artificial causes.

On the said 28th day of August, 1936, the state road commission of West Virginia, in a proceeding entitled The State of West Virginia by the State Road Commission of West Virginia, a corporation, v. Altha E. (Dillon) Solomon, F. P. Solomon, her husband, et al., filed its petition in the common pleas court of Kanawha county, West Virginia, for the condemnation of a certain described portion of the land owned by the said claimant, Altha E. (Dillon) Solomon. Said condemnation proceedings were prosecuted to termination on the 20th day of February, 1937. The commissioners appointed in said cause filed their report on the 20th day of February, 1937. The award made to claimants for the portion of the real estate above mentioned intended to be appropriated for highway purposes as just compensation therefor, as well as for damages to the residue of said real estate beyond the benefits which would be derived in respect to said residue from the work to be constructed, was the sum of $2,800.00. Said report was confirmed, without exception, by the court and the said sum of $2,800.00 was paid to the owner of said real estate.

In said proceeding the state of West Virginia appropriated for public road purposes an average of 33½ feet off the front part of said lots NOS. 1, 2, 3 and 4. It is averred that in the construction of the highway over and across the part of said lots appropriated in said condemnation proceeding the toe and the sodded portion of the slope in the front of said lots within the limits of the part appropriated were cut away and removed so as to leave a slope from the front line of the residue of claimants' property to the ditch along the southerly side of said lot having a grade of forty-five degrees.

Claimants say that from time to time after the construction of the highway by the state road commission of West Virginia on and over the parcel of land appropriated earth in varying quantities fell away from the embankment left by the state road commission adjoining the residue of said property, and that the earth which fell away from said embankment was removed by respondent after the same slipped away, and that earth has since continued to the present time to slip and fall away from said embankment so that instead of the slope originally contemplated, that is to say forty-five degrees, said slope has become and is materially altered and now presents the appearance of an almost perpendicular wall of earth.

It is further alleged by claimants that as a result of the slipping away of said embankment and the removal of said slips by the state road commission it has destroyed the lateral support which the residue of petitioners' property had at and before the commencement of the work of constructing said road on and over the part of claimants' land taken as aforesaid, and that as a consequence of the removal of said lateral support claimants' residue of the lots, constituting the parcel of land owned by them, as shown upon the map filed with the petition of the road commission in said eminent domain proceedings, and the improvements on said real estate have been and are being greatly injured and damaged. Cracks in the ground and general damages to the two dwelling houses are specifically pointed out.

The state has moved to dismiss the claim for want of jurisdiction on the part of the court of claims to entertain and make determination of said claim. Respondent also, by way of further defense, has filed a plea of *res adjudicata* and contends that the claim involved herein was adjudicated and finally disposed of in the condemnation proceeding above mentioned.

Respondent contends that the damages to the property of claimants, if any, occurred from the construction of a state highway with excavation of forty-five degree embankment slopes and that such alleged damages, if any, that may have

occurred from the said construction work would be recoverable by a proper mandamus proceeding against the state road commission requiring the state road commission to institute condemnation proceedings to ascertain damages upon authority of *Hardy* v. *Simpson*, 118 W. Va. 440, 191 S. E. 47; *State* v. *Riggs*, 120 W. Va. 299, 197 S. E. 813; *F. F. Cottle* v. *State Road* Commission, 1 Ct. Claims (W. Va.) 84.

Some exceedingly interesting questions of law and fact are presented by the record. However, we are of opinion that under authority of the above cited cases claimants have a plain remedy in the courts of the state. We are further of opinion that the jurisdiction of the court of claims to make a determination of the claim in question is expressly excluded by subsection 7 of section 14 of the court act. In the case of *F. F. Cottle* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 84, we laid down this rule:

> "The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

In the case of *Jessie Williams* v. *State Road Commission*, claim No. 352, and the case of *Jesse Wright* v. *State Road Commission*, claim No. 351, both determined at the present term of this court, we held as follows:

> "The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

We can act only within the limits of the jurisdiction conferred upon the court of claims.

The claim is dismissed.

(No. 418-S—Claimant awarded $145.00)

TOM MOORE, Claimant,

v.

CONSERVATION COMMISSION OF WEST VIRGINIA, Respondent.

Opinion filed November 14, 1944

ROBERT L. BLAND, JUDGE.

Claimant, Tom Moore, of Gordon, West Virginia, seeks an award for $145.00 for the loss and burial of a cow belonging to him. The case is informally considered upon a record prepared by the conservation commission and duly filed with the clerk.

The division of forestry of the conservation commission maintains certain telephone lines in order to communicate with lookout, or fire posts, to guard against the outbreak and suppression of forest fires. A pole from one of these telephone lines, in Crook district, Boone county, had become rotten and fallen from its natural position. The claimant's Holstein cow became entangled in the fallen wire from the telephone line and was found dead on the morning of August 14, 1944. An official of the commission authorized and directed claimant to bury the animal. To do so he was obliged to pay the sum of $20.00. From the facts set forth in the record it would appear that the reasonable value of the cow was $125.00.

There is no stock law in Crook district, of Boone county.

The head of the department concerned concurs in the claim made for loss and reimbursement. It is approved for payment by an assistant attorney general.

In view of the facts disclosed by the record, the concurrence in the claim by the department concerned and the approval of the attorney general, an award is now made in favor of claimant Tom Moore, for the said sum of one hundred forty-five dollars ($145.00).

(No. 397—Claim dismissed)

DELPHIA BAY BURNS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 14, 1944

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state.

Wm. Herbert Belcher, Esq., for the claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

This court recently held in the case of *Jesse Wright* v. *State Road Commission*, and *Jessie Williams* v. *State Road Commission*, that where damages are claimed for injuries to prop-

erty occasioned by the permanent construction, change or improvement of a highway, that following the decisions of our State Supreme Court of *Hardy* v. *Simpson*, 118 W. Va. 440, 191 S. E. 47 and *Riggs* v. *Commission*, 120 W. Va. 298, 197 S. E. 813, this court was without jurisdiction to hear and determine the merits of such claims and claimant is obliged to resort to the State Supreme Court or circuit courts for relief.

The act creating this court specifically provides, section 14, relative to its jurisdiction that there shall be excluded from such jurisdiction any claim which may be maintained by or on behalf of claimant in the courts of the state.

A careful reading of the petition filed by claimant as well as the plea filed by the state through the attorney general's office, and the answer thereto by claimant makes it clear to us that under the provision just quoted we are without jurisdiction. The motion to dismiss and the plea for want of jurisdiction filed by the respondent are therefore sustained.

(No. 389—Claim dismissed)

EMMA QUICK, MILDRED MILLER and HARRY MILLER,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 15, 1944

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state.

Messrs. *Stealey & Black,* for the claimant;

W. Bryan Spillers, Esq., assistant attorney general, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimants ask damages for injuries to their property, comprising a tract of 42½ acres of land in Wirt county, West Virginia, and located near the left fork of Tuckers creek in said county. In 1940 the state road commission rebuilt the road running in, over, adjacent and upon the said tract of land and also constructed a dam or bridge across the left fork of Tuckers creek and made a fill 8 to 10 feet high across the bottom of said creek; leaving an opening under the dam or bridge in question which, according to the allegations set forth in claimant's petition, was insufficient to drain the water flowing into said Tuckers creek and, as a result of rains in July, 1943, the water backed up to the dwelling house of claimants over the garden and cornfield of their property, causing the damages aforesaid. Recently, this court in the case of *Jessie Williams* v. the *State Road Commission,* a claim very similar in all respects to the one now being considered, held that the court

of claims was without jurisdiction to hear and determine the merits of the claim under section 14 of the act creating the court of claims.

The said act specifically provides that there shall be excluded from the jurisdiction of the court of claims any claim which may be maintained by or on behalf of the claimants in the courts of the state.

A careful reading and consideration of the petition filed by claimants, as well as the plea filed by the state through the attorney general's office, seem to indicate that the claim in question is one that should properly be presented to the state courts, and that therefore this court is without jurisdiction. See the opinion in *Jessie Williams v. State Road Commission, supra.*

The motion to dismiss the claim for want of jurisdiction as filed by the respondent is therefore sustained.

(No. 209—Claim denied)

POLINO CONSTRUCTION COMPANY, a Corporation,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 15, 1944

When it appears from the evidence upon the hearing of a claim for additional compensation by way of damages alleged to have been sustained in the performance of a contract for building and completing a highway project, that the Legislature has previously made an appropriation in favor of claimant for a substantial amount of money, when claimant was remediless in law or equity under the terms of its contract, and voluntarily accepted and retained the benefit of such appropriation and executed and delivered a receipt showing it to be complete and final payment for all work performed in accordance with its contract and for all claims of any nature, the court of claims will not make or recommend a further award on account of such claim.

L. T. Eddy, Esq., for claimant;

W. Bryan Spillers, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

The claim for which an award is sought in this case is in the sum of $85,686.20 and arises out of a highway construction project in Hardy county, West Virginia.

In 1931 the state, acting by and through its agency, the state road commission, under a certain advertising duly published and posted according to law, invited proposals for building and completing, according to plans then on file in the office of the state road commission, and according to plans and specifications of the road commission, a certain road in said county of Hardy, from Lost City to the Virginia line, known as project

NO. 3471-B, being approximately 59,136 feet in length. Pursuant to said advertisement, claimant, Polino Construction Company, submitted to the commission a written proposal and bid for building and completing said road according to said plans and specifications. Being the lowest responsible bidder therefor the contract for said work was awarded to claimant for the unit prices specified in its proposal and bid, amounting in the aggregate to $216,368.84. Thereupon claimant entered into a contract with the state of West Virginia, by and through the state road commission, bearing date on the 23rd day of April, 1931, for the construction of said project. The plans and specifications for the project were made parts of the contract.

Claimant contends that there was submitted with said contract, as part thereof, certain plats, tables, estimates, and blueprints showing the course of said road, locating the highway, and showing cuts and fills, and certain measurements on said cuts and fills, and estimating the amount of yardage and excavations from the cuts, and the amount of yardage required to make fills. It says that it employed an efficient and competent engineer to go over the plans and specifications and to check the final estimate submitted by the state road commission in order to determine, as best it could determine, the amount of yardage to be removed and the yardage required to make certain fills; and that the engineer or engineers employed by the road commission to make the drawings, estimates, and tables failed to take into account and make allowance for what is known among contractors, road builders, and engineers as "swells." "Swells" are a condition of compaction of materials to be removed which produce more actual yardage in excavation than the measurements of the engineer total.

It is claimed that the land and territory in which the project was embraced was known to the road commission as a territory in which there would be "swells."

Claimant further says that in building roads there is another condition often found which is termed "shrinkage,"

wherein a certain allowance must be made on account of ready compaction of the materials removed from and excavation of the solid into a fill, which was known generally by the road commission.

Claimant takes the position that the engineers for the state road commission, who worked on the project had not been advised of these conditions of "swell" and "shrinkage," and did not make proper allowance or in any manner indicate in their blueprints, drawings, tables, or estimates, so that it, in checking drawings, tables, blueprints, and estimates would have knowledge that it would have to deal with such conditions, and that such conditions were unknown at the time it signed the contract. It may be apropos at this point, however, to observe that section 4 of said contract provides as follows:

> "The contractor further agrees that he is fully informed as to all conditions affecting the work to be done, as well as to the labor and materials to be furnished for the completion of this work, and that such information was secured by personal investigation and research and not wholly from the estimate of the engineer; and that he will make no claim against the said state by reason of estimates, tests, or representations theretofore made by any officer or agent of said state."

The schedule of prices contained in claimant's proposal or bid and forming a part of his contract contemplated an approximate or estimated quantity of 400,000 cu. yds. of unclassified excavation at 30 cents per cu. yd. and 25,000 cu. yds. of borrow excavation, unclassified, at 30 cents per cu. yd. The plans and blueprints for the project as prepared by the commission's engineers showed the profiles of the road and that the excavation from the cuts would be substantially the same amount of material necessary to make the corresponding fills. The total estimated amount of unclassified excavation for the project was 400,000 cu. yds., and the estimate as shown by the blueprints for the fills or embankments was 314,570 cu. yds. When the project was finally completed it was shown

that instead of the 400,000 cu. yds. estimated, the dirt actually excavated from the cuts and measured in the solid was 396,227 cu. yds., and that the dirt actually hauled away from the cuts and placed in the fills and otherwise amounted to 502,000 cu. yds., as measured in the fills. Claimant maintains that the materials excavated from the cuts as measured in the solid totaled 396,227 cu. yds., which was sufficient to make all the fills called for by the blueprints without requiring any borrow, and left an excess of 105,775 cu. yds. of material which had to be hauled away and disposed of otherwise than in the fills, as set forth on the blueprints, making a variation from the original blueprints of 33.4%. This condition was the result of the peculiar nature of the soil which was excavated from the cuts, it consisting of shale which when excavated and placed in the fills swelled. We think that it is sufficiently shown by the record that claimant encountered practically an unprecedented situation. It is the contention of claimant that this unprecedented and unforseen condition arising out of the peculiar nature of the soil constituted a risk or hazard which was not in the contemplation of either of the contracting parties. It argues that there was a mutual mistake of fact as to the estimate that the material removed from the cuts would be and could be, entirely disposed of in the fills. In other words, the claim made is not for any payment under the contract, but is more in the nature of a quasi-contractual claim for a benefit conferred upon the road commission by the claimant.

It is said that the road commission always figures a shortage instead of a swell for the material which is to go into the fill, and that claimant's contract contemplated a shortage, as shown by the blueprints, for the reason that the blueprints estimated 400,000 cu. yds. of borrow and represented that the total of 425,000 cu. yds. would be just sufficient to make the estimated 314,570 cu. yds. of fill. It is argued, therefore, that according to the blueprints and specifications the commission itself figured on an allowance of 110,430 cu. yds. of shortage. It is pointed out that 105,773 cu. yds. of excess material had to be disposed of otherwise than in the fill as shown by the blue-

prints and specifications and necessitated an additional expense to claimant. No claim is made for compensation for actually digging the dirt out of the cut, for the reason that that is covered by the contract itself. The claim for additional compensation is based at the point where the disposition of the dirt began after it had been excavated.

We think it is made quite clear upon the record that claimant actually sustained substantial loss in the performance of its contract, but it is equally clear that its claim for any additional compensation whatever other than that provided for by the contract could not be sustained under the terms and provisions of the contract. After the completion of the project claimant was afforded a hearing before the road commission in support of its claim for additional compensation, but the claim was rejected. There was no way under the law whereby the claim could be recognized, although the road commission as constituted at that time believed that the claim to some extent was possessed of merit. What seems to have been a rather thorough and comprehensive examination of the merits of the claim was given to it by a committee of the Legislature of 1937. It was considered fully. The Legislature of 1937 made an appropriation in favor of claimant in the amount of $12,313.83 to take care of the loss which it had sustained in the completion of the project for which the present claim is made. When that amount was paid to claimant by the road commission it executed and delivered a receipt therefor endorsed on the back of the final estimate for the road project, reading as follows:

> "The Polino Construction Company of Fairmont, West Virginia, contractor for the construction of project 3471-B, Hardy County hereby accepts the amount of $12,879.70 as shown on this final estimate No. 18, as complete and final payment for all work performed in accordance with its contract and for all claims of any nature.
>
> Polino Construction Company
>
> Sam G. Polino
>
> By Sam G. Polino, President."

Notwithstanding the above mentioned appropriation and receipt therefor claimant now in this proceeding says that the reasonable and fair value placed upon the extra services which it rendered under its said contract with the road commission made necessary by reason of errors of the commission, is $44,000.00.

In addition to said claim for $44,000.00 claimant says that in the years 1930, 1931, and 1932 it had bought certain machinery and equipment on the payment plan, the total contract price for which equipment amounted to $64,000.20, and that by reason of the extra work and time required in completing the project under the terms of its said contract and due to the neglect and failure of the road commission to pay for its alleged extra work and time required to complete the project aforesaid it was unable to meet its installment payments due on said machinery and in consequence of such failure lost said machinery and equipment, and says that there is now due and owing it from the state road commission, after allowing credit for the award made as aforesaid by the Legislature and all other credits or setoffs to which the respondent is in any wise entitled, the just and full sum of $85,680.20.

We are of the opinion that it was the intention of the Legislature in appropriating the said sum of $12,313.83 in favor of claimant to compensate it to the extent to which it believed it was entitled to be compensated for all work and labor done and performed in the completion of the Hardy county project and that claimant so understood that to be true when it executed and delivered to the road commission its receipt for the amount of said appropriation. In *Massing* v. *State*, 14 Wisc. 502, it is held:

> "Where an act of the Legislature makes an appropriation as in full payment of a demand some portion of which was controverted or disallowed, the acceptance of the money is a bar to any further claim on account of such demand in cases where there is no

evidence of fraud, accident or mistake in matter of fact."

In the instant case no fraud, accident or mistake is shown. The money was voluntarily accepted by claimant.

The claim will be denied and an order entered accordingly.

REFERENCES

ACCORD AND SATISFACTION

When it appears from the evidence upon the hearing of a claim for additional compensation by way of damages alleged to have been sustained in the performance of a contract for building and completing a highway project, that the Legislature has previously made an appropriation in favor of claimant for a substantial amount of money, when claimant was remediless in law or equity under the terms of its contract, and voluntarily accepted and retained the benefit of such appropriation and executed and delivered a receipt showing it to be complete and final payment for all work performed in accordance with its contract and for all claims of any nature, the court of claims will not make or recommend a further award on account of such claim. *Polino Construction Company* v. *State Road* 443

Where it appears from the evidence that claimant a former employee of the state, failed to present his claim as a setoff or credit in his settlement made with the state, at a time when he was heavily in debt to the state for funds misappropriated and wrongfully used by him, it will be presumed that such claim presented some time later to this court was without merit and an award will be denied. *Neese* v. *Conservation* 177

ASSAULT AND BATTERY

A case in which it is held that the state was not responsible in damages for injuries to one of its road foremen caused by a personal assault on him by one of his fellow employees; however, a claim for which the amount of lost services is allowed. *Pierson* v. *State Road* 273

BLASTING OPERATIONS

Where a state road commission employee is injured by reason of a dynamite explosion, through no fault of his own, and from the evidence it appears that he was using a mixed case of dynamite, and from all probability from the evidence a stick of dynamite had an explosive cap in it, setting off the explosion, then an award will be made to him as a method of compensation for the injuries received. The injuries were received before the employees of the road commission were placed under the provisions of the workmen's compensation act, and an award is made in accordance with the following decision. *Bennett* v. *State Road* 108

Where private property not taken for public use but damaged by blasting in the course of grading, draining and hard-surfacing with a rock base of a public road an award may be made for such damage. *Proudfoot* v. *State Road* 78

See also

Everhart v. *State Road* 424

Rial v. *State Road* 242

BRIDGES, CULVERTS AND DRAINS

A claim for damages filed by the personal representative of a boy four and one-half years of age, who walked upon and fell from a state-owned bridge, while it was closed for necessary repairs, then being made thereon, and sustained injuries which resulted in his death will be denied, when it appears from the evidence that such bridge was duly barricaded and ample precautions observed to prevent accident thereon. *Sims Admx.* v. *State Road* 369

An award will be refused where alleged negligence of respondent is not proved, and when claimant, knowing the conditions and existence of a danger, voluntarily and unnecessarily exposed herself to it, when an ordinarily prudent person would not have incurred the risk of injury, which such conduct involved. *Morton* v. *State Road* 262

Where alleged inadequacy of a sewer maintained by respondent to carry off storm water from a road, resulted in overflowing water which caused damage to claimant's property is not proven, an award will be refused. *Wilson* v. *State Road* 432

See also

Meyers, et al. v. *State Road* 128

COMPROMISE SETTLEMENTS—See also Accord and Satisfaction

A compromise settlement made by the state road commission of a claim filed against that state agency in the court of claims for damages for personal injuries sustained by claimant when he was struck by a disconnected wheel and axle from a one and one-half ton state truck being towed from one point to another point on a state highway, subject to the ratification and approval of the court of claims, will be approved and an award made for the amount of such compromise settlement when the evidence offered upon the hearing of the claim shows such settlement to have been proper and advisable in the premises. *Lester* v. *State Road* 265

CONTRACTS

A claim in which the evidence justifies a finding for the claimant company for extra compensation, to wit, for wages paid during "shutdowns" caused by change of plans on the part of the state road commission; fair rental value of equipment on the project not used during the cessation of work caused by said changes; and extra compensation for work done and not comtemplated in any manner by the plans and specifications under which the contract was originally entered into. *Hatfield, et als* v. *State Road* 3

Where a contract for road improvement is interfered with or delayed by the action of the state road commission, through no fault of the contractor, and the contractor thereby suffers loss by not being able to use his equipment or part thereof, and, in consequence, said equipment remains idle during the period of the delay, then the contractor is entitled to a reasonable rental value as damages for said equipment so idle during the period of the delay or interference. Reaffirming *Keeley Construction Company* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 168. *Cain & Company* v. *State Road* 48

Where a commissioner in chancery to whom school land suits were referred for the usual accounting required in such suits, failed to avail himself of the remedy afforded commissioners in chancery for payment of services performed for the court in such suits, by filing his certificate, under oath, showing the number of hours that he was actually and necessarily employed in such matters, to enable the chancellor to fix his fee based upon such services performed, before the funds available for its payment are disbursed, as prescribed by law in such cases, but has pursued another method not authorized by law, and received substantial fees under such method without complying with the requirements of the statute, there was no liability of the state to pay additional fees by reason of the acts abolishing the office of school land commissioner and thus preventing his collection of additional fees under the method so pursued at variance with the terms of the statute. *Adkins* v. *Auditor* 41

When the evidence shows that a claimant who had been awarded a contract by the state for the construction of a road project was required to place gravel on the road of greater thickness than provided for by the specifications, an award will be made to cover the amount due for such extra thickness. *Sargent* v. *State Road* 228

When a controversy arises between a contractor for the construction of a state road project and the state road commission as to whether material used in the gravel surfacing of a road shall be paid for by weight or on the number of cubic yards of surfacing material, compacted by manipulation and traffic, in place on the road, the method set forth in the specifications will prevail. *Id.*

An award will be made in favor of a contractor for the construction of a state road project for the outlay made by him in leasing scales to weigh gravel material to be placed thereon, when he had reason to rely on the fact that a unit of weight would be adopted by which to estimate the weight per cubic yard of such gravel material. *Id.*

Where one purchases a team of horses from one of the state departments at a public sale without any guarantee of any kind being given him as to the soundness and physical condition of the horses, and after he has seen them and made his own investigation at the time of the sale, he assumes all risk and cannot recover against the department in question for any defects appearing after the consummation of the sale. *Ball* v. *Public Assistance* 391

Where the testimony shows that the state or department involved has fully complied with the oral contract or understanding of employment, and has fully discharged all of its obligations assumed by it under such oral contract or understanding, an award will be refused. *Ross* v. *State Road* 337

An award will be made by this court to a claimant for the payment of an unpaid debt regularly incurred by a state government agency, when presented after the biennium has passed in which such claim should have been paid. *Firestone* v. *Conservation* 173

When it appears from the evidence upon the hearing of a claim for additional compensation by way of damages alleged to have been sustained in the performance of a contract for building and completing a highway project, that the Legislature has previously made an appropriation in favor of claimant for a substantial amount of money, when claimant was remediless in law or equity under the terms of its contract, and voluntarily accepted and retained the benefit of such appropriation and executed and delivered a receipt showing it to be complete and final payment for all work performed in accordance with its contract and for all claims of any nature, the court of claims will not make or recommend a further award on account of such claim. *Polino Construction Company* v. *State Road* 443

Where a tenant rents property with full knowledge that it is to be taken for road improvement purposes by the state, and where by the provisions of his lease he is entitled to but a thirty-day notice to vacate, and is given more than the said period to remove his business after the purchase of the property by the state, he is not entitled to any damages, and an award will be refused. *Miller* v. *State Road* 112

The state court of claims is without authority to make an award reimbursing a coal company which had voluntarily advanced money prior to May 16, 1933, the effective date of chapter 40 of the acts of the first extraordinary session of the Legislature of 1933, for the payment of labor, materials and supplies (used along with county funds) in the construction of a county-district road in West Virginia, notwithstanding that such county-district road for which such moneys were expended has since become an integral part of the state system of highways; and a claim asserted against the state for such reimbursement will be denied and dismissed. *New River and Pocahontas Consolidated Coal Company* v. *State Road* 210

When it appears from the evidence upon the hearing of a claim filed by a former member of the department of public safety who had been granted an indefinite leave of absence, without pay, privilege or prerogative, for salary alleged to be due him for the unexpired term of his said enlistment, that such claimant had very defective hearing, failing sight, very bad hemorrhoids, a broken arch in the left foot, and was not physically qualified to serve in the department of public safety, and performed no duties or served any part of the last year of the term of his enlistment, and that such disabilities did not arise from and were not incident to his service in the department of public safety, the court of claims will not make recommendation to the Legislature for an appropriation for the payment of such claimed salary. *Brockus* v. *Dept. Public Safety* 164

Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power; and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent. *Rosendorf* v. *Poling,* 48 W. Va. 621. *Morton et als* v. *State Road* 180

When upon the hearing of demands seeking awards for the price of lumber claimed to have been purchased for the use of the state road commission by a superintendent of a prison labor camp, the evidence shows that such lumber was actually furnished to the state by another person who had been given purchase orders therefor in the usual and customary manner in which such purchases were made by the state, and had been paid in full for such lumber, awards will be denied to such defendants. *Id.*

See also

Sam G. Polino & Company v. *State Road* 354

CONTRIBUTORY NEGLIGENCE

An award will not be made for the value of surgical instruments belonging to the superintendent of a state emergency hospital, misplaced or lost at a time when such superintendent was responsible for the security and safekeeping of such instruments. *Hartigan* v. *Board Control* 275

Where the evidence clearly shows that a pedestrian on a highway was injured by the faulty and defective equipment of a passing state road truck, whcih defect should have been known, or could have been known through the proper inspection of the truck by the employees of the road commission previous to the time of its use on the highway; and no negligence on the part of the pedestrian is shown, but that on the contrary she was exercising the required and necessary degree of care as such pedestrian, an award will be made in her favor. *Golden* v. *State Road* 346

When claimant fails to show by the evidence that injuries received in a fall from an approach to a bridge on the highway were caused by lack of due care on the part of the state road commmission, and it appears that he failed to eercise due care for his own safety to avoid the accident, an award will be denied. *Tacey* v. *State Road* 27

Where proximate cause of an inury to an automobile from stone on highway is due to lack of care of the driver, no award for damages will be made in favor of claimant against respondent for alleged negligence not proven. *Mace* v. *State Road* 399

A case in which the claimant's negligence was of such a nature and degree as to bar any recovery, notwithstanding the serious injuries she sustained in the accident. *Mattis* v. *State Road* 31

A case in which the testimony shows the claimants' automobile was operated at a high and dangerous rate of speed under adverse weather conditions, thereby constituting such negligence as would bar an award. *Scott* v. *State Road* 386

The state is not liable for medical and surgical expenses incurred by the father of a child seven years of age who suffered personal injuries as the result of an unavoidable accident when he suddenly emerged from between two parked automobiles and started to cross a state highway in front of an approaching state road commission truck, and was knocked down and run over. *Swiger* v. *State Road* 93

Choice of several safe ways of descent from one floor of a building to another being available to claimant, an award will not be granted where a dark stairway is chosen in preference to ways known to be safe, and when an ordinarily prudent man would not have incurred the danger of injury known, or which could have been reasonably anticipated from such choice, alleged negligence of respondents not having been shown. *McClure* v. *Building & Grounds* 269

An award will be refused where alleged negligence of respondent is not proved, and when claimant, knowing the conditions and existence of a danger, voluntarily and unnecessarily exposed herself to it, when an ordinarily prudent person would not have incurred the risk of injury, which such conduct involved. *Morton* v. *State Road* 262

Where the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negligence will be considered in determining whether or not an award should be made, and if made, the amount thereof. *Upton* v. *State Road* 134

Where the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negligence will be considered in determining whether or not an award should be made, and, if made, the amount thereof. *Burgess, Adm.* v. *State Road* 140

CONVICTS, Escaped—See Escapees

EMPLOYEES OF STATE—See State Employees

ESCAPEES

Upon failure of claimant to prove by a preponderance of evidence his claim that certain personal property belonging to him was stolen by convicts from the state penitentiary, engaged in performing special labor under the direction of the prison labor division of the state road commission in time of flash-flood, in a proceeding in the court of claims to obtain an award for the value of such alleged stolen property, an award will be denied when it appears from the record that all proper precautionary measures were employed to guard such convicts and no negligence or dereliction of duty is shown on the part of the officials having them in charge. *Worrell* v. *State Road* 342

Unless the authorities in charge of the boys' industrial school at Pruntytown are guilty of such negligence or breach of duty as contributes directly to the escape of one of the boys, the state or the board of control in charge of the school, cannot be held liable for a tort committed by the boy while such escapee. *Lambert* v. *Board Control* 198

For reasons set forth in the opinion, an award is allowed in this claim and the case distinguished from the opinion filed in *Lambert* v. *State Board of Control*, case No. 139. *Fletcher* v. *Board Control* 280

A case in which the claim is found to be just and proper under the peculiar facts supporting it, and for which an award will be made. *Johnson* v. *Board Control* 203

EVIDENCE

A claimant must prove his claim by a preponderance or greater weight of the evidence and no award can be made in the absence of such proof. *Hartigan* v. *Board Control* 275

Upon failure of claimant to prove by a preponderance of evidence his claim that certain personal property belonging to him was stolen by convicts from the state penitentiary, engaged in performing special labor under the direction of the prison labor division of the state road commission in time of flash-flood, in a proceeding in the court of claims to obtain an award for the value of such alleged stolen property, an award will be denied when it appears from the record that all proper precautionary measures were employed to guard such convicts and no negligence or dereliction of duty is shown on the part of the officials having them in charge. *Worrell* v. *State Road* 342

Where alleged inadequacy of a sewer maintained by respondent to carry off storm water from a road, resulted in overflowing water which caused damage to claimant's property is not proven, an award will be refused. *Wilson* v. *State Road* 432

Where alleged negligence of respondent causing injury to claimant is not proven, no award will be made. *Varney* v. *State Road* 403

An award will not be made where alleged negligence of respondent is not proven. *Buckley* v. *State Road* 340

Where alleged negligence of respondent causing injury to claimant's property is not proven, an award will not be made. *Fair* v. *State Road* 401

A claim is denied when claimant fails to establish liability on the part of the department concerned by the production of proper evidence as proof in support of his claim. *Swartzwelder* v. *State Road* 96

FELLOW SERVANT

A case in which it is held that the state was not responsible in damages for injuries to one of its road foremen caused by a personal assault on him by one of his fellow employees; however, a claim for which the amount of lost services is allowed. *Pierson* v. *State Road* 273

FENCES ALONG RIGHT OF WAYS

An award will be granted when a fence, forming the boundary between land of claimants and right of way of respondent on claimants' land and kept up and maintained by them for over twenty-five years and not constituting an obstruction to the right of way, is without notice to claimants deliberately destroyed by employees of respondent without legal justification. *Mallow* v. *State Road* 411

GLASS, PLATE GLASS BROKEN BY CINDERS, etc.

When agents of the state road commission engaged in spreading cinders on a state highway, to promote the safety and public use thereof under icy and slippery weather conditions, negligently place and leave large and heavy clinkers with such cinders, and one of said clinkers is dislodged by passing traffic and cast with such force against a plate glass window in the store of merchants whose place of business abuts on said highway and breaks such plate glass window, an award will be made for the cost of replacing it. *Bassitt et al* v. *State Road* 174

See also

Harpold Bros. v. *State Road* 69

Darling Shops v. *State Road* 397

GUARD RAILINGS AND BARRIERS

When the state road commission by the act of 1933 assumed control and authority over the primary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Burgess Adm. et als.* v. *State Road* 140

An award will be granted claimants where by failure of respondent to exercise the care required of it and the abuse of the discretion vested in it, obstructions were created and existed for a considerable time in a public road under its jurisdiction creating a public nuisance by which negligence claimants in an automobile were precipitated down a mountainside and sustained injuries and the automobile destroyed. *Perdue* v. *State Road* 312

When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Upton* v. *State Road* 134

An award will not be granted claimant, asking damages against respondent for alleged negligence in the erection of an insufficient and inadequate barrier, or safeguard on top of a wall extending along a sidewalk under its jurisdiction, where an unattended child of tender years had fallen from the barrier seventeen feet to the base of the wall and sustained injuries, when the barrier is proven sufficient to meet the legal requirements of ordinary care. *Gill, infant* v. *State Road* 290

ICE ON ROADS—See Snow and Ice on Roads

INSURANCE ON STATE VEHICLES—See Advisory Opinions In

American Insurance Agency v. *Conservation, et al* 175

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JURISDICTION

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Burns* v. *State Road* 439

By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the court of claims shall not extend to any injury to or death of an inmate of a state penal institution. *Baisden* v. *State Road* 352

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Miller* v. *State Road* 441

By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the court of claims shall not extend to an injury to or death of an inmate of a state penal institution. *Pruitt* v. *State Road* 350

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Wright* v. *State Road* 405

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Solomon* v. *State Road* 434

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Williams* v. *State Road* 408

A claim which has been barred by a statute of limitations for a period of more than five years prior to the reenactment of chapter 14, article 2 of the 1931 code, creating the court of claims, which was of such nature that it could have and should have been presented to the circuit court of Kanawha county for auditing and adjusting and its action reported by the auditor to the Legislature under a proceeding then provided for by statute, held not revived, and an award denied, when petitioner has not been prevented or restricted from prosecuting such claim under the procedure provided prior to the time such claim became barred under the statute. *Consolidation Coal Company* v. *Auditor* 10

This court under section 14, chapter 20 of the acts of 1941, does not have jurisdiction to consider a claim for refundment of an overpayment of taxes erroneously assessed, continuing for a period of twenty-two years, when an adequate remedy in the courts of the state has been disregarded yearly during such period. *Ford, et als.* v. *County Court Randolph County* 238

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County*, 1 Ct. Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County*, 1 Ct. Claims (W. Va.) 366. *Utz* v. *Board Education* 220-222; *Marsh* v. *Board Education* 224-226.

LANDS—See also Jurisdiction and Right of Ways

When it appears from the evidence that the state road commission has made an entry upon property leased, equipped and used for a golf course, and in surveying places stakes in such proximity to the holes on said course and removes sod to the extent that it may not be used in its customary manner, before the right of the tenant to possession of such leased premises is terminated, and such tenant is shown to have sustained damages in consequence of such entry and work of the state road commission, an award will be made in favor of the tenant for the loss of profits suffered by him. *Braid* v. *State Road* 23

Where a tenant rents property with full knowledge that it is to be taken for road improvement purposes by the state, and where by the provisions of his lease he is entitled to but a thirty-day notice to vacate, and is given more than the said period to remove his business after the purchase of the property by the state, he is not entitled to any damages, and an award will be refused. *Miller* v. *State Road* 112

Where private property not taken for public use but damaged by blasting in the course of grading, draining and hard-surfacing with a rock base of a public road an award may be made for such damage. *Proudfoot* v. *State Road* 78

NEGLIGENCE

An award will be granted claimants where by failure of respondent to exercise the care required of it and the abuse of the discretion vested in it, obstructions were created and existed for a considerable time in a public road under its jurisdiction creating a public nuisance by which negligence claimants in an automobile were precipitated down a mountainside and sustained injuries and the automobile destroyed. *Perdue* v. *State Road* 312

Upon failure of claimant to prove by a preponderance of evidence his claim that certain personal property belonging to him was stolen by convicts from the state penitentiary, engaged in performing special labor under the direction of the prison labor division of the state road commission in time of flash-flood, in a proceeding in the court of claims to obtain an award for the value of such alleged stolen property, an award will be denied when it appears from the record that all proper precautionary measures were employed to guard such convicts and no legligence or dereliction of duty is shown on the part of the officials having them in charge. *Worrell* v. *State Road* 342

No negligence of respondent having been shown, no award is made and the case is dismissed. *Sandridge, executrix,* v. *State Road* 309

A claim for damages filed by the personal representative of a boy four and one-half years of age, who walked upon and fell from a state-owned bridge, while it was closed for necessary repairs, then being made thereon, and sustained injuries which resulted in his death will be denied, when it appears from the evidence that such bridge was duly barricaded and ample precautions observed to prevent accident thereon. *Sims, Admx.* v. *State Road* 369

Where proximate cause of an injury to an automobile from stone on highway is due to lack of care of the driver, no award for damages will be made in favor of claimant against respondent for alleged negligence not proven. *Mace,* v. *State Road* 399

An award will not be made where alleged negligence of respondent is not proven. *Buckley* v. *State Road* 340

The duty of the state or highway commission in the matter of the removal of obstruction caused by snow or ice is a qualified one, and if ordinary care is used by the state or its department in charge of the roads at such times or in the winter months, and an accident happens nevertheless by reason of such snow or ice the state is not liable. *Woofter* v. *State Road* 393

Where alleged negligence of respondent causing injury to claimant's property is not proven, an award will not be made. *Fair* v. *State Road* 401

The state does not guarantee the freedom from accident or safety of pedestrians on its public highways; and upon the facts disclosed by the record in the case, an award will be denied to the claimant. *Harmon* v. *State Road* 329

Where alleged negligence of respondent causing injury to claimant is not proven, no award will be made. *Varney* v. *State Road* 403

Where the evidence clearly shows that a pedestrian on a highway was injured by the faulty and defective equipment of a passing state road truck, which defect should have been known, or could have been known through the proper inspection of the truck by the employees of the road commission previous to the time of its use on the highway; and no negligence on the part of the pedestrian is shown, but that on the contrary she was exercising the required and necessary degree of care as such pedestrian an award will be made in her favor. *Golden* v. *State Road* 346

A case in which the testimony shows the claimants' automobile was operated at a high and dangerous rate of speed under adverse weather conditions, thereby constituting such negligence as would bar an award. *Scott* v. *State Road* 386

When claimant fails to show by the evidence that injuries received in a fall from an approach to a bridge on the highway were caused by lack of due care on the part of the state road commission, and it appears that he failed to exercise due care for his own safety to avoid the accident, an award will be denied. *Tacey* v. *State Road* 27

An award will not be granted claimant, asking damages against respondent for alleged negligence in the erection of an insufficient and inadequate barrier, or safeguard on top of a wall extending along a sidewalk under its jurisdiction, where an unattended child of tender years had fallen from the barrier seventeen feet to the base of the wall and sustained injuries, when the barrier is proven sufficient to meet the legal requirements of ordinary care. *Gill, infant,* v. *State Road* 290

Where private property not taken for public use but damaged by blasting in the course of grading, draining and hard-surfacing with a rock base of a public road an award may be made for such damage. *Proudfoot* v. *State Road* 78

Where the testimony shows that an operator of a state road commission grader was negligent in operating the said grader, and by reason of the said negligence a boy twelve years of age was severely injured, an agreed award of $1262.50 will be sanctioned and authorized by this court. *Dornon, Guardian* v. *State Road* 30

Where it appears that the damages to claimant's truck were the result of a head on collision of claimant's truck with a state road truck driven by a state road commission employee on duty which could have been avoided by said state road commission employee, by the exercise of reasonable care and caution, an award will be made to compensate claimant for the damages sustained. *Smith* v. *State Road* 8

Where a claimant is injured on the highway by the faulty or negligent operation of a snowplow at the hands of a state road commission employee, and the claimant himself is free from any negligence, an award will be made in his favor. *Geimer* v. *State Road* 36

Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made. *Arbogast* v. *State Road* 104

An award will be refused where alleged negligence of respondent is not proved, and when claimant, knowing the conditions and existence of a danger, voluntarily and unnecessarily exposed herself to it, when an ordinarily prudent person would not have incurred the risk of injury, which such conduct involved. *Morton* v. *State Road* 262

Unless the authorities in charge of the boys' industrial school at Pruntytown are guilty of such negligence or breach of duty as contributes directly to the escape of one of the boys, the state or the board of control in charge of the school, cannot be held liable for a tort committed by the boy while such escapee. *Lambert* v. *Board Control* 198

A case in which the evidence shows that the driver of a state road truck, owned and operated by the state, was negligent in its operation, and which negligence caused the accident or collision complained of and therefore made the state road commission liable in damages for the injuries to claimant. *Marshall* v. *State Road* 206

OBSTRUCTIONS—In Roads or Right of Ways

PEDESTRIANS

PENAL INSTITUTIONS

PRIMA FACIE JURISDICTION — See Jurisdiction

PROOF OF CLAIMS—See Evidence

PUBLIC NUISANCES

An award will be granted claimants where by failure of respondent to exercise the care required of it and the abuse of the discretion vested in it, obstructions were created and existed for a considerable time in a public road under its jurisdiction creating a public nuisance by which negligence claimants in an automobile were precipitated down a mountainside and sustained injuries and the automobile destroyed. *Perdue* v. *State Road* 312

RIGHT OF WAYS, Roads

An award will be granted when a fence, forming the boundary between land of claimants and right of way of respondent on claimants' land and kept up and maintained by them for over twenty-five years and not constituting an obstruction to the right of way, is without notice to claimants deliberately destroyed by employees of respondent without legal justification. *Mallow* v. *State Road* 411

The state court of claims is without authority to make an award reimbursing a coal company which had voluntarily advanced money prior to May 16, 1933, the effective date of chapter 40 of the acts of the first extraordinary session of the Legislature of 1933, for the payment of labor, materials and supplies (used along with county funds) in the construction of a county-district road in West Virginia, notwithstanding that such county-district road for which such moneys were expended has since become an integral part of the state system of highways; and a claim asserted against the state for such reimbursement will be denied and dismissed. *New River and Pocahontas Consolidated Coal Company* v. *State Road* 210

When it appears from the evidence that the state road commission has made an entry upon property leased, equipped and used for a golf course, and in surveying places stakes in such proximity to the holes on said course and removes sod to the extent that it may not be used in its customary manner, before the right of the tenant to possession of such leased premises is terminated, and such tenant is shown to have sustained damages in consequence of such entry and work of the state road commission, an award will be made in favor of the tenant for loss of profits suffered by him. *Braid* v. *State Road* 23

ROCK SLIDES

Where proximate cause of an injury to an automobile from stone on highway is due to lack of care of the driver, no award for damages will be made in favor of claimant against respondent for alleged negligence not proven. *Mace* v. *State Road* 399

SALES

Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power; and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent. *Rosendorf* v. *Poling,* 48 W. Va. 621. *Morton, et als.* v. *State Road* 180

When upon the hearing of demands seeking awards for the price of lumber claimed to have been purchased for the use of the state road commission by a superintendent of a prison labor camp, the evidence shows that such lumber was actually furnished to the state by another person who had been given purchase orders therefor in the usual and customary manner in which such purchases were made by the state, and had been paid in full for such lumber, awards will be denied to such demandants. *Id.*

Where one purchases a team of horses from one of the state departments at a public sale without any guarantee of any kind being given him as to the soundness and physical condition of the horses, and after he has seen them and made his own investigation at the time of the sale, he assumes all risk and cannot recover against the department in question for any defects appearing after the consummation of the sale. *Ball* v. *Public Assistance* 391

An award will be made by this court to a claimant for the payment of an unpaid debt regularly incurred by a state government agency, when presented after the biennium has passed in which such claim should have been paid. *Firestone Tire & Rubber Company* v. *Conservation* 173

SCHOOLS—Boards of Education

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct. Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct. Claims (W. Va.) 366. *Utz* v. *Board Education* 220-222; *Marsh* v. *Board Education* 224-226

SNOW AND ICE IN ROADS

The duty of the state or highway commission in the matter of the removal of obstruction caused by snow or ice is a qualified one, and if ordinary care is used by the state or its department in charge of the roads at such times or in the winter months, and an accident happens nevertheless by reason of such snow or ice the state is not liable. *Woofter* v. *State Road* 393

STATE AGENCY

This case is controlled by the majority decision announced in the cases of *Jess E. Miller* v. *The Board of Education of Lewis County,* 1 Ct. Claims (W. Va.) 205 and *Mary Dillon* v. *The Board of Education of Summers County,* 1 Ct. Claims (W. Va.) 366. *Utz* v. *Board Education* 220-222; *Marsh* v. *Board Education* 224-226

STATE EMPLOYEES

When a state department fails to avail itself of the mandatory provisions of the workmen's compensation act, and subsequent to the effective date of the said act an employee of the said department is injured while so employed, under circumstances which would have entitled her to compensation had the said department complied with the act in question, then an award will be recommended in an amount to reasonably cover the damages occasioned by her injuries. *Dixie* v. *Building & Grounds* 171

Where a state road commission employee is injured by reason of a dynamite explosion, through no fault of his own, and from the evidence it appears that he was using a mixed case of dynamite, and from all probability from the evidence a stick of dynamite had an explosive cap in it, setting off the explosion, then an award will be made to him as a method of compensation for the injuries received. The injuries were received before the employees of the road commission were placed under the provisions of the workmen's compensation act, and an award is made in accordance with the following decision. *Bennett* v. *State Road* 108

Where a state road commission employee is injured by reason of defective equipment, through no fault of his own, and is in no manner connected with the operation of the said equipment, then an award will be made to him as a matter of compensation for the injuries received. This accident happened before the employees of the road commission were placed under the provisions of the workmen's compensation act, and therefore an award is made in accordance with the following decision. *Swisher* v. *State Road* 72

One who is summoned or drafted by a state forester to assist in fighting a forest fire is entitled to all reasonable protection when complying with the said summons, and if injured while being transported to the scene of the fire, through no negligence of his own, and in an automobile not under his control, then, under the circumstances, he is entitled to an award. *Bailey* v. *Conservation* 70

Choice of several safe ways of descent from one floor of a building to another being available to claimant, an award will not be granted where a dark stairway is chosen in preference to ways known to be safe, and when an ordinarily prudent man would not have incurred the danger of injury known, or which could have been reasonably anticipated from such choice, alleged negligence of respondents not having been shown. *McClure* v. *Building & Grounds, et al.* 269

When, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy. *Lynch* v. *Board Control* 1

A case in which it is held that the state was not responsible in damages for injuries to one of its road foremen caused by a personal assault on him by one of his fellow employees; however, a claim for which the amount of lost services is allowed. *Pierson* v. *State Road* 273

An award will not be made for the value of surgical instruments belonging to the superintendent of a state emergency hospital, misplaced or lost at a time when such superintendent was responsible for the security and safekeeping of such instruments. *Hartigan* v. *Board Control* 275

When it appears from the evidence upon the hearing of a claim filed by a former member of the department of public safety who had been granted an indefinite leave of absence, without pay, privilege or prerogative, for salary alleged to be due him for the unexpired term of his said enlistment, that such claimant had very defective hearing, failing sight, very bad hemorrhoids, a broken arch in the left foot, and was not physically qualified to serve in the department of public safety, and performed no duties or served any part of the last year of the term of his enlistment, and that such disabilities did not arise from and were not incident to his service in the department of public safety, the court of claims will not make recommendation to the Legislature for an appropriation for the payment of such claimed salary. *Brockus* v. *Dept. Public Safety* 164

Upon a claim for wrongful death where no workmen's compensation was carried by the department concerned at the time of the death, when it appears from the evidence that the death was due to natural causes and not to any injury or other cause incident to the course of decedent's employment, an award will be denied. *Frazier, Executrix* v. *Board Control* 130

Where it appears from the evidence that claimant a former employee of the state, failed to present his claim as a set off or credit in his settlement made with the state, at a time when he was heavily in debt to the state for funds misappropriated and wrongfully used by him, it will be presumed that such claim presented some time later to this court was without merit and an award will be denied. *Neese* v. *Conservation* 177

When, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy. *Null* v. *Board Control* 169

Arbogast v. *Board Control* 170

STATUTE OF LIMITATIONS

A claim which has been barred by a statute of limitations for a period of more than five years prior to the reenactment of chapter 14, article 2 of the 1931 code, creating the court of claims, which was of such nature that it could have and should have been presented to the circuit court of Kanawha county for auditing and adjusting and its action reported by the auditor to the Legislature under a proceeding then provided for by statute, held not revived, and an award denied, when petitioner has not been prevented or restricted from prosecuting such claim under the procedure provided prior to the time such claim became barred under the statute. *Consolidation Coal Company* v. *Auditor* 10

STORM SEWERS—See Bridges, Culverts and Drains

TAXES, REFUNDMENT OF

This court under section 14, chapter 20 of the acts of 1941, does not have jurisdiction to consider a claim for refundment of an overpayment of taxes erroneously assessed continuing for a period of twenty-two years, when an adequate remedy in the courts of the state has been disregarded yearly during such period. *Ford, et als.* v. *County Court Randolph County* 238

See also

Dulaney v. *State Tax* 417

Fredeking et als. v. *State Tax* 360

Producers Gas Company v. *State Tax* 283

Teleweld v. *State Tax* 418

VACATIONS OF STATE EMPLOYEES

When, upon the hearing of a claim filed by a former employee of a state department, it is disclosed by the record that it is the policy of such state department to allow employees who have been in the service of the state for more than one year an annual vacation with pay, an award will be made in accordance with such policy. *Lynch* v. *Board Control* 1

WARRANTIES, Implied

WORKMEN'S COMPENSATION