STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1946-1948

Volume

4

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from December 1, 1946,
to November 30, 1948.

By

JOHN D. ALDERSON

Clerk

VOLUME IV

(Published by authority. Code 14-2-25).

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OF THE

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HONORABLE WALTER T. CROFTON, JR.
.....Alternate Judge
HONORABLE JACK MARINARI.....Alternate Judge
HONORABLE G. H. A. KUNST.....Alternate Judge

JOHN D. ALDERSON.....Court Clerk
LENORE THOMPSON.....Law Clerk

IRA J. PARTLOW.....Attorney General

Letter of Transmittal

To His Excellency
The Honorable Clarence W. Meadows
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, 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-six to November thirtieth, one thousand nine hundred forty-eight.

Respectfully submitted,

JOHN D. ALDERSON,
Clerk.

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

Passed March 6, 1941; amended March 8, 1945

CHAPTER 14, CODE

Article 2. Claims Against the State.

Section

Section 1. *Purpose.*—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.

Sec. 2. *Definitions.*—For the purpose of this article "Court" means the state court of claims established by section four of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of the state government: *Provided, however,* That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

Sec. 3. *Proceedings Against State Officers.*—The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

1. Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

2. Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the state obtained in any circuit court.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the state from suit under section thirty-five, article six of the constitution of the state.

Sec. 4. *Court of Claims.*—There is hereby created a "State Court of Claims" which shall be a special instru-

mentality of the Legislature for the purpose of considering claims against the state, which 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 heard in a court of law or equity, and recommending the disposition thereof to the Legislature. 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.

The court shall consist of three judges who shall be appointed by the governor with the advice and consent of the senate. The terms of judges shall be six years, except that the first membership of the court shall be appointed as follows: One judge for two years; one judge for four years, and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be members of the same political party. An appointment to fill a vacancy shall be for the unexpired term. The court shall each year elect one of its members as presiding judge.

The governor shall appoint three persons as alternate judges. Whenever a regular judge is unable to serve or is disqualified, the governor shall designate an alternate judge to serve in the place and stead of the regular judge. Alternate judges shall be appointed for six-year terms except that the first alternates appointed shall be designated to serve for two, four, and six-year terms as in the case of regular judges. Not more than two alternate judges shall belong to the same political party. The provisions of sections eight to ten, inclusive, of this article with respect to judges shall apply with equal effect to alternates.

Sec. 5. *Court Clerk.*—The court shall have authority to appoint a clerk, and shall fix his salary at not to exceed

the sum of three thousand six hundred dollars per annum to be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations and shall issue all official summonses, orders, statements and awards.

Sec. 6. *Terms of Court.*—The court shall hold at least four regular terms each year, on the second Monday in January, April, July and October. If, however, one week prior to the date of a regular term, no claims are ready for hearing or consideration the clerk, with the approval of the presiding judge, shall notify the members that the court will not be convened. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the presiding judge whenever the number of claims awaiting consideration, or any other pressing matter of official business, makes such a term advisable.

Sec. 7. *Meeting Place of the Court.*—The regular meeting place of the court shall be at the state capitol, and the board of public works shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

Sec. 8. *Compensation of Members.*—Each judge of the court shall receive twenty dollars for each day actually served, and actual expenses incurred in the performance of his duties. Requisition for traveling expenses shall be accompanied by a sworn and itemized statement, which shall be filed with the auditor and preserved as a public record. For the purposes of this section, days served shall include time spent in the hearing of claims, in the consideration of the record, and in the preparation of opinions. In no case, however, shall a judge receive compensation

for more than one hundred fifty days' service in any fiscal year.

Sec. 9. *Oath of Office.*—A judge shall, before entering upon the duties of his office, take and subscribe to the oath prescribed by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

Sec. 10. *Qualifications of Judges.*—A judge shall not be a state officer or a state employee except in his capacity as a member of the court. A member shall receive no other compensation from the state.

A judge shall not hear or participate in the consideration of a claim in which he is personally interested. Whenever a member is thus disqualified, the clerk shall notify the governor, and thereupon the governor shall assign an alternate to act during such disqualification. Whenever a judge is unable to attend and serve for any reason, the governor shall, when so notified by the clerk, assign an alternate to act in the absence of the regular judge.

Sec. 11. *Attorney General to Represent State.*—The attorney general shall represent the interests of the state in all claims coming before the court.

Sec. 12. *General Powers of the Court.*—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. 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 shall consider claims in accordance with sections sixteen to twenty, inclusive, of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk.

Each claim shall be considered by three judges. If, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. If the determination of the court is not unanimous, the reasons of the dissenting judge shall be separately stated. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

Sec. 13. *The Jurisdiction of the Court.*—The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. 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.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counter claim on the part of the state or any of its agencies.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

Sec. 14. *Claims Excluded.*—The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For injury to or death of an inmate of a state penal institution.

3. Arising out of the care or treatment of a person in a state institution.

4. For a disability or death benefit under chapter twenty-three of this code.

5. For unemployment compensation under chapter twenty-one-a of this code.

6. For relief or public assistance under chapter nine of this code.

7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Sec. 15. *Rules of Practice and Procedure.*—The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims.

The court shall also adopt and may from time to time amend rules pertaining to persons appearing as representatives of claimants. Rules shall permit a claimant to appear in his own behalf, or to present his claim through a qualified representative. A representative shall be a person who, as further defined by the rules of the court, is competent to present and protect the interests of the claimant.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court 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.

Sec. 16. *Regular Procedure.*—The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he

desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is *prima facie* within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During a period of negotiations and pending hearing, the state agency and the attorney general's office shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearings. If the parties are unable to agree upon the facts, an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability. Any judge may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

Sec. 17. *Shortened Procedure.*—The shortened procedure authorized by this section shall apply 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 purposes of this article, should be paid.

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. The record shall be filed with the clerk. The court shall consider the claim informally upon the record submitted. 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 rejection of a claim under this section shall not bar its resubmission under the regular procedure.

Sec. 18. *Advisory Determination Procedure.*—The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or one of its agencies. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk the record of the claim including a full statement of the facts, the contentions of claimant, and such other materials as the rules of the court may require. The record shall submit specfic questions for the court's consideration.

2. The clerk shall examine the record submitted and

if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When the claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in conection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be *de novo*.

Sec. 19. *Claims Under Existing Appropriations.* — A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the state agency, the state auditor, and the governor. The governor

may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and verified by the court.

Sec. 20. *Claims Under Special Appropriations.*—Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing biennium, determination of claims and the payment thereof may be made in accordance with this section. But this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award to the governor. The clerk shall issue his requisition to the auditor who shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

Sec. 21. *Limitations of Time.*—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 limitation 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 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 limnitation.

Sec. 22. *Compulsory Process.*—In all hearings and proceedings before the court, the evidence of witnesses and the production of documentary evidence may be required. Summons may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a summons or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers, and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

Sec. 23. *Inclusion of Awards in Budget.* — The clerk shall certify to the director of the budget on or before the twentieth day of November of each year next preceding the year in which the Legislature meets in regular session, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include subsequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the Legislature.

Sec. 24. *Records to Be Preserved.*—The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the Legislature or any committee thereof for the re-examination of the claim.

Sec. 25. *Reports of the Court.*—The clerk shall be offi-

cial reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of a biennial report.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the Legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payments out of regular appropriations for the biennium.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the biennium.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its biennial report to the governor who shall transmit a copy thereof to the presiding officer of each house of the Legislature. The biennial reports of the court shall be published by the clerk as a public document.

Sec. 26. *Fraudulent Claims.*—A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer who knowingly and wilfully participates or assists in the preparation of a false

or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer he shall, in addition, forfeit his office.

Sec. 27. *Repealer.*—Section three, article three, chapter twelve of the official code, one thousand nine hundred thirty-one, is hereby repealed. Any other provision of law in conflict with the provisions of this act is hereby repealed.

Sec. 28. *Provisions Severable.*—If any part of this act is held unconstitutional, the decision shall not affect any portion of the act which remains. The remaining portions shall be in full force and effect as if the portion declared unconstitutional had never been a part of the act.

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court July 30, 1941, and
Revised July 19, 1945)

TABLE OF RULES

Rules of Practice and Procedure

Rules of Practice and Procedure

OF THE

State Court of Claims

RULE 1. CLERK'S OFFICE, LOCATION AND HOURS.

The office of the Clerk of the Court shall be at the State Capitol, in the City of Charleston, and shall be kept open in charge of the Clerk, or some competent employee of the Court under the direction of the Clerk, each weekday, except legal holidays, for the purpose of receiving notices of claims and conducting the business of the office, during the same business hours as other public offices in the State Copitol are kept open, except when otherwise required by the Court during a regular or special session of the Court.

RULE 2. CLERK, CUSTODIAN OF PAPERS, ETC.

The Clerk shall be responsible for all papers, claims or demands filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim or demand. The Clerk shall also properly endorse all such papers, claims, or demands showing the title of the claim or demand, the number of the same, and such other data as may be necessary to properly connect and identify the document or writing, claim or demand.

RULE 3. FILING PAPERS.

(*a*) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents received or filed in the office kept by the Clerk of this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

(*b*) The Clerk, upon receipt of a notice of claim, shall enter of record in the docket book, indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly.

RULE 4. RECORDS.

The Clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(1) Minute and Order Book, in which shall be recorded at large, on the day of their filing, all orders or recommendations made by the Court in each case or proceeding, and the Minutes of all official business sessions of the Court, including Rules of Procedure, orders paying salaries of members and expenses of the Court, and the salaries, compensations and expenses of its employees, and all orders pertaining to the organization and administration of the Court, together with such other orders as may be directed to be entered therein by the Court.

(2) Docket Book in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(3) Financial Ledger, in which shall be entered chronologically, all administrative expenditures of the Court under suitable classifications.

RULE 5. FORM OF CLAIMS.

Notices of all claims and demands must be filed with the Clerk of the Court and may be by a written statement, petition, declaration, or any writing without regard to form, which sufficiently sets forth the nature of the claim or demand, the facts upon which it is based, the time and place of its origin, the amount thereof, and the State

Agency, if any, that is involved. Technical pleadings shall not be required. The Court, however, reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notices of claims be furnished in triplicate.

RULE 6. COPY OF NOTICE OF CLAIMS TO ATTORNEY GENERAL AND STATE AGENCY.

Upon receipt of a notice of claim or demand to be considered by the Court, the Clerk shall forthwith transmit a copy of the notice to the State Agency concerned, if any, and a copy thereof to the office of the Attorney General of the State, and the Clerk shall make a note of the time of said delivery of such notice to the Attorney General's office.

RULE 7. JURISDICTION, PRIMA FACIE.

A reasonable time before the printing of the docket, as provided by these rules, the Court will examine each claim to ascertain whether it is *prima facie* within its jurisdiction. If it is found that the Court has jurisdiction, the claim will then be ordered to be placed upon the docket. If it is found that the Court is without jurisdiction, the claimant or representative presenting the claim will be notified accordingly, by letter from the Clerk; leave being granted the claimant or his representative to appear before the Court at any time during a regular or special session thereof, to show cause, if any, why the Court has or should assume jurisdiction of the claim.

RULE 8. PREPARATION OF HEARING DOCKET.

The Clerk shall prepare fifteen days previous to the regular terms of Court a printed docket listing all claims and demands that are ready for hearing and consideration by the Court, and showing the respective dates, as fixed by the Court, for the hearings thereof. The said claims

or demands shall appear on the said docket in the order in which they were filed in the office of the Clerk. The Court, however, reserves the right to rearrange or change the order of hearing claims or demands at any regular term, when in its judgment such rearrangement or change would help to expedite and carry on the work of the term. As soon as the docket is completed and printed, a copy thereof shall be mailed to the address of record of each claimant or his representatives of record, and a copy furnished the office of the Attorney General.

RULE 9. PROOF, AND RULES GOVERNING TESTIMONY.

(*a*) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as provided under Rule 11 of the Court, before an award will be made in any case. Affidavits are not admissible as proof of claims under the regular procedure.

(*b*) While it is not intended or contemplated that the strict rules of evidence governing the introduction of testimony shall control in the hearing or presentation before the Court of any claim or demand; and while, so far as possible, all technicalities shall be waived, yet the Court reserves the right to require or outline from time to time certain formalities to be required in presenting testimony in support of a claim or in opposition thereto, and to preserve the proper sequence of procedure in the hearing of each individual claim, as the circumstances may demand or require. Such requirements or formalities may be announced from time to time during sessions of the Court.

(*c*) Under its rules, the Court shall not be bound by the usual common law or statutory rules of evidence. The Court 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.

RULE 10. CLAIMS, ISSUES ON.

In order to promote a simple, expeditious and inexpensive consideration of the claim made, the Attorney General shall within ten days after a copy of the notice has been furnished his office file with the clerk a formal or informal statement or notice in writing, either denying the claim, requesting postponement of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigation of the claim, otherwise after said ten-day period the Court may order the claim placed upon its regular docket for hearing, if found to be a claim *prima facie* within its jurisdiction.

RULE 11. STIPULATIONS OF FACT, INTERROGATORIES TO DETERMINE.

(*a*) It shall be the duty of claimants or their attorneys or representatives, in claims under the regular procedure, to negotiate with the office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon, as for example, such factual data as the following if material and applicable to the particular claim:

The control and jurisdiction over, location, grade, width, type of surface and condition of particular roads, right of ways and bridges; exact or approximate dates; identities of persons; identity, description and ownership of property; and any and all other evidential facts directly involved or connected with the claim, without regard to the foregoing enumeration of data, and which the parties may be able properly and definitely to agree upon and stipulate, for the purpose of expediting the hearing, simplifying and shortening the transcript or record of the claim and to facilitate the labour of the Court in arriving at and re-

solving the controverted questions and issues involved; and to the further end, where the claim is small, to avoid, if possible, the necessity for the introduction of evidence.

(*b*) Where there is a controversy between a claimant and any State Agency, the Court may require each party to reduce the facts to writing, and if the parties are not in agreement as to the facts, the Court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

RULE 12. CLAIMANTS, APPEARANCES.

Any claimant may appear in his own behalf or have his claim presented through a duly qualified representative. The representative may be either an attorney-at-law, duly admitted as such to practice in the courts of the State of West Virginia, or one who has the qualifications, in the judgment and opinion of the Court, to properly represent and present the claim of a claimant. Where the representative is not an attorney-at-law, then such representative must have the written authority of the claimant to act as such.

RULE 13. BRIEFS, NUMBER OF COPIES.

(*a*) Claimants or their duly authorized representatives, as well as the Attorney General or the State Agency concerned, may file with the Court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. The Court may designate the time within which reply briefs may be filed.

(*b*) All briefs filed with, and for the use of, the Court shall be in quadruplicate—original and three copies. As soon as any brief is received by the Clerk he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 14. AMENDMENTS TO NOTICES, PETITIONS, ETC.

Amendments to any notice, petition, or other pleading may be made by filing a new statement of claim, petition, or such other pleading, unless the Court otherwise directs.

RULE 15. CONTINUANCES; DISMISSAL FOR FAILURE TO PROSECUTE.

(*a*) After claims have been set for hearing continuances are looked upon by the Court with disfavor, but may be allowed *when good cause is shown therefor,* or when the State and the claimant jointly move for a continuance.

(*b*) A party desiring a continuance should file a motion showing good cause therefor, *before the first day of the term,* or otherwise at the earliest possible date, so that if the motion be granted the opposing party may be notified, if possible, in time to obviate the attendance of witnesses on the day set for hearing.

(*c*) Whnever any claim regularly filed shall not be moved for trial by the claimant during the time that four regular terms of Court have been held at which the claim might have been prosecuted, and the state shall be ready to proceed with the trial thereof, the Court may, upon its own motion or that of the State, dismiss the claim unless sufficient reason appear or be shown by the claimant why such claim cannot be tried.

(*d*) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the Clerk or the Court prior thereto, advising of his inability to attend and the reason therefor, and if it further appear that the claimant or his representative had sufficient notice of the docketing of the claim for hearing, the Court may, upon its own motion or that of the State, dismiss the claim.

(*e*) Within the discretion of the Court, no order dismissing a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of Court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

RULE 16. ORIGINAL PAPERS NOT TO BE WITHDRAWN; EXCEPTIONS.

No original paper in any case shall be withdrawn from the Court record, except upon special order of the Court, or one of the Judges thereof in vacation, and except when an official of a State Department is testifying from an original record of his department a certified copy of the original record of such department may be filed in the place and stead of the original without special order of the Court.

RULE 17. WITHDRAWAL OR DISMISSAL MOTION BY PARTY FILING CLAIM.

(*a*) Any claimant may move to withdraw his claim and the same shall be dismissed. Should the claimant later refile the claim, the Court shall consider its former status, such as previous continuances and any other matters affecting its standing, and may redocket or refuse to redocket the claim as in its judgment justice and equity may require under the circumstances.

(*b*) Any department or state agency, having filed a claim for the Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may move to withdraw the claim and the same shall be dismissed, but without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 18. WITNESSES.

(*a*) For the purpose of convenience and in order that proper records may be preserved claimants and State Departments desiring to have subpoenas for witnesses shall file with the Clerk a memorandum in writing giving the name and number of the claim and setting forth distinctly the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(*b*) Requests for subpoenas for witnesses should be furnished to the Clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(*c*) The payment of witness fees, and mileage where transportation is not furnished, of any witness subpoenaed by or at the instance of either the claimant or the respondent state agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 19. DEPOSITIONS.

(*a*) Depositions to be read as part of the record in any claim under the regular procedure shall not be taken, recognized or allowed except in accordance with this Rule of the Court.

(b) Before any deposition shall be taken, permission shall be obtained from the Court if in session, or from the Presiding Judge, or one of the other regular Judges in the vacation of the Court. Application for such permission shall be made in writing and show good and sufficient reason why the designated witnesses, whose depositions are sought to be taken, cannot appear and testify before the Court when such claim shall come up in regular order for hearing and investigation.

(*c*) If such permission is granted to take the deposi-

tions of any designated witnesses, reasonable notice of the time and place shall be given the opposite party or counsel, and the party taking such depositions shall pay the costs thereof and file an original and three copies of such depositions with the Court. Extra copies of exhibits will not be required; however, it is suggested that where exhibits are not too lengthy and are of such a nature as to permit it, they should be read into the deposition.

RULE 20. REHEARINGS AND REOPENINGS OF CLAIMS AFTER DETERMINATION.

(*a*) Rehearings may not be allowed except where good cause is shown why the case should be reconsidered. Motions for rehearings may be entertained and considered *ex parte*, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the rehearing. Such petition and brief shall be filed within 30 days after notice of the Court's determination of the claim, and the filing of the Court's opinion therein, unless good cuase be shown why the time should be extended.

(*b*) Unless the petitioner expressly shall seek that the case also be reopened upon the rehearing for the introduction of new testimony, and unless such request for reopening the case appears proper and is supported by affidavits showing good cause why the case should be reopened, such petition shall be treated only as seeking a reconsideration of the claim upon the record already made and before the Court. If a rehearing is allowed it shall be only for the purpose of a reconsideration and redetermination of the case upon the record already before the court unless the Court, in its discretion shall, by its order, otherwise direct.

RULE 21. RECORDS OF SHORTENED PROCEDURE CLAIMS SUBMITTED BY STATE AGENCIES.

When claims are submitted under the shortened pro-

cedure section of the Court Act, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record, among other things which may be peculiar to the particular claim, should show as definitely as possible that:

(1) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. In other words, it should appear he was innocent or without fault in the matter.

(2) The department, by or through neglect, default or failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(3) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for as to the correctness and reasonableness by some one in authority in the department.

The State Agency shall ascertain that it and the claimant are in agreement as to the amount of the claim as proposed to be presented to the Court. Before the record of the claim is filed with the Clerk it must bear the concurrence of the head of the State Agency concerned and the approval for payment by the Attorney General.

REPORT OF THE COURT OF CLAIMS

For Period December 1, 1946, to November 30, 1948

(1-a) Approved claims and awards referred to the Legislature, 1947, for the period December 1, 1946, to February 7, 1947, after Report No. 3 had gone to press; allowed by the Legislature, 1947; opinions therein included in this report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
577	Alt, Grant, Sheriff	State Auditor	$ 51.05	$ 51.05	January 18, 1947
565	Bennett, Jacob F. (To be paid in monthly installments of $52.00 each from 1-1-47 to 6-30-49.)	State Road Commission	1,560.00	1,560.00	February 4, 1947
566	Cabell, N. B. and W. E. Myles	State Road Commission	39.75	39.75	January 15, 1947
567	Davis, Robert	State Road Commission	100.00	100.00	January 16, 1947
560	Gribble, L. G.	State Road Commission	—	250.00	January 28, 1947
570	Hall, D. Ray	State Road Commission	57.00	57.00	January 17, 1947
578	King's, Inc.	Department of Public Safety	132.77	132.77	January 22, 1947
574	Meeker, David	State Road Commission	9.10	9.10	January 17, 1947
568	McClung, Alice E.	State Road Commission	720.00	720.00	January 16, 1947

REPORT OF THE COURT OF CLAIMS (Continued)

(1-a) Approved claims and awards referred to the Legislature, 1947, for the period December 1, 1946, to February 7, 1947, after Report No. 3 had gone to press; allowed by the Legislature, 1947; opinions therein included in this report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Determination Date of
573	O'Conner, George E.	State Road Commission	92.85	92.85	February 5, 1947
569	Pratt, Effie Savage, Gdn. Charles Layman and Lois Elaine Savage	State Road Commission	240.00	240.00	January 16, 1947
564	S. G. M. Gas Company	State Road Commission	4.50	4.50	January 15, 1947
563	Weir-Cove Ice & Coal Co.	State Road Commission	435.19	435.19	January 15, 1947
		Totals	$3,442.21	$3,692.21	

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the Legislature, 1949, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
615	American Oil Co.	State Tax Commissioner	$ 674.83	$ 674.83	April 21, 1948
614	Bailey, Clark	State Road Commission	50.00	50.00	January 16, 1948
597	Bonded Oil Co.	State Tax Commissioner	1,147.43	448.67	November 7, 1947
591	Bowling, J. Otis	State Road Commission	—	1,500.00	November 5, 1947
606	Breedlove, John H.	State Road Commission	210.73	210.73	April 20, 1948
642	Brodhead-Garrett Co., Inc.	W. Va. Board of Education	69.86	69.86	October 29, 1948
537	Buffalo-Winifrede Coal Co., a corporation	State Department of Unemployment Compensation	408.25	52.05	January 22, 1948
625	Caplan, Ben, d/b/a National Towel Supply Co.	State Tax Commissioner	1,514.89	944.27	July 26, 1948
636	Catron, S. P.	State Road Commission	62,240.00	1,250.00	November 4, 1948
617	Clark, Maud	State Road Commission	3,769.00	500.00	July 23, 1948
612	Cochran, Zackwell	State Road Commission	40.00	40.00	January 16, 1948
646	Coole, J. W.	State of West Virginia	50,000.00	10,000.00	Nov. 12, 1948
609	Crescent Brick Co.	State Auditor	333.40	333.40	January 26, 1948
621	Daugherty, Duncan W.	State Auditor	615.00	615.00	April 14, 1948
616	Davis, I. S., d/b/a Fairmont Linen Supply Co.	State Tax Commissioner	685.96	685.96	April 21, 1948
592	Eastern Coal Sales Co., a corporation	State Tax Commissioner	4,616.10	4,616.10	Sept. 17, 1947

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the Legislature, 1949, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
633	Elite Laundry Co.	Dept. of Motor Vehicles	52.50	52.50	November 9, 1948
602	Eureka Pipe Line Co.	State Road Commission	367.42	367.42	November 3, 1947
611	Eureka Pipe Line Co.	State Road Commission	209.31	209.31	January 16, 1948
607	Evening Journal Publishing Co.	State Auditor	250.80	250.80	January 23, 1948
600	Farley, Alex	State Road Commission	100.00	100.00	October 31, 1947
643	Galperin Music Co.	W. Va. Board of Education	30.11	27.95	Nov. 10, 1948
632	Hayes, Isaac	State Board of Control	10,000.00	1,600.00	Nov. 12, 1948
582	Hendrickson, Jack and Martha	State Road Commission	22.15	22.15	April 17, 1947
641	Jackson, Dee	State Road Commission	100.00	100.00	October 19, 1948
599	Knisely, Wm. M.	State Road Commission	17.50	17.50	October 28, 1947
626	Light, Sibyl C.	State Road Commission	3,955.00	540.00	November 5, 1948
613	Moore, Lucille	State Road Commission	239.62	239.62	January 16, 1948
589	Musgroves Wholesale Grocery	State Board of Control	221.03	151.66	July 17, 1947
603	McGrady, Sim	State Road Commission	38.00	38.00	November 3, 1947

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the Legislature, 1949, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
623	Pinnell, W. L. Sr. and W. M. Pfost, d/b/a Pinnell & Pfost	State Tax Commissioner	907.72	907.72	July 27, 1948
586	Presson, Katherine	State Road Commission	1,000.00	100.00	November 6, 1947
579	Raleigh County Bank	State Tax Commissioner	737.88	472.83	Sept. 15, 1947
610	Robinson, Robert Ray, an infant, by Bob Robinson	State Conservation Commissioner	2,500.00	2,000.00	January 27, 1948
620	Saunders, Thomas	State Road Commission	300.00	300.00	April 26, 1948
580	Short, Nellie O.	State Road Commission	43.90	43.90	April 24, 1947
640	Sidell, A. R., M.D.	State Road Commission	19.81	19.81	October 20, 1948
583	Slayton, George	State Road Commission	25.00	25.00	April 17, 1947
576	Starcher, Zora, Bessie Starcher Cahill and Nora Starcher Rexroad	State Road Commission	835.00	150.00	April 28, 1947
536	Utilities Coal Co., a corporation	State Department of Unemployment Compensation	1,884.42	240.62	January 22, 1948
631	Webb, Lena J.	State Conservation Commission	40.00	35.00	Nov. 10, 1948
629	Whitaker, R. C. and American Central Insurance Co.	State Road Commission	41.93	41.93	July 14, 1948

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the Legislature, 1949, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
584	Wilson, Blanche	State Road Commission	15,000.00	750.00	April 29, 1947
605	Wisman, George, James and Garnett and Hazel Wood and Ed. Moore	State Road Commission	2,500.00	500.00	January 29, 1948
639	Young, Elizabeth	State Road Commission	16.70	16.70	October 18, 1948
		Totals	$167,831.25	$31,311.29	

(2) Approved claims and awards satisfied by payments out of regular appropriations for the biennium: (None.)

(3) Approved claims and awards satisfied by payments 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 Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
595	Albright, S. D. & F. V., d/b/a Albright Oil Co.	State Road Commission	$ 631.18	Denied	May 3, 1948
575	Bess, John W.	State Road Commission	1,871.14	Denied	November 3, 1947
557	Brigode, Lillian	W. Va. and Kanawha County Boards of Education	3,000.00	Dismissed	January 23, 1947
619	Duke, Ruth C.	Department of Public Safety	300.00	Denied	April 30, 1948
542	Goins, Harry	State Board of Control	5,000.00	Denied	February 5, 1947
627	Hartigan, J. W., M.D.	State Department of Public Assistance	1,170.00	Dismissed	June 18, 1948
628	Hartigan, J. W., M.D.	Workmen's Compensation Dept.	305.00	Dismissed	June 18, 1948
618	Hartley, John R., Admr. estate of Donald Lee Hartley, decd.	State Road Commission	10,000.00	Denied	April 30, 1948
624	Huntington Excavating Co.	State Tax Commissioner	379.75	Dismissed	June 18, 1948
596	King, Ida Mae	State Road Commission	25,000.00	Denied	January 19, 1948
558	Loveless, Columbus	State Road Commission	1,000.00	Denied	January 28, 1947
581	Matherly, Effie	State Road Commission	—	Dismissed	May 5, 1948
585	Mize, Benny	State Road Commission	1,978.59	Denied	April 30, 1947

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
571	Morris, Paul Edward, infant, by W. S. Morris	W. Va. and Mason County Boards of Education	25,000.00	Dismissed	January 21, 1947
572	Morris, William	W. Va. and Mason County Boards of Education	5,000.00	Dismissed	January 21, 1947
608	Morrison, James A. and Onieda	State Road Commission	1,000.00	Denied	May 4, 1948
622	McGraw, Della J.	State Board of Control	5,200.00	Denied	October 20, 1948
590	McNeil, Louise	State Board of Control	208.20	Denied	July 22, 1947
561	Neville, Charles W.	State Conservation Commission	955.00	Denied	February 7, 1947
601	Orsini, Sylvia	State Road Commission	31.95	Denied	November 4, 1947
594	Richmond, Jess P.	State Tax Commissioner	5,557.86	Denied	October 22, 1947
598	Saunders, Thomas	State Road Commission	1,500.00	Dismissed	January 28, 1948
593	Thompson, A. J.	State Road Commission	50.00	Denied	October 20, 1947
		Total	$95,138.67		

(5) Advisory determinations made at the request of the Governor or the head of a State Agency: (None.)

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.

OPINIONS

TABLE OF CASES REPORTED

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

(No. 563-S—Claimant awarded $435.19)

WEIR-COVE ICE & COAL COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1947

CHARLES J. SCHUCK, JUDGE.

Claimant's Dodge truck, loaded with coal and having a gross weight of 14,700 pounds, while crossing the bridge spanning Holberts Run in Hancock county, West Virginia, broke through the said bridge causing damage to the truck in the amount of $435.19. From the record it appears that two of the stringers underneath the bridge and supporting the floor thereof had been affected by dry rot and had consequently materially weakened the carrying capacity of the bridge, which was a wooden structure. No signs were posted as to weight limits, nor had the bridge been inspected for several months previous to the time of the accident in question. A detailed and itemized statement is furnished showing the various repairs that total the amount of the claim.

The state road commission shows through its special claims investigator, George I. Simons, that a personal in-

vestigation of the claim was made by him; that the bridge in question had not been inspected for several months and then only in a haphazard manner; that there were no caution signs and no load-limit signs placed anywhere near the bridge designating the limit of the load that the bridge would carry. He also states that a towing truck and wrecker was necessary to remove the wrecked truck, and that other expenses were incidental to the removal of the wrecked truck and coal; also that the bridge in question had been used for loads similar to those that claimant had at the time of the collapse of the bridge. He recommends that payment be made in favor of the claimant in the amount asked for and this recommendation is approved both by the head of the state road department and the attorney general's offiice, by the attorney general and the assistant attorney general.

Under the circumstances and facts, as shown, there was negligence on the part of the road crew or local superintendent of the road commission in not having signs posted and the bridge in question inspected and we are of the opinion that the claim should be paid. An award is therefore made in the amount of four hundred thirty-five dollars and nineteen cents ($435.19).

(No. 564-S—Claimant awarded $4.50)

S. G. M. GAS COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1947

CHARLES J. SCHUCK, JUDGE.

On March 6, 1946, a state road commission crew was engaged in placing gravel in the Armstrong Creek Road in

Fayette county, West Virginia, and in the course of said work was using a state road truck for the purpose of hauling the gravel. From the facts, as submitted, it seems that it was necessary for the driver to leave the state right of way in the operation of his truck and drive in, over, and upon private property to reach other state road equipment which was then located in the creek bed of the aforesaid creek. In doing so and while operating the said truck, as aforesaid, it struck the private gas line of claimant, causing the pipe to become separated and bring about a leak in the gas line. Damages in the amount of $4.50 are claimed.

The claim is recommended for payment by the head of the department involved and approved by the attorney general's office, through the attorney general and the assistant attorney general. We are of the opinion that the carelessness of the operator of the state road truck was the immediate cause of the accident, and therefore recommend payment of the claim and make an award in the amount of four dollars and fifty cents ($4.50).

(No. 566-S—Claimants awarded $39.75)

N. B. CABELL and W. E. MYLES, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1947

CHARLES J. SCHUCK, JUDGE.

On July 12, 1946, a state road commission crew, under the supervision of W. A. Dysard, as foreman, was employed at cleaning out what is known as Spring Run in Greenbrier county, a mile and one-half northwest of White

Sulphur Springs, West Virginia. The work was being carried on upon private property and was for the purpose of removing the debris and filling an embankment that had been considerably washed during a previous flood. A state road shovel was used for doing the work and during the process of cleaning the aforesaid run the shovel in question came in contact with, raised and damaged the private gas line of claimants, causing damage to the extent of $39.75.

Payment of the claim is authorized by the state road commissioner and approved by the attorney general's office by the attorney general, himself, and the assistant attorney general.

We are of the opinion that under the circumstances claimants are entitled to an award in the sum heretofore specified, to wit, thirty-nine dollars and seventy-five cents ($39.75).

(No. 567-S—Claimant awarded $100.00)

ROBERT DAVIS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1947

ROBERT L. BLAND, JUDGE.

According to a record prepared by the state agency involved in this case and submitted to this court on December 11, 1946, under section 17, article 2, chapter 14 of the code, the state road commission exercises supervision of a bridge crossing Kanawha Two-mile Creek and what is known as Dutch Hollow Road, in Kanawha county, West Virginia. This bridge is fifty-two feet long and fourteen

feet wide. The floor of the bridge is seven feet above the stream of water. It had been neglected and permitted to become and remain in a defective and dangerous condition. Close to one end of the bridge was a large hole, sixty-six inches long and eleven inches wide, according to a statement made by Grover Melton, district safety director. The hole had been in existence approximately six weeks prior to the accident out of which the instant claim arises. The state claim agent, who investigated the claim in question, refers to the bridge accident as "another case of no reports, no inspections."

Claimant and his family reside in Dutch Hollow, one-fourth mile up the hollow from Kanawha Two-mile Road. About five o'clock, P. M., on November 4, 1946, claimant's small daughter, Arbutus Davis, aged seven years, was sent by her mother to a mail box to obtain a daily paper. While crossing the bridge on her way home the child stepped into the hole and fell for a distance of seven feet, knocking out one permanent tooth and one "baby" tooth, and sustaining bruises to her body. Claimant made certain expenditures for X-ray pictures and dental treatment and will incur other and further liability in the necessary treatment of the child, and dental work and services. A careful investigation reveals that this liability will approximate the sum of $100.00.

It is difficult to believe that officials of the road commission should be so neglectful of duty and so indifferent to the safety of the traveling public as is shown by the record of this claim. No excuse can be offered for the continued existence of the dangerous hole in the bridge in question. There is, we think, under the facts disclosed by the record, a moral obligation on the part of the state sufficient to warrant an award in this case. An award is, therefore, made in favor of claimant Robert Davis, in the sum of one hundred dollars ($100.00), to compensate him for money already expended in the necessary treatment of his child, Arbutus Davis, and for the further use and benefit of said child in providing necessary dental services.

(No. 568-S—Claimant awarded $720.00)

ALICE E. McCLUNG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1947

ROBERT L. BLAND, JUDGE.

Claimant Alice E. McClung is the dependent widow of John McClung, deceased. Said John McClung, while an employe of the state road commission and in the line of duty sustained a fatal injury when struck by a snowplow in Greenbrier county, West Virginia, on January 25, 1936. His death occurred on February 9, 1936. At the time of the accident the state road commission was not a subscriber to the workmen's compensation fund. In 1937, 1939, and 1941 the Legislature made appropriations for the benefit and relief of his widow, the said Alice E. McClung. In 1943 this court made a further award in her favor. See *Alice E. McClung* v. *State Road Commission* 2 Ct. Claims (W. Va.) 83. The opinion of Elswick, Judge, sets forth the facts out of which the claim arose and the reasons supporting the appropriations and awards made. Reference is also made to the subsequent opinion of this court, *Alice E. McClung* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 47.

The claim under consideration now comes to this court again from the state road commission. It is concurred in by the state road commissioner and approved by an assistant attorney general as a claim which, within the meaning of the act creating the court of claims, should be paid by the state.

Pursuant to the policy established by the Legislature, and following the precedent created by this court, an award is now made in favor of claimant Alice E. McClung for

the sum of seven hundred and twenty dollars ($720.00), payable in monthly installments of thirty dollars ($30.00) each from January 1, 1947, to December 31, 1948, but to terminate and end upon her remarriage or death within such period of twenty-four months.

(No. 569-S—Claimant awarded $240.00)

EFFIE SAVAGE PRATT, *Guardian of* Charles Layman Savage and Lois Elaine Savage, *infants* under the age of sixteen years, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1947

ROBERT L. BLAND, JUDGE.

The two claims involved in this case grow out of the death of Theodore Savage, a former employe of the state road commission, and father of said infants. Each claim is in the sum of $120.00, and each is concurred in by the state road commission, and approved by the attorney general as a claim that, in view of the purposes of the court of claims statute, should be paid by the state. The claims are submitted to this court for determination under the provisions of section 17 of the court act.

Said Theodore Savage was engaged in the line of duty as an employe of the state road commission when his death occurred on the twelfth day of June, 1936. The facts supporting the claims are particularly set forth in case No. 227-S, in which the opinion of the court by Elswick, Judge, appears in 2 Ct. Claims (W. Va.) 89, to which reference is here made. At the time of the accident which resulted in the death of said Theodore Savage, the state road com-

mission was not a subscriber to the workmen's compensation fund. The decedent left surviving him Effie Savage, as his widow, and said Charles Layman Savage and Lois Elaine Savage, as his only children and sole heirs at law. Appropriations were made for the benefit of said widow and two dependent children by the Legislature in 1937, 1939 and 1941, the amount appropriated in 1937 for said widow and two children being one thousand three hundred seventy dollars ($1370.00), the amount for 1939, nine hundred sixty dollars ($960.00), and in 1941, three hundred sixty dollars ($360.00), as compensation to said two children, their mother having entered into a second marriage. In 1943 this court made awards of five dollars ($5.00) per month for each of said children from January 1, 1943. to December 31, 1944, and further awards were made for said two children by this court in case No. 424-S, *Effie Savage Pratt, gdn., etc.*, 3 Ct. Claims (W. Va.) 46.

Pursuant to the policy established by the Legislature, and following the precedent created by this court, an award of two hundred forty dollars ($240.00) is now made in favor of claimant, Effiie Savage Pratt, guardian of Charles Layman Savage and Lois Elaine Savage, infants under the age of sixteen years, payable in monthly installments of five dollars ($5.00) each for each of said infants, for a period of twenty-four months from January 1, 1947, to December 31, 1948.

(No. 570-S—Claimant awarded $57.00)

D. RAY HALL, Claimant

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 17, 1947

MERRIMAN S. SMITH, JUDGE.

In the fall of 1945 and spring of 1946, Sam Smith, an employe of the state road commission, was engaged in driving a patrol grader, and graded onto the private property of claimant D. Ray Hall, situated off Popular Street in the town of St. Albans, Kanawha county, West Virginia. During the same period of time stone was being blasted from the embankment and dumped on claimant's property. This work was being done on a private road which was not included in the state road commission system of Kanawha county and consequently was not authorized by any official of the state road commission.

The damage done necessitated claimant employing a surveyor to reestablish the property line, and labor for removing the stone and dirt, which work was done in August, 1946. An itemized bill in the amount of $57.00 was filed with the record of this claim.

The claim is recommended for payment by the head of the department involved and approved by the assistant attorney general.

An award in the sum of fifty-seven dollars ($57.00) is therefore made in favor of claimant, D. Ray Hall.

(No. 574-S—Claimant awarded $9.10)

DAVID MEEKER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 17, 1947

MERRIMAN S. SMITH, JUDGE.

While driving across the Aetnaville toll bridge operated by the state road commission in Ohio county, West Virginia, on September 29, 1946, the muffler and exhaust pipe of claimant's car were damaged when a loose or displaced floor or deck board flew up and engaged the underside of the car. The cost of repairing the damage to the said automobile was $9.10.

The circumstances and facts connected with this claim having been duly investigated by those in authority in district No. 6 of the state road commission, and the payment of the claim being concurred in by the state road commissioner and approved by an assistant attorney general, an award in the amount of nine dollars and ten cents ($9.10) in favor of the claimant, David Meeker, is recommended.

(No. 577-S—Claimant awarded $51.05)

GRANT ALT, Sheriff, Claimant,

v.

STATE AUDITOR, Respondent

Opinion filed January 18, 1947

MERRIMAN S. SMITH, JUDGE.

Grant Alt, sheriff of Pendleton county, West Virginia, did not present to the state auditor for payment twenty certificates for state's witness attendance at December 1941 and 1942 terms of circuit court, totaling $51.05, until after the statutory period for current appropriations out of which they could have been paid had expired.

It appears from the twenty certificates, made a part of the instant record, that this is a just obligation and one that should be paid, the payment of which is concurred in and recommended by the state auditor and the assistant attorney general. Therefore, an award in the amount of fifty-one dollars and five cents ($51.05) is hereby made to the claimant, Grant Alt, sheriff of Pendleton county, West Virginia.

(Nos. 571, 572—Claims dismissed)

PAUL EDWARD MORRIS, *infant*, by W. S. MORRIS, *his next friend*, claimant,

v.

WEST VIRGINIA BOARD OF EDUCATION and BOARD OF EDUCATION OF MASON COUNTY, Respondents.

WILLIAM S. MORRIS, Claimant,

v.

WEST VIRGINIA BOARD OF EDUCATION and BOARD OF EDUCATION OF MASON COUNTY, Respondents.

Opinion filed January 21, 1947

The court of claims is without jurisdiction to hear and determine or to make an award in any matter or claim involving a county board of education. Reaffirming *Dillion* v. *Board of Education*, 1 Ct. Claims (W. Va.) 366; *Richards* v. *Board of Education*, 3 Ct. Claims (W. Va.) 251.

Appearances:

Kay, Casto & Amos (John S. Haight) for the claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The above claims growing out of the same facts, for the purpose of this opinion, are herewith considered jointly. The state department involved having filed a plea denying the court's jurisdiction to hear and determine the claims on their merits, we are now called upon to render an opinion on the pleadings as filed by the claimants and the said plea as to jurisdiction. This court has heretofore on

several occasions passed upon the question here involved, and has held that we are without jurisdiction to hear and determine any claim or matter involving a county board of education. See *Dillon* v. *Summers County Board of Education,* 1 Ct. Claims (W. Va.) 366; *Richards* v. *State and Calhoun County Boards of Education,* 3 Ct. Claims (W. Va.) 251.

We appreciate, however, that the claimants have made the state board of education a party to these proceedings, and are seeking by argument presented in an able brief to make the state board liable, on the theory that under section 5, article 2, chapter 18 of the code of West Virginia (1933) the state board shall make rules and carry into effect the laws and proceedings of the state relating to education, ". . . including rules relating to the physical welfare of pupils, . . ."; and further, that under section 3, article 3 of the same chapter the general supervision of the schools is vested in the state superintendent of schools.

We have again considered the foregoing provisions in connection with the claims as presented, and are of the opinion to affirm our former opinions herein referred to and to hold that we are without jurisdiction to hear and determine the merits of the said claims. Chapter 39 of the acts of the Legislature 1945 specifically excludes from our consideration or jurisdiction any claim that may grow out of any matter involving a county board of education, and also excludes all county boards of education from the definition of the term "state agency" as found in the act creating this court.

We believe that the Legislature clearly intended, by the aforesaid act, to take from this court every right to hear and determine any question involving in any manner a claim against any county board of education, even when coupled with the state board. Especially is this true, in our opinion, when the claims, as presented, arose originally by reason of the alleged negligence of employes or attaches employed by the county board of education and under the

control and supervision of such board. The statute above referred to is plain and unambiguous, clear and definite in its application, and therefore leaves not the slightest reason for doubt or conjecture.

The local or county board of education has full charge of the personnel that is required to operate the schools located within the county; retains the services of teachers, superintendents and principals, as well as janitors and those employed in and about the school buildings, and who are charged with keeping the buildings in a safe, sanitary condition for the welfare of pupils enrolled in the school; fixes their salaries and discharges them when their services are no longer wanted or required. The state board of education does not control this personnel in any way, except as to certain requirements that are necessary in the matters of superintendents, principals and teachers before they can be employed by the local board. The negligence, therefore, of any employe such as a janitor or one in charge of the school buildings, could not by the widest stretch of the imagination place upon a state board a moral obligation to respond in damages for the negligence of an employe of the local board. We cannot agree with the proposition that the state board is in any sense involved, and feel that we are likewise enjoined from hearing any matter against the state board, not only by reason of the imputation and intent of the legislative acts, but by decisions of our State Court of Appeals as well. These claims seem to be highly meritorious, and claimants, of course, can still present the matter to the Legislature for appropriate action.

The plea to the jurisdiction is sustained and the cases dismissed.

(No. 578-S—Claimant awarded $132.77)

KING'S, INC., Claimant,

v.

DEPARTMENT OF PUBLIC SAFETY, Respondent

Opinion filed January 22, 1947

MERRIMAN S. SMITH, JUDGE.

Ticket invoices for repairs to leggings and shoes belonging to various members of the West Virginia state police during the years 1943, 1944 and 1945, were presented by King's, Incorporated, of Charleston, West Virginia, to the department of public safety, in the total amount of $132.77.

After double checking the individual tickets as to names, dates and amounts, the total amount claimed was found to be correct and just; and the head of the agency involved certified that said bills, as rendered, had not been paid. This claim being concurred in by the superintendent of the department of public safety, and approved by the assistant attorney general, an award in the sum of one hundred thirty-two dollars and seventy-seven cents ($132.77) is hereby made to King's, Inc., of Charleston, West Virginia.

(No. 557—Claim dismissed)

LILLIAN BRIGODE, Claimant,

v.

STATE BOARD OF EDUCATION and KANAWHA COUNTY BOARD OF EDUCATION, Respondents.

Opinion filed January 23, 1947

The court of claims is without jurisdiction to hear and determine or to make an award in any matter or claim involving a county board of education. Reaffirming *Dillon* v. *Board of Education*, 1 Ct. Claims (W. Va.) 366; *Richards* v. *Board of Education*, 3 Ct. Claims (W. Va.) 251.

Appearances:

Dayton, Campbell & Love (Ernest Gilbert), for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The above claim grows out of facts involving a county board of education, and in accordance with our opinions heretofore rendered in similar cases or claims, we again hold that we are without jurisdiction, and reaffirm our previous findings or conclusions in a claim or claims of similar nature.

(No 560—Claimant awarded $250.00)

L. G. GRIBBLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 28, 1947

An award will be made when the evidence shows that the employes of the state road commission entered upon private property without authority and felled some twenty trees and otherwise damaged the property.

Appearances:

Claimant, in his own behalf.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

In August, 1946, a crew of the state road commission was clearing the right of way on state route 17 in the suburbs of St. Albans, Kanawha county, West Virginia, and while so doing they cut down twenty trees and three rose bushes which were located on two lots belonging to L. G. Gribble, the claimant. These trees were situated from eighteen to twenty-four inches off the state's right of way and on the land of the said Gribble.

The liability of the state road commission for the wrongful act was admitted by the assistant attorney general on behalf of the state, therefore evidence was introduced by claimant in order that the amount of damages sustained might be ascertained.

From the evidence introduced it appeared that claimant purchased these two lots in 1945, paying approximately

$1000.00 for them, and that he expects to build his home thereon, at such time as materials are available, in which to live during his declining years.

Some of the trees, by virtue of their location, would undoubtedly have been cut down anyway; on the other hand, they were from four to twelve inches in diameter, and two of them were so planted as to distance that they were especially arranged for the placing of a hammock and the claimant had visions of spending many idle moments under the spreading boughs and shades reclining in his hammock.

Jus as "Rome was not built in a day" so with trees, they are the handiwork of the Ruler of the Universe, and only time can develop them to usefulness to mankind.

After due consideration the court approves an award in the sum of two hundred and fifty dollars ($250.00) to the said claimant, L. G. Gribble.

(No. 558—Claim denied)

COLUMBUS LOVELESS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 28, 1947

An award will be denied upon failure to prove by a preponderance of the evidence the justness and merit of a claim against the state or any of its governmental agencies.

Hendricks, Bouldin & Jones, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The state road commission exercises control over and maintains a bridge for pedestrians and vehicular traffic over Big Coal River, within the corporate limits of the town of Whitesville in Boone county, West Virginia. It extends from the main highway in the direction of and toward a coal mining camp.

Claimant Columbus Loveless, a "grease man" in the employ of the Anchor Coal Company, resides about three hundred yards from this bridge, and has crossed over it on an average of twice a day for the past seven years. About four-thirty o'clock on the morning of Saturday, September 21, 1946—after having been out until that hour having a "good time"—while crossing the bridge on his way home from Whitesville he claims to have stepped into a large and dangerous hole in the treadway on which he was walking and thereby sustained personal injuries, in consequence of which he suffered much discomfort and pain and was prevented from resuming the duties of his employment with the coal company for fourteen days, thus losing

wages at the rate of $11.85 per day for that period of time. He, therefore, seeks an award of $1000.00 to compensate him for his personal injuries and loss of wages. He made several trips to a physician, but asks no compensation for medical attention. No one witnessed the alleged accident, but when claimant returned to his home he informed his wife and stepson and stepdaughter as to how he claimed the accident occurred, and they perceived the extent of his injuries, and know that he lost fourteen days of working time wages.

Claimant related the circumstances attending his accident in these words: "Well, about 4:30 in the morning I was coming across that bridge and my right leg went down in a hole and my left leg doubled up under me and I reached over to the bannister to pull myself out."

To make out a case entitling him to an award the claimant has the laboring oar. The onus of proof is on him. An award will be denied upon failure to prove, by a preponderance of the evidence, the justness and merit of a claim against the state or any of its governmental agencies.

Oak planks in the floor of the bridge were laid crosswise. In course of time when, on account of heavy traffic and hard usage, holes would from time to time appear in the floor of the structure, a "traffic tread" was built on the bridge. In doing so the planks were laid lengthwise. This was done to secure greater safety. According to the testimony of claimant he was walking on this treadway when he crossed the bridge to go to his home. He always walked on the treadway, and had never, prior to his accident, observed a hole in the treadway. He testified that the hole in the treadway was about six by eighteen inches in size, and that his leg went through this hole as far as his thigh.

The evidence in the case shows that when holes would appear in the floor outside of the treadway they were always promptly repaired. The evidence of the mayor of Whitesville and other testimony shows this to be true. When a new floor was to be placed in the bridge the

treadways were removed. No holes appeared in these treadways, and no holes were discovered in the oak planks on which the treadways were constructed.

We deem it unnecessary to record in this statement the evidence at any length. Suffice it to say that the claimant has not only failed to prove that a hole in the bridge was the proximate cause of his accident, but has wholly failed to establish a just and meritorious claim against the state—one for which an appropriation of the public funds should be made. The evidence as a whole conclusively disproves the contention of the claimant. We cannot, under the convincing showing of the record, make an award in favor of claimant.

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

(No. 565—Claimant awarded $1560.00)

JACOB F. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 4, 1947

Appearances:

Claimant, in his own behalf.

George I. Simons, special claims investigator for the state road commission, for respondent.

CHARLES J. SCHUCK, JUDGE.

As heretofore noted in the several awards made to the claimant, he was permanently injured by reason of a dynamite explosion, through no fault of his, while employed

by the state road commission; his injuries having been received at a time when the road commission had not as yet been placed by statute under the provisions of the workmen's compensation act, and this court, finding that the state was morally bound to compensate him, made an award accordingly. *Bennett* v. *Road Commission,* 2 Ct. Claims (W. Va.) 108. By the said award claimant was, and has been, paid at the rate of $52.00 per month for the biennium of 1943 and 1945, which payments per month at the same rate have been continued by reason of a subsequent award made by this court at its January term 1945. *Bennett* v. *Road Commission* 3 Ct. Claims (W. Va.) 7.

The claim as now presented is in effect for a continuation of the awards heretofore made; and the court again having heard all the evidence adduced, is of the opinion that the said monthly payments, desired as such by the claimant, should be continued at the same rate, namely $52.00 per month for the period beginning January 1, 1947 and ending July 1, 1949, on or before which time a physical examination of claimant shall be made by a competent physician or physicians, designated by the court, for the purpose of guiding the court in its future consideration of this claim as well as to determine whether or not such payments should be continued, modified or discontinued.

An award is therefore made in the sum of one thousand five hundred and sixty dollars ($1,560.00) payable in monthly payments of fifty-two dollars ($52.00) each, for and during the period hereinbefore indicated.

ROBERT L. BLAND, JUDGE, concurring.

It is with hesitation that I concur in the above award. Taking into consideration the amount of said award, the claimant will have received $9,747.02 since his accident. When the claimant first came before the court I was of opinion that an award adequate to compensate him for his suffering and disability should have been made. I do not believe that awards should be made in the manner in

which they have been made to this claimant. I believe in finality of awards. I am not satisfied that the claimant is entitled to any more money than the total amount for which awards have heretofore been made. Upon the last hearing it was made clear that he can milk cows and perform chores about the farm and he was able to travel a distance of eighty miles in order to attend the hearing. Should this claimant desire other and further compensation from the state I am of opinion that he should come into the court under its regular procedure and let the case be thoroughly investigated; certainly there should be a proper medical examination made to determine the extent of his disability before any other or further compensation shall be made to him. I have never been satisfied that this court should make awards as contemplated under chapter 23 of the code.

(No. 573—Claimant awarded $92.85)

GEORGE E. O'CONNOR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 5, 1947

Negligence in maintaining the traveled portion of a highway in a reasonably safe condition, thereby causing claimant's automobile to be wrecked and damaged, without any contributory negligence on his part, entitles claimant to an award.

Appearances:

Claimant, in his own behalf.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Early on the morning of October 15, 1946, while driving

on Coal Fork road, about one mile from the intersection with Davis Creek road, at Loudendale, Kanawha county, and while accompanied by his wife and two minor daughters, the right front wheel of claimant's automobile dropped into an opening in the highway several feet in diameter, and located adjacent to a certain bridge crossing what is known as Davis Creek, causing damages to the car and slight injuries to one of the children. Since the accident, however, the said child has suffered no ill effects by reason thereof, is in good health, and no claim is made by or for her except the cost and expenses of doctors examinations to determine the nature and extent of the injuries, if any, that she might have had.

The evidence shows that the opening or hole in the road was covered by grass and weeds which had improperly and negligently been allowed to grow and spread, and that consequently the defect could not be seen by one using the road as a traveler in an automobile and while approaching the bridge in question, as claimant was doing at the time of the accident. Claimant was driving at the rate of about ten miles per hour and seemingly using the necessary care in approaching the bridge and nowhere does the record in the case reveal that there was any negligence on his part contributing in any manner to the happening of the accident. The evidence further tends to show that the condition of the highway had been called to the attention of the road authorities prior to claimant's accident, but no effort of any kind was made to remedy the defect, until after the accident.

Under all the facts and circumstances adduced we are of the opinion that the state is morally bound to reimburse the claimant for the damages suffered by him.

Accordingly an award is made in favor of the claimant in the sum of ninety-two dollars and eighty-five cents ($92.85), being the amount of the damages to his automobile and medical expenses incurred by him on behalf of his daughter.

(No. 542—Claim denied)

HARRY GOINS, Claimant

v.

STATE BOARD OF CONTROL, Respondent

Opinion filed February 5, 1947

1. The effective date of the court of claims is held to be the date, after the appointment and qualification of its members, that the court convened and organized and proceeded to function in accordance with the purposes of its creation, namely, July 14, 1941.

2. A person in accepting an assignment in a state mental institution, knowing he would be placed in contact with mentally deranged and incapacitated patients "assumed risk" of injury which might result from such association.

John S. Haight, for the claimant.

W. Bryan Spillers, Assistant Attorney General for the respondent.

ROBERT L. BLAND, JUDGE.

Claimant Harry Goins, now residing at Cleveland, Ohio, but formerly a citizen of West Virginia and an attendant at Lakin State Hospital located in Mason county, is seeking an award in the sum of $5,000.00 to compensate him for damages claimed to have been sustained on account of an alleged assault made upon him on the first day of October, 1934 by an inmate of the hospital. Lakin State Hospital is an institution for the treatment and care of mentally defective negro persons. Claimant's petition, setting forth the nature and character of his claim against the state, was filed with the clerk of this court on the twenty-eighth day of June, 1946, eleven years, eight months and twenty-seven days after the alleged occurrence of the accident.

In the petition he alleges that he was, upon his employ-

ment as an attendant in said institution, assigned to duty on the third floor of the hospital, on which floor were a number of violently insane persons; that on October 1, 1934, while engaged in the duties assigned to him by the superintendent, he was stabbed, cut and severely wounded by an insane inmate of the hospital. He contends that there were normally two attendants constantly on duty on the said third floor or ward and that said attendants had instructions to enter patients' rooms and handle patients only when both attendants were present, the purpose of this instruction being to prevent or minimize injury to attendants at the hands of violent inmates. He further contends that on the first day of October, 1934, and for two weeks prior thereto, he had been required by the superintendent to act as the attendant for the said third floor by himself and without the assistance of any other employe, and that the fact that he himself was the only attendant in the ward was due to the fact that the other person normally employed as an attendant in the ward had been permitted to take a vacation and no arrangements or provisions had been made by the superintendent or other authorities of the hospital to have a substitute for the absent attendant on vacation. He charges that the patient who assaulted and stabbed him was known to the superintendent of the hospital to be insane and given to physical violence and that the claimant entered the patient's room alone because of the absence of any other employe, and that when he entered the room said patient struck and stabbed him several times with a large knife, inflicting serious injuries to his hands, arms, head and back.

The state agency involved opposes an award to claimant and has filed two pleas in the case, one for want of jurisdiction of the court to hear and determine the claim, and the other a general denial of liability, and the attorney general has also moved to dismiss the said claim on account of the bar of the statute of limitations. By its special plea, the board of control says that claimant should not be permitted to maintain his claim in the court of claims because the jurisdiction of the court does not extend to

any claim for disability or death benefit under chapter 23 of the code, governed by the workmen's compensation commission. The motion to dismiss the said claim presents a more serious question. Section 21 of the court of claims law reads as follows:

> "Limitations of Time.—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 limitation 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 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."

May the court properly take jurisdiction of the claim in question? Was said claim presented to the court of claims within five years from the time it could have been presented to the court? There was, we think, no opportunity afforded to present said claim to the court of claims until its members had been appointed, qualified, and the court was ready to function in accordance with the purposes of its creation. The act of the Legislature creating the state court of claims was passed March 6, 1941, was in effect from passage and duly approved by the Governor. Commissions were issued by the Governor as follows: to Walter M. Elswick, June 30, 1941; Charles J. Schuck, July 1, 1941 and Robert L. Bland, July 1, 1941. Although the court act was passed on March 6, as above stated, it thus appears that the membership of the court was not created

until the dates last aforesaid. The court was not formally organized until Monday, July 14, 1941, as disclosed by the following excerpt from its records:

> "The State Court of Claims having been created by an Act of the Legislature of West Virginia, Regular Session of 1941, and the Honorable M. M. Neely, Governor of West Virginia, having appointed and issued commissions to the Honorable Charles J. Schuck, of Wheeling, the Honorable Robert L. Bland of Weston, and the Honorable Walter M. Elswick of Hinton, as members of said Court for terms ending, respectively, on the thirtieth day of June, 1943, the thirtieth day of June, 1945, and the thirtieth day of June, 1947; and said Act having fixed the Office of the Secretary of State as the meeting place for said Court, and designated the Secretary of State as ex officio Clerk thereof, said three members appeared at the office of the Secretary of State on Monday, the fourteenth day of July, 1941, that being the beginning of the July term fixed by statute. And said three members having respectively qualified in manner prescribed by law, an organization was effected by the election of Honorable Robert L. Bland as Presiding Judge for the ensuing year."

Since the claim in question was filed with the clerk of the court on June 28, 1946, it necessarily follows that it was filed within five years from the date that the court was organized and ready to proceed with business. We therefore hold that the court has *prima facie* jurisdiction of the claim and the motion to dismiss it is accordingly overruled.

We shall now proceed to determine said claim upon its merits. It is predicated upon alleged negligence of the authorities of Lakin State Hospital in not providing more attendants in the ward in which claimant was employed. The evidence adduced consisted of testimony of the claimant and the affidavit of Dr. G. A. Banks who was superintendent of Lakin State Hospital at the time of the accident of which the claimant complains, which affidavit was permitted to be filed and considered by agreement of coun-

sel for the claimant and counsel for the state. It is shown that claimant accepted employment as an attendant in the hospital on March 10, 1933 and was assigned to duty in the ward on the third floor of the institution. There were from fifty to sixty patients in said ward under care and attention of two attendants who were usually on duty at the same time. It was their duty, according to the affidavit of the former superintendent to look after the inmates of the wards to which they were assigned for duty, there being three floors in the hospital building, each attendant being rotated from one floor to another so that within three months each attendant manned all three floors, and the instructions to claimant and to all other attendants were to search all patients night and morning who were located on the second and third floors of the hospital. He recollected that the inmate who was alleged to have assaulted claimant was a patient of the instituiton for about one month prior to October 1, 1934 and that he could not recall any information that the alleged assailant was particularly dangerous or violent. The superintendent recalled the incident of the accident which occurred to the claimant and affirmed that to the best of his recollection claimant was taken to the clinic where his wounds were dressed and injury was found to be chiefly in his right arm. After proper dressing Mr. Goins was taken to his room in the hospital where he remained for a week or more and then returned to duty as an attendant. According to the physician's statement, claimant's wounds had completely healed. Evidence of the claimant is to the effect that he was so badly injured that he has never been able from the time of his accident until the present time to perform heavy labor. It does appear, however, from his testimony that after resigning from the institution in 1935 claimant returned to Charleston and engaged in work as a janitor and other employment. During the recent world war he had worked in Cleveland, Ohio, apparently doing heavy work. It further appears from the testimony of the claimant himself that on the day of the accident in question he was preparing to take patients from the third floor of the

hospital out on the lawn for recreation and had entered the room of the patient by the name of Davis in order to have him accompany the group. Evidently if this patient were of a violent and dangerous type he would not have been permitted to go out on the lawn. How this patient who is alleged to have assailed claimant obtained the knife with which he stabbed him is not made to appear. It was evidently the duty of the claimant as an attendant in the ward to search the rooms of the patients in order to discover possible dangerous weapons. It was when the claimant entered the room that he was assailed by Davis. If there had been a half dozen other attendants in the ward the sudden assault upon claimant could not have been prevented. It therefore follows that the absence of another attendant in the ward at the time of the assault was not the approximate cause of assault.

> "'Negligence' does not exist unless there is a reasonable likelihood of dangerous consequence of the act complained of, and the possibility of an accident must be clear to the ordinarily prudent eye." *Herrick* v. *State*, 32nd N. Y. Supplement (2nd Series) p. 607.

In the case just cited, prosecuted in the court of claims of New York, by a student nurse for compensation for damages claimed to have been sustained by her in a state hospital when she was assaulted by an inmate in a cafeteria, it was held as follows:

> "Although state assumes the responsibility of caring for and keeping individuals in state hospitals from harm and injury, there is no such obligation or duty to a student nurse in such a hospital."

And further:

> "Student nurse, in accepting assignment in state hospital, knowing she would be placed in contact with mentally deranged and incapacitated patients, 'assumed risk' of injury which might result from such association, including risk of alleged

assault by inmate allegedly suffering from dementia praecox when leaving cafeteria."

In the above case Greenberg, Justice, in the opinion says:

"Can the State be charged with negligence because of its failure to have additional nurses and attendants in charge of the patients while in the cafeteria? Would additional nurses or attendants have prevented such an accident? There were, at the time of the alleged assault, in addition to claimant, four regular nurses or attendants and four dining room attendants. Even if there were more attendants or nurses in charge of the patients in the cafeteria, the assault might not have been prevented. The alleged striking was sudden and momentary and the hospital authorities had no notice of its imminence. How, then, could such a happening have been avoided? Even a guard or attendant for each and every inmate would not have avoided what is alleged to have happened to the claimant. There is no such duty on the part of the State to maintain such supervision. Any such rule of law would place an unreasonable burden upon the State or upon the authorities of the State . . ."

Claimant had a special relief bill introduced on his behalf in the Legislature of 1939. It was referred to the committee and permitted to sleep there. So far evidence shows no other step has been taken by claimant to assert his alleged grievances against the state of West Virginia. Under all the evidence, we are of the opinion that claimant has failed to establish a case that would warrant the court of claims in recommending an appropriation in his behalf for any sum, especially in view of his statement that after the alleged assault was made upon him he received his salary and resumed the duties of employment until such time as he saw fit to resign and leave the institution.

An award is accordingly denied and claim dismissed.

(No. 561—Claim denied)

CHARLES W. NEVILLE, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed February 7, 1947

Where a guest passenger who, with another passenger, protested to the driver regarding the speed of the truck, after having made several stops affording him ample occasion to alight from the truck, fails to avail himself of such opportunity, thereby assumes the risk, and an award will be denied.

Appearances:

M. S. Hodges, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

MERRIMAN S. SMITH, JUDGE.

Mr. Cokeley, superintendent of the trout hatchery operated by the state conservation commission, at Petersburg, West Virginia, notified Hansel Ruddle, who was employed by the conservation commission as game protector for Pendleton county, in May, 1945, that he was sending a load of trout to distribute above Thorn Creek, near Franklin, Pendleton county, West Virginia. On the morning of May 24, 1945, Ruddle arrived at the court house at Franklin with a pick-up truckload of fish; he called Dr. Richard Boggs, a dentist in Franklin, who was president of the local sportsmen's club and advised him of the arrival of the truck and he talked with Charles W. Neville, the claimant, on the street; consequently a number of the sportsmen's club members gathered around the truck to look over the fish. Frank Sites, the driver of the truck, Ruddle and

Neville (the claimant) occupying the cab, and Jimmy Anderson and Stanley Spaulding, two high-school boys being in the rear with the tank of fish, the truck proceeded on its journey to distribute the fish. They were accompanied by Dr. Thacker and at least one other party in a private passenger car.

On the way out, in leaving the highway and crossing a field, Ruddle cautioned the driver, Frank Sites, not to drive too fast because the boys on the rear of the truck ". . . . would fall off or something." (Record p. 19). After having stocked all their fish and emptied the tank, and upon their return while on U. S. route 220, about four miles from Franklin, the driver of the truck, in passing another oncoming truck, rounding the curve at a point known as Trout Rock Curve, lost control of the truck and went off the highway over the bank, upsetting the truck and injuring the claimant, Neville, who is seeking damages for his medical, hospital and incidental expenses thereto, and for loss of time from his work.

For the past several years various sportsmen's clubs over the state have insisted that they accompany the game protectors when restocking the fish so as to be on hand when the fish are released, primarily for two reasons; first, that they might see that the fish are properly stocked, and second, to ascertain the location of the holes that the fish go in. It has grown to be a regular custom that these clubs be notified of the time and place of these stockings by the game protector, since they are conducted primarily for the benefit of the fishermen and public of this state. However, no specific order was entered on this particular distribution, according to the following testimony of Mr. B. D. Wills, supervisor of state fish hatcheries: ". . . . there has never been any specific request by the commission to have them meet the trucks and go out. They take that on themselves, that if they want to go, why, they have gone in the past and they want to see how they are stocked." (Record p. 37). Consequently, when these club members

go on these restocking trips they assume the risk.

In the very nature of automobile accidents each one is dependent upon the specific incidents, circumstances and acts surrounding the particular accident. And in the instant case when driving through a rough field, Ruddle cautioned the driver not to drive too fast on account of the boys in the rear of the truck. If the claimant felt that the driver of the truck was a reckless driver he could easily have gotten out of the truck and could have ridden in the private car which was accompanying the truck and driven by Dr. Thacker. The evidence further shows, (record p. 4) that Neville testified: "So, there was one sharp curve that we come to and I made the remark to him and Mr. Ruddle that if we got around this one we may save our necks and get to town alive, but we didn't." This was just before the accident occurred and about four miles from their destination. Again, if the claimant was so fearful of having an accident he could have had the truck stopped and gotten out. Before the accident the truck had made about ten stops and if the claimant was under any apprehension or fear that the driver of the truck was reckless, ample opportunity was afforded him to alight from the truck. By his own evidence the claimant assumed the risk by continuing his ride with the driver for, after having remonstrated with the driver, he could have alighted from the truck at any one of the stops which it made during the process of distributing the fish. *Young* v. *Wheby*, 126 W. Va. 741. Speed is a relative element depending upon the kind and condition of the roadbed, the topography of the terrain and the mechanical condition of the machine; also the coordination of the driver.

The evidence in this case is conflicting as to the speed of the truck at the time of the accident. Ruddle testified that they were making from thirty to thirty-five miles per hour, while the claimant says they were going from fifty to fifty-five miles before rounding the curve at Trout Rock, so upon passing the oncoming truck Sites momentarily lost control of the wheel, and from the remarks of Neville, en

route, who apparently was a highly nervous passenger and by this time had played upon the driver's nerves to the extent that he momentarily lost control and the truck headed over the embankment. In this manner the claimant contributed in no small way to the incoordination of the driver.

The stocking and restocking of the streams and game preserves by the conservation commission is done primarily for the benefit and pleasure of a particular small group of the citizens of the state and the state derives no particular benefit by having the beneficially interested members of a club inspect or assist in the distribution of the fish or game and there is no record of a general specific request by those in authority to have them meet the trucks or to *accompany* them during the distribution.

Where a guest passenger who, with another passenger, protested to the driver regarding the speed of the truck, after having made several stops affording him ample occasion to alight from the truck, fails to avail himself of such opportunity, thereby assumes the risk, and an award will be denied.

Award denied and claim dismissed.

CHARLES J. SCHUCK, JUDGE, dissenting.

I cannot agree with the majority opinion filed in this case, primarily for the reason that I do not believe the facts justify the conclusion set forth in the opinion. Too much is taken for granted which is not supported by the evidence and assumptions are made and conclusions drawn that are not supported by the evidence as introduced during the hearing. In the first place, I am quite sure that an impartial reader of the transcript of the evidence must conclude that the claimant here was not only an invitee, but that he was rendering a service to the state department involved for which no charge was made, and which department was carrying out one of the purposes for which

it is created and for which those in charge are paid by the taxpayers of the state. It doesn't make any difference, in my opinion, what some superintendent may say, that no specific requests are made for outsiders to meet the trucks about to make distribution of fish, the contrary is shown by the evidence in this case; not only was the claimant invited to accompany the driver and game warden on the trip in question, but the warden had special instructions to obtain the services of high school boys, as well, to accompany them on this trip of fish distribution. The majority opinion seems to be based entirely on the case of *Young* v. *Wheby*, 126 W. Va. 741, which in my judgment does not govern in the instant case. In that case the injured person was purely a guest passenger, all of the persons in the car, including the passenger in question, were drinking, and an ample opportunity had been given the injured passenger to get out of the automobile at a town where one of the passengers had alighted, and after she was fully aware of the reckless driving of the operator of the automobile and after she must have concluded that the said driver was under the influence of liquor. No such circumstances are presented in the case before us. It is true that the driver of this truck hauling the fish had been cautioned on the way out to the point of distribution, while crossing an open, rough field, primarily because of the fact that two high school boys, who had been asked to accompany them, were riding on the rear of the truck and might be thrown off owing to the rough condition of the ground. Claimant testifies (record page 12) that at the time the driver was cautioned about the boys riding on the rear of the truck, that he wasn't making excessive speed, but that as the field over which they were passing was rough, he should drive slower. It was the rough condition of the field and not the matter of speed at that time which brought the caution to the driver from the game warden himself, who was riding in the cab of the truck.

The statement is also made, in the majority opinion, that claimant could have ridden with a certain doctor who

was accompanying the expedition in his own machine, but I fail to find any support for this contention in a careful reading of the transcript and it seems to me that it is simply an assumption on the part of the majority members so far as the claimant riding with the doctor in question was concerned, and not justified by the evidence in the case.

So also does the evidence reveal that the farthest point away from Franklin from which distribution was made was ten or twelve miles, and to state or to intimate that claimant could have refused to ride on the truck would be an unwarranted assumption not justified by the circumstances as presented at the time of the hearing. I repeat, claimant was not only an invitee but he was assisting in the work of making the distribution of the fish for and on behalf of the commission charged with that duty and for which he, claimant, was to receive no compensation.

On the return trip and when about four miles from Franklin, the driver was cautioned that he was then operating the machine in a reckless manner by reason of the speed that he was maintaining and in my opinion claimant had the right to assume that the driver of the truck would heed the warning and act accordingly in the operation of the truck. I cannot see that any reasonable opportunity was given the claimant to leave or get out of the truck, nor do I believe the law even as set forth in the *Young* case, *supra,* would contemplate that claimant was obliged to get out of the truck and perhaps run the risk of walking back to Franklin, a distance of four miles. It seems that shortly after being given the caution referred to, the truck was wrecked and claimant injured by reason of the excessive speed and the carelessness of the driver, an employe of the state conservation commission. Under all the circumstances, I feel that claimant is entitled to an award.

(No. 583-S—Claimant awarded $25.00)

GEORGE SLAYTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 17, 1947

CHARLES J. SCHUCK, JUDGE.

On December 6, 1946, claimant's horse, while being driven across a wooden bridge located on road No. 72, Mason county, broke through the flooring of the bridge, injuring its right hind leg and disabling the horse for a period of approximately five weeks. The record before us shows that the floor of the bridge was rotten and that the road commission was negligent in not making the necessary repairs to the bridge, previous to the accident in question. No fault or negligence of any kind is shown on the part of the owner of the horse or the son of the owner, who was driving the animal at the time. A compromise settlement of $25.00 is recommended by the road commission and approved by the attorney general and his assistant, and acceptable to the claimant.

We feel from the facts disclosed that there is a moral obligation on the part of the state to pay the amount agreed on by the several parties and therefore make an award in favor of the claimant, George Slayton, in the sum of twenty-five dollars ($25.00).

(No. 582-S—Claimant awarded $22.15)

JACK L. and MARTHA HENDRICKSON, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 17, 1947

MERRIMAN S. SMITH, JUDGE.

On April 6, 1946, a prison labor crew, working for the state road commission on route 88, at Bethlehem, Ohio county, West Virginia, upon setting off a blast threw rocks and debris striking the roof and downspout on the home of Jack L. and Martha Hendrickson, damaging it to the extent of $22.15.

The Allemannia Fire Insurance Company paid claimants under a loan agreement the above mentioned sum.

The itemized items covering the cost of material and labor appear to be just and the claim is one deserving of payment.

The state agency concurred in this claim and the claim is approved by the attorney general. Therefore, an award in the sum of twenty-two dollars and fifteen cents ($22.15) is hereby made to the claimants Jack L. and Martha Hendrickson.

ROBERT L. BLAND, JUDGE, dissenting.

The record of the claim for which an award is made in this case by a majority of the court, prepared by the state road commission and filed with the clerk on March 14, 1947, contains a letter addressed to the state road commission under date of December 6, 1946, which reads in part as follows:

"So far as I am concerned the matter is closed.

I was reimbursed by my insurance company to the amount of $22.15. I do not seek any additional claim against the Road Commission."

The majority opinion discloses on its face that the claim described in the record, concurred in by the agency concerned and approved by an assistant attorney general as a claim which, within the meaning of the court act, should be paid by the state, was paid by the Allemannia Fire Insurance Company.

I see no reason to pay the claim in question twice.

No question of subrogation is presented by the record.

I cannot, for reasons assigned, agree to recommend the claim to the Legislature.

(No. 580—Claimant awarded $43.90)

NELLIE O. SHORT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 24, 1947

A case in which the evidence introduced upon the investigation of the merits of a claim asserted against the state shows the existence of a moral obligation on the part of the state to make reparation by way of money compensation in view of the purpose of the act creating the state court of claims.

Schmidt, Hugus & Laas, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The claim involved in this proceeding is submitted upon

an agreed statement of facts. On the fifteenth day of February, 1946, claimant Nellie O. Short was driving her Cadillac automobile, model 61, on national road designated as U. S. route 40, in the city of Wheeling, Ohio county, West Virginia, a highway under the jurisdiction and control of the state road commission of said state. About one-fifteen o'clock P. M. on the date stated claimant was driving her said automobile, using due care on her part, in an easterly direction on that part of said national road, or U. S. route 40, known as Reid's Hill. At said time and place the said road was icy and slippery and a truck of the said road commission was proceeding some distance ahead of claimant's said automobile in an easterly direction on said road. As claimant was about to pass and in passing said truck of said state road commission of West Virginia, an employe of said commission threw a shovelful of shale and cinders from said truck directly on claimant's automobile, which said cinders scratched and otherwise damaged the windshield, hood, body and fender of the motor vehicle. As a result of such action on the part of said employe of the state road commission claimant was required to and did expend the sum of $43.90 for painting and repairs of her said automobile, said amount being actually necessary by reason of the damage done to said vehicle; said sum of $43.90 is made up of the following items:

One-half windshield and installation	$15.90
Repair of scratches and painting	28.00
Total	$43.90

The claimant, a citizen of the state, was entitled to use the highway on the occasion mentioned and was, as above stated, exercising due care in her driving and entitled to protection against the consequence of the state road commission employe's action. According to the agreed statement of facts it is shown that the road commission truck was at the time of the occurrence of the accident engaged in the spreading of cinders on the highway, and that the person who actually threw the cinders on claimant's car

was an employe of the state. Under such circumstances it would appear, we think, that there is a clear moral obligation on the part of the state to make reparation for the damages which claimant suffered. We think, furthermore, that it is a claim which within the meaning of the purpose of the act creating the court of claims an appropriation by way of money compensation should be made to claimant.

An award is, therefore, made in favor of claimant Nellie O. Short, for the said sum of forty-three dollars and ninety cents ($43.90).

(No. 579—Claimant awarded $472.83 upon rehearing)

RALEIGH COUNTY BANK, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed April 28,1947
Opinion upon rehearing filed September 15, 1947

Where a gross sales tax is paid voluntarily and without filing any protest since there was no question as to the validity of the exemption and such tax was improperly accepted by the state tax commissioner there is a moral obligation imposed upon the state to refund the total amount of the exempted tax.

Appearances:

Ashworth & Sanders (Carl Sanders), for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

The Raleigh County Bank of Beckley, Raleigh county,

West Virginia, owns the [illegible] building in which it operates the business of banking. During the years 1939 to 1943 inclusive it reported and paid tax to the tax commissioner of the State of West Virginia as follows:

	BANK RENT	OTHER RENT	TOTAL	PAID	SHOULD HAVE PAID	REFUND DUE
1939	$ 8,831.05	$ 5,021.12	$ 13,852.17	$ 123.56	$ 35.65	$ 88.31
1940	17,673.90	10,573.26	[illegible] 247.16	257.47	80.73	176.74
1941	15,648.75	11,723.73	27,372.48	248.72	92.24	156.48
1942	14,389.89	11,562.19	25,952.08	234.52	90.62	143.90
	7,715.83	6,482.12	14,197.95	129.18	52.32	
1943	10,587.75	4,572.03	15,159.78	113.04	18.65	172.45
	$74,847.17	$49,934.45	$124 [illegible] 81.62	$1,108.99	$370.21	$737.88

It is provided under Michie's code section 961 (p. 395), official code chapter 11, article 13, section 3, Exemptions; Non-Exempt Business.—" . . (b) Persons engaged in the business of banking: Provided, however, That such exemption shall not extend to that part of the gross income of such persons which is received for the use of real property owned, other than the banking house or building in which the business of the bank is transacted, whether such income be in the form of rentals or royalties; . . ."

It is apparent from the statute that the claimant is exempted from paying business and occupation tax on rentals accruing from the banking house or building in which the business of the bank is transacted.

It is our opinion that since the claimant made these payments voluntarily and without filing any protest, but through ignorance solely, and since our statute of limitations would only include the years 1942 and 1943 and the payments for 1939 to 1941 inclusive would be barred by this statute, that this is a moral obligation and either all of the payments should be refunded or none, notwithstanding that the claimant did pay mistakenly this specifically exempted tax from 1939 to 1943 inclusive, voluntarily and without being required, which taxes were accepted by the

state tax commissioner. Therefore it is the opinion of the majority of this court that this is a moral obligation on the part of the state of West Virginia and refund should be made of the amount paid for the respective years as follows:

1939	Refund	$ 88.31
1940	Refund	176.74
1941	Refund	156.48
1942	Refund	143.90
1943	Refund	172.45

making a total refund for the five-year period of seven hundred thirty-seven dollars and eighty-eight cents ($737.88), which amount is hereby awarded to the claimant, The Raleigh County Bank, Beckley, West Virginia.

ROBERT L. BLAND, JUDGE, dissenting.

It is regrettable that I find myself at variance with my colleagues in respect to the award which they have made in this case. Such award, in my judgment, cannot be sustained or upheld on the ground of a moral obligation on the part of the state to pay it, since it is in direct conflict with and in total disregard of two express statutory enactments.

Claimant, the Raleigh County Bank, owns its banking house in the city of Beckley, West Virginia and also other real estate. From 1939 to 1943, inclusive, it received rents from said banking house building, aggregating $74,847.17. For said years it made regular reports of the receipt of such rentals to the state tax commissioner, and voluntarily paid what is generally known as gross sales tax on account of said rental receipts.

By virtue of chapter 11, article 13, section 3 of the code of West Virginia, the banking house or buildieg in which claimants business is conducted is exempt from the payment of business or occupational tax. Apparently claimant

was not aware of this fact until the latter part of the year of 1946.

In this proceeding claimant seeks an award covering what it conceives to have been erroneous gross sales taxes, paid by it to the state tax commissioner; not only on account of the banking building itself but also on other real estate owned by the institution.

By virtue of chapter 11, article 1, section 2(a) of the code of West Virginia, it is provided as follows:

> "On and after the effective date of this section, any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state, may, within two years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer by the issuance of his or its requisition on the treasurer; and the auditor shall issue his warrant on the treasurer therefor, payable to the taxpayer entitled to the refund, and the treasurer shall pay such warrant out of the fund into which the amount so refunded was originally paid: Provided, however, That no refund shall be made, at any time, on any claim involving the assessed valuation or appraisement of property which was fixed at the time the tax was originally paid."

It will thus be observed that unless application is made to the state tax commissioner within two years from the date of the payment of the gross sales tax to him, he is precluded from making any refund for such taxes.

Upon the hearing of the claim it was made to appear that proper application for a refund for the years 1944-

1945-1946 has been made to the state tax commissioner, and it is shown that checks covering refunds for such period of three years will be released to claimant on the twenty-fifth day of May, 1947.

Claimant is now seeking to recover refunds for the years 1939 to 1943 inclusive, and the award above made embraces said periods.

Chapter 14, article 2, section 21, being the act creating the court of claims, provides as follows:

> "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 limitation 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 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 award made by majority members of the court includes refunds for the years 1939, 1940, 1941, 1942 and 1943.

In claim No. 542, *Goins* v. *Board of Control*, we held the effective date of the court to be July 14, 1941.

The Legislature itself has seen fit to fix a time beyond which this court is without power or jurisdiction to make an award.

By virtue of the two-year period of the statute of limitations, first above cited, and by virtue of the statute of limitations contained in the court act, a refund could not,

in my judgment, be lawfully made, either by the state tax commissioner or this court, to claimant for the years for which the award in this case has been made, it having been clearly shown that no application was made to the state tax commissioner for refund until December, 1946.

How, therefore, can it be said that there is a moral obligation on the part of the state to make refund to the claimant for the periods excluded by the two statutes of limitations? It may be said in passing that it is generally understood that voluntary payments of taxes may not be recovered back; however, in view of the purpose of the court act, in a proper case where the claim is shown to be meritorious, I should say that this court would recommend such payment.

In my judgment the above award creates a dangerous precedent. It cannot be helpful to the state tax commissioner, and it is in excess of our jurisdiction.

MERRIMAN S. SMITH, JUDGE, upon petition for rehearing.

Where a gross sales tax is paid voluntarily and without filing any protest since there was no question as to the validity of the exemption and such tax was improperly accepted by the state tax commissioner there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations.

Ashworth & Sanders (Carl G. Sanders) for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

At the April 1947 term of the court of claims the above styled claim was heard and an award was made in the sum of $737.88 for the refund of gross sales tax for the years

1939 to 1943 inclusive. Upon motion by the state a rehearing was granted by the court.

It is provided under Michie's code section 961 (p. 395), Offiicial code chapter 11, article 13, section 3, Exemptions; Non-Exempt Business.—". . . (b) Persons engaged in the business of banking: Provided, however, That such exemption shall not extend to that part of the gross income of such persons which is received for the use of real property owned, other than the banking house or building in which the business of the bank is transacted, whether such income be in the form of rentals or royalties; . . ."

For the years 1939 to 1943 inclusive the claimant paid to the state tax commissioner gross sales tax on all rents derived from its bank building and all other property and is now seeking a refund on the taxes paid upon the rents from the banking building.

It is the opinion of the majority of the court that since the claimant made these payments voluntarily and without filing any protest and without an audit being made by the state tax department, and since the statute of limitations imposed upon the court of claims would only include the years 1941, 1942 and 1943 and the payments for 1939 and 1940 would be barred by the statute of limitations, that this is a moral obligation and that refund should be made of the amount paid for the respective years as follows:

1941	$156.48
1942	143.90
1943	172.45

making a total refund for the three year period of four hundred seventy-two dollars and eighty-three cents ($472.83), which amount is hereby awarded to claimant The Raleigh County Bank, Beckley, West Virginia.

ROBERT L. BLAND, JUDGE, dissenting.

The claim involved in this case was filed in the court of

claims on January 1, 1947.

Refund of business and occupation taxes paid for the years 1939, 1940, 1941, 1942, and 1943 is sought in the proceeding.

Any remedy which claimant may ever have had to obtain a refund of the taxes which it contends it paid through mistake into the treasury of this state has been exhausted by reason of its *laches* in making application for such refund within the period prescribed by statute in such case made and provided.

Chapter 11, article 1, section 2(a) of the code of West Virginia provides that any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state may, within two years from the date of such payment, *and not after,* file with the offiicial or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully. The refund authorized by the statute is to be paid by the treasurer out of the fund into which the amount so refunded was originally paid. Such remedy to obtain any such refund is exclusive. *State* v. *Penn Oak Oil & Gas, Inc.,* 128 W. Va. 212; 36 SE (2nd) 595.

> "An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as prescribed by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes." *Del Balso* v. *State Tax Commissioner,* 1 Ct. Claims (W. Va.) 15.

> "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." *Consolidated Coal Company* v. *State Auditor,* 2 Ct. Claims (W. Va.) 10.

"An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes." *State Construction Company* v. *State Tax Commissioner,* 3 Ct. Claims (W. Va.) 85.

"The Court of Claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief." *Long* v. *State Tax Commissioner,* 3 Ct. Claims (W. Va.) 25.

Code 11-13-3 exempts persons engaged in the business of banking from the payment of a business or occupation (commonly known as gross sales) tax on a banking house or building. The Legislature has thus been very generous toward persons engaged in the banking business. Notwithstanding the statute in question, claimant, which had received rentals on leased portions of its banking house from 1939 to 1943, inclusive, of $74,847.17, and also rentals from other property which it owned for the same period, of $49,934.45, paid to the state tax commissioner business or occupation taxes on the combined rentals which it had

collected from its demised premises. It did not segregate or separate the rental collected from the banking house from the rental received from other real estate, but made its own computation of gross sales tax due on the entire rental, and made return accordingly to the state tax commissioner with checks for the amount which it conceived to be in proper settlement of such taxes. These payments were purely voluntary. The state tax commissioner did not *require* claimant to pay taxes on the rentals received from its banking house. Claimant made such payments without duress or compulsion of any kind. It made its own determination of the amount due the state on account of its supposed liability to pay business or occupation taxes on rentals collected by it. The money paid to the tax commissioner by claimant was not unlawfully received by the tax commissioner. The tax commissioner had no way of knowing that the return made by claimant of liability to pay the taxes was not a correct computation and finding by claimant. The tax commissioner could not be expected to act as a bookkeeper or accountant for the bank. The payment made was a purely voluntary payment of taxes which claimant felt it should account for and pay to the state. The money paid to the tax commissioner was paid as taxes.

> "Money paid voluntarily with full knowledge of the facts under a mistake of law cannot be recovered." *Beard* v. *Beard,* 25 W. Va. 486.

In the opinion in the above case, on page 489 it is said:

> ". . . It is too well settled in Virginia and in this State to now be controverted, that when one voluntarily pays money to another with full knowledge of all the facts but under a mistake of law he cannot recover it. *(Mayor of Richmond* v. *Judah,* 5 Leigh 305; *Haigh* v. *Building Association,* 19 W. Va. 792; *Transportation Company* v. *Sweetzer, supra,* p. 434.)"

The Supreme Court of the State of Illinois, in *American*

Can Company v. *Gill, County Collector,* 364 Ill. 254, held that taxes voluntarily paid cannot be recovered or refunded unless the statute expressly authorized such recovery or refunding. And the same court, in *LeFevre* v. *County of Lee,* 353 Ill. 30, held that taxes paid voluntarily and not under duress cannot be recovered by the taxpayer, even though the tax be illegal.

Claimant concedes that if the state were suable its claim would have no standing in a court of law or equity, but argues that the court of claims was created for the very purpose of doing what a majority of the court did upon the original hearing of this case and, in effect, attempts to invoke the *equity* and *good conscience* provision of the court act. The language used in the court act, in relation to equity and good conscience, defines the jurisdiction of the court and does not create a new liability against the state, nor increase or enlarge any existing liability. I prefer to adopt the view of the court of claims of the state of Illinois, where the court act is very similar to the act creating the court of claims of West Virginia. The court of claims of that state has held that the jurisdiction of the court is limited to claims in respect to which the claimant would be entitled to redress against the state, either at law or in equity, if the state were suable, and that unless the claimant can bring himself within the provisions of a law giving him the right to an award he cannot invoke the principles of equity and good conscience to secure such an award. It seems to me that this is substantially the view expressed by the Supreme Court of West Virginia in the recent case of *Cashman* v. *State Board of Control.* Such view also finds support in the language used by Judge Fox in the opinion in the *Penn Oak* case, *supra:*

> "Where a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder and the taxpayer fails to avail himself of the remedy so provided, he cannot go

outside the statute for other and different remedies."

Claimant freely admits that the state tax commissioner made no demand upon it to pay taxes on the rentals received from its banking house, and agrees that such payments were not required by him, but were voluntarily paid by it without separating such rentals from the rentals which it received from other properties. Subsequently it made proper application to the state tax commissioner to obtain refunds of such payment so made for the years 1944, 1945 and 1946, and refunds for such years were made by the tax commissioner, but because applications had not been made for refunds for the preceding years no such refunds were made by him. Claimant pursued the remedy afforded it by statute to obtain refunds for the three years for which refunds were made. It seeks an award for refunds for the preceding years from this court. I respectfully maintain that this court is without jurisdiction to make such refunds, since the only remedy afforded claimant by statute is the remedy it pursued when refunds were made to it by the tax commissioner for the years 1944, 1945 and 1946. Claimant paid its money to the said tax commissioner as taxes. Such payments must be treated as taxes paid.

For reasons set forth in my dissenting statement upon the first hearing and additional reasons herein announced I would deny an award to claimant and dismiss its claim.

(No. 576—Claimants awarded $150.00)

ZORA STARCHER, BESSIE STARCHER CAHILL, and NORA STARCHER REXROAD, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 28, 1947

A case in which the facts justify the finding of a moral obligation on the part of the state to reimburse claimants for their loss.

Appearances:

John P. Malloy, for the claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimants Zora Starcher, Bessie Starcher Cahill and Nora Starcher Rexroad are the owners of a tract of land or farm comprising about forty-two acres located on or along Straight Run of Fink Creek in Freeman's Creek district, Lewis county. A state secondary road passes through part of the meadowland of the acreage and also through the better part of the farm which is adjacent to the said road; it is a public road under the control of the state road commission and traverses claimants' farm for a distance of approximately a quarter of a mile. Sometime previous to the spring of 1939 a slip of the road along the said farm occurred, covering claimants' land for an area variously estimated from six-tenths to three-quarters of an acre; which part so covered was meadowland, used for grazing and hay producing purposes and considered as part of the best land in the said farm. The slip also destroyed about four hundred feet of fencing along the road which had

been constructed or erected a number of years before at the time when the father of claimants was still living and in control of the farm.

Another slip occurred at about the same place as the first, in 1942, which required the reconstruction of the road and which reconstruction seems to have cured the difficulty with reference to the maintenance and stability of the road, as no further slips have occurred to injure or damage claimants' land.

The road commission's efforts to make the road safe and free from slides seem to have been successful, as heretofore indicated, and we feel that under existing conditions no further damages from the road maintenance will occur. It seems to be a somewhat heavily traveled county road which as the testimony reveals is and has been receiving the necessary attention of the road authorities in recent years.

As to the item for the trees owned by claimant and cut down during the reconstruction of the road in 1942 we are of the opinion that claimants fully gave their consent to the cutting down of the trees; have the wood or lumber for their use and were materially benefitted by the reconstruction and location of the road.

Considering all of the facts as presented and giving due consideration to the evidence as submitted and the rights of the parties involved, we are of the opinion that a moral obligation rests upon the state to compensate claimants for their loss or damage and accordingly recommend an award in the sum of one hundred and fifty dollars ($150.00).

(No. 584—Claimant awarded $750.00)

BLANCH WILSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 29, 1947

Where by reason of an inadequate drainage system, as maintained by the state road commission, surface water is collected and cast in a mass or body on adjoining property, the owner of such property is entitled to an award.

Appearances:

E. Franklin Pauley and *Wilbur L. Fugate,* for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Blanch Wilson, the owner of several lots located on Camden Avenue, South Parkersburg, Wood county, and on which are erected three small frame houses, petitions this court for an award in the amount of $15,000.00 for damages to the said properties, occasioned by overflows of water thereon from the adjacent street or highway. Claimant contends that the sewerage or drainage system maintained by the respondent, the state road commission, in front of the said houses is inadequate and improperly constructed and fails to take care of heavy rainfalls causing the water to flow in, over and upon claimant's premises and property, to her damage and loss. Claimant further alleges that on several occasions, the basements of said houses have been flooded; the foundations washed out, the floors rotted and a dangerous and

unsafe condition created, by reason of all of which she has suffered a financial loss as the owner of the properties in question.

In order to thoroughly acquaint ourselves with all the facts involved the court, together with counsel, viewed the premises and property at Parkersburg, and thus obtained much firsthand information for our benefit and use during the subsequent hearing of the claim.

The lots are partially level at the street grade but drop off in a sharp decline to a much lower level at the rear thereof and within a distance of forty or fifty feet. The three houses are comparatively small one-story cottage buildings, renting at present for the sum of $20.00 per month each, and as testified to by the son of claimant (record pp. 81-82) were probably worth about $2000.00 each in 1934, the time of the death of his father, who was then the owner of the properties. The houses were built in 1929, of frame construction and rented for $17.50 each per month, before the raise to $20.00 each in July 1946. While there is testimony that the properties are worth more than herein indicated, we are of the opinion that the true value of the whole property including the houses is properly fixed at five or six thousand dollars.

The testimony with reference to the drainage system, shows that for many years previous to the erection of the houses the road in front of the properties was a county, unpaved road and that subsequently was improved and partially paved and a drainage or sewer system installed; that in 1933 or 1934 the control and maintenance of the road or street was assumed or taken over by the state road commission; that subsequently, about the year 1938, by reason of a W.P.A. project the paving of the street was widened on the side immediately adjacent to claimant's property. Claimant maintains that the widening of the street as indicated added to the danger of the flooding of her property by collecting the water and directing it to claimant's side of the street and to the sewer drop or basin immediately in front of one of her houses, which basin was

inadequate to carry off a heavy rainfall thereby causing the water to flood and damage her property. The said catch basin is at the very lowest point in the street, in fact the lowest level of the surrounding contour. It is approximately twenty-four inches square, of street level construction, easily clogged by debris that washes into the gutters on Camden Avenue from adjacent and intersecting roads and streets and carried into the basin by the drain of the said street. A twelve inch line or sewer leads from the basin to a twenty-four inch line or pipe at the rear of the houses and the water is in turn carried through this twenty-four inch pipe across and underneath the street to an outlet several hundred feet from claimant's property. Testimony was offered by the claimant to the effect that if the drainage system was changed to a curb drop basin and a fifteen inch pipe outlet installed in place of the twelve inch, as at present maintained, the situation would be remedied and the flow of water taken care of without any danger to claimant or her property. We are inclined to agree with this conclusion. The testimony further shows that for a distance of approximately 1800 feet along Camden Avenue and on the side thereof adjacent to claimant's property there are eleven or twelve catch basins to take care of the water flowing in and along the gutter; however, it is definitely shown that for a distance of eight hundred and twenty-five feet, or nearly one-half the distance of the said 1800 feet, only one catch basin exists or is constructed, and this the one immediately in front of and adjacent to claimant's property at the lowest point or level in the street, receiving the water from both east and west thereof, and which has been the cause of the overflow in recent years. This condition, in our opinion, taken in connection with the inadequate construction of the basin and its outlet, allows the surface water to be collected and cast in a mass or body over and upon claimant's premises during a heavy rainfall or storm and thus forms the basis for the complaint as heard by this court.

Taking into consideration all the facts as shown in the

testimony, together with the knowledge obtained by a view of the premises, a majority of the court is of the opinion that a moral obligation rests on the state to compensate the claimant for an amount which in our judgment will be just and equitable.

The testimony reveals that claimant in July, 1946, completed repairs to the properties which while seemingly protecting the houses from further damage by any overflow at the same time added to the value of the properties; in fact these repairs were made the basis of claimants asking for and receiving federal authority to increase the rent of each house from $17.50 to $20.00 per month. The witness Emrick, the contractor who made the repairs in question and rebuilt the porches with concrete floors, testifies (record p.p. 97-98) that in his opinion no overflow of water would damage the properties again. The repairs cost approximately $735.00 (record p. 72).

A review of all the testimony therefore leads us to the conclusion that an award of seven hundred and fifty dollars ($750.00) will compensate claimant for all damages and an award in the said amount is accordingly recommended.

ROBERT L. BLAND, JUDGE, dissenting.

I do not see the claim in this case in the light in which it is viewed by majority members of the court. I perceive no breach of duty on the part of the state road commission, and do not think that an award in any sum is warranted or should be made.

It is shown, as alleged in the petition, that claimant is the owner of three lots of land, each having a home thereon, situate at 3408, 3410 and 3412 Camden Avenue, South Parkersburg, West Virginia (unincorporated), and that the state road commission of West Virginia, a governmental agency of said state, has jurisdiction over U. S. route No. 21 on which said lots abut, and of the disposal of over-

flow water therefrom, including a sewerage system along the said highway.

Claimant maintains that the said state road commission, being charged with the duty of providing adequate sewerage disposal for overflow waters along said highway, at the location of her said property, negligently failed to provide an adequate disposal system for the overflow waters alongside the said property, and that as a result thereof the said overflow waters damaged her property.

Claimant has the "laboring oar" in the premises. The onus is on her to establish the merit of her claim. This, in my judgment, she has failed to do.

The right of the claimant to have an award is stoutly resisted by the road commission. I do not recall a stronger or more complete defense heretofore made to any claim asserted against that agency in the court of claims.

Counsel for the state cite this well recognized rule of law, found in 25 American Jurisprudence, Highways, Section 87:

> "Generally, when constructing, grading, or otherwise improving a street or highway, a municipal or quasi-municipal corporation is not obliged to protect the adjoining property by the construction of sewers and drains, or otherwise, from the natural flow of surface water therefrom. . . ."

This rule, however, is not without qualification in West Virginia. In the opinion in the case of *Clay, et ux* v. *City of St. Albans,* 43 W. Va. 539, Judge Brannon says, on page 546:

> ". . . Our Code gives municipal corporations power to construct drains and gutters. They may or may not, as they choose, exercise this power in any street, as the right to elect to do so or not to do so is a matter of discretion, *quasi* judicial; but when once the corporation decides to

> do so, and constructs sewers or drains and gutters, the duty has become merely ministerial, and the town bound to keep them in *fairly good condition* to carry off the water ordinarily and naturally coming into the gutter or sewer in the section where the town is, so as not to overflow lot owners. . . ." (Last italics ours).

The claimant does not prove a case in which it is shown that the state road commission is responsible for the collecting of surface water and casting the same in a mass or body on her property. This fact is made clear by the great weight of the evidence. I think the claim is exaggerated and not one for which the state should respond in damages.

In the disposal of the surface water in the vicinity of claimant's property, the road commission has used due care and prudence in its work. It has been engaged in the exercise of a governmental function and is not answerable to the claimant's damage. As Judge Brannon has so well pointed out in the authority cited above, no higher duty could properly rest upon the road commission in taking care of the surface water.

The homes on claimant's lots were erected in 1929. They were built subject to the catch basins and sewers then existing. There has been no change in the road in any way. There has been no act on the part of the road commission to direct the surface water from its natural course. It has done nothing to increase the flow of such water. It seems to me that the commission has been exceedingly diligent and careful in providing for an orderly, proper and adequate disposal of the surface water from the highway. Eleven catch basins have been installed, and other necessary measures employed to prevent injury or damage to the claimant.

I do not think that it has been shown that the road commission, by gutters, sewers, or otherwise, has collected surface waters and cast it in a body on claimant's land.

No higher measure of responsibility could rest upon th

road commission under any circumstances than that pointed out by Judge Brannon in *Clay, et ux* v. *City of St. Albans, supra*, that such drainage and gutters should be maintained in fairly good condition. Employes of the state road commission, experienced in highway work, have testified very clearly that they regarded the catch basin in front of the middle house of claimant to be adequate to take care of the surface water.

(No. 585—Claim denied)

BENNY MIZE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 30, 1947

Where it is shown by the evidence that property damage sustained by the claimant, if any, was not caused by any act or acts of the state road commission, an award will be denied.

Appearances:

Robert J. Ashworth, for the claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

MERRIMAN S. SMITH, JUDGE.

In 1938 the claimant purchased two lots with a combined storeroom and dwelling building thereon, at the intersection of Bailey Avenue, the old Wehrle Road and U. S. route

Nos. 19-21, in what is now the city of Beckley, Raleigh county, West Virginia.

During the year 1935, under the supervision of the state road commission, the Hatfield Construction Company built a concrete road along the old Wehrle road, raising the grade thereof. However, they installed an eighteen inch culvert at the lowest point of the drainage area upon the land, which land was later purchased by claimant Benny Mize.

This eighteen-inch culvert was sufficient to adequately drain an area of eleven acres, whereas the drainage area for this particular drainage perimeter was approximately two acres.

It appears from the evidence that not until the year 1943, or about seven years after the installation of the culvert, did the surface water begin to back up and stand on the property of claimant. About this time the Elk Refining Company, which had leased the property of H. E. Fox, the adjoining property owner on the north side of the concrete highway, covered up the outlet of the culvert, which caused the water to stand on the property of claimant.

Any damage or injury to the property of claimant was not caused by any act or acts of the state road commission according to the facts as presented in the testimony.

Therefore, the state is not liable and an award will be denied.

(No. 589—Claimant awarded $151.66)

MUSGROVE'S WHOLESALE GROCERY, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 17, 1947

CHARLES J. SCHUCK, JUDGE.

This claim was first placed on the regular docket and thereafter by consent of the claimant and the department involved changed to what is known as a "shortened procedure" claim.

The claim is in the amount of $221.03 for groceries and provisions supplied to the industrial home at Pruntytown, West Virginia, and is evidenced by several invoices filed; however, an examination of the said invoices shows that three of them, aggregating $69.37, were contracted for and the merchandise supplied at a time or period five years previous to the time the claim was filed in this court. To be exact, the total claim was filed on June 17, 1947. The items or invoices referred to as not having been presented or filed within the five-year period, as provided in the act creating the court of claims, were:

February 11, 1942	$23.64
March 13, 1942	24.68
May 23, 1942	21.05

These three foregoing items are therefore barred by the statute of limitations as found in the aforesaid act, reducing the total amount of the claim due and payable to the sum of $151.66.

The state, of course, is morally bound to pay for the groceries and provisions supplied by claimant to the institution in question. The claim is recommended for payment

by the board of control and approved by the office of the attorney general.

An award in the amount of one hundred-fifty-one dollars and sixty-six cents ($151.66) is therefore made and recommended for payment to the Legislature.

(No. 590—Claim denied)

LOUISE McNEIL, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 22, 1947

The mere loss by theft in a state emergency hospital of personal belongings of a registered nurse employed in such hospital does not constitute ground or warrant for the appropriation by the Legislature of public funds to reimburse such nurse for the value of the stolen property.

Claimant, in her own behalf.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Louise McNeil, formerly employed as a registered nurse at Fairmont Emergency Hospital, Fairmont, West Virginia, seeks an award against the state board of control for the sum of $208.20 to reimburse her for the value of certain articles of personal property belonging to her which she claims were stolen from her room at said hospital by a female convict who had been temporarily domiciled at the institution at the request of a member of

the board of control. The respondent challenges claimant's right to such award.

The articles of personal property alleged to have been stolen with the values placed thereon by claimant, are as follows:

Fur Coat (old)	$ 75.00
Overnight Bag (new)	25.00
Eyeglasses	20.00
Dress (had never been worn)	16.25
Shoes (good)	5.00
Slips (5-good)	25.00
Night Gowns	
one never worn	12.00
four in good condition	20.00
Bed Jacket (good)	5.00
Nylon Hose (3 new pairs)	
at $1.65	4.95
Red Cross Nurses pin given	
claimant by Red Cross	------
	$208.20

One Helen Sartwell, *alias* Griffith, *alias* Landon, was convicted in the intermediate court of Kanawha county of grand larceny and sentenced to a term of imprisonment in the penitentiary at Moundsville. At the time of her conviction the woman was expecting the birth of a child. The judge who imposed sentence upon her, not wanting the child to be born in jail or the penitentiary communicated with the board of control in an endeavor to have some arrangement made for her removal to one of the state hospitals, where the child could be born. The Honorable L. Steele Trotter, a member of the board, without any formal board action in the premises, but motivated wholly by a humanitarian impulse, arranged for the woman to be transferred to the Fairmont Emergency Hospital. At the same time the authorities of the institution were advised that

the woman had a criminal record and was at the time under sentence of imprisonment for grand larceny.

Upon an examination made by the superintendent of the hospital it was ascertained that the child would not be born for several months subsequent to the time fixed for its birth by the Sartwell woman. This fact was communicated to the board of control, but Dr. Johnson, the superintendent, said that since she had had some experience in nursing they would allow her to do odd jobs about the institution until the time arrived for her confinement. Shortly after being received at the hospital the woman made her escape. After she had gone claimant discovered the loss of her personal belongings and immediately concluded that the same had been stolen by the fleeing woman. There was, however, no direct or positive evidence that the Sartwell woman had taken the property, although it might be readily concluded from the circumstances that she was the guilty party. A beautician told claimant that she recognized a dress worn by the woman as one that belonged to claimant.

The Sartwell woman was apprehended within a few days after her escape from the hospital and conveyed to the penitentiary. She was, however, removed from the penitentiary to a Wheeling hospital when her child was born. The possession of the child was taken by the department of public assistance, and arrangements made for its proper disposition.

None of the alleged stolen property was found in the possession of the Sartwell woman.

We are unable to perceive any responsibility of the state to recompense claimant for the loss of her property.

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

(No. 592—Claimant awarded $4,616.10)

EASTERN COAL SALES COMPANY, a corporation,
Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed September 17, 1947

A claim properly filed with the court for the refund of gross sales taxes mistakenly and erroneously paid to the state tax commissioner, will be allowed where there is a moral obligation on the part of the state to refund the payment so made and where in equity and good conscience, and upon the facts as presented, the claim should be allowed; provided, of course, that it is filed within the five year rule governing the consideration of claims by the court.

Appearances:

Richardson & Kemper, for claimant.

W. Bryan Spillers' Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, a coal sales agency of Bluefield, West Virginia, asks for a refund in the amount of $4616.10, heretofore erroneously paid the state tax commissioner on gross sales or business and occupational taxes for the period from April 1, 1942 to June 30, 1946; the amount in question and so admitted by the state having been paid on sales of coal made wholly in the state of Kentucky and not in the state of West Virginia.

As shown by the record of claimant's returns for the second, third and fourth quarters in 1942, all of 1943 and the first, second and third returns and payments for 1944, made to the tax commissioner are here involved and total

the amount for which claim is made in this court. The state tax commissioner on petition heretofore filed pursuant to code 11-1-2a, refunded similar overpayments for the fourth quarter of 1944, all of 1945 and the first and second quarters of 1946, but refused to refund the payments made for prior years on the ground that the payments had been made more than two years prior to the filing of the petition for a refund and were therefore barred by the statute governing the return of erroneously paid sales taxes.

All of the overpayments however, for which claim is here made, were paid within less than five years prior to the filing of this claim and in this connection we are of the opinion that the court is bound by the five-year limitation as set forth in the act creating the court, code 14-2-21, rather than by the two-year limitation, and consequently is charged with the duty of considering the claim as presented on its merits and not on any technical objection as interposed. That the state was not entitled by law to any of the payments in question is tacitly admitted; and that the contracts for the sale of coal made by claimant were consummated wholly in another state, and therefore did not give rise to any transactions on which the state of West Virginia could or had the legal right to assess or collect any gross sales taxes whatever; and therefore collected the payments and now withholds them without any warrant of law and is therefore morally bound to refund them accordingly. Surely, in equity and good conscience the state should not be placed in a different or paramount position, under the conditions here presented, than would be an individual who erroneously, improperly and illegally obtained money or funds which he refused to pay to the rightful owner upon demand or request for their return.

We are of the opinion that every claim for a refund of payments of taxes improperly made and unjustly collected by the state presents an independent matter based upon the particular facts surrounding the claim, and that

therefore the decision of the court in the instant claim is not inconsistent with former decisions.

In shortened procedure cases, *Dulaney Motor company* v. *State Tax Commissioner*, 2 Ct. Claims (W. Va.) 417 and *Telewald, Inc.* v. *State Tax Commissioner*, 2 Ct. Claims (W. Va.) 418, this court upheld the refund of gross sales taxes where they had been paid by mistake of fact, as in the instant case. Both of these cases as required by statute were concurred in by the state tax commissioner and approved by the attorney general. The majority of this court is still of the opinion that the five-year statute of limitations enacted by the Legislature for claims presented to the court applies to the instant case and that the two-year statute applies to the tax commissioner, but in those cases where there is a moral obligation upon the state that the court of claims should invoke the five-year statute of limitations.

In this claim the state is not required to pay out the public funds for private use but is merely asked to repay monies which were mistakenly paid to the tax commissioner and should never have been accepted by the tax commissioner.

A majority of the court is therefore of the opinion that an award in the amount of four thousand six hundred sixteen dollars and ten cents ($4616.10) should be allowed and recommend payment to the Legislature accordingly.

ROBERT L. BLAND, JUDGE, dissenting.

Claimant is a corporation having its principal office and place of business in Bluefield, Mercer county, West Virginia. It was incorporated under the laws of West Virginia in April 1942. It appears from a stipulation of agreed facts that its principal activity is the selling of coal produced by others, most of which is produced in the state of Kentucky and sold by it in and as a part of interstate commerce, only a small quantity of the coal sold by it

being sold within the state of West Virginia. When it began business in 1942 it proceeded upon the assumption that since its office was located in West Virginia it was liable to pay business and occupation taxes under the West Virginia statute on all the commisisons which it derived from its sale of coal, both interstate and intrastate, and accordingly made returns and paid taxes on all such commissions until it discovered that it was in error in so doing, and thereupon applied to the tax commissioner of the state of West Virginia for an audit and check. Such audit was made in the latter part of December, 1946. At the time of such audit commissions received from interstate and intrastate business were segregated and a correct basis of accounting and payment ascertained. The result of the audit disclosed an overpayment of business and occupation taxes paid by claimant to the tax commissioner of $6,875.79. Application thereafter was made to the tax commissioner for a refund of the whole amount of said overpayment. A refund of $2,259.69 was made, but the tax commissioner declined to refund the balance of said amount for the reason that application therefor had not been made within the time prescribed by statute in such case made and provided. To secure an award for the balance of such overpayment of taxes, claimant has invoked the relief of the court of claims and an award has been made to it for the sum of $4,616.10 by a majority of the court. I do not concur in such award for the reason that by virtue of chapter 11, article 1, section 2(a) of the code of West Virginia, it is provided that any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state may, within two years from the date of such payment, *and not after*, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully. This statute was in existence at the time of claimant's creation and organization as a corporation. It was its duty to take notice of such statute and be governed by its terms and provisions. It

was not obliged to pay business and occupation taxes on interstate business under West Virginia statute. The payment which it did make thereon was purely voluntary on its part and not required by the tax commissioner. It made its own returns to the tax commissioner without separating the interstate from the intrastate transactions. It made its own computation of taxes due the state on gross commissions received by it. The tax commissioner had no means of knowing that such returns included both interstate and intrastate business. The money which it paid to the tax commissioner was paid as taxes and upon such payment became public funds. The remedy provided by the statute above cited to obtain a refund of money improperly paid as taxes affords an exclusive remedy. Claimant had an opportunity to pursue that remedy to obtain a refund of the taxes which it had erroneously paid. It neglected to avail itself of the benefit of the only statute in West Virginia, of which I have knowledge, that would entitle it to a refund.

It seems to me that it is unnecessary to cite authorities or enter into any discussion further than to cite the recent case of *State* v. *Penn Oak Oil & Gas, Inc.*, 128 W. Va. 212; 36 S. E. 2nd. 595, decided November 20, 1945. In point three of the *syllabi,* our Appellate Court has declared:

> "The provisions of Code, 11-14-19, as amended by Chapter 124, Acts of the Legislature, 1939, relating to a refund of the excise tax on gasoline, create the exclusive remedy which may be used to obtain such refund. Any refund provided for therein must be based on an application for the return of a tax theretofore paid."

In the opinion, Judge Fox says:

> ". . . Where a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder, and the taxpayer fails to avail himself of the remedy so provided, he cannot go outside the statute for other and different remedies. . . ."

In view of this binding authority I do not see how I could give my consent to making an award to the claimant for the amount sought in this proceeding. Taxpayers cannot sleep on their rights given by statute. They are expected to be diligent in seeking the relief afforded them by the Legislature. The Legislature has not, as I interpret our court act, invested the court of claims with power or authority to make an award where a taxpayer has failed to pursue the only remedy afforded by statute to obtain relief. The award made in this case, is against all of the precedents of this court from the time of its organization hitherto. The cases submitted to this court under the shortened procedure provision of the court act and cited in the majority opinion are not applicable. Those were cases where it clearly appears from the opinions that application had been duly made to the tax commissioner for refunds, that is, within the time prescribed by statute for doing so, and the tax commissioner for some reason unknown to us failed to make such refund. If the court of claims would ignore all of its precedents in relation to dealing with refunds such as in the instant case, and make refunds as it has done in this case and in the case of the *Raleigh County Bank* versus *State Tax Commissioner*, determined at the present term of this court, it could easily destroy the tax structure of the state. It is my judgment that it is not only the duty of the court of claims to make careful and thorough investigation of all claims filed, but to advise the Legislature, so far as it is possible to do so, with reference to the law governing such claims or awards or determinations.

Since the Supreme Court of Appeals has declared that the statute hereinbefore cited affords an exclusive remedy for relief in cases such as the instant claim, I respectfully defer to that court and record my dissent to the action of my colleagues.

(No. 593—Claim denied)

A. J. THOMPSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 20, 1947

A claim for damages not sustained by the evidence and an award refused.

Appearances:

Claimant, in his own behalf.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant A. J. Thompson prosecutes his claim in the amount of $50.00 as damages to his truck caused by a branch of a tree falling from the hillside on route 10, near Logan, West Virginia, on or about April 1, 1947, and while claimant was passing or driving on said highway in his truck. The testimony shows the weather was fine and visibility good at the time of the accident, that employes of the state road commission were at work on the cliff immediately above the place of the accident clearing the cliff of decayed branches, brush and undergrowth likely to fall on, and cause injury and damages to, travelers on the road, and by reason of the nature of the work and its proximity to the highway, guards were stationed to warn drivers and to direct them to the side or part of the highway away from and opposite to the place or point where the work was being carried on.

Claimant denies that such guards had been stationed

for the purpose just mentioned, but we are of the opinion that the evidence fully justifies the conclusion that guards had been properly stationed to warn drivers on the road; that claimant had been signalled by one of the guards to pass to the opposite side and out of the path of danger, but paid no attention to the warning and continued on the side of the highway next to the cliff to the place where the accident happened. In our opinion claimant was negligent and by his negligence brought about the accident. The damage to the truck was slight, and taken as a whole the testimony rather weak and unsatisfactory as to the cost of repairing it. However, as heretofore indicated, we are of the opinion that the employes of the road commission were in no wise responsible for the accident and therefore deny an award.

(No. 594—Claim denied)

JESS P. RICHMOND, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 22, 1947

Chapter 11, article 13, section 2c, of the code contemplates only sales of *tangible* property and fixes the rate of taxation accordingly. It does not include sales of services as such, nor does it fix the rate of taxation for such services, but such services are governed by the rate fixed and set forth in section 960(8) Michie's code, official code Section 2h.

Appearances:

Ashworth & Sanders, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the respondent.

CHARLES J. SCHUCK, JUDGE.

Jess P. Richmond, claimant, operates a laundry and dry cleaning plant in the city of Beckley, Raleigh county, the business extending into neighboring and contiguous counties, and in a large measure consisting of services rendered in dry cleaning, pressing and laundering the clothing and wearing apparel of miners employed by the various coal companies in that section of our state. By arrangement and oral contracts with the coal companies concerned claimant, through his truck drivers, gathers the clothing and laundry from the various coal company stores, renders the necessary dry cleaning, washing, repairing and laundry services, and then returns the clothing and apparel to the stores from which the said articles were first collected. In the due course of his business, he bills the coal companies for the full or retail price for the services so rendered and then allows a twenty per cent reduction to the companies,

making his collections on the basis of eighty per cent of the invoice billing accordingly. He deals only with the various coal companies or their proper representative and at no time with the miners personally. This method of rendering the said services has been followed by claimant from the year 1942 to the present time.

During the said period and for each year thereof he has paid his business and occupation tax to the state tax commissioner based on the amount of his actual collections from the coal companies (record pp. 26-27) at the retail rate as fixed by statute, namely one half of one per cent of the gross income of his business.

In the year 1946 claimant maintained that the business with the coal companies, as heretofore outlined, was wholesale in its nature and that such portion of his business should be reclassified; that in the future he should be taxed at the wholesale rate and that a refund should be allowed him for the so-called overpayment made by him to the tax commissioner for the years from 1942 to the end of the year 1945 inclusive; these overpayments for the said period as calculated by the claimant, amounting to $4,488.66 (record p. 21) being the basis for the claim presented here.

Bearing in mind that only *services* were rendered by claimant in the said business transactions, that the sale of tangible property is not involved in any manner and that the services rendered are not a part of nor incident to the sale of food, etcetera, as outlined by the statute, what is or must be claimant's classification and at what rate shall he be taxed by the commissioner on his gross income from the business with the said coal companies as heretofore detailed? Chapter 11, article 13, section 2c of the code provides:

> "Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating

houses, except sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected, a tax equivalent to one-half of one per cent of the gross income of the business, except that in the case of a wholesaler or jobber, the tax shall be equal to fifteen one-hundredths of one per cent of the gross income of the business."

Claimant maintains that under the section just quoted he is a wholesaler so far as his transactions with the coal companies are concerned, and that he should have been taxed at the wholesale rate as provided for in said section and not at the retail rate. We are not in accord with this conclusion. We feel, and so hold, that the section in question applies only to the sale of tangible property at wholesale or retail. The section bears the title "Business of Selling Tangible Property; Sales Exempt." This title would clearly seem to indicate that only sales involving tangible property were contemplated. Certain exceptions are noted as to services, but the language employed again clearly shows that the services rendered must be connected with and incident to the sale of tangible property at wholesale or retail. Services as such and not rendered in connection with the sale of tangible property are not included, and in our opinion not to be taxed at the rates fixed in the section heretofore referred to. So, too, do the other exceptions plainly indicate that they have no relation whatever to such busines transactions as those shown to have been carried on by claimant and the coal companies in question.

We repeat, the plain and obvious intendment of the language used unqualifiedly means that a wholesaler can only claim classification as such when making sales of tangible property. No such claim is made by the claimant in the instant case. No tangible property is involved. A careful reading of the remaining sections of said article 13 indicates in our opinion that section 960(2h) entitled "Serv-

ice Business or Calling Not Otherwise Specifically Taxed" applies to the transactions set forth in claimant's petition and fixes the rate of taxation to be charged.

The state by counsel has heretofore filed a motion to dismiss the claim.

As indicated by the foregoing opinion we deny an award and dismiss the claim.

(No. 599-S—Claimant awarded $17.50)

WILLIAM M. KNISELY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 28, 1947

MERRIMAN S. SMITH, JUDGE.

Employes of the state road commission were making repairs to a secondary road in Marion county, West Virginia, on November 1, 1946. William M. Knisely, the claimant, had occasion to interview Earl Erskine, the foreman of the state road commission crew, who was standing on a bridge at the time. As claimant was leaving the approach to the bridge, a state road commission truck loaded with hot reddog came up and dumped it into a hole in the roadway. Claimant was on the blind side of the truck and the steam from the hot reddog burned his face, arm and legs. The doctor's bill for treatment thereof amounted to $17.50, which amount is the basis of this claim.

The state road commissioner concurred in the amount of this claim and it was approved by the attorney general.

The facts produced as contained in the record and the

report of the investigator fail to show whether or not any warning was given by any of the state employes. On the other hand, it can be fairly well concluded that no warning or signal was given that the cargo of hot reddog was to be dumped at this spot, and due to the ripe old age of the claimant, and in the absence of any contributory negligence on his part, there is a moral obligation on the part of the state to assume the obligation for the medical services rendered.

It is therefore the opinion of the majority of this court that an award in the sum of seventeen dollars and fifty cents ($17.50) be and is hereby granted to the claimant, William M. Knisely.

ROBERT L. BLAND, JUDGE, dissenting.

In the case of *Appalachian Electric Power Company* v. *State Road Commission,* in which I wrote the majority opinion of the Court, found in 3 Ct. Claims (W. Va.) 150, I stated:

> "The scheme for the creation of the State Court of Claims was carefully considered and worked out by an interim committee of the Legislature. In its report to the Legislature that committee expressly stated: 'A shortened procedure is provided for small claims where no question of fact or liability is in issue.' For such purposes only should the shortened procedure provision of the court act be used."

I adhere to the above expressed views.

The instant claim is submitted to the court of claims under the shortened procedure provision of the court act. The record was prepared by the state road commissioner and the claim concurred in by him and approved by an assistant attorney general of the state. The accident which is the basis of the claim was unfortunate. The amount recommended for an award by this court is small but the case involves the same principle as if the claim

were seventeen thousand dollars. It is obvious, I think, that both questions of fact and liability are in issue. The effect of the award made by majority members of the court is to ratify upon the meagre facts provided by the record the conclusions reached by the head of the agency involved and the attorney general's office. I do not see the case in the light in which they view it or in which it is viewed by majority members of the court. It cannot be said that the claimant was not aware of the fact that the road commission truck was loaded with reddog. He saw it. He was charged with the exercise of prudence when attempting to pass the truck. He knew that the road commission was engaged in the exercise of a governmental duty. The basis of the claim is negligence. No prior statute authorizing this court to make an award upon the facts disclosed by the record is shown.

I respectfully dissent.

(No. 600—Claimant awarded $100.00)

ALEX FARLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 31, 1947

MERRIMAN S. SMITH, JUDGE.

On April 2, 1947, Alex Farley, the claimant, while returning to his home with a bushel basket of groceries on his back, upon crossing a bridge spanning Guyandotte River, on state route No. 3, at Chapmansville, Logan county, West Virginia, stepped into a hole in the floor of the bridge and skinned his leg to such an extent that the medical services rendered amounted to $20.00. He lost twelve weeks work by virtue of such injury. It was about

eight o'clock in the evening when claimant was walking with the bushel basket of groceries on his back, and the headlights of an approaching automobile were so bright that he became blinded therefrom and stepped into a hole in the floor of the bridge which was about two feet by ten inches in diameter, sustaining an injury to his right leg. He therefore makes claim for $100.00 for medical services received and the loss of twelve weeks work.

The state road commissioner concurred in the payment of this claim and it was approved by the attorney general.

The state's primary roads and all bridges should be maintained in a reasonably safe condition at all times and a hole two feet by ten inches in diameter is an unsafe condition for pedestrians, especially at nighttime. From the record there was no act of contributory negligence on the part of claimant. Therefore, an award in the sum of one hundred dollars ($100.00) is hereby granted to the claimant, Alex Farley, by a majority of the court.

ROBERT L. BLAND, JUDGE, dissenting.

The basis of the claim, for which an award is made by majority members of the court, is alleged negligence of one of the governmental agencies of the state. I regret that I am constrained to file this dissenting statement, but as I perceive my duty I am compelled to do so. The claim is considered informally upon a meagre record prepared by the head of the agency involved. It does not appear from such record that "No question of fact or liability is involved." On the contrary I think very serious questions of both fact and liability are involved. No independent investigation is made by the court. It is provided by statute that the road commission shall inspect all bridges upon state roads. If any bridge is found to be unsafe, the commission shall promptly condemn, close and repair it. Chapter 17, article 4, section 33, code. Was such action taken in the instant case? If not, why not? No such information is afforded by the record. I have fixed notions

about the appropriation of the public funds. I think every case presented to this court should be carefully considered by its three members. The report of the legislative interim committee never contemplated that the shortened procedure provision of the court act, provided for small claims, should be used in such a case as presented by the record of this claim.

(No. 575—Claim denied)

JOHN W. BESS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 3, 1947

Where the evidence clearly shows that claimant's negligent acts were the cause of the accident for which he seeks damages an award will be denied.

Appearances:

W. C. Haythe, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant John W. Bess, of Montgomery, West Virginia, prosecutes his claim against the state road commission for personal injuries to himself and damages to his automobile occasioned by a collision between his car and that of another automobile stopped on the highway immediately in front of the claimant's; said second automobile being in a line of several cars, all stopped to permit a state road

truck to turn on the highway at a point where it was to be loaded with ground, dirt and debris being removed from a ditch adjacent to and parallel with the highway. Negligence and carelessness in the operation of the state truck is alleged as the basis for the claim here presented. The accident happened on highway route U. S. No. 60, near Dickinson, Kanawha county, on or about July 24, 1946, shortly after one o'clock P. M. of the day in question.

The testimony shows that a line of four or five automobiles following the state road truck and all traveling in an easterly direction on the said highway had reached the place or point where the truck was to turn to be reloaded and while said line of cars were stopped to allow the state truck to pull out of the line of traffic, claimant's automobile, also traveling eastward on the said highway, crashed into the rear car of said line causing serious damages to both automobiles and claimant alleges causing personal injuries to himself. Claimant maintains that while he saw signs "Men working" before he had reached the point of collision, yet there was no flagman to warn him of the stopped line of automobiles or to indicate that the state truck was about to make a turn on the highway at a point shortly ahead.

We are of the opinion that the testimony of the several witnesses shows, first, that a flagman was present to warn, and did warn, automobile drivers of the road operations in question, and that the flagman was stationed at a proper place to give the necessary warning to east bound traffic, and that claimant seemingly paid no attention to him; second, that the day was bright, visibility good and the highway dry, and that from the very nature of the accident, it being a rear-end collision, claimant did not have his car under the proper and necessary control and therefore was negligent and careless in its operation; third, that there is no evidence before us upon which we could predicate the charge of negligent and improper handling or operationg of the truck which, we repeat, is the basis for this claim, but on the contrary we find the testimony

to be that the truck was still in the line of traffic when the collision took place and that its operation in no manner contributed directly or indirectly to the claimant's accident. In view of these findings, it is obvious that an award must be refused. Fortunately claimant was not seriously injured. He so testified himself; seemingly he suffered very little pain or inconvenience.

For the reasons herein set forth an award is refused.

(No. 602-S—Claimant awarded $367.42)

EUREKA PIPE LINE COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed November 3, 1947

CHARLES J. SCHUCK, JUDGE.

The Eureka Pipe Line Company, a corporation, claimant, was the owner of a certain pipe line located on the E. C. Parks farm in Murphy district, Ritchie county, West Virginia, which pipe line was used and operated for the purpose of conveying and transporting oil, and known as a four-inch gravity line.

On or about July 3, 1947, while the employes of the state road commission were engaged in repairing what is known as Indian Creek Road and located in the immediate vicinity of said pipe line, rocks removed from said road were thrown by the highway employes over and upon the pipe line in question, causing it to break apart and allowing oil to leak and escape therefrom to the damage of the claimant in amount of $367.42. A detailed account showing the items of loss and the labor necessary to make the required repairs is filed with the claim. Payment in the amount

claimed is recommended by the authorities of the state road commission and concurred in by the attorney general.

We are of the opinion that a moral obligation rests on the state to make restitution, and an award in the amount of three hundred sixty-seven dollars and forty-two cents ($367.42) is hereby recommended.

ROBERT L. BLAND, JUDGE, dissenting.

Since I do not think that claims against the state involving questions of fact or liability should be submitted to the court of claims for determination under its "shortened procedure" provision as has been done in this instance, I do not concur in the award of $367.42 made in the case. The "shortened procedure" is provided for small claims where no question of fact or liability is in issue.

(No. 603-S—Claimant awarded $38.00)

SIM McGRADY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 3, 1947

MERRIMAN S. SMITH, JUDGE.

Janet Lee McGrady, the daughter of claimant Sim McGrady, a rural mail carrier, was carrying the mail from Lester, Raleigh county, West Virginia, on October 3, 1946, when crossing a wooden bridge about one mile from Lester, on Maple Meadow secondary road in Hoo-Hoo hollow, the horse broke through the wooden boards, straining and bruising the stifle joint on its right hind leg. Sim McGrady, the owner of the horse, by way of a compromise

agreement made claim for $38.00, which covered a substitute horse used fourteen days, at $2.00 per day, and veterinarian services of $10.00.

Payment of this claim was concurred in by the head of the state road commission and approved by the attorney general.

The statute, Michie's code section 1474(15), official code, chapter 17, article 4, section 33, provides for the inspection and safe maintenance of the bridges in the road system of the state.

The record in this claim states that the bridge upon which this accident occurred was in very bad condition. Therefore, the majority of this court recommends an award for the sum of thirty-eight dollars ($38.00) in behalf of the claimant Sim McGrady.

ROBERT L. BLAND, JUDGE, dissenting.

Since I do not think that claims against the state involving questions of fact or liability should be submitted to the court of claims for determination under its shortened procedure provision, as has been done in the instant case, I do not concur in the award made. The "shortened procedure" is provided for small claims where *no question of fact or liability* is in issue.

(No. 601-S—Claim denied)

SYLVIA ORSINI, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 4, 1947

MERRIMAN S. SMITH, JUDGE.

During May, 1946, employes of the state road commission were making repairs to a section of U. S. route No. 19, in the town of Worthington, Marion county, West Virginia. The particular work being done was the laying of crushed stone from the curb to the streetcar rails, in making a base preparatory to blacktopping the surface. During this time a stone or stones were thrown against the claimant's store windows by passing cars or trucks in the normal flow of road traffic, breaking two windowpanes, two jars of wax and lids to a soft-drink cooler, damage for which amounted to $31.95, and for which amount claim is made against the state road commission. Claimant's place of business parallels the street.

In order to accommodate the public, traffic was not held up but allowed to proceed in the normal course. This was a necessary work and for the public good and benefit. The facts presented were that stones were thrown by "person or persons unknown" from the roadbed, and nowhere is any negligence attributed to employes of the state road commission. Since the damage in the instant claim was caused by cars or trucks of unknown persons the state road commission is not liable and accordingly an award is denied and the claim dismissed.

(No. 591—Claimant awarded $1500.00)

J. OTIS BOWLING, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 5, 1947

The state road commission of West Virginia, in the operation of motor vehicles on the highway of the state, is chargeable with the duty of so equipping and using such vehicles as not to cause injury to the property of other persons, and a failure to observe such duty, in circumstances, may warrant an award in the interest of the public welfare.

Richardson & Kemper, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant J. Otis Bowling seeks an award by way of compensation for losses sustained and suffered by him when a devastating fire, communicated from a steam shovel owned by the state road commission and operated by one of its employes, swept with terrific velocity over a boundary of one hundred and ten acres of land lying adjacent to and on the northern side of a portion of the state highway system, designated as state route 12, and known locally as Bluefield-Oakvale Cut Off, in Mercer county, West Virginia. The road commission denies claimant's right to such an award.

On or about the third day of May, 1943, the state road commission had occasion to move a steam shovel from a point where it had been operating to another point where it was to be placed upon a trailer and taken to a garage. One G. W. Burton, an employe of the commission, was the

operator in charge of the shovel. He was assisted by another employe by the name of J. I. Taylor. Preparatory to starting the steam shovel Mr. Burton fired it with wood and thereafter with coal. The vehicle moved slowly on its way. It was not equipped with a spark arrestor. It did have, however, a screen over the smokestack, insufficient, as the evidence shows, to prevent the emitting of fire from the smokestack. Shortly after the shovel passed the corner of the one hundred and ten acres of land owned by claimant, its driver looked back and discerned smoke on the bank above the road and on claimant's premises. He called to his companion to see what could be done in order to extinguish what by that time proved to be fire. A high wind was prevailing and the fire made such headway that it soon spread over the entire area of claimant's property. About seventy rods of rail fence and from fifty to fifty-five rods of barbed wire fence were quickly destroyed and rendered worthless. A vast number of growing young trees of various dimensions, suitable for staves and props were quickly consumed by the flames. Large trees, of recognized value, which had been felled were entirely destroyed. The fire was so intense and so rapid in its movement that it was out of the question to try to control it. Briefly, it may be said that the timber on the area of one hundred and ten acres was totally destroyed and even the larger trees standing were so badly burned as to render them of inconsequential value. No one saw just how the fire originated, but the circumstantial evidence is so strong and overwhelming that there can be no doubt in the minds of the members of this court that it was caused by escaping sparks from the smokestack of the steam shovel, a fact which might not have occurred and probably would not have happened if the smokestack had been properly equipped with a spark arrestor and not a makeshift network hastily attached by the driver of the vehicle. Evidence was adduced tending to show that the value of the property destroyed would be about $40.00 per acre. Some acres, however, had fewer growing trees than other acres.

Appraisement was made by claimant of the property and demand made upon the state road commissioner for compensation. The matter has been held in abeyance since 1943, until the claim was filed in this court on the twenty-third day of June 1947. No evidence was offered by the road commission to meet or overcome the strong and convincing proof offered by the claimant to support his claim and fix responsibility for the occurrence of the fire on respondent. It is true that what purported to be an affidavit made by the witness Burton was identified and offered for the court's consideration. The contents of this affidavit could have no controlling influence upon the determination now made of the claim. Moreover, the witness Burton denied that he had ever signed the affidavit or sworn to the truth of its contents. An employe of the road commission testified that he was a notary public before whom the said witness, Burton, appeared and swore to the truth of the contents. He also testified that the affidavit was in his own handwriting and prepared upon the basis of information given him by Burton. Burton, on the contrary, positively and emphatically denied these statements. At the instance of the court he signed his name on a blank sheet of paper. There is no comparison between the signature appearing on the purported affidavit and the signature written by Burton for the inspection of the court. There are other differences that need not be further detailed. We are persuaded from the evidence in the case that the claim is meritorious and that it should be allowed. We are moreover of opinion that if the steam shovel had been properly and adequately equipped the fire would not have occurred and the property of claimant would not have been destroyed. It seems to us that under the circumstances it would be manifestly improper to deny claimant relief in the premises. He has established by ample and convincing proof a good case and we believe that it would be in the interest of the public welfare to make, what in our judgment is, an award reasonable in the premises. After due and careful consideration of all the growing trees, timber

and fences destroyed we find the loss sustained by claimant to be $1500.00.

An award is therefore made in favor of claimant J. Otis Bowling for the said sum of fifteen hundred dollars ($1500.00).

(No. 586—Claimant awarded $100.00)

KATHERINE PRESSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 6, 1947

The state is morally bound to use reasonable care and diligence in the maintenance of a state controlled highway, and failure to use such reasonable care and diligence in allowing a hole to exist in the highway for several years, thereby causing injuries to a person lawfully using said highway, presents a claim for which an award should be made.

Appearances:

E. L. Cutlip, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, a resident of Upper Glade, Webster county, West Virginia, sustained personal injuries by stepping into a hole in state road No. 20 in the town of Camden-on-Gauley, Webster county, while shopping there on the night of November 16, 1946. She had parked her car off the hard surface of the said highway and on the berm thereof, and while returning to the car, in stepping from the side-

walk and not being able to see the hole in the darkness, stepped into it and was thrown to the ground sustaining a fractured rib and other injuries which incapacitated her for several weeks thereafter. She had seen the hole on previous visits to Camden-on-Gauley but on the night in question a number of automobiles were parked along the sidewalk or close thereto, leaving little space for claimant to get to the highway in endeavoring to reach her car. The night was dark and from the testimony it would seem that the street lighting system of the town was not sufficient to assist her or light her way as she stepped off the sidewalk at the time and place indicated. She testifies (record p. 14) that the only vacant place between parked cars affording an opportunity to reach the highway was where she stepped off the sidewalk. This statement is not contradicted. Bearing in mind the foregoing facts and the attendant circumstances we do not feel that claimant had such knowledge of the presence of the hole as would charge her with contributory negligence and thus bar the prosecution of her claim. She knew the hole was there somewhere, but in the darkness of the night and with no light to guide her, having finished her shopping, she seemingly used the only available place to get to her car on the highway which action on her part cannot be construed as negligence or the lack of proper care when considered in connection with the surrounding facts and circumstances. The testimony shows in our opinion that she was lawfully and properly using the highway at the time of the accident. The hole extended from the edge of the berm of the highway and immediately adjacent to the sidewalk, a distance of about eighteen or twenty inches out, into and upon the highway, and was about eight inches deep. It is used as a drainage point, to collect the water from the highway and direct it under the sidewalk to what is known as Coon Run, and while it has been repaired at times, yet, as shown in the instant claim, it is dangerous to those using the highway in question at the place where the accident to claimant happened while in its present state or condition. We believe a catch basin with grating, as testi-

fied to by one of the witnesses (record p. 63) would remedy the condition and thus prevent the happening of any other or future accidents. The state, of course, is morally bound to make its highways reasonably safe for travel and to keep them in proper repair for the use of the public. This, in our opinion, was not done with the highway here involved, by reason of which neglect the hole in question continued as dangerous and a menace to those obliged to use the highway in the town of Camden-on-Gauley. Accordingly an award will be recommended.

Claimant some time after her accident, believing that the town of Camden-on-Gauley was responsible or liable for her damages, agreed to settle her claim, if paid then, for approximately thirty-three dollars. The town disclaimed liability and she was obliged to present and prosecute her claim here, involving, of course, additional time and expense as well as legal services. She also maintains that she could not do all of her housework for several months after she had made the offer of settlement to the town of Camden-on-Gauley, which she could do before; and that her suffering at times has continued for a longer period than she had expected. Taking into consideration all these facts we are of the opinion that she has suffered damages to the extent of $100.00 and that the state is morally bound to reimburse her.

An award is recommended accordingly in the said sum of one hundred dollars ($100.00) in favor of the claimant Katherine Presson.

No. 597—Claimant awarded $448.67)

BONDED OIL COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed November 7, 1947

Where gross sales tax is paid voluntarily and without filing any protest, under a mistake of fact, and erroneously paid to the state tax commissioner, and there is no question as to the validity of the exemption, and such tax is improperly accepted, there is a moral obligation imposed upon the state to refund the amount not barred by the court of claims statute of limitations. *Raleigh County Bank* v. *State Tax Commissioner* and *Eastern Coal Sales Company* v. *State Tax Commissioner.*

Appearances:

Fitzpatrick, Strickling & Marshall (O. J. Rife, Jr.), for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

The Bonded Oil Company, a corporation existing under the laws of the state of Ohio, files this claim in the amount of $448.67 for the refund of overpayment to the state tax commissioner of business and occupation tax as levied by chapter 11, article 13, code (W. Va.) for the years 1942, 1943 and 1944, and which amount is admitted by the state agency after having made an audit of claimant's books. The state tax commissioner on petition heretofore filed pursuant to code 11-1-2a, refunded similar overpayments for the years 1945, 1946 and the first quarter of 1947, but refused to refund the payments for prior years on the ground that the payments had been made more than two years

prior to the filing of the petition for a refund, and were therefore barred by the two-year statute applicable to the state tax commissioner governing the return of erroneously paid taxes.

The overpayments were made because of an erroneous interpretation of the definition of "gross proceeds of sales" under chapter 11, article 13, section 1, in that amounts paid to the federal and state governments as a gallonage tax were included in determining the amount of the gross sales. The state gallonage tax, amounting to five cents per gallon, as authorized in chapter 11, article 14, section 3, code, and the federal gallonage tax, amounting to .015 cents per gallon, as set out in 26 U.S.C.A. section 3412, as amended, should have been deducted from the total retail price of the gasoline, and the net figures used as a basis for the computation of the business and occupation tax due the state of West Virginia by the claimant.

An itemized list of refund for the respective years are as follows:

	Amount paid	Correct amount due	Amt. of overpayment
Year ending 12-31-1942	$681.58	$466.64	$214.94
Six Months ending 6-30-1943	223.23	153.41	69.82
Six Months ending 12-31-1943	164.03	111.57	52.46
Year ending 12-31-1944	359.44	247.99	111.45

making a total refund due of $448.67.

All of the overpayments for which claim is here made were paid within less than five years prior to the filing of this claim, and the only question before this court is whether the five-year statute of limitations under code 14-2-21, the act creating the state court of claims, applies rather than the two-year statute of limitations, code 11-1-2a, which is applicable to the tax commissioner.

In conformity with the majority holding in former claims, namely, *Raleigh County Bank* v. *State Tax Commis-*

sioner, No. 579 and *Eastern Coal Sales Company* v. *State Tax Commissioner,* No. 597, the opinion of the majority of the court in the instant claim is that it is the duty of this court to consider each claim as presented on its merits, and if there is a moral obligation upon the state under equity and good conscience, such as there would be in a judicial proceeding between private persons, that an award should be made and the five-year statute of limitations, code 14-2-21 is applicable to this claim. Therefore, an award in the amount of four hundred forty-eight dollars and sixty-seven cents ($448.67) is hereby recommended to be made to claimant, the Bonded Oil Company.

ROBERT L. BLAND, JUDGE, dissenting.

The claim is filed for the refund of an overpayment of gross sales tax. The reason assigned for such overpayment is the faulty interpretation by claimant of the term "gross proceeds of sale." The amount of the refund originally sought was $1147.43, the aggregate amount of alleged overpayments for the years 1939 to 1944. The petition was so amended as to reduce the amount to that for which the award is made.

Chapter 11, article 1, section 2a of the code of West Virginia provides that any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state may, within two years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment of which is claimed by him to have been required unlawfully. No application, under this statute, was made to the tax commissioner, within two years from payments, for the refund of overpayment of taxes for which the above award is made. The specific remedy afforded by such statute for the refund sought was not pursued.

Section 21 of the court of claims act provides as follows:

> "Limitations of Time.—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 . . ."

The single question presented by the record in this case is by which of the two statutes of limitations aforesaid is the claim controlled.

By its failure to make application to the tax commissioner for refund under code chapter 11, article 1, section 2a, I think claimant has slept upon its rights. It has exhausted a specific remedy provided by law.

In the opinion in the case of *State* v. *Penn Oak Oil & Gas Company, Inc.* 128 W. Va. 212; 36 S. E. (2d) 595, Judge Fox says:

> "When a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder, and the taxpayer fails to avail himself of the remedy so provided, he cannot go outside the statute for other and different remedies."

I refer to my dissenting statements in *Raleigh County Bank* v. *State Tax Commissioner* and *Eastern Coal Sales Company* v. *State Tax Commissioner,* in both of which awards were made by a majority of the court at its present term, for further elaboration of my opposing views.

(No. 611-S—Claimant awarded $209.31)

EUREKA PIPE LINE COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1948

MERRIMAN S. SMITH, JUDGE.

The maintenance crew of the state road commission was engaged in relocating a section of the highway along Rush Creek, secondary road No. 50 in Roane county, West Virginia, on August 25, 1947. They excavated a ledge of hard stone which necessitated setting off a blast of dynamite. The Eureka Pipe Line Company had relocated their four-inch oil line running it parallel with the newly located highway, but it had not been buried so was exposed when the blast was put off. Claimant had no notice that the shot was to be put off and as a consequence the pipe line was broken when the stone was thrown over the side of the road.

An itemized statement of man-hours for labor, replaced pipe, use of truck and nineteen barrels of oil was presented by the Eureka Pipe Line Company, in the sum of $209.31, this being the amount claimed.

The head of the agency involved, the state road commissioner, concurred in and recommended an award, which was approved by the attorney general.

A majority of this court hereby recommends an award in the sum of two hundred nine dollars and thirty-one cents ($209.31) to be made to claimant, the Eureka Pipe Line Company.

ROBERT L. BLAND, JUDGE, dissenting.

Since this case embraces questions of fact and liability

and comes to the court of claims under section 17 of the court act for informal consideration upon a record made and filed by the state road commissioner, and no opportunity is afforded the court to make an independent investigation of the facts attending the claim, I cannot see my way clear to concur in the award made by majority members of the court. It is, however, obvious to my mind that the amount of the award made represents a compromise agreement made by the head of the agency concerned, and the court has merely ratified that settlement. This is apparent from the record. The claim is not established by evidence. The award ratifies admitted negligence of the state.

(No. 612-S—Claimant awarded $40.00)

ZACKWELL COCHRAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed January 16, 1948

MERRIMAN S. SMITH, JUDGE.

The state road commission, in October 1946, established a rock quarry at Turkey River on route 20, about seven miles east of New Martinsville, Wetzel county, West Virginia, which it maintained over a period of eight months, or until June 9, 1947. During this time road commission employes blasted the rock with regularity.

Claimant Zackwell Cochran's store building, service station and dwelling were situated about two hundred fifty feet away from the quarry and on the same strata of rock. By reason of this blasting over such a long period of time the walls of his store building, which were built of concrete blocks, shook loose from the foundation. There also were

holes and near-holes on the roofs of the buildings, which necessitated repair and paint.

After a thorough investigation by the state agency involved an agreement was entered into wherein claimant, Zackwell Cochran, for the sum of forty dollars would release the state road commission for all damages to his property by virtue of the blasting operations.

The state road commission concurred in the payment of this claim and it was approved by the attorney general. Therefore, a majority of this court recommends that an award in the sum of forty dollars ($40.00) be made to claimant, Zackwell Cochran.

ROBERT L. BLAND, JUDGE, dissenting.

The constitution of West Virginia provides that the state shall never be made defendant in any court of law or equity. However, on March 6, 1941, the Legislature passed an act creating the state court of claims as a special instrumentality of that body, for the purpose of providing a simple and expeditious method for the consideration of claims against the state, which, by reason of its constitutional immunity from suit, cannot be determined in a court of law or equity, and recommending the disposition thereof to the Legislature. The jurisdiction of the court is limited to the consideration of such claims and demands against the state as it should, as a sovereign commonwealth, in equity and good conscience discharge and pay. I do not regard the present claim as one belonging to that category. If the state were suable the claimant could have no recovery in a court of law. There is no evidence in the record to support the claim or give it dignity or standing in any court. Only by the widest stretch of fanciful imagination can it be held that the state should be responsible for the alleged damages sustained by claimant on account of the atomic reverberations of the blasting operations of the road commission. Seemingly the award made overlooks the inferior and insecure construction of claimant's concrete

block buildings, and the effect of the elements upon them. The road commission is without authority of law to enter into a contract providing for the payment of the claim before it is considered by the court of claims or the Legislature. A state is not bound by the unauthorized acts of public officers. *State* v. *Chilton*, 49 W. Va. 453. The head of a state agency may concur in a claim against the state, but the court of claims is not obliged to be bound by such concurrence, especially when it appears from the record that it is not one for which the Legislature should make an appropriation of the public funds. My conception of duty in the premises forbids my concurrence in the award in this case made by majority members.

(No. 613-S—Claimant awarded $239.62)

LUCILLE H. MOORE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1948

CHARLES J. SCHUCK, JUDGE.

On May 27, 1947, claimant Lucille H. Moore, a school teacher living at Wallace, West Virginia, driving over and along what is known as Gregory's Run road, a secondary road in Harrison county, met with an accident, having her car overturned and damaged to the extent of the claim here presented, namely $239.62. Fortunately she suffered no personal injuries.

The record as submitted to us for our consideration reveals that the road in question was being resurfaced with tar and no notice of any kind, either by watchman's signals or warning signs, had been given to those using the highway on the morning in question. The statement of the

safety director contains the significant statement that claimant ". . . was on the tar before she knew it and as the result the accident occurred." Claimant herself makes the statement that she ran into the fresh oil on the road surface and traveling a distance then slid to the side, hit a dry spot and turned over. We repeat, no warning of any kind was given to the travelers of oncoming automobiles.

Under all the facts as revealed, we feel that either flagmen should have been properly stationed to warn automobile drivers of the condition of the road, or that some warning signs or notices of some kind should have been used, and that the failure to do so was the immediate cause of the accident and that claimant is entitled accordingly to the sum asked for, namely $239.62, for repairs to her car and labor incident to make said repairs. It is admitted that the road was dangerously slick, but no explanation is given why the foreman in charge did not use the necessary precaution when he first discovered that he was making the road highly dangerous for travel. Experience has shown that even the most careful driver will often find himself in trouble when passing from a dry roadway onto a freshly tarred surface of the road.

The state road department recommends payment of the claim and the attorney general of the state approves the claim. We feel, therefore, that there is a moral obligation devolving upon the state of West Virginia to make restitution, and an award, by a majority of the court, in amount of two hundred thirty-nine dollars and sixty-two cents ($239.62) is hereby made to the claimant.

ROBERT L. BLAND, JUDGE, dissenting.

The record of this claim, prepared by the state road commissioner, with his concurrence therein and recommendation for payment thereof, consists of six pages intended to show grounds sufficient to warrant this court in making an award of $239.62 of the public funds and

justify the Legislature in making an appropriation of that amount of the people's money. Not one of these pages contains an affidavit to verify the truth of its contents. Mere *ex parte*, unverified statements do not constitute evidence or proof. The validity of every claim filed in the court of claims against the state, seeking money allowance, should be established by legal proof. In no other way can the merit of such claims be properly determined. This court is an investigating body, charged with the duty of acquainting itself with all the facts concerning the claim presented and recommending to the Legislature the proper disposition thereof. It must necessarily place the court in an embarrassing situation to recommend to the Legislature the wisdom of appropriating the public funds when such claim is not shown by valid and satisfactory proof that it is possessed of merit.

The claim under consideration involves both questions of fact and liability. In its consideration of the claim the court is precluded from examining and cross examining the claimant. The court is asked to act in making its determination as a mere ratifying body. Such action is repugnant to my way of thought. I am constrained to perform my duty as I see it.

At the time of the accident alleged to have occurred, the road commission was engaged in the performance of a governmental function. It was acting in pursuance of mandatory, lawful authority. Claimant in the use of the highway possessed no right or privilege superior to the right of the state. She was charged with the duty of having her automobile under control. The court has had no opportunity to investigate the extent, if any, to which she may have been guilty of contributory negligence. The main part of the road is built of asphalt. It is a straight road for a short distance, with grade. Its width is eighteen feet, with berm on the east of two feet and berm on the west of five feet. The claimant, I think, by the exercise of proper discretion could have avoided the accident. Within the meaning of the rule announced by the Supreme

Court of Appeals of West Virginia in the case of *State, ex rel, Cashman* v. *Sims, Auditor,* as to what constitutes a moral obligation of the state, I perceive no such duty in this case. I recognize the binding effect of that decision.

For the reasons herein set out and others that might be easily assigned, I dissent from the judgment of my esteemed colleagues and would disallow the claim.

(No. 614-S—Claimant awarded $50.00)

CLARK BAILEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1948

CHARLES J. SCHUCK, JUDGE.

Claimant, Clark Bailey, presents his claim in the amount of $50.00, based on the following facts as revealed by the record submitted for our consideration.

On April 29, 1947 the state's patrol grader, while working on state road No. 20 in Calhoun county, cut a hole in the galvanized culvert constructed over and across said highway near Beech in the said county. The following day, April 30, claimant's horse, while being ridden along said highway and while passing over the said culvert, stepped into the hole made by the patrol grader and severely injured his right hind leg. No negligence on the part of the claimant is shown and as the state is charged with the duty of keeping the highway in a reasonably safe condition for travel, the failure to do so, in the instant claim, makes it liable for the damages incurred. The claim is recommended for payment by the state road commission and approved by the attorney general.

Claimant was obliged to expend the sum of eighteen dollars for veterinary services, and an additional sum of ten dollars for the use of a horse to take the place of the injured animal. The balance of his claim is for damages to the horse, impairing its ability to work as it could and did before the accident and thereby affecting its value. The appearance of the horse is somewhat marred. The cut was half around the ankle and the hide was cut off the ankle. The horse for a time at least could not be worked on frozen ground or in the mud for if so worked the injured ankle would bleed and become irritated.

In view of these facts we feel that the amount of the claim, to wit $50.00, is reasonable and that a moral obligation devolves upon the state to pay the same.

An award is accordingly made in the sum of fifty dollars ($50.00) by a majority of the court.

ROBERT L. BLAND. JUDGE, dissenting.

I do not see in this case any moral obligation of the state to compensate the claimant.

> "To constitute a valid declaration by the Legislature of the existence of a moral obligation of the State for the discharge of which there may be an appropriation of public funds in the interest of the public welfare, it is necessary, as a general rule, that there be an obligation or a duty by prior statute created or imposed upon the State, to compensate a person for injury or damage sustained by him by reason of its violation by the State or any of its agencies . . ." *State ex rel Cashman* v. *Sims, Auditor,* 43 S.E. 2d 805.

The state road commission was engaged in the exercise of a governmental function when a puncture or hole was cut in the galvanized culvert by the patrol grader. This fact was not known to the operator of the vehicle during the day that he was employed in the grading work. On

the following day claimant's horse stepped into the hole and was injured. The incident was thereupon reported to an employe of the state road commission, and the next day after this report was made, and after the road commission's first knowledge of the existence of the hole, the culvert was promptly repaired. Certainly no negligence is shown on the part of the road commission. It was alert in making the necessary repairs to the culvert. Necessarily, highways, by the continuous use thereof, will frequently get out of order or repair. It cannot be said that sufficient time may not be allowed for such repair work.

I find in the report of the court of claims of Michigan for the biennium ending December 31, 1942, wherein it held in the case of *Manion* v. *State Highway Department* as follows:

> "The State may not be held liable for injures sustained by an engineer while off duty on ferry operated by State highway commissioner because of negligence of operators of defendant's ferries since the operation of such ferries was a governmental function in the absence of statutory liability for negligent operation of such ferries (1 Comp. Laws 1929 Secs. 4698-4702, as amended)."

(No. 596—Claim denied)

IDA MAE KING, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 19, 1948

When a pedestrian while crossing a culvert or bridge on a highway of the state steps off thereof and falls into a creek or run and sustains personal injures and it appears upon the hearing of the claim prosecuted by her for damages on the grounds of negligence

on the part of the road commission that she could easily have avoided the accident by stepping off the pavement of the road onto the berm on either side thereof and that no negligence on the part of the road commission or the state is disclosed by the evidence in the case, an award will be denied.

W. Hayes Pettry, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

In this case Ida Mae King seeks an award of $25,000.00 to compensate her for personal injuries alleged to have been sustained on a secondary highway known as state route No. 79, leading from the Appalachian Power Plant at the mouth of Cabin Creek on Kanawha river, near Cabin Creek Junction in Kanawha county, West Virginia and running and extending upon said Cabin Creek for a distance of several miles to the town of Leewood in said Kanawha county. Said road is paved and is sixteen feet in width. It is extensively used for both vehicular and pedestrian traffic.

Claimant maintains that on said highway there are several bridges, including a culvert or bridge thereon which crosses what is known and designated as Bears Creek or Ohley Hollow, a tributary of Cabin Creek, at or near the town of Ohley in said Kanawha county.

Claimant and her husband reside in a small cottage in said village or town of Ohley, a short distance from said culvert or bridge. About a quarter of a mile from the home of claimant and across said culvert or bridge a gentleman by the name of Stone lives, where he discharges the duties of a barber for the accommodation and benefit of his neighbors and friends.

On the evening of August 31, 1946, claimant's husband had gone to the home of Mr. Stone for the purpose of

having his hair cut. While he was there claimant concluded to go over to the house to obtain milk and butter. The highway is comparatively straight, conducive to speed of motor vehicles traveling on the road in both directions in the vicinity of the bridge or culvert. This fact was particularly observed when the members of the court inspected the location of the point at which claimant's accident occurred. When claimant got perhaps halfway over said bridge or culvert two automobiles approached from opposite directions. The light from the vehicle traveling in the direction of Ohley was so brilliant that it seemingly dazed and blinded her. For the purpose of safety and to avoid accident claimant, who was walking on the left side of the highway, stepped as she thought off the pavement of the road and fell for a distance of some seven or eight feet into the creek or run spanned by the culvert or bridge, suffering painful personal injuries. She was conveyed by ambulance to a hospital in the city of Charleston where she remained for a period of thirteen days. Upon her arriva at the hospital she was placed in a cast which she was obliged to wear for five weeks. After the removal of this cast she was provided with a brace which she was wearing at the time of the hearing before this court. There can be no doubt about the fact that claimant was seriously injured and suffered a severe nervous shock.

In her petition claimant charges that the state road commission failed to provide guardrails or any other means of protection for pedestrians traveling on the highway culvert or bridge, although the said culvert or bridge had been made for the purpose and use of persons who found it necessary to travel on said highway. She also charges that the road commission failed to provide a wide shoulder or berm sufficient in which to permit and allow pedestrians to step off the paved portion thereof to permit oncoming vehicular traffic to pass. Claimant prosecutes her claim against the road commission on the ground of its alleged negligence in the premises.

As above indicated the members of the court visited the

scene of the accident and made careful inspection of the road, the bridge or culvert and the general surroundings. We are unable in view of the evidence presented in support of the claim and our personal observations to recommend to the Legislature an appropriation in favor of claimant to compensate her on account of her accident and suffering. It was apparent to us at the time we inspected the culvert, and as shown by the engineer who testified upon the hearing on behalf of claimant, that there was sufficient berm on either side of the pavement of the road on which claimant could have stepped and been out of the way of either approaching car. We are unable to perceive any negligence on the part of the road commission either in the construction or maintenance of said bridge or culvert.

In view of recent decisions of the Supreme Court of Appeals relative to the responsibility of the state and the extent to which the Legislature is authorized to appropriate public funds to compensate persons by way of damages resulting from accidents on the highways of the state, we are unable upon due consideration of all of the evidence before the court in the present case to make an award in favor of claimant.

An award is therefore denied and the claim dismissed.

(No. 536—Claimant awarded $240.62)

UTILITIES COAL COMPANY, a Corporation, Claimant,

v.

DEPARTMENT OF UNEMPLOYMENT COMPENSATION, Respondent.

Opinion filed January 22, 1948

1. Checks mailed to the unemployment compensation department

and received into the custody of an employe duly authorized to receive them, which checks were in payment of contributions due the unemployment compensation fund from an employer, and which were subsequently fraudulently embezzled and uttered by the said authorized employe, are nevertheless payment to the state by the employer for the amounts of the checks and for the purpose intended.

2. Where the employer complying with the demands of the department of unemployment compensation makes a second or further payment under protest of the amounts of the said original checks, it is entitled to be reimbursed in the full amount thereof, in a claim properly and duly presented in this court, and an award will be made for any unpaid balance not paid back to the employer by the state.

Appearances:

Peyton & Winters, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, the Utilities Coal Company, is a corporation engaged in the coal mining business in Logan county, West Virginia, and as such is governed by the provisions of chapter 21A, code of West Virginia, and is obliged to contribute and pay into the West Virginia Department of unemployment compensation from time to time certain sums of money as determined by law and set out in the said chapter.

In the due course of its business and as required by the law, claimant sent to the said unemployment compensation department two certain checks, one for the month ending May 31, 1941, in the sum of $900.65 and the other for the month ending September 30, 1941, in the sum of $983.77, making a total of $1884.42 for the said two months. Both checks were payable to the West Virginia department of unemployment compensation, mailed to the aforesaid department at its offices in the capitol building, Charleston,

West Virginia, and received in the regular course of business by one Charles Summers, a junior auditor of the department, duly authorized to receive the checks in question and to give proper credit therefor to the claimant. Shortly after the receipt of the said checks the said Summers stole, embezzled, altered and uttered them and a period of several months elapsed before the theft, embezzlement and uttering was discovered, and thereafter the department of unemployment compensation upon numerous and divers occasions demanded of claimant that it again pay the amount of said checks, with which demands claimant finally complied, and on April 23, 1946, sent to the department two checks aggregating the sum of $1884.42, said payments having been made under protest by claimant. Subsequently Summers was indicted for the theft and uttering of the checks dated May 31, 1941 and September 30, 1941, respectively, and upon a plea of guilty was sentenced to the penitentiary. Summers was and had been under bond in the amount of $2000.00 which bond was executed by the Continental Casualty Company and which company denied liability in a suit brought against it by the unemployment compensation department to recover and collect upon the bond in question.

In *State* v. *Continental Casualty Company,* 42 SE (2d) 820, the Supreme Court of our state in determining most of the issues and questions here involved, held, *inter alia,* that:

> "The provisions of the statute having been complied with, the checks having been paid, and the proceeds of the checks having come into the custody of an employe of the department who, by virtue of his employment, was authorized to receive them, the liability of the employers to the department for the payment of the contributions in the amounts represented by the checks has been fully satisfied and discharged. Their obligations in that respect have been paid in full and any claim of the department notwithstanding its failure or refusal to credit the amounts of the checks

> to their accounts, or its contention that the contributions have not been paid, has been legally satisfied and extinguished."

After the department had recovered and been paid a judgment against the bonding company it applied the amount of $1643.80 to claimant, thus leaving a balance of $240.62 or the difference of the amounts of the first two checks, namely $1884.42 and the amount of $1643.80, leaving the said balance of $240.62 for which claimant asks an award at the hands of this court.

In view of all the circumstances and facts presented for our consideration we are of the opinion and so hold that there is a moral obligation devolving upon the state to return to claimant the full amount of the checks embezzled and the state having returned or applied the sum of $1643.80, the balance of $240.62 is justly due and payable to claimant. The original checks were sent in due time, mailed to the office of the department in Charleston, were received by the proper and duly authorized officer or agent of the state as provided by law and thereafter claimant was not responsible for the fraudulent acts of the officer or agent in question. The checks were paid in due course and the state in due time having received the amount of the tax payable by claimant should now make restitution of the balance not yet paid to claimant. Claimant should not be penalized for the fraudulent acts of an authorized state agent after fully complying with the provisions of the act requiring such payment to be made and after discharging every obligation that devolved upon it.

An award in the amount of two hundred forty dollars and sixty-two cents ($240.62) is accordingly recommended in favor of the claimant.

(No. 537—Claimant awarded $52.05)

BUFFALO-WINIFREDE COAL COMPANY,
a corporation, Claimant,

v.

DEPARTMENT OF UNEMPLOYMENT
COMPENSATION, Respondent.

Opinion filed January 22, 1948

The facts as shown by the record and stipulations filed herein are identical with those disclosed in the claim of *Utilities Coal Company* v. *Department of Unemployment Compensation,* except as to the amount of the check involved, and the opinion of the court rendered in *Utilities Coal Company, supra,* therefore controls in the instant case.

Appearances:

Peyton & Winters, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The record and stipulations tending to support the instant claim reveal that the facts relied upon by claimant, except as to the amount of the check involved, are identical in all other respects with the facts presented by the claim of *Utilities Coal Company, a corporation,* v. *Department of Unemployment Compensation,* decided by this court during the present term.

A check in the amount of $408.25 was mailed to and received by a duly authorized employe at the office of the department in question at Charleston, West Virginia; the check was subsequently fraudulently embezzled and uttered by the said employe and in due course was paid. A

second payment of the amount set forth in the original check was subsequently made, under protest, to the department, after several requests so to do; and after collection of the judgment by the department from the insurance company involved, the department returned or paid back to claimant the amount of $356.20 leaving a balance of $52.05 unpaid, or the difference between the amount of $408.25 and the amount repaid to claimant, namely $356.20.

For the reasons assigned in the opinion of *Utilities Coal Company, supra,* which control in determining our conclusion in the instant claim, we find that the claimant is entitled to the sum of $52.05 and accordingly recommend an award in the amount of said sum, fifty-two dollars and five cents ($52.05).

(No. 607—Claimant awarded $250.80)

EVENING JOURNAL PUBLISHING COMPANY, incorporated, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed January 23, 1948

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, and the Legislature in regular session by special act authorizes and appropriates money from the general school fund for the payment of said legal notices, it becomes a just obligation and an award will be recommended.

Appearances:

Harry M. Byrer, Jr., for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

The Evening Journal Publishing Company, Inc., a corporation, incorporated under the laws of the state of West Virginia and authorized to do business in the said state and its principal place of business being at 207 West King Street, Martinsburg, Berkeley county, West Virginia, publishes, at that location, a daily newspaper known as the Martinsburg Journal.

It appears from an agreed stipulation of facts that during the months of February and March, 1943, said claimant published in its said newspaper eleven (11) separate legal notices to redeem land from sale, under the acts of the West Virginia Legislature of 1941, chapter 117, dealing with the collection of delinquent land taxes, and presented

the said notices to Charles G. Gain, deputy commissioner for the collection of delinquent land taxes for the county of Berkeley, state of West Virginia, for confirmation of publication, and that the said Charles G. Gain refused to confirm said publications on the grounds of the unconstitutionality of said act of the West Virginia Legislature of 1941, chapter 117, a part of which was held to be unconstitutional by the Supreme Court of Appeals of the state of West Virginia.

The advertising charges as set out in an itemized statement for the publication of the eleven separate legal notices total $250.80, which amount is the subject of this claim.

This court in a similar claim *in re Berkeley Printing & Publishing Company, Inc.* v. *State Auditor*, 3 Ct. Claims (W. Va.) 231, made an award and recommended payment under date of July 1, 1946.

Since the ruling in the *Berkeley Printing & Publishing Company* claim, *supra*, the Legislature in regular session in March 1947 passed an act, senate bill No. 337, chapter 26, advance copy of acts of the forty-eighth Legislature of West Virginia, finding the claims of various newspapers for publications of orders and notices of sale of forfeited and delinquent lands to be moral obligations, and appropriated funds from the general school fund to pay the said moral obligations. Section 3 of said act provides in part:

> ". . . that there is and will be in the general school fund of the state treasury revenue, in excess of all other appropriations sufficient to pay the amounts hereafter appropriated, there is hereby appropriated from the general school fund of the state treasury for the remainder of the fiscal year one thousand nine hundred forty-six—one thousand nine hundred forty-seven and for the fiscal year one thousand nine hundred forty-seven —one thousand nine hundred forty-eight, an amount sufficient to pay the moral obligations described in sections one and two herein, which

moral obligations cannot now be ascertained in sums certain."

An award is therefore now made in favor of the claimant, the Evening Journal Publishing Company, Inc., for the sum of two hundred fifty dollars and eighty cents ($250.80) payable out of the appropriation as provided for in the act as cited above.

(No. 609—Claimant awarded $333.40)

CRESCENT BRICK COMPANY, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed January 26, 1948

When a foreign corporation pays its license tax in advance of its due date for the fiscal tax year and prior to the beginning of the license tax year said corporation dissolves and ceases to do any operations within the state a refund of the amount so paid will be recommended.

Appearances:

Thorp, Bostwick, Reed & Armstrong, for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

In April, 1946, the Crescent Brick Company, a Delaware corporation, and duly registered in West Virginia, filed its annual license tax report and paid to the auditor of the state of West Virginia the sum of $333.40 for the year from July 1, 1946 to June 30, 1947.

In the meantime and prior to July 1, 1946 the Crescent Brick Company sold all of its holdings in West Virginia to the Crescent Brick Company, Inc., incorporated in the state of West Virginia on June 21, 1946. On July 1, 1946 the new company succeeded to the operations formerly carried on by the old company.

The new Crescent Brick Company, Inc., also paid its annual license tax for the year beginning July 1, 1946, to June 30, 1947 inclusive, the same period for which the old corporation, the Crescent Brick Company, had made payment.

From the stipulation of facts as agreed upon by the claimant and the assistant attorney general as presented to this court, it appears that the claimant corporation did not do any business in the state of West Virginia after July 1, 1946 except for final liquidation and dissolution proceedings which were carried on outside of the state of West Virginia, all of its business and operations being carried on by its successor within this state after July 1, 1946.

Since the claimant had paid its license tax before it had anticipated withdrawing from the state of West Virginia, and did withdraw and ceased operations before the beginning of the fiscal license tax year, it now asks for the refund of the tax paid to the auditor of the state of West Virginia, that is $333.40.

The license tax for the year beginning July 1, 1946 to June 30, 1947 was not due the state until July 1, 1946 and since the claimant corporation could not and did not anticipate its withdrawal from the state prior to the beginning of the tax year, the opinion of this court is that this is a just obligation and a refund of the tax paid should be made to the claimant.

There is no statutory remedy provided in such case for refund, but we are of opinion that this is a just and meritorious obligation imposed upon the state and the claimant

should be reimbursed, otherwise it would be imposing a penalty for prompt payment of taxes whereas such practice should be encouraged rather than penalized.

An award in the amount of three hundred thirty-three dollars and forty cents ($333.40) is hereby recommended to be paid to the claimant, Crescent Brick Company.

(No. 610—Claimant awarded $2000.00)

ROBERT RAY ROBINSON, an infant, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed January 27, 1948

One who is summoned or drafted by a state forester or protector to assist in fighting a forest fire is entitled to all reasonable protection when complying with such summons, and if injured while so engaged without fault or negligence on his part is entitled to an award. See *Bailey* v. *State Conservation Commission*, 2 Ct. Claims (W. Va.) 70.

J. M. Ellis, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Robert Ray Robinson, an infant aged fifteen years, was summoned on or about November 9, 1946 to assist in fighting a forest fire in Fayette county, West Virginia. On the evening of that day (about six o'clock) he, together with a number of other boys and young men, was transported by truck from his home community to the scene of the fire, and sometime after midnight while engaged in what

the foresters term "mopping up" meaning thereby quenching or smothering the burning embers and tree stumps after the fire itself has passed over the area, Robinson was struck by a burning log, his left leg crushed and the femur bone fractured. He was carried to a house nearby and about two o'clock A. M. on the following day was removed in an ambulance to a hospital where he was confined for a period of three weeks. His leg was kept in a cast for several months and his last examination revealed a fairly good union of the bone, with the leg, however, about one-half inch shorter than the other or normal leg. He complains of pain in the injured leg from time to time and there is no doubt that he is permanently injured and will suffer some inconvenience by reason of his condition throughout his life. So, too, did he suffer much pain at the time of the injury and for some time thereafter. The hospital bill of approximately $284.00 is, so far as we know, still unpaid and held against the boy's father who prosecutes the pending claim as next friend.

The facts as presented reveal a rather startling condition or situation surrounding the drafting of this immature boy and make us wonder why one so young, without any parental consent or knowledge, should have been summoned to take part in the rather hazardous undertaking of helping to fight a forest fire that was at that time covering several thousand acres. The evidence shows that it was understood among the boys that they would be fined or punished if they failed to respond. We are convinced by the testimony that this impression prevailed in the community from which this boy was recruited. The department involved recognized his employment by paying him the usual wage paid so-called "fire fighters" in the county or vicinity where the fire was raging, checks covering the amount of wages due him, $2.50, having been sent to him a short time after he was injured.

The evidence as a whole shows conclusively that he was summoned by an agent or fire protector of the department to assist in fighting the fire; that he was transported to the

scene of the fire in a truck provided for that purpose; that he was under the impression he would be fined if he refused to respond, notwithstanding his age and slender physical build; that the department treated him as one duly employed or recruited to help; that the work was highly dangerous; that he was paid according to the scale of wages paid for such work in that vicinity; that he was permanently injured while engaged in assisting to extinguish the fire, through no fault or carelessness on his part; that there is a large hospital bill to pay and that he will always suffer some inconvenience and impairment by reason of his injuries.

We, therefore, are of the opinion that one so young and immature should not have been called upon to perform such a hazardous and dangerous task but having been summoned and responded as requested, should be compensated accordingly. We feel than an award of two thousand dollars ($2000.00) should be made to this infant claimant, and recommend that the Legislature make an appropriation in the aforesaid amount and that a full release be executed both by him and his father when the award is paid.

(No. 598—Claim dismissed)

THOMAS SAUNDERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed January 28, 1948

MERRIMAN S. SMITH, JUDGE.

Claimant's petition, seeking an award of $1500.00, was filed under the regular procedure on September 4, 1947.

On August 1, 1947, claimant Thomas Saunders was

riding his five-gaited saddle horse across bridge No. 2 between the towns of Highcoal and Garrison, in Sherman district, Boone county, West Virginia, which bridge was under the control and supervision of the state road commission and while riding across said bridge the horse broke through a rotten floor board and broke his left hind leg and it became necessary to destroy the horse. The claimant also alleged that his left hand and left ankle were dislocated, and asked for a sum of $1500.00 for injuries sustained by himself and the horse.

On January 12, 1947 the state road commission submitted a shortened procedure record for $300.00, the value of the horse, together with an affidavit signed by the claimant Thomas Saunders releasing the state for any and all personal injuries and making no claim therefor. The shortened procedure record, as provided for under section 17 of the act creating the court of claims, was concurred in by the state road commissioner and approved by the attorney general as one that, in view of the purposes of the court of claims should be paid.

It is the opinion of this court that the record as submitted is inadequate and that the members of the court should have the opportunity of questioning the witnesses and that more information relative to the market value of the horse should be ascertained.

Under the circumstances the claim is rejected without prejudice to the claimant. The court act provides: "The rejection of a claim under this section shall not bar its resubmission under the regular procedure."

Without passing on the general merits of the claim in question, an award is denied and the claim is dismissed.

(No. 605—Claimants awarded $500.00)

GEORGE WISMAN, JAMES WISMAN, GARNETT WISMAN, HAZEL WOOD and ED WOOD,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 29, 1948

The evidence presented in support of the claim under consideration and the facts adduced show such a breach of the contract by the department involved as to justify an awarad to claimants.

Appearances:

Kay, Casto & Amos, for claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimants, George Wisman and others, are the owners of a tract of land comprising approximately seven and one-half acres located on what is known as Brown's Creek Road, in Jefferson district, Kanawha county, West Virginia. As such owners claimants entered into several agreements in 1940 with the state road commission, culminating in a final contract executed on October 21, 1940, between claimants and the road commission, known as a "Borrow Pit Agreement," whereby, among other provisions, for the consideration of $500.00 to them to be paid, claimants as the first parties to the said contract agreed to grant to the state road commission the right to enter on said tract to quarry and *remove* therefrom approximately 50,000 cubic yards of earth and stone (or a greater or lesser amount if necessary) together with the

right of ingress and egress, and to operate any machinery and equipment necessary for the purpose of quarrying and removing the stone in question. The said contract also sets forth that a further consideration for the rights and privileges granted by claimants shall be ". . . the improvements and benefits that will accrue to the said First Parties' property by reason of the improvement of said Browns Creek Road." The project was to be carried on by the road commission in conjunction with the aid and assistance of the Federal W. P. A.

The agreement executed October 6, 1938, and to be in force until October 1, 1939, contains no provisions inconsistent with the conditions set forth in the final contract, upon which this claim is based and need not be further considered in arriving at our conclusion or decision. The second agreement, dated March 18, 1940, so far as the record before us is concerned, was never executed, except that on its face there is a notation in ink as follows: "It is O. K. with me for you to use rock from this quarry on Tornado Upper Falls Road"—signed "George Wisman, August 22, 1940," and witnessed by several witnesses. Consequently this exhibit (No. 2 state) is of no value whatever in determining the merits and justice of the claim submitted. In addition there was introduced by the state exhibit No. 3, purporting to be a letter from the assistant district right of way agent to the district engineer, which on its face shows it to be wholly self-serving and hearsay and not worthy of serious consideration on our part. However, it contains the recital that the orchard located on the tract in question and nearby to the quarry from which the stone was to be taken contained thirty-three bearing apple trees, and then proceeds with the following language which we quote:

> "Many of these trees have already been totally destroyed through careless construction of approach roads and blasting and other quarry operations. It is unlikely that any of these trees will

have any value after this quarry has been completely worked."

As the state was the only agency that carried on the quarrying operations the reference made in the letter to careless construction, blasting and quarry falls wholly upon the state and the agency involved, and in these respects supports fully the evidence submitted by claimants with reference to the damages done to their orchard and other parts of the property. This exhibit (No. 3 state) contains the statement (again self-serving) that the payment of $500.00 to the owner of the tract is for all damages to the residue of the premises, as well as for the quarry, and it is upon this provision in the exhibit that the state partly relies in its defense to the claim. We repeat, the letter would be of no value whatever in the usual judicial proceeding. It was never seen by the claimants before it was presented in the hearing before us; is hearsay and self-serving and therefore not binding on them. It is significant, however, that with this letter (exhibit 3) there was transmitted the identical "Borrow Pit Agreement" dated October 21, 1940 upon which the claim before us is based; that the agreement had already been signed by the claimants and at that time awaited the signatures of and execution by the road commission officials to make the contract binding and complete. Having been duly executed by all parties concerned the interpretations of its provisions and the construction thereof in the light of subsequent events connected with the quarrying operations must necessarily form the basis upon which the claim before us will fall or be sustained. The evidence clearly shows and a view of the premises by two members of the court proves that the allegations set forth in claimants' petition are substantially true. The orchard appears to have been destroyed; stone weighing many tons has been allowed to remain on the slope immediately below the quarry, undoubtedly causing the slide of earth, which, if it continues, may in time involve all of the tract and seriously impair its value; a water well at the foot of the

slope has been completely destroyed, and in other respects much of the property rendered useless for the purposes for which it was used before the quarrying operations began. The road (Browns Creek Road) was not improved as contemplated and intended by the contract, but on the contrary was made a gravel road, and not stone based with stone from the quarry, because of economic reasons and because the improvement of the road as contemplated by the contract had to be abandoned before reaching claimants' land since there was no further appropriation of funds available and cheaper construction had to be used. In the opinion of a majority of the court these actions on the part of the agency concerned constitute a breach of the contract and were detrimental to claimants' rights in the premises. Furthermore, it appears from the evidence that after the execution of the contract quarrying operations continued for several months but no stone was removed from the property used on the road as intended, but on the contrary the stone was allowed to accumulate in piles on the upper part of the property and eventually by its weight caused the slide and the damages complained of by claimants. All of the stone quarried after the signing of the contract is still on the premises, notwithstanding the protests made to the road authorities by claimants to have it removed. Damages are continuing to accrue caused by the careless and negligent acts of the agents and employes of the department, and in our opinion are not contemplated or covered by the clause relating to "damages to the residue" as set forth in the contract, and considered in connection with all the attendant circumstances. These negligent acts were unnecessary and not merely incidental to the quarrying of the stone; therefore, were not contemplated by the clause of the contract just referred to.

Claimants wanted a worthwhile road and were ready and willing to give and furnish the necessary stone not only for the road immediately adjacent to their tract of land, but for other roads as well; to all of which purposes the state agreed, but failed to do or carry into effect.

A majority of the court is therefore of the opinion, after weighing and considering all the facts involved, that claimants are entitled to damages in the sum of five hundred dollars ($500.00) in addition to any sum or sums heretofore paid, and recommend an award accordingly for payment as a full settlement for all damages past, present or future.

ROBERT L. BLAND, JUDGE, dissenting.

I cannot give sanction to the award in this case made by majority members of the court. I cannot endorse or agree to the correctness of the statement in the majority opinion that "The evidence presented in support of the claim under consideration and the facts adduced show such a breach of the contract by the department involved as to justify an award to claimants." There has been no breach of the contract in the premises. The majority members, in their determination of this claim, have lost sight of the polestar in the case. They have failed to see and follow the unerring guiding light of truth so brightly reflected throughout the record. Wandering in the darkness they have overlooked the impregnable defense made to the claim by the state road commission.

A proper analysis of the whole evidence must necessarily lead to the conclusion and show that the claim should be denied and the case dismissed.

In 1938 persons residing in the vicinity of Browns Creek, in Kanawha county, West Virginia, were desirous of having a secondary road built in their neighborhood. About that time the state road commission was sponsoring a federal works progress administration project in Kanawha county. Before the road commission could build a road it was necessary for rights of way and so forth to be obtained. The people in the Browns Creek section arranged with a gentleman by the name of Knapp, then mayor of St. Albans, to secure such rights of way. The road commission needed a quarry for the W.P.A. forces to

start the road work. There were two quarries in the neighborhood available, one on the Mason Arbaugh property and one on the seven and one-half acres of land owned by the claimants. Mr. Knapp deemed the quarry on the Arbaugh property inadequate. He was therefore directed to get a contract for the claimants' quarry before the road work was begun. By an agreement in writing bearing date of the sixteenth of October, 1938, claimant George Wisman granted to the road commission the right to quarry and remove rock from the quarry on the property of claimants until October 1, 1939. The said agreement provided, however, that such rock should be used on the Browns Creek Road. The road project was then started and prosecuted until funds available for the purpose ran out. At this time about one and one-half miles of the Browns Creek road had been built. For a period the W.P.A. forces remained idle, but in a short time another project was started on the Tornado or Upper Falls road. In order to use rock from claimants' quarry on the Upper Falls road it was deemned necessary to obtain a further agreement from claimants. Accordingly an agreement dated March 19, 1940, was prepared and submitted for execution. Claimant George Wisman wrote an endorsement thereon assenting to the use of rock from claimants' quarry on the Upper Falls road. Work was done on the latter road for a while and claimant George Wisman complained about damages on the Wisman property. Some apple trees in the orchard had been destroyed. His claim was duly considered by the road commission officials and in order to effect full, complete and final settlement of all matters in difference and all damages then or thereafter to be done on account of or resulting from quarry operations on claimants' property, an agreement bearing date on the twenty-first day of October, 1940, called the "Borrow Pit Agreement" was executed. The three paper writings in question should be read and considered together. That the "Borrow Pit Agreement" was intended to take care of all damages which had been done to the property of claimants and all future damages that might be done thereon as a

result of quarry operations was clearly understood by all parties concerned. The majority opinion challenges this proposition and quotes partially from a letter written by an assistant district right of way agent to the district engineer of the commission and asserts the said letter to be "Wholly self-serving and hearsay and not worthy of serious consideration." Section 15 of the act creating the court of claims provides in part as follows:

> "Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court 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."

Since this provision in the statute is not self-executing it was formally adopted as a court rule, i.e. rule IX, subsection (c), by the court of claims.

In view of an excerpt from the above mentioned letter used in the majority opinion, a quotation that does not give or set forth all of the information furnished to the court by that letter, the said letter, dated October 26, 1940, is now set forth in its entirety as follows:

"Mr. Ray Cavendish
District Engineer
Charleston, West Virginia

Re: Borrow Pit Agreement
George Wisman, et als
Browns Creek Road

Dear Mr. Cavendish:

We enclose herewith a Borrow Pit Agreement, in triplicate, executed by George Wisman, et als, and covering the stone quarry previously used to secure material for the Browns Creek and Coal River Road.

The purpose of this agreement is to cover any or all damages sustained by the Wisman property,

and to extend the privilege of further quarrying until October 1, 1942.

The consideration of Five hundred ($500.00) dollars to be paid may seem excessive, but I wish to point out that this quarry is situated immediately above an orchard containing in all 33 bearing apple trees. Many of these trees have already been totally destroyed through careless construction of approach roads and blasting and other quarry operations. It is unlikely that any of these trees will have any value after this quarry has been completely worked.

With this in mind, I have agreed to a consideration of Five Hundred ($500.00) dollars for the quarry and all damages to the residue of the premises and recommend that this agreement be approved and passed for payment.

I will check the title to this property at the earliest possible time, and advise you of my finding.

Very truly yours,

/s/ George A. Wilson

GEORGE A. WILSON
Assistant District Right of Way Agent"

GAW:bb

Reading this letter in conjunction with the "Borrow Pit Agreement" it is made manifest that the payment of $500.00 made to claimants under the terms of said "Borrow Pit Agreement" was intended to be in full settlement of all damages which might result to claimants on account of quarry operations. The evidence introduced upon the hearing of the claim shows that the said sum of $500.00 was paid by the road commission to the claimants. They are bound by that agreement. What advantage would a solemn agreement be if it could be so easily disregarded at the will and pleasure of any of the parties thereto? What use would there be for the road commission to enter into

an agreement at any time if the party or parties with whom it is made could disregard and evade its binding provisions at their will and pleasure?

It was shown upon the hearing that the entire parcel of land owned by claimants on which the ledge or quarry is located is and has for several years past been assessed at $100.00. The taxes thereon are seventy-eight cents for each half year or $1.56 per annum. There are no improvements on the land. On the entire parcel there is only approximately 100 X 100 feet of level land. There is no fence on the property so far as the evidence discloses. What apples grew in the orchard were given away to the Salvation Army and anybody else who wanted them. It was shown by the testimony introduced by the claimants that the land is not worth more than $600.00. The claimants have heretofore been paid $500.00 by the road commission. The award made by majority members of the court gives them an additional sum of $500.00. Certainly there is some duty resting upon the court of claims to protect the interest of the state.

With becoming deference to the action of my esteemed colleagues I most respectfully record my dissent to their judgment in this case.

(No. 621-S—Claimant awarded $615.00)

DUNCAN W. DAUGHERTY, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed April 14, 1948

CHARLES J. SCHUCK, JUDGE.

This claim, in the amount of $615.00, is for services

rendered as special judge in Cabell county, in the cause of *F. O. Lamb, Receiver, etc.* v. *Huntington Securities Corporation.* The services extended over a period from May 7, 1940 to July 1, 1945, and no objection is made by the auditor or the state authorities to the amount claimed, and in view of the fact that the services were continuing in their nature and effect and not ended until July 1, 1947, seven years after they began, no objection is made nor could one be maintained that payment of any part of the amount involved is barred by the statute of limitations governing the disposition of claims filed in this court. The state auditor and the attorney general both recommend an award.

The claim as first presented to the state auditor was in the amount of $675.00, as allowed by the regular circuit judge of Cabell county, and duly certified for payment to the auditor. Both the circuit judge of Cabell county and claimant as special judge, had agreed that the charge for the services to be rendered in the cause referred to should not be presented until the work was fully completed and the services ended. This agreement was carried out and the bill for services rendered accordingly.

Upon presentation of the certified order or bill for the services to the auditor he allowed and paid the amount of $60.00, being the amount accruing after July 1, 1945, and refused payment of the balance on the ground that it was not payable from the current appropriation and that the appropriations had expired out of which said balance might properly have been paid. As stated by the auditor in his communication to the claimant, payment was not refused because the claim lacked merit but because the auditor felt and maintained that he was inhibited by the laws of the state from making payment for the balance of the services which had been rendered previous to July 1, 1945. The auditor states in his communication that the claimant should be paid. An itemized statement at the rate of fifteen dollars per day showing the days and dates during which

the services in question were rendered is filed for our consideration.

We are of the opinion that the state having benefited by the services rendered, that the amount asked is reasonable and just, that no objection to an award is offered by any state official or agency, but rather that recommendation of payment is made, and that the only reason payment has been withheld is because the period during which the services were rendered overlapped the appropriations from which payments could have been made, and which appropriations have expired, that an award should be made to claimant.

Accordingly, an award in the amount of six hundred and fifteen dollars ($615.00) is hereby made and allowed and the necessary and proper appropriation by the Legislature is recommended.

No. 606-S—Claimant awarded $210.73)

JOHN H. BREEDLOVE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 20, 1948

MERRIMAN S. SMITH, JUDGE.

On June 20, 1947, claimant John H. Breedlove was driving his privately owned one and one-half ton Chevrolet truck, loaded with coal, along secondary road No. 50-9, near Grafton, Taylor county, West Virginia. Upon crossing a wooden bridge (culvert type) the said bridge collapsed causing damages in the amount of $210.73 to the

tires, tubes, spring and body of the truck.

The claimant had paid license fee for overload of six tons gross and at the time of the accident the gross weight of the cargo and truck was well within the limits allowed by law. There was no "load limit" sign posted at the bridge and no warning of any kind was given to the public as to the unsafe condition of the bridge. Michie's Code of West Virginia, 1943, chapter 17, article 4, section 1474(15) provides:

> "The commissioner shall inspect all bridges upon state roads. If any bridge is found to be unsafe, the commissioner shall promptly condemn, close and repair it."

It seems from the record in this case that the statute above cited was disregarded in this instance, thereby making the state guilty of negligence. The failure of the state road commission to perform its statutory duty was the proximate cause of the damage to the said truck. No negligence of any kind was shown on the part of claimant.

The state road commission made proper investigation as to the merit of this claim and concurs in the claim and the claim is approved by the special assistant to the attorney general as one that should be paid.

From the record as filed before this court it appears that claimant, John H. Breedlove, carried a one hundred dollar deductible collision policy with the State Automobile Mutual Insurance Company of Columbus, Ohio, which took subrogation to the extent of its payment.

It is the opinion of the majority of this court that an award be made in the amount of two hundred ten dollars and seventy-three cents ($210.73) to be paid jointly to John H. Breedlove and the State Automobile Mutual Insurance Company of Columbus, Ohio.

ROBERT L. BLAND, JUDGE, dissenting.

The facts which constitute the basis of this claim are set forth by the state road commissioner, the head of the agency involved, as follows:

> "A privately-owned 1½ ton truck (Chevrolet) of John Breedlove, Taylor County, hauling a load of coal on Secondary Road No. 50/9 and crossing wooden bridge (culvert type) when rear wheels crashed through bridge. SRC did not have bridge posted for any gross load limit and truck was issued overload license of 6 tons. The load traveling over the bridge at the time of the accident was less than what trucker was permitted to haul by law."

By reason of the accident claimant's truck was damaged, as he maintains, to the extent of $210.73, and the road commissioner concurs in the claim for that amount, and it is approved by the attorney general's office "as one that, in view of the purposes of the Court of Claims Statute, should be paid."

I do not think the facts relied upon for an award in this case warrant or justify the making of such an award. Certainly it cannot be seriously maintained upon the meagre showing made by the record that if the state were suable there could be recovery in a court of law. How heavy was the load of coal that was being transported over the bridge? To what extent was claimant acquainted with the bridge? How frequently did he cross over the bridge in the hauling of coal? These and other pertinent questions could have been propounded if the case had been heard under the regular procedure and not under the shortened procedure. Was the claimant in any way guilty of contributory negligence? In the recent case of *Jacob F. Bennett* v. *State Road Commission,* not yet reported, the Supreme Court of Appeals of West Virginia held that an award made by this court was based upon manifestly insufficient facts. The record in the instant case certainly falls far short of the facts set forth in the Bennett record.

I respectfully dissent from the award made by majority members of the court.

(No. 616—Claimant awarded $685.96)

I. S. DAVIS, d/b/a FAIRMONT LINEN SUPPLY COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed April 21, 1948

When the State Supreme Court rendered a decision exempting the furnishing of linens, towels and similar articles from the provision of the business and occupation tax, there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

I. S. Davis, doing business as Fairmont Linen Supply Company, operates a linen and towel supply business in the city of Fairmont, Marion county, West Virginia. Since 1939 he has paid annually to the state tax commissioner under the business and occupation tax statute. In 1944 the Supreme Court, in *Harper* v. *State Tax Commissioner,* 126 W. Va. 707, held that the furnishing of linen and towels was not a "service" within the meaning of the statute, and such receipts were exempt as to individuals engaged in such activity. Since there was no controversy between the state and claimant as to the amount of overpayment, the sole question for this court is to determine whether the two-year statute of limitations applicable to the state tax commissioner or the five-year statute of limitations applicable

to the state court of claims shall prevail in the instant claim.

It is the opinion of the majority of the court that there is a moral obligation imposed upon the state to refund the amount overpaid not barred by the state court of claims statute of limitations. *Raleigh County Bank* v. *State Tax Commissioner; Jess P. Richmond* v. *State Tax Commissioner*, not yet reported.

The amount of refund, including tax and penalties for the respective years as filed by the claimant and audited by the state tax department, is as follows:

Second half of 1942	$106.11
First half of 1943	98.28
Second half of 1943	94.14
Entire year 1944	242.90
First half of 1945	68.46
Second half of 1945	76.07

making a total refund amounting to six hundred eighty-five dollars and ninety-six cents ($685.96) which amount is hereby awarded to claimant, by a majority of the court.

ROBERT L. BLAND, JUDGE, dissenting.

I cannot concur in the award made in this case by majority members of the court for the reason that I believe it to be in direct conflict with the law as interpreted and announced by the Supreme Court of Appeals of West Virginia. See *State* v. *Penn Oak Oil & Gas, Inc.*, 128 W. Va. 212. For further reasons upon which I base my dissent I respectfully refer to my dissenting statement filed in the case of *Raleigh County Bank* v. *State Tax Commissioner* and my further dissenting statement filed in the case of *Eastern Coal Sales Company* v. *State Tax Commissioner*, not yet reported.

(No. 615—Claimant awarded $674.83)

AMERICAN OIL COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed April 21, 1948

Syllabus in re Eastern Coal Sales Company, a corporation, v. *State Tax Commissioner,* decided by this court September 17, 1947, adopted and affirmed.

Appearances:

Oscar Hoth, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant seeks refund of $322.28 for the year 1943 and $352.55 for the year 1944, making a total of $674.83, representing overpayment of its business and occupation (gross sales) taxes for the two years in question. The state admits the payments and their amounts as correct, but objects to the refund on the ground that the statute of limitations bars recovery, since no action was commenced by claimant within two years of the time the several payments had been made. That the state was not entitled to any of the payments made at the time they were received is admitted and the only question for our consideration is whether the payments of the tax having been made within less than five years prior to the filing of this claim, claimant should have the overpayments refunded or whether refund of the amount should be refused on the ground that no claim or petition was filed or presented, within two years after the payments had been made, as provided by code 11-1-2a.

During the war years claimant was obliged to pay to the

Defense Supplies Commission, a federal agency created for the purpose of taking care of excess transportation costs in the oil industry occasioned by land shipments of oil rather than by the cheaper method of shipping by water, and rather than pass the increased costs to the consumer directly, claimant was obliged by the said federal commission to collect and turn over to the commission the excess amounts so collected and as then required by the state tax commissioner to pay the gross sales tax to the state of West Virginia on said excess collections, notwithstanding that claimant received no benefit whatever from such excess sales. In due time the matter was called to the attention of the state tax commissioner, who ruled that claimant was not required under the law to pay a tax on the said excess costs and at the time made a refund of $180.14, refusing, however, to refund any other overpayments on the ground that such repayments were barred by the statute of limitations (two year rule). A similar quesiton was presented to this court *in re* the claim of *Eastern Coal Sales Company, a corporation,* v. *State Tax Commissioner,* decided September 17, 1947, a majority of the court holding that the statute giving the court of claims the right to hear and determine a claim for refund of erroneously paid taxes, filed within five years after said erroneous payment, governed as against the two-year statute of limitations referred to and relied upon by the state.

The act creating the court of claims allowing a claim to be filed within the five-year period also contains the following language:

> "Sec. 13. . . . 1. 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."

What is the significance of the language so employed? What does the term or phrase "equity and good conscience" as set forth in the act really mean? Is the language

susceptible of several interpretations or are we restricted in its application when confronted with the merits of a claim such as we have under consideration? In its general signification the term "equity and good conscience" must denote the spirit and habit of fairness, justice and right dealing, which would regulate the intercourse of men with men, simply the rule of doing to all others as we desire them to do to us; as Justinian has said, "To live honestly, to harm nobody and render to every man his due." The term or phrase is the synonym of the natural right of justice. In this sense its obligation is ethical rather than jural and it belongs rightfully in the sphere of morals and therefore in the realm of moral obligations.

The facts presented show conclusively a moral obligation on the part of the state to refund the amount of the tax erroneously paid, and the Legislature having definitely fixed the period of five years, during which claims could be presented and prosecuted, to the *definite exclusion* of any other statute of limitations, we feel we are bound by such provision and make an award accordingly in favor of the claimant in the amount of six hundred seventy-four dollars and eighty-three cents ($674.83), and recommend that an appropriation by the Legislature be made to cover the said refund or overpayment of the said tax.

ROBERT L. BLAND, JUDGE, dissenting.

In my judgment the claimant by reason of its failure to make application for refund within the time prescribed by the two-year period of limitation has exhausted its remedy for the recovery of such refund. In the case of *State* v. *Penn Oak Oil & Gas, Inc.*, 128 W. Va. 212, it is held in point three of the *syllabi:*

> "The provisions of Code, 11-14-19, as amended by Chapter 124, Acts of the Legislature, 1939, relating to a refund of the excise tax on gasoline, create the exclusive remedy which may be used to obtain such refund. Any refund provided for

> therein must be based on an application for the return of a tax theretofore paid."

It is expressly provided by statute that application for a refund such as involved in this case must be made within a period of two years. That is the exclusive remedy provided by law. In the *Penn Oak* case, *supra*, Judge Fox in the opinion, at page 222, says:

> "Where a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder and the taxpayer fails to avail himself of the remedy so provided, he cannot go outside the statute for other and different remedies."

I do not agree with Judge Schuck's views with respect to the exercise by this court of the function of equity and good conscience. The language in relation to equity and good conscience found in the act creating the court of claims of West Virginia merely relates to the jurisdiction of the court and does not create a remedy. Such is the view of the court of claims of Illinois, in which state the court of claims act is very similar to the West Virginia court act.

Because I am firmly of opinion that the two-year period of limitation controls in the claim in question I respectfully dissent from the award made by majority members.

No. 620—Claimant awarded $300.00)

THOMAS SAUNDERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 26, 1948

The statute requiring inspection and proper maintenance of bridges controlled by the road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence.

Appearances:

P. W. Hendricks and *John Mark Stephens,* for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant's horse, while being ridden across bridge No. 3, spanning a tributary of Big Coal River located near Highcoal in Boone county, broke through the floor thereof and was so badly injured that it had to be destroyed. The horse was very valuable, being a five-year old, five-gaited saddle horse, sometimes used to perform light farm work, and seemingly sound and healthy in all respects. The uncontradicted testimony shows the animal to have been worth the sum of $300.00 at the time of the accident. An inspection of the bridge by the road authorities, after the accident, showed the bridge to have been in bad condition and in need of repair. The state admitted liability and submitted to the court the question of determining the value of the horse at the time it broke through the bridge floor and was injured as herein stated.

Claimant had also in his first presentation of the claim asked for an award for personal injuries. He was riding the horse across the bridge in question at the time and place of the accident. However, he withdrew his claim for personal injuries and the claim was accordingly dismissed and we have now before us only the question of the value of the horse. As before stated, the evidence as to value is uncontradicted. That it was an unusually valuable animal, suited not only for saddle purposes but for work as well, is likewise proven, and we are of opinion that an award of three hundred dollars ($300.00) should be made to claimant; that there is a moral obligation on the part of the state to pay claimant, arising out of the facts and circumstances as presented, and we therefore make a recommendation accordingly.

ROBERT L. BLAND, JUDGE, concurring.

The evidence offered in this case in support of the merit of the claim involved consists of the testimony of the claimant, that of his father, who had given the horse to his son, and one other witness. The state filed a plea contesting the right of the claimant to an award and upon the hearing an assistant attorney general stipulated that the bridge on which the accident occurred, and where claimant's horse was so badly injured and crippled that it became necessary for it to be shot, was in a defective condition and produced no evidence in opposition to the claim. The evidence offered by the claimant showed the horse to be of the value of $300.00. In view of the manner in which the claim is presented to the court and the failure of the state to offer any evidence in opposition to the claim, I reluctantly concur in the determination made. I may add, however, that personally I do not feel that the hands of the court, as an investigating body, should be tied by stipulation of fact where issues are involved. If a claimant and the attorney general's office may agree upon a valid award of the public funds, it would seem to me that there would be no occasion to have a court of claims.

(No. 618—Claim denied)

JOHN R. HARTLEY, Admr. of the estate of DONALD LEE HARTLEY, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 30, 1948

To justify the Legislature in making an appropriation of the public funds in favor of a claimant he must show a state of facts from which it appears that such appropriation would be for a public and not a private purpose.

Pinsky & Mahan, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The Wellsburg American Legion Post, sponsoring a baseball field which it maintained near the southern corporate limits of the city of Wellsburg, on the Wellsburg-Bethany Pike, in Brooke county, West Virginia, entered into an arrangement with a representative of the state road commission whereby it was permitted to borrow from said commission a road scraper, for the purpose of scraping and leveling the said baseball field. No consideration was paid by the legion post to the road commission for the use of said scraper, but it was stipulated and agreed that when the said scraper was to be employed on the work of said baseball field it should be operated by an employe or servant of the commission, who was acquainted with that particular piece of machinery. Accordingly, on the nineteenth day of April, 1947, the said scraper was operated on the baseball field by one Nolan Green, an employe of the commission. However, the nineteenth of April, 1947,

fell on a Saturday, a time when the said Green was not on duty for the road commission, but acting wholly on his own account and responsibility. For the service rendered by him on that day in operating the scraper he was paid by the Wellsburg American Legion Post the sum of eight dollars by check drawn on a Wellsburg bank by J. K. Taylor, an official of the post, which said check was duly cleared and is filed and made a part of the record in this action.

During the time that said scraper was being operated on said baseball field a number of young folks who had congregated at the scene of the work climbed upon the scraper from time to time. One of these youths was Donald Lee Hartley. He was past seventeen years of age, six feet tall and weighed one hundred and eighty pounds. He had, prior to the nineteenth day of April, 1947, been in the employ of the state road commission and had also worked in Ohio for a period. The evidence offered in support of the claim upon the hearing clearly showed that he was a young man of understanding and discretion, fully capable of appreciating the danger to which he was subjected in riding upon the scraper. He fell, or was thrown, from said scraper and sustained injuries which resulted in his death. Claimant John R. Hartley, father of the deceased, was duly appointed and qualified as administrator of the personal estate of his said intestate. By the claim prosecuted by him in this court he seeks an award of $10,000.00. His said claim is prosecuted upon the theory that the said scraper, during the time it was employed in service on said baseball field by said Nolan Green, was being operated by the said Green within the scope of his authority and that there was such negligence on his part as would render the state responsible for the accident and death of claimant's said intestate.

We have duly considered the evidence offered for and against the claim in question, and are of opinion that the theory upon which the said claim is prosecuted cannot be sustained. In Blashfield's Cyclopedia of Automobile Law

and Practice, volume 5, section 3005, at page 129, this pertinent authority is stated:

> "The test, therefore, for determining whether the owner of an automobile is liable to strangers for the wrongful and negligent acts or omissions of his servant in operating the machine is whether the servant, at the time of the accident, was engaged in furtherance of the master's business or enterprise concerning which he was employed and acting within the scope of his employment."

We readily concede that the general rule of agency is that the principal is liable civilly for the tortious acts of his agent which are done in the scope of the agent's employment. In the instant case, however, it is very clear to our minds that the said Nolan Green, at the time the accident occurred, was not acting within the scope of his employment as an employe of the state road commission. No essential purpose would be subserved by a further discussion of the record. The claim is not one for which the Legislature would be warranted in making an appropriation of the public revenue.

An award is therefore denied and the claim dismissed.

(No. 619—Claim denied)

RUTH C. DUKE, Claimant,

v.

DEPARTMENT OF PUBLIC SAFETY, Respondent.

Opinion filed April 30, 1948

The Legislature is without power to make an appropriation of the public funds that would amount to the bestowal of a gratuity.

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant Ruth C. Duke is the widow of Milton R. Duke, deceased, a former member of the department of public safety of West Virginia. She prosecutes her claim against the department of public safety in the sum of $300.00 to reimburse her for that amount paid to the Huntington Memorial Hospital on the twenty-sixth day of February, 1943, for hospitalization and treatment rendered her said husband in said hospital. She maintains that the said Milton R. Duke suffered a compound fracture of his left leg in the line of duty while an enlisted trooper in said department of public safety in a motorcycle accident on September 6, 1930. Following said injury osteomyelitis developed and numerous treatments over a period of years thereafter were paid for by said department of public safety, but the claim in question was never paid by the said department.

The said trooper, Milton R. Duke, died February 18, 1943. Claimant filed her claim in this court exactly five years after the death of her said husband, but the payment

made by her to the hospital, for which she seeks reimbursement, was eight days after the trooper's death. No itemized statement from the hospital showing the dates of the trooper's hospitalization and medical attention has been furnished to us. Our investigation of the claim, however, discloses that the department of public safety actually paid for Trooper Duke's hospitalization and medical treatment, independent of the sum of $300.00 for which an award is now sought, a total sum of more than $4000.00. We do not perceive any authority of law warranting such payments. In addition, Trooper Duke was paid the maximum amount which he might receive under statute from the death and disability fund for a considerable period of time.

Claimant and one dependent child are now receiving the maximum pension that may be paid under authority of law.

In our judgment the granting of an award to claimant for the said sum of $300.00 would be equivalent to the bestowal of a gratuity. The Legislature may not under any authority of law bestow a gratuity. We are of opinion, from a careful investigation of the claim, that the department of public safety dealt most generously with the trooper after his accident, and actually paid him money without authority of law so to do.

We are unable to see our way clear from the record before us to recommend to the Legislature the payment to claimant of the amount she seeks, or any amount.

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

(No. 595—Claim denied)

S. D. ALBRIGHT and F. V. ALBRIGHT, d/b/a ALBRIGHT OIL COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 3, 1948

To sustain a claim for damages caused by alleged negligence of a state road crew, the evidence must be clear and convincing and that the negligence of the said crew was the proximate cause of the injury to claimant.

Appearances:

Milford L. Gibson, for claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

S. D. Albirght and F. V. Albright, partners, doing business as the Albright Oil Company, and located at Albright, Preston county, West Virginia, maintain that on or about July 12, 1946, a certain oil or pipe line, leading from the B. & O. station or sidetrack down the hill and across the Cheat River to claimants' tanks, was broken by reason of stone being dumped and thrown on the said line by state road employes working at and near the place in question. The claimants maintain the pipe line in question for the purpose of carrying gasoline from railroad tank cars on the B. & O. siding or switch and which is located at a considerable elevation across the river and above the town of Albright, and the gasoline is conducted by gravity to the tanks of claimants situated in the town of Albright, said pipe line being about one-quarter of a mile in length and

for the greater portion of that distance being above the ground. The breaking of the pipe caused the loss of many hundreds of gallons of gasoline and entailed a financial loss of approximately $631.18 to claimants. Claimants specifically aver that on the twelfth day of July, 1946, a maintenance and repair crew then employed near the town of Albright, on route No. 26, did dump and throw, from the said state route No. 26 over and through a row of guard posts, several large trucks of dirt, debris and rocks which fell over, against and upon the said gasoline or oil pipe line causing the breaking thereof and the loss of the gasoline in question.

If this allegation had been sustained by the proof, there could be no question of recovery. However, we look in vain for any evidence that definitely fixes the blame for the breaking of the pipe line in question upon the state road commission or its employes and agents. It is true that there are suspicious circumstances, namely, the pipe line was broken; there were marks of violence on the line itself at the point where it was broken; there were several stones lying around near the break and the crew of the state road commission had been working at or near the point in question. The evidence, however, so far as the record is concerned definitely shows that the dumping of the dirt and stone was lower down the hill than the point where the pipe line was broken and, consequently, if this was true, the dumping of the stone and debris itself could not have been the cause of the breaking of the pipe line and the consequent loss of gasoline. The pipe line is located near the state highway, approximately some forty to fifty-five feet away, and is on a lower level as it descends the hillside down the roadway in question. No witnesses, at least none present before the court, saw the accident nor the dumping of any stone on the said pipe line and the break was not discovered until late in the evening of the day on which the pipe line is supposed to have been broken. Taken as a whole, claimants assume that the pipe line was broken in the manner alleged in their petition or dec-

laration, but present to the court no evidence upon which a finding in their favor could be made, premised on alleged negligence of the state road commission crew working at that point on the day in question. It is purely a matter of speculation, and as heretofore held by our Court of Appeals we are obliged at least to have some tangible, positive evidence upon which we can base a finding and make an award accordingly. Considering the evidence as a whole, it is contradictory and not convincing, and an award is therefore refused.

(No. 608—Claim denied)

JAMES A. MORRISON and ONEIDA MORRISON,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 4, 1948

Where the evidence in a claim seeking an award for damages to private property on the alleged ground that a bridge crossing a state highway was inadequate to take care of the water flowing thereunder and caused such water to overflow and inundate such private property shows that the source of the trouble was not at the bridge but due to natural causes for which the state is in no way responsible an award will be denied.

Appearances:

Lucian W. Blankenship, for claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

James A. Morrison and his wife, Oneida Morrison, live

at Winslow, Wayne county, West Virginia. They have lived there for over fifty years. The home place is owned by James A. Morrison, and is situated on about one acre of ground on the east side of Grassy Lick Branch and on the western side of state route No. 13. Another tract of bottom land on the south side of state route No. 13 and bordering on the east side of said Grassy Lick Branch, which is a tributary of Beech Fork Creek, is owned by both James A. Morrison and Oneida Morrison, his wife.

For the past five years upon several occasions flash floods or unusual rises have caused the waters of Grassy Lick Branch to overflow and inundate the property of the claimants, damaging the foundation of the dwelling, and emptied and discharged filthy and unsanitary water into their well, and otherwise damaged the cellar house, flowers and landscaping to the extent of $1000.00, for which the claim is made.

A short time prior to 1933 the Wayne County Court built a concrete bridge across Grassy Lick Branch along what is now state road No. 13, the bridge having two arches each about ten feet wide with a pier in between about three feet wide, making a total length of twenty-three feet. The uncontradicted evidence is that for years prior to the erection of said concrete bridge that the water from Grassy Lick Branch did get up in the Morrison yard but did not overflow the well, cellar or toilet. Grassy Lick Branch is a sluggish stream, and it meanders for a distance of three or four hundred feet north of the bridge and all the way south of the bridge until it reaches Beech Fork Creek about 1981 feet south of the bridge. The evidence of the engineers showed the drainage area north of the bridge to be 1088 acres (geographical map, state's exhibit 15) and they figured a rainfall of 2½ inches, which is one-half inch above normal, would require 78.85 square feet to go through, whereas the clearance of the bridge totals 98.06 square feet (record p. 83). The roof of the bridge is 598.34 elevation. The elevation of the top of the south wall in front of the Morrison home, paralleling road 13, is

599 and the elevation of the top of the wall on the west side of the home, facing Grassy Lick Branch, is 597.88, which is five-tenths lower than the roof of the bridge. The heavy rainfall on Monday, April 12, 1948, was 2.57 inches and on Tuesday, the thirteenth, .98 inches and on Wednesday, the fourteenth, .53 inches, making a total of 4.08 inches during the three-day period. (Record p. 84). The engineers were on the scene on Thursday, the fifteenth of April, and their observation was that the high water on the bridge was 7½ inches below the roof of the bridge which was about two inches lower than the west retaining wall around the Morrison yard, which elevation is 597.88. The bottom land owned by claimants to the south of the bridge through which Grassy Lick Branch flows and forms the western boundary of the Morrison property is crooked and meandering; it is also sluggish since the drop there is .513, which is a little over a half a foot in 100 and it is 1981 feet from the bridge to the waters of Grassy Lick Branch at Beech Fork, so a rise of ten feet in Beech Fork Creek would cause the water in Grassy Lick Branch to backwater. Furthermore, to the east and to the rear of the Morrison residence the lot runs back gradually to a hillside. The drainage from this hillside is by a ditch along the northern boundary of Morrison's lot, also another ditch to the south of Morrison's dwelling which parallels state road 13 and drains into Grassy Lick Branch. There is a concrete walkway from the house to the road which crosses the ditch and there is a pipe line under the walk which is totally stopped up. The water comes off this hillside at a one and one-half to two per cent grade. The state road is higher than the Morrison lot which parallels it on the north side. At no time has the surface of the roadway been damaged by the high waters of Grassy Lick Branch.

After a view of the Morrison property the bridge over Grassy Lick and the adjoining area by members of the court, we are of the opinion that the building of the concrete bridge over Grassy Lick Branch is not the cause of the water damage to the Morrison property. The house

and outbuildings are built in a low, swampy and poorly drained area, and the bridge opening is ample during normal rainfall, and it is not encumbent upon the State to construct its roads and bridges to take care of flash floods or cloudburst which frequent most areas especially in the spring and summer months. If a person builds his home on a rock foundation and on an elevation it will withstand the flood and elements. On the other hand, if he builds his home on sand and in swampy soil the elements will in time undermine, inundate and wash away the results of his labor.

An award is denied and the claim dismissed.

(No. 624 Claim dismissed)

HUNTINGTON EXCAVATING COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed June 18, 1948

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline, as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refund unless such application is filed as provided by the statute permitting refunds on gasoline used for certain specific purposes.

Claimant, on its own behalf.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant seeks an award for the sum of $379.75 for

"fuel oil" taxes paid on eight invoices purchased from the Pure Oil Company, of Huntington, West Virginia. The account was due in December 1947, but payment for the gasoline was not made until February 27, 1948, on account of "financial difficulties" of claimant. Within five days after such payment, claimant made application to the state tax commissioner for refund of taxes but such refund was denied on the ground that more than sixty days had elapsed from the date of the original purchases. The application for refund was made on March 1, 1948, including purchases made on December 3, 5, 10, 12, 17, 19 and 23, 1947, the more recent having been made sixty-nine days prior to the date of filing claim for refund on March 1, 1948.

Section 20, chapter 11, article 14 of the code of West Virginia of 1943, authorizing refunds of taxes under certain conditions, reads in part as follows:

> " . . . Provided, however, That the tax commissioner shall cause refund to be made under authority of this section only when application for refund is filed with the tax commmissioner, upon forms prepared and furnished by the tax commissioner, within sixty days from the date of purchase or delivery of the gasoline."

It will thus be observed that all purchases made more than sixty days prior to March 1, 1948, were deleted from the claimant's application.

In the case of *Del Balso Construction Company* v. *State Tax Commissioner,* 1 Ct. Claims (W. Va.) 15, we held as follows:

> "An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of

> such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes."

Such holding was followed *in re* claim No. 404, *State Construction Company* v. *State Tax Commissioner*, 3 Ct. Claims (W. Va.) 85, and *William E. Snee* v. *State Tax Commissioner*, 3 Ct. Claims (W. Va.) 94.

In re claim No. 324, *Joseph Harvey Long, et als* v. *State Tax Commissioner*, 3 Ct. Claims (W. Va.) 25, we held:

> "The court of claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief."

When preparing the docket for hearing of claims at the present term of this court it was ascertained and so held that the instant claim was not *prima facia* within its jurisdiction, and therefore the court declined to place it upon the trial calendar.

(No. 627—Claim dismissed)

J. W. HARTIGAN, M. D., Claimant,

v.

STATE DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed June 18, 1948

Appearances:

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

This claim is for medical services rendered to one Ross Lemly while confined in the Monongalia General Hospital at Morgantown, and to one Frank Bujous, also of Monongalia county, and likewise for medical services, the total claim amounting to $1170.00. The state, by its assistant attorney general, has moved the court to dismiss the claim and to refuse to docket it for consideration on the ground of insufficient facts presented by the record to warrant any consideration of the claim at this time.

An examination of the record fails to show any authorization for the services so rendered, by either the state department of public assistance or any other state department. So far as we are able to ascertain, from the claim as submitted, the services were voluntarily rendered by the claimant, and while no doubt necessary for the benefit of the afflicted persons, yet we feel that to entertain this claim at the present time would be a usurpation on our part and would be taking from the state department of public assistance the right to investigate and determine in the first instance whether or not the whole or any part of

the amount in question should be paid by the state and whether or not in the opinion of those in charge of public assistance there is any merit in the claim for the services so rendered.

We are of the opinion to and accordingly do sustain the motion dismissing the claim, without any prejudice to the claimant's rights and advising that the claimant should first seek redress from the state department of public assistance after properly presenting his claim for services to that department before being considered by the court of claims. The motion to dismiss is sustained.

(No. 628—Claim dismissed)

J. W. HARTIGAN, M. D., Claimant,

v.

STATE COMPENSATION DEPARTMENT, Respondent.

Opinion filed June 18, 1948

Appearances:

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

This claim, presented by Dr. J. W. Hartigan of Morgantown, West Virginia, is for medical services rendered to one Lonnie Newbraugh for some fifty-three visits extending from August 28, 1945, to November 6, 1946, amounting to $265.00, together with medical attendance rendered William Newbraugh amounting to $40.00, making a total of $305.00. The medical services in question seem to have

been made necessary by reason of injuries sustained by the said Lonnie Newbraugh and William Newbraugh while employed as miners near Morgantown, West Virginia.

A careful reading of the record before this court reveals that it is a claim that should be presented to and considered by the state compensation commission or department.

The state, by its assistant attorney general, accordingly moved to dismiss the claim on the ground that the state court of claims was without jurisdiction.

The act creating the court of claims, under the title "Claims Excluded" specifically provides that any claim for disability or death benefits under chapter 23 of the West Virginia code (workmen's compensation act) is excluded from consideration by this court and deprives us of any jurisdiction to consider and determine matters arising under the compensation act in question.

The motion by the state is therefore sustained and the claim dismissed from further consideration by this court.

(No. 629-S—Claimants awarded $41.93)

R. C. WHITAKER, and AMERICAN CENTRAL INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 14, 1948

MERRIMAN S. SMITH, JUDGE.

Claimant R. C. Whitaker was traveling on U. S. route 50, September 15, 1947, and upon crossing a steel bridge (Fetterman Bridge) in Taylor county, West Virginia, his 1947 Packard sedan was spotted with aluminum paint.

The painters, employed by the state road commission, were spraying the overhead structure of the bridge at the time with the aluminum paint which was blown around in the air and settled on the ground. At the time of his crossing the bridge there were no warning signs nor any watchman and traffic was permitted to travel the span without any notice of the painting operation. Under such circumstances there was no contributory negligence on the part of the claimant and the sum of $41.93 appearing to be a fair assessment for the damages sustained and the said amount having been concurred in by the state road commission and approved by the attorney general, the majority of the court hereby makes an award and recommends the payment of forty-one dollars and ninety-three cents ($41.93) to claimants R. C. Wihtaker and the American Central Insurance Company.

ROBERT L. BLAND, JUDGE, dissenting.

As I view this case the meagre facts relied upon do not warrant an appropriation of the public funds. Meagre facts present controversial questions, yet the case is submitted under section 17 of the court act. The road commission was engaged in the exercise of a public function. Was the driver of the automobile guilty of contributory negligence? What, if any, precaution did he employ to avoid the accident? Did he see the employes of the road commission at work and fail to stop before proceeding through the bridge? According to the facts as stated in the record claimant R. C. Whitaker's automobile "Passed through the bridge and while passing small mist of aluminum paint *carried by the wind* fell on car, spotting or dotting the body, fenders and top." (Italics ours.) If warning signs had been installed could the result have been different? Evidently the award sought is one way of subrogation.

Since I cannot see the case in the same light of my colleagues I most respectfully record my dissent.

(No. 617—Claimant awarded $500.00)

MAUD CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 23, 1948

The state is obliged to compensate a landowner from whose property sand, gravel and other materials were wrongfully taken, to be used in the building of a nearby secondary public road.

L. R. Morgan, for claimant.

W. Bryan Spillers, Assistant Attorney General for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Maud Clark, the owner of a tract of land comprising about one and three-tenths acres, located at Avondale, McDowell County, West Virginia, and having erected thereon a three-room cottage, alleges that employes of the state road commission, notwithstanding her protests and while engaged in constructing and rebuilding a nearby secondary public road, wrongfully took and removed from her said property and premises a large amount of sand, gravel, stone and ground, which materials were used in the building and construction of said road, and for which she was never compensated. Her claim for materials and damages as alleged is in the amount of $3,769.00. The work on the road in question, and the taking of the said materials, was carried on during the months of October and the beginning of November, 1947, and embraced a period of from four to six weeks. That the said materials were improperly and wrongfully taken is virtually admitted and the sole question for our determination is the amount of the dam-

age due claimant, and which should be paid in full settlement of her claim.

The testimony as offered showed a marked variance in the amount of materials taken, their value, and further damages, if any, to claimant's property. Several witnesses maintained that over 9000 cubic yards of said building materials had been removed, while others testified that approximately 1000 cubic yards had been taken; so, too, did the price or worth of the materials differ approximately from twenty cents to $1.00 per cubic yard. Claimant also claimed $1000.00 for future damages caused by the wrongful actions of road commission agents and employes, although in this respect her testimony seemed to be a mere hazard or guess. The property when purchased some years ago cost slightly in excess of $1000.00 and the part of the tract under cultivation was not interfered with in any manner by the actions of the state's agents and employes. A splendid, strong concrete bridge had been erected, within the last few years, by the state, close to claimant's property, which undoubtedly has enhanced its value and made it more accessible for all purposes than before.

Appreciating the problems presented by the testimony and desiring to learn at firsthand the real facts, the members of the court took a view of the land involved and of the surrounding conditions, and from such investigation and again considering the testimony as a whole, determined that the sum of $500.00 would be a just and full compensation to claimant for all damages suffered by her. We are of the opinion that a fair price per ton based on claimant's selling price to others generally, for the same materials as shown by the testimony, would be about forty cents, and that approximately 1000 to 1200 tons had been taken or removed, thus fixing the value of the claim at $500.00.

Accordingly, we are of the opinion, in the light of all facts and testimony presented and governed further by

our own personal view and investigation, that the state is bound to make restitution to claimant, and recommend an appropriation to her in the sum of five hundred dollars ($500.00) in full settlement of all past, present and future damages or claims caused by said wrongful acts of the said agents and employes of the state.

(No. 625—Claimant awarded $944.27)

BEN CAPLAN, d/b/a NATIONAL TOWEL SUPPLY,
Claimant.

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed July 26, 1948

Syllabus in re I. S. Davis, d/b/a *Fairmont Linen Supply Company* v. *State Tax Commissioner,* decided April 21, 1948, reaffirmed and adopted.

Appearances:

Rummel, Blagg & Stone (Donald O. Blagg), for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Ben Chaplan, doing business as the National Towel Supply, operates a linen and towel supply business in the city of Charleston, Kanawha county, West Virginia. Before and since 1942 claimant has paid annually to the state tax commissioner under the business and occupation tax statute, certain specific amounts for each year, as reported on forms used for that purpose and supplied by the

state to the taxpayer. In 1944 our Supreme Court, in *Harper* v. *State Tax Commissioner,* 126 W. Va. 707, held that the furnishing of linen and towels was not a service within the meaning of the statute, and that persons so engaged were not subject to taxation under the business and occupation tax statute of the state. It is admitted by the state that the tax payments made by claimant were exempt and not collectible but that a refund should only be allowed under the two-year statute of limitations as provided, and that such refund having already been made by the tax commissioner that claimant is not entitled to any further refund by the state or by the agency involved.

In the opinion of the majority of the court there is a moral obligation imposed upon the state to refund all taxes so improperly paid and illegally collected, not barred by the statute of limitations, to wit, five years, governing consideration of claims by this court. A majority of the court so held in *Davis* v. *State Tax Commissioner,* decided April 21, 1948, and we reaffirm and readopt the opinion rendered in that claim as governing in the determination of the instant claim.

Claimant filed an itemized statement detailing the tax payments made for the years 1942 to 1944 inclusive and totaling $1,514.89, which statement was not contradicted by the state; however, the payment of $570.62, made for the year 1942, is barred by the statute of limitations governing consideration of this claim and cannot be included in any award made herein.

Therefore, a majority of the court is of the opinion that a refund should be made to the claimant for the taxes paid for the years 1943 and 1944, and amounting to the sum of $944.27.

Accordingly, an award in the sum of nine hundred forty-four dollars and twenty-seven cents ($944.27) is made in

favor of claimant and recommended to the Legislature for appropriation and payment.

ROBERT L. BLAND, JUDGE, dissenting.

The majority opinion reaffirms the *syllabus* in Case No. 616, *I. S. Davis, d/b/a Fairmont Linen & Supply Company,* v. *State Tax Commissioner.* The *syllabus* in that case reads as follows:

> "When the State Supreme Court rendered a decision exempting the furnishing of linens, towels and similar articles from the provision of the business and occupation tax, there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations."

I fail to perceive how, when a claimant neglects and fails to file application with the state tax commissioner for a refund of taxes paid within two years from the date of such payment as provided by chapter 11, article 1, section 2a of the code providing an exclusive remedy for obtaining such refund, there should be a moral obligation of the state to make such refund.

In volume 51, American Jurisprudence, under the subject Taxation, Sec. 1167, I find the following well understood and recognized rule of law stated:

> "On grounds of public policy, the law discourages suits for the purpose of recovering back taxes alleged to be illegally levied and collected. Taxes voluntarily paid without compulsion, although levied under the authority of an unconstitutional statute, cannot be refunded or recovered back without the aid of a statutory remedy."

See Annotation 94 Am. St. Rep. 425; Stratton v. St. Louis Southwestern R. Co. 284 U. S. 530, 76 L. ed. 465, 52

S. Ct. 222; Brunson v. Crawford County Levee Dist. 107 Ark. 24, 153 S. W. 828, 44 L. R. A. (NS) 293, Ann. Cas. 1915A 493; Roberts v. Boise City, 23 Idaho 716, 132 P. 306, 45 L. R. A. (NS) 593; People ex rel Eitel v. Lindheimer, 371 Ill. 367, 21 N. E. (2d) 318, 124 A. L. R. 1472, appeal dismissed in People ex rel Eitel v. Toman, 308 U. S. 505, 84, L. ed. 432, 60 S. Ct. 111, rehearing denied in 308 U. S. 636, 84 L. ed. 529, 60 S. Ct. 137; Wilson v. Philadelphia School Dist. 328 Pa. 225, 195 A. 90, 113 A. L. R. 1401; Philadelphia & R. Coal & I. Co. v. School Dist. 304 Pa. 489, 156 A. 75, 76 A. L. R. 1007; Putnam v. Ford, 155 Va. 625, 155 S. E. 823, 71 A. L. R. 1217.

In further support of my dissent to the award made in this case by majority members of the court, I refer to my dissenting statement in *Raleigh County Bank* v. *State Tax Commissioner, Eastern Coal Sales Company* v. *State Tax Commissioner* and *Pinnell & Pfost* v. *State Tax Commissioner.*

(No. 623—Claimants awarded $907.72)

W. L. PINNELL, SR., and W. M. PFOST, d/b/a PINNELL & PFOST, Claimants,

v.

STATE TAX COMMISSIONER, Respondent

Opinion filed July 27, 1948

A claim properly filed with the court for refund of gross sales tax mistakenly and erroneously paid to the state tax commissioner will be allowed where in equity and good conscience there is a just obligation on the part of the state to make refund for the payment

so made, provided of course that it is filed within the five-year rule governing the consideration of claims by the court.

Appearances:

W. L. Pinnell, Sr., and *F. G. Wade*, for claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

Claimants operated a general contracting business, also sold lumber and mill supplies at retail, in Ripley, Jackson county, West Virginia. During the year 1943 and especially the year of 1944 the partnership ceased contract operations and rented most of its equipment to other companies and individuals.

Under the terms of the lease agreements the lessees paid the cost of transportation of the leased equipment from claimants' storage yard and returned the equipment to such point at the expiration of the agreement, and had undisputed control over all equipment during the term of the lease.

During the years 1943 to 1946 inclusive the claimants paid business and occupation taxes as a partnership, under chapter 11, article 13, section 960(2i), Michie's code. The overpayments are as follows for the years ending:

December 31, 1943	$135.54
December 31, 1944	772.18
December 31, 1945	346.22
December 31, 1946	297.06

Amended forms 301-A for the years ending December 31, 1945, and December 31, 1946, were filed with the state tax commissioner as of May 16, 1947, and refund payments were properly received. Amended forms 301-A, for the

years ending December 31, 1943, and December 31, 1944, were filed with the state tax commissioner as of July 11, 1947, and refund was requested for the overpayments for the years 1943 and 1944 in the total amount of $907.72. The tax commissioner was unable to refund the taxes overpaid for the years 1943 and 1944 since the general statute prohibits the tax department from making refund for any period prior to two years from date of application for refund. Since the departments of the state operate on a two-year basis because the Legislature only appropriates funds for each biennium the general statute limits the tax commissioner to two years prior to the date of application for tax refunds.

The statute creating the business and occupation tax does not contain any specific limitation on refund of tax payments. However, the Legislature in creating the court of claims enacted a five-year statute of limitations on all claims for which it has *prima facie* jurisdiction. Code 14-2-16. Since the instant claim is one in which the court of claims has *prima facia* jurisdiction it is a claim in which in equity and good conscience the claimants should be reimbursed for monies paid to the state tax commissioner through a mistake of fact and of law, because under code 11-13-2i money received for lease of personal or real property by an individual or a partnership is exempted from such tax and it was not until January 1947 that the claimants were informed by an auditor of the state tax commissioner's office that the tax which they had been paying was exempt. Whereupon the claimants duly filed for a tax refund and such refund for the years 1945 and 1946 was made by the state tax commissioner as provided by the statute. On the other hand if it was a case wherein the claimants had failed to pay the proper amount due as provided by statute they would have had to make payment for an unlimited period since there is no statute of limitation against the state for collection of the business and occupation tax.

This is a claim for money paid into the state coffers through mistake and in equity and good conscience it should be returned to the rightful owners since it is no burden on the taxpayers of the state and does not deplete the legally held resources of the state tax department and the period covered for the refund is within the five-year statute of limitation applicable to the court of claims. It is a meritorious claim, since it would be judicially recognized as legal or equitable in cases between private individuals.

It is the opinion of the majority of this court, as now constituted, and so held in the cases of *Raleigh County Bank* v. *State Tax Commissioner, Eastern Coal Sales Company* v. *State Tax Commissioner* and *I. S. Davis, d/b/a Fairmont Linen Supply Company* v. *State Tax Commissioner,* that this is a claim which should be paid.

Therefore, an award in the sum of nine hundred seven dollars and seventy-two cents ($907.72) is hereby recommended to be paid to the claimants W. L. Pinnell, Sr., and W. M. Pfost, d/b/a Pinnell & Pfost.

ROBERT L. BLAND, JUDGE.

Claimants sole remedy to obtain a refund of taxes paid, for which an award is made in this case by a majority of the court, is provided by chapter 11, article 1, section 2a of the code of West Virginia, which reads as follows:

> "Refund of Taxes Erroneously Collected.—On and after the effective date of this section, any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this state, may, within two years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required un-

> lawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer by the issuance of his or its requisition on the treasurer; and the auditor shall issue his warrant on the treasurer therefor, payable to the taxpayer entitled to the refund, and the treasurer shall pay such warrant out of the fund into which the amount so refunded was originally paid: Provided, however, That no refund shall be made, at any time, on any claim involving the assessed valuation or appraisement of property which was fixed at the time the tax was originally paid."

The remedy thus furnished by general law is exclusive. The intendment of the Legislature is clearly manifest. The statute establishes a policy to be followed in all cases. No other construction can reasonably be given to its meaning.

> "The provisions of Code 11-14-19, as amended by Chapter 124, Acts of the Legislature, 1939, relating to a refund of the excise tax on gasoline, create the exclusive remedy which may be used to obtain such refund. Any refund provided for therein must be based on an application for the return of a tax theretofore paid." State v. Penn Oak Oil & Gas, Inc., 128 W. Va. 212; 36 S. E. (2nd) 595.

> "An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on

> gasoline used for certain specific purposes." *Del Balso Construction Corporation* v. *State Tax Commissioner,* 1 Ct. Claims (W. Va.) 15.

In that case two of the present members of the court of claims participated and concurred in the determination made and the rule stated in the *syllabus.* The holding of the court in this case was followed in the case of *State Construction Company* v. *State Tax Commissioner,* 3 Ct. Claims (W. Va.) 85. Two of the present members of the court participated in the determination made in the case, and in the rule stated in the *syllabus.*

> "The court of claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief." *Long, et als.,* v. *State Tax Commissioner,* 3 Ct. Claims (W. Va.) 25.

Two of the present members of the court participated in the determination of the claim involved in the case last cited.

At the present term of court an opinion was filed in the case of *Huntington Excavating Company* v. *State Tax Commissioner,* reaffirming the rule stated in the *syllabus* in the *Del Balso* case, *supra.* In the opinion in the *Huntington* case, the case of *Long, et als,* 3 Ct. Claims (W. Va.) 25, is cited. All three of the present members of the court concurred in the rule stated in the *syllabus* in said case of *Huntington Excavating Company* v. *State Tax Commissioner.*

It has been the consistent policy of the court of claims from the time of its organization until the determination of the case of the *Raleigh County Bank* v. *State Tax Commissioner* to follow the rule stated in the *syllabus* in the *Del Balso* case, *supra.* The court is now divided and there are two distinct lines of holding.

In the *Penn Oak* case, *supra*, Judge Fox says in the opinion, on page 222:

> "Where a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder, and the taxpayer fails to avail himself of the remedy so provided, he cannot go outside the statute for other and different remedies."

A specific remedy was afforded claimants in the instant case by chapter 11, article 1, section 2a of the code. It was claimants' duty to pursue that remedy. By their failure so to do they are not entitled to be heard in this court under section 21 of the court act, being the five-year period of limitation. In my judgment, where it appears from a declaration or petition filed by a claimant in this court seeking a tax refund that application was not made to the tax commissioner for such refund within two years from the date of such payment of taxes, there would be no *prima facie* jurisdiction of the court to entertain such claim.

For the reasons herein set forth and further grounds stated in my dissenting opinions in the cases of *Raleigh County Bank* v. *State Tax Commissioner* and *Eastern Coal Sales Company* v. *State Tax Commissioner*, and especially in view of the holding of the West Virginia Supreme Court of Appeals in the *Penn Oak* case, above cited, I most respectfully dissent from the action of majority members in making an award in the instant case.

I prefer to follow and be guided by the holding of our own State Court of Appeals.

(No. 639-S—Claimant awarded $1670.)

ELIZABETH YOUNG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 18, 1948

MERRIMAN S. SMITH, JUDGE.

Claimant Elizabeth Young, of Marietta, Ohio, was driving her automobile across the Williamstown-Marietta bridge, in Wood County, West Virginia, on June 2, 1948. The wooden floor at that time was in very bad condition and one of the spikes penetrated the left front tire and tube and damaged them beyond repair. By statute, code 17-4-33, Michie's code 1474(15), provision is made for regular inspection of all bridges and for proper repairs to be made.

It is apparent from the record before this court that the floor of the bridge was in bad condition and not safe for the traveling public, and no contributory negligence was shown on the part of the claimant, and since this claim was concurred in by the state road commissioner and approved by the attorney general, an award in the amount of sixteen dollars and seventy cents ($16.70) is hereby granted by a majority of the court to claimant Elizabeth Young.

ROBERT L. BLAND, JUDGE, dissenting.

The state road commissioner concurs in the claim involved in this case. It is approved by the attorney general's office.

The facts certified to this court by the state road com-

missioner to support his concurrence in the claim are stated as follows:

> "On June 2, 1948, while crossing the Williamstown-Marietta bridge, one of the spikes in the floor of the bridge pierced the left front tire of car ruining the tire and tube."

If the state were suable could the claimant successfully maintain his action against the state road commission upon the above facts? I think not.

I respectfully dissent to the award made by majority members of the court.

(No. 641-S—Claimant awarded $100.00)

DEE JACKSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1948

CHARLES J. SCHUCK, JUDGE.

On the night of September 15, 1947, between the hours of eight and nine o'clock, claimant, while crossing a bridge on the secondary route spanning Buffalo Creek, near Lundale, in Logan county, stepped into a large hole in the flooring of the bridge, causing him to be thrown, injuring his leg and suffering considerable pain therefrom, which pain has continued, according to claimant's statement, to the present time, nearly a year after the accident. Claimant is sixty-nine years of age; was unemployed at the time he was hurt, and is still unemployed, though not by

reason of his accident. Claimant maintains that he seldom crossed the bridge in question and that when he did he walked on the opposite side from that on which he was walking when injured. These statements are uncontradicted so far as the record of the claim reveals.

An x-ray was ordered by the physician to whom claimant was taken by the companions accompanying him at the time of the accident, but not having the necessary funds an examination was refused by the hospital authorities.

The road department, through its safety director, made an investigation of the facts and has recommended a compromise settlement of $100.00 in full payment and satisfaction for all injuries and pain suffered by the claimant, and to this amount or settlement the claimant agrees. The attorney general's office has approved the proposed settlement. In view of the facts as presented, the nature of the injuries received, the pain suffered and the further fact that claimant was free from any negligence on his part, a majority of the court feels that the sum of $100.00 is a just and proper settlement and accordingly recommends to the Legislature that an appropriation be made in the said sum in favor of the claimant, and that upon the payment of the aforesaid sum, a receipt in full of all damages arising by reason of the said accident be executed by the claimant to the state.

ROBERT L. BLAND, JUDGE, dissenting.

The facts certified to this court by the state road commission in support of its concurrence in the claim involved in this case are as follows:

> "On Sept. 15, 1947, between 8:00 and 9:00 o'clock P. M., in company of James Vaughn, Buster Clay and Rev. W. E. Jackson, Claimant, while crossing a bridge on Secondary Rt. No. ——

> spanning Buffalo Creek, near Lundale, Logan County, stepped into a large hole in the flooring, causing his left foot, leg and upper part of his body to drop, injuring his leg, which still causes him pain. Doctor bills amounting to $ ....., plus compromise figure of $ ..... for injuries, bring claim to $100.00 which will be in full settlement of injuries sustained."

Upon the above facts the case is informally considered by the court of claims and an award made in favor of claimant by majority members. In view of the holding of the Supreme Court of Appeals of West Virginia in the recent mandamus action of *Jacob F. Bennett* v. *State Auditor,* I regard the above facts as insufficient to warrant an appropriation of the public funds and most respectfully dissent to the award made.

It will be observed that the actual settlement of the claim is made by respondent and the attorney general's office. The award in question is merely a ratification of their action.

Why was the hole in the bridge allowed to exist by the road commission? How long had it existed before the accident? Why was it not repaired? Did the claimant know of the presence of the hole? Was he guilty of contributory negligence?

The public funds are not to be indifferently appropriated by the Legislature.

I respectfully record this my dissent to the award made.

(No. 622—Claim denied)

DELLA J. McGRAW, admx. of the estate of GEORGE T. McGRAW, deceased, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed October 20, 1948

Evidence to sustain a claim that death was caused by exposure to silicosis must be certain and definite, otherwise an award will be denied.

Appearances:

D. Grove Moler, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

CHARLES J. SCHUCK, JUDGE.

Claimant's deceased husband entered Pinecrest Sanitarium, a state institution located near Beckley, West Virginia, on or about August 29, 1943, seemingly suffering from tuberculosis; at least his affliction seems to have been so diagnosed by the medical authorities in charge of the sanitarium. About September 1, 1944, he was discharged from the said institution and thereafter entered a veterans hospital at Oteen, North Carolina, where he died on August 8, 1945. An autopsy was performed at the North Carolina hospital and in some manner, whether by correspondence or otherwise, claimant got the impression that her husband had been afflicted with silicosis, a compensable disease under the laws of the State of West Virginia, and that she was therefore entitled to compensation ac-

cordingly. On or about April 10, 1946, as the widow and administratrix of her deceased husband's estate she presented her claim to the West Virginia compensation commission, but was denied relief on the technical ground that her application had not been filed within one year after the last exposure (about August 29, 1943) as required by law, and therefore could not be considered by the commission. Subsequently, and after the workmen's compensation appeal board had affirmed the action of the commission, she filed her claim in this court alleging, among other matters, that a wrong diagnosis had been made of her husband's illness by those in charge of the Pinecrest sanitarium, upon which diagnosis she had reasonably relied, until after a sufficient time had elapsed to bar the workmen's compensation commission's jurisdiction, under section 9, article 6, chapter 23, code of West Virginia; and that therefore in equity and good conscience this court should make an award in her favor.

It will readily be appreciated that in view of the facts as heretofore recited, claimant must first show by competent evidence, certain and convincing, that her husband had been afflicted with the disease known as silicosis, and that this disease was in fact the real cause of his ailment and subsequent death. Failure to do so must, of course, be fatal to her claim as presented for our consideration. A review of claimant's own testimony does not help us, since she had no knowledge herself as to the nature of her husband's illness and affliction other than that he was suffering from tuberculosis as she had been informed by the doctors at Pinecrest. The testimony as to her husband's employment during the last years of his life and his possible exposure as a miner to silicosis is likewise vague and indefinite. Doctor William Paul Elkin, a member of the West Virginia Silicosis Medical Board and an expert in radiology, having devoted the last ten years exclusively to x-ray work and having had occasion during that time or period to read and study many x-ray pictures of the

lungs to interpret them with reference to whether or not they disclosed silicosis, was the only other witness presented. Upon Dr. Elkin's testimony claimant must necessarily rest her claim, and upon his testimony the claim must stand or fall. With the report and findings of the autopsy before him, as submitted by the medical officials of the North Carolina hospital and which report was offered as evidence and admitted as such during the hearing of the claim, Dr. Elkin testified (record p. 28) that the autopsy report failed to show silicosis as the cause of death or as a disease involved in the death of claimant's husband. No testimony to the contrary was offered. Dr. Elkin seems to have carefully examined the seven different causes or findings as detailed in the autopsy report and then testified as herein set forth.

Since we must conclude, then, that the disease of silicosis was not in any manner involved in the death of claimant's husband, we are not called upon to consider or question the diagnosis made at the Pinecrest sanitarium and must refuse to make any award to claimant in view of all the testimony, records and exhibits as submitted.

An award is denied and the claim dismissed.

(No. 640-S—Claimant awarded $19.81)

A. R. SIDELL, M. D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 20, 1948

MERRIMAN S. SMITH, JUDGE.

On June 21, 1948, Dr. A. R. Sidell, of Williamstown,

Wood county, West Virginia, was driving across the state-owned Williamstown-Marietta bridge, about 8:45 o'clock in the morning, and the wooden floor boards being loose, one flew up and cut in two the right rear tire and tube of claimant's automobile, damaging the same in the amount of $19.81.

The bridges along the state highways should be maintained in a safe condition at all times; for this reason the Legislature has enacted a statute, code 17-4-33, Michie's code 1474(15), which provides for regular inspection of all bridges and proper care and maintenance of them.

From the written evidence of the district engineer of the state road commission, the bridge in the instant claim was in bad condition, and due to the negligence of the state road commission and no apparent negligence on the part of the claimant this is a meritorious claim.

The state road commission concurred in and submitted the claim to this court and it was approved by the attorney general.

An award by majority of the court is hereby granted to claimant Dr. A. R. Sidell, in the amount of nineteen dollars and eighty-one cents ($19.81).

ROBERT L. BLAND, JUDGE, dissenting.

The facts supporting this claim, for which an award is made by majority of the court, are set forth in the record prepared by the state road commission and filed in this court on September 9, 1948, as follows:

> "On June 9, 1948, about 8:45 A. M., while crossing the Williamstown-Marietta bridge, a short loose board flew up under the car striking the right rear tire, cutting it in two.
>
> "Concurrence by State Road Commission because it is our duty to maintain and keep the

bridges of highways in reasonably good repair and this we failed to do because of facts set forth in letter of District Engineer E. M. Cottle."

The letter referred to reads as follows:

"Mr. Harry Bell
State Claims Agent
The State Road Commission
Charleston, West Virginia

Dear Mr. Bell:

I am transmitting herewith Form M-503-Revised, the Shortened Procedure Claim Form, which has been submitted to this office for further handling.

The claim in the amount of $19.81 covers damage due to cutting a tire in two on the car operated by Dr. A. R. *Slidell*, 200 Highland Avenue, Williamstown, West Virginia.

The other claim in the amount of $16.70 covers the claim of Elizabeth Young, Muskingum Drive, Marietta, Ohio.

It is my recommendation that these claims be presented to the Court of Claims for consideration, due to the fact that the wooden floor on the Williamstown-Marietta Bridge has been, and still is, in very bad condition, due to the fact that the wooden stringers to which the transverse wooden floor is nailed have deteriorated to the point where they will no longer hold a nail when driven in same.

The State Road Commission awarded a contract for the erection of a new concrete steel grid floor on this bridge in 1947, but due to shortage of material the contractor has just started the work a few days ago., and according to the terms of his contract, it is entirely up to the contractor

to maintain traffic in a satisfactory matter until the contract is completed.

Very truly yours,

/s/ E. M. Cottle,
District Engineer"

EMC:P

Respondent cites and relies upon the case of *William G. Gantzer* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 221.

It may be observed before proceeding further that since a determination in that case was made by this court the Supreme Court of Appeals of West Virginia has decided the mandamus proceeding of *Jacob F. Bennett* v. *State Auditor*, in which the facts stated by the state road commission in support of a claim in which that agency had concurred were held to be insufficient to sustain an appropriation of public funds made by the Legislature; and, of course, this court is bound by that decision.

I cannot give my consent to the award made in the instant case. The facts relied upon do not in my judgment warrant an award of the public funds. The case is not strengthened or in any respect aided by respondent's frank admission that concurrence by the state road commission is "because it is our duty to maintain and keep the bridges of highways in reasonably good repair and this we failed to do." It does not appear from the records that the bridge was closed to travel or that it was not safe for use. As a matter of fact the determination of the claim in question is actually made by the state road commissioner and an assistant attorney general, and the award made is simply a ratification of their action. I am impressed with the fact that it is the duty of the road commission officials in the county in which the accident occurred to examine bridges from time to time and see that they are in condition for public use.

I respectfully record my dissent to the award made in favor of claimant.

(No. 642-S—Claimant awarded $69.86)

BRODHEAD-GARRETT COMPANY, INC.,
Claimant,

v.

WEST VIRGINIA BOARD OF EDUCATION, Respondent.

Opinion filed October 21, 1948

ROBERT L. BLAND, JUDGE.

Claimant asserts a claim for $69.86 against the West Virginia board of education for merchandise duly purchased and delivered to the West Virginia state college at Institute, in the year 1945. The claim consists of four invoices, as follows:

March 21	$44.06
April 13	6.70
July 25	11.00
October 10	8.10

The college failed and neglected to transmit invoices for payment of the bills rendered by claimant until after the then current appropriations had expired and reverted to the state treasury, and claimant has all the while been deprived of the money justly due it. In its petition addressed to this court claimant says: "We just can't understand why the business department of West Virginia College cannot have some system that would keep track of these invoices and compel clerks to present them for payment within a reasonable length of time." The negligence exhibited in this case constitutes a reflection upon the integrity of the state and should not be allowed to pass unnoticed. The claim is concurred in by the governmental agency involved and its payment approved by the attorney general of the state. It is manifestly a meritorious claim

and one for which the Legislature should make appropriation.

An award is therefore made in favor of claimant Brodhead-Garrett Company for the sum of sixty-nine dollars and eighty-six cents ($69.86).

(No. 636—Claimant awarded $1250.00)

S. P. CATRON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 4, 1948

An award may be made for the payment of public revenues to a private person in discharge of an obligation or duty of the state, legal or equitable, not imposed by statute, but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons, and the Legislature is the judge of what is for the public good.

Appearances:

Townsend & Townsend (*John T. Keenan*), for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant S. P. Catron asserts his claim against the state road commission, a governmental agency of the state of West Virginia, for the sum of $62,240.00, which amount he contends is due him by way of compensation for the property loss sustained by him as the direct result of the

wrongful conduct of employes of the said state road commission. He represents to the court that he is the lessee and in possession of a boundary of land containing seventy acres, more or less, lying adjacent to and on the northerly side of a portion of that part of the state highway system designated as West Virginia-United States route No. 60, and located on the westerly side of the town of Milton in Cabell County, West Virginia, and commonly known as the Malcolm Springs Farm, pursuant to a lease originally executed by C. P. Nelson and wife, and subsequently by James Houghton Nelson and Richard H. Williams, as trustees. Said boundary of land is presently owned by said James Houghton Nelson and Richard H. Williams, as trustees, under a certain indenture of trust dated the 28th day of December, 1938. Upon said property approximately 141,000 valuable evergreen Christmas trees were growing, all of which were owned by claimant and the said James Houghton Nelson and Richard H. Williams, as trustees.

Claimant states that on or about the 17th day of April, 1947, the state road commission of West Virginia, acting through its servants and employes, was engaged in clearing the right of way by removing from the area on each side of said West Virginia-United States route No. 60 the trees and brush thereon accumulated adjoining said lands leased by him. He further contends that in order to clear said right of way fires were maintained for the purpose of destroying the said trees and brush collected along said right of way adjoining his leased premises. He maintains that it was the duty of the state road commission, acting through its servants and employes, in clearing said right of way and maintaining fires thereon to provide the same with proper protection so that fires could not be communicated from said right of way to his said leased premises, whereby said evergreen trees would be consumed and destroyed, and to maintain and supervise said fire in a prudent, careful and proper manner, having due regard for the safety of the property of other persons, including

himself, but that such precautionary measures were not taken. Claimant charges that on the contrary the state road commission negligently, carelessly and in reckless disregard of the safety of the property of other persons, including himself, along and adjacent to said highway, permitted and caused said fire situate on said right of way to be managed and supervised so that the same did communicate from said right of way to his said leased property and evergeen Christmas trees, thereby starting and causing said land to be set on fire, which quickly spread into a conflagration and burned over nearly the entire boundary of land, thereby consuming and destroying hi evergreen trees.

The court of claims conducted a careful and thorough investigation of claimant's said claim. It is made clear by the evidence that he has suffered a distinct and severe loss of property. It is shown that he had a market for his growing Christmas trees, many of which were several years of age. The record discloses that he furnished and sold these trees on the land for sixty-five cents for each tree. Claimant showed that he had evergreen trees growing on the premises as follows:

1935	83,000	1942	15,000
1939	15,000	1943	5,000
1940	10,000	1944	11,000
1941	10,000	1945	2,000

It is also made to appear that he had from time to time made various sales of said growing trees.

After the taking of the evidence in the case the members of this court visited the scene of the fire and made personal inspection of the extent of the damage done. They beheld a vast area of devastation and destruction.

A feeble attempt was made to show that the state was in no way responsible for the fire, and that such fires as had been maintained along the right of way of the thor-

oughfare had been a week earlier than the time when the conflagration occurred that destroyed claimant's property. We are of opinion that it is abundantly and very satisfactorily shown by the evidence that the fire which destroyed claimant's Christmas trees originated from the point on the road or highway where brush and other debris was burned by employes of the state road commission. The fire on the highway was within six feet of claimant's growing trees. It would seem to us that the employes of the road commission would be charged with notice of the inflamability of evergreen or pine trees. No precaution whatever is shown to have been taken by the state in order to prevent the fire on the road right of way from communicating to the premises of claimant. After the fire on the right of way had been started the road supervisor left two employes to watch it. One of those employes has since died. The survivor testified in the case. He stated that he and his companion remained on the highway until everything placed on the fire had burned to ashes. A witness for claimant who testified impartially but very positively said that at the time the fire was raging on the premises of claimant he saw burning embers of logs at the point where the fire was started on the highway. The deposition of Richard L. Weaver, at U. S. Naval Training Center, Great Lakes, Illinois, was taken on behalf of claimant. This witness resided on the leased land at the time the evergreen Christmas trees were destroyed. We are of opinion that his deposition very clearly establishes the origin of the fire.

Having found and being firmly of opinion that the fire which destroyed the growing evergreen Christmas trees of claimant in such vast numbers was due to the wrongful and negligent conduct of employes of the state road commission, the question immediately arises whether or not in view of recent holdings of the Supreme Court of Appeals in West Virginia an award in this case may be properly made; and if so in what amount in should be.

In the case of *State ex rel. Adkins* v. *Sims, Auditor,* 34 S.E. 2d 585, it is held by our Court of Appeals as follows:

> "In order to validate a legislative appropriation of public money for private use it must affirmatively appear that the Legislature in making the appropriation has found that it was necessary in order to discharge a moral obligation of the State."

In the case of *State ex rel. Cashman* v. *Sims, State Auditor,* 43 S. E. 2d 805, it is held by the Court as follows:

> "To constitute a valid declaration by the Legislature of the existence of a moral obligation of the State for the discharge of which there may be an appropriation of public funds in the interest of the public welfare, it is necessary, as a general rule, that there be an obligation or duty by prior statute created or imposed upon the State, to compensate a person for injury or damage sustained by him by reason of its violation by the State or any of its agencies, or to compensate him for injury, damage or loss incurred by him in or by his performance of any act authorized or required by such statute; or an obligation or a duty, legal or equitable, not imposed by statute, but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons."

It is also held by our Supreme Court, in the case of *Woodall* v. *Darst, Auditor,* 71 W. Va. 350:

> "The Legislature is without power to levy taxes or appropriate public revenues for purely private purposes; but it has power to make any 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."

The Supreme Court of Appeals of West Virginia has not at any time held that the Legislature is without power to ascertain, find and declare the existence of a moral obligation of the state that will support and warrant its appropriation of public revenues. What the Court has held is set forth in point two of the *syllabi* in the case of *State ex rel. Adkins* v. *Sims, Auditor,* 46 S.E. 2d 81, reading as follows:

> "2. Whether an appropriation is for a public or a private purpose depends upon whether it is based upon a moral obligation of the State; whether such moral obligation exists is a judicial question; and a legislative declaration, declaring that such moral obligation exists, while entitled to respect, is not binding on this Court."

We find further in the case of *Guilford* v. *Chenango County,* 13 N. Y. 143, at page 149, the following pertinent language:

> "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it 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."

The Legislature is not prevented from recognizing claims founded on equity and justice though they are not such as could have been enforced in a court of law if the state had not been immune from suit. The basis for such allowance is the moral obligation or the equity arising out of the facts. *Munro* v. *State,* 223 N. Y. 208.

We understand that the appropriation of public revenues

for public purposes is within the police power of the state.

After the fire in question Mr. George I. Simons, then state claims agent, made an investigation as to its origin and extent. By appointment he met and discussed the situation with claimant. On the hearing of the case he testified on behalf of the respondent as follows:

> "Q. When next did you discuss or confer with the claimant, Mr. Catron, in regard to this fire?
>
> A. Mr. Catron was at my office on two or three occasions as he would be in Charleston. I made arrangements to meet him and talk with Commissioner Worthington and Mr. Radcliffe concerning a settlement. I talked to Mr. Catron, went to Huntington, met him, and we went from there to the office of the Nelson Trust, realty owners, and there met Mr. Williams, who is listed as trustee—R. H. Williams. That was in June, 1947.
>
> Q. What was the result of that interview?
>
> A. We reached an agreement as to the amount of damages that the State Road Commission would pay. It was reached in the presence of and with the approval of Mr. Williams and Mr. Catron. Mr. Williams stated that the property, the trees themselves, had been managed by Mr. Catron, and, therefore, he was in position that whatever he would do would be perfectly all right with him.
>
> JUDGE BLAND: Q. Was Mr. Williams one of the trustees?
>
> A. He was, or he was at that time.
>
> MR. SPILLERS: Q. What figure, if any, did you and Mr. Catron or any of the others interested arrive at at that time?
>
> A. One thousand dollars."

We think it appears from the record that Mr. Simons,

as state claims agent, made investigation of the origin and damage done by the fire in question, and with knowledge of all the facts was of opinion that the state was responsible for the damage suffered by the claimant in the burning and destruction of his evergreen trees and offered the sum of $1000.00 in full settlement of such damage, and that his offer was accepted by claimant; and that steps were accordingly made to make such payment through the office of the road commission. It appears, however, from the records that after such agreement was made Mr. Simons and Mr. Spillers, of the attorney general's office, visited the state auditor for the purpose of learning whether he would pay or issue his warrant for the payment of such agreement. Why this was done is not made clear to the court. While we recognize that the opinion in the case of *Woodall* v. *Darst*, 71 W. Va. 350, concedes the right of the auditor to challenge the validity of an appropriation made by the Legislature, it is strange that he would deny the right of payment before an appropriation is made and without knowledge of the facts involved in a particular case. The court of claims was created for the purpose of investigating the merits of claims asserted against the state and making recommendations accordingly to the Legislature. The Legislature is the only tribunal in the state that has power under the law to make apprporiations of the public revenues. The Legislature has unquestioned power, in circumstances and within the limitations of law, to make appropriations of public moneys in discharge of moral obligations of the state, subject, however, to the right reserved by the Supreme Court of Appeals to declare what constitutes a moral obligation of the state.

We are of opinion from our investigation of the instant case that the effect of the negligence of employes of the state road commission and their failure to employ proper precautionary measures to prevent the fire that destroyed countless hundreds of claimant's evergreen Christmas trees amounted to a confiscation of his property, sufficient

to warrant an appropriation by the Legislature in his favor in discharge of a moral obligation on the part of the state in the interest of public welfare. Such an award would not, we think, amount to a gift of the state's money to the claimant. It would not constitute or be a gratuity. Rather it would be a reasonable compensation to him for the unwarranted confiscation of his property. The amount of the award which we shall make is based on what we conceive to have been an agreement made by the parties themselves in settlement of all damages suffered and sustained. There are other facts in the case which we have fully considered such as the planting of thousands of the evergreen trees by an agency of the government without cost to claimant. We may observe at this point that after the agreement of settlement had been made between Mr. Simons and claimant, with the approval of Mr. Richard H. Williams, trustee, and after the visit to the auditor's office, above referred to, and his statement that he would not pay the claim, Mr. Williams addressed a letter to Mr. Simons inquiring why the agreement had not been consummated. To deny to claimant an award in the premises and to say that he should bear the tremendous loss of property which he has sustained would be shocking to the public conscience. We think that his claim is meritorious and that the Legislature should make an appropriation in his favor and ascertain and declare that it is in discharge of a moral obligation of the state.

An award is therefore made in favor of claimant S. P. Catron for the sum of twelve hundred and fifty dollars ($1250.00).

(No. 626—Claimant awarded $540.00)

SIBYL C. LIGHT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 5, 1948

The state is morally bound to reimburse an owner of property for damages thereto caused by blasting operations in a road improvement and the deposit of rocks and dirt over and upon claimant's property causing a spring theretofore used to be destroyed and of no further value to claimant.

Appearances:

Ben H. Light, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Sibyl C. Light prosecutes her claim against the state road commission for damages to a tract of land located on primary route No. 3, near Pence Springs, West Virginia; said damages as alleged, having been caused by the improvement made to a secondary road leading from said route No. 3 to the town of Clayton in the county of Summers, and immediately adjacent to claimant's land. The petition of claimant further alleges that rocks and dirt were deposited on her property causing a spring on said premises to be destroyed and the destruction of trees then growing on the said tract in question.

Claimant purchased the whole tract, comprising fifteen and one-half acres, on or about April, 1947, paying

$4200.00 therefor. The main portion, or approximately twelve acres, is not involved in the question of damages here presented, but a smaller portion, comprising about three and one-half acres, and lying in a triangle between said route 3 and the secondary road to the rear of said parcel is involved in the claim as submitted. This smaller parcel is very precipitous and steep and many parts thereof could not be used advantageously for the erection of houses or homes thereon.

The members of the court took a view of this property and carefully examined it with reference to the damages alleged and the cause for said damages, and we are therefore in a position by reason of this firsthand information to give to the testimony the benefit of our personal inspection and examination and to better determine what damages, if any, the claimant sustained.

Based upon the cost price of the whole tract, the tract here involved was probably worth $800.00 to $900.00, or approximately one-fifth of the price paid for the whole tract; the remaining twelve acres were much more desirable in all respects than the tract in question. Upon the said twelve-acre tract the claimant has since erected her home and generally this part is level and much more available for all purposes. Claimant alleges that the said blasting operations, as well as the throwing or dumping of large rocks from the said secondary road, destroyed a spring which claimant had incased at a cost of $540.00 previous to the time that the said road improvement took place. The testimony reveals that the said spring was being used by claimant to supply her home for domestic purposes, but claimant has since dug and built a water well on the lower or larger portion of said tract, which well, aided by a refining process which claimant has installed, now supplies her with water for all domestic purposes and the spring in question is no longer used. Claimant alleges further that the said spring by reason of the interference with its operation by the blasting and the dumping of the

said rock and dirt is, as stated, no longer available.

The testimony also shows that the well on the lower tract and located near the home of claimant was started on the said premises before any damage was done to the reservoir or spring on the smaller tract which, in our opinion, would indicate that the well and not the spring in question was to be used in the future by claimant for her own uses and purposes. There is plenty of water from this newly dug well to satisfy the claimant so far as the enjoyment of her home is concerned.

As heretofore stated the members of the court made a careful investigation and examination of all attendant conditions when viewing these tracts referred to, and we conclude that the improvement of the secondary road to the rear of the precipitous tract had a tendency to improve its value rather than to lessen it. However, in view of the fact that claimant maintains and there is no contradiction so far as the record reveals, that she spent $540.00 in constructing the cement encasement of the spring, she should be reimbursed for that outlay and accordingly an award is made in the sum of $540.00.

We repeat that, in our opinion, outside of the destruction of the said spring, the tract involved, if anything, has been enhanced in value and consequently the only damages of any kind which in our opinion have been sustained by the claimant is the cost of the spring for which an ward, as indicated, is made. We therefore recommend to the Legislature that the necessary appropriation be made for the benefit of the claimant in the amount aforesaid, to wit, five hundred and forty dollars ($540.00) in full settlement of all claims for damages caused by the improvement of said secondary road and by the acts of the state road commission complained of in the petition.

(No. 633—Claimant awarded $52.50)

ELITE LAUNDRY COMPANY, a corporation,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 9, 1948

A case in which, upon the facts disclosed by the evidence, an appropriation of public funds should be made by the Legislature.

Hark & Moore (*I. R. Hark*) for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant Elite Laundry Company, a corporation, of Charleston, West Virginia, experienced great difficulty in securing the kind of light delivery truck which it desired for use in its business and had made application to numerous different dealers to furnish the particular type of motor vehicle which it wished to obtain. The first one it was able to secure since the late war was purchased from the Valley Motor Sales, which was described and registered as a one-ton truck. However, this truck was too large to place in the building and it was necessary for it to be parked outside and exposed to changing weather conditions. The next effort made to purchase a truck was to obtain a smaller vehicle. When the Capitol Motor Sales informed claimant that it had a three-quarter-ton Ford truck equipped with the same kind of body, it assumed that it was the same kind of truck and instructed the seller to deliver the same to its place of business. This

was done but the delivery was made in the evening after Mr. Walter McNeal, chairman of the board, who conducted the transaction, had retired to his home, and therefore he did not have an opportunity to see the truck until the following morning when he returned to claimant's place of business.

It is shown that the seller of the truck in question obtained a title from the state road commission and delivered it with the truck to claimant. The purchase price of the truck was to be $2,625.00 and the tax payable to the state was 2% of that amount, or $52.50. Upon the delivery of the truck and title to claimant's office someone there gave the seller of the vehicle a check for the purchase price of the vehicle including the amount which it had paid for the title. When Mr. McNeal came to the office he immediately perceived that there was an error in the description of the truck. Instead of being a three-quarter-ton vehicle it was a truck which registration papers showed had a capacity of five thousand pounds. There had been some alteration in the factory description which misled him. The Capitol Motor Sales agreed to reclaim the truck and did so. It offered to return the money which had been paid for the truck by claimant or give claimant credit therefor on any truck which it might thereafter purchase from the company, but it could not refund to claimant the 2% tax which it had paid to the state road commission. Claimant then applied to respondent for such refund but was advised by the state road commission that it had no way of refunding it. The claimant thereafter filed its claim in this court to obtain an award for the amount of the tax paid as aforesaid to the respondent.

Claimant maintains that since no actual sale of the truck was completed and because the title was transferred through error, the amount of such tax should be refunded to it. It further maintains that the said tax is similar to what is known as consumers' sales tax and based upon the actual consideration paid on a consummated purchase, and

that if no sale has been consummated, no tax is collectible, and in the instant case such tax should not have been collected for the reason that the actual purchase of the truck was not made by claimant.

It does not appear that the Capitol Motor Sales had any express authority from claimant to obtain on its behalf a title to the truck from the state road commission, but acted voluntarily in the premises.

We are of opinion that upon the showing made by the record that claimant is entitled to an award in this case.

An award is, therefore, made in favor of claimant Elite Laundry Company, a corporation, for the sum of fifty-two dollars and fifty cents ($52.50).

(No. 643—Claimant awarded $27.95)

GALPERIN MUSIC COMPANY, Claimant,

v.

WEST VIRGINIA BOARD OF EDUCATION, Respondent.

Opinion filed November 10, 1948

Where purchases are made by a state institution and the state derives the benefit from such purchases, an award will be made although the requisitions were not made in the prescribed form or manner.

Appearances:

L. A. Dudding, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

During the years 1943 to 1946 the West Virginia state

college, at Institute, Kanawha county, West Virginia, made several purchases of musical accessories on credit from the claimant, Galperin Music Company, a West Virginia corporation, doing retail musical merchandising in the city of Charleston, West Virginia. The various purchases were covered by invoices signed by Professors Williams and Phillips, as follows:

Date	Invoice Number	Item	Amount
7-27-43	1073	Reeds	$2.16
10-27-43	3991	Reeds	.10
2-23-44	7485	Repair to Inst.	2.05
2-23-44	7484	Repair to Inst.	4.00
3-14-45	19308	Phono Needle	1.50
4-10-46	5484	Music Books	3.00
8- 2-46	8830	Phono Needles	3.00
8 -3-46	8836	Phono Needle	1.00
10 -7-46	9883	Music Books	5.00
11-29-46	18329	Music Books	3.10
11-27-46	18934	Lyra	5.20

All of the above enumerated purchases were made within the five-year statutory period except purchase made on July 27, 1943, amounting to $2.16, and which is barred by the statute of limitations. While these purchases were not made in conformity with the rules governing the handling of purchases made in behalf of the state, on the other hand the state received the benefit of the merchandise so purchased and the claimant relied upon the credit of the state when furnishing the merchandise. The credit of the great state of West Virginia should not be impaired by some oversight of its employes in carrying out in detail the rules and regulations of the department.

The court is in favor of an award to the claimant Galperin Music Company, in the amount of twenty-seven dollars and ninety-five cents ($27.95).

(No. 631—Claimant awarded $35.00)

LENA J. WEBB, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent

Opinion filed November 10, 1948

Where the employes of the state conservation commission willfully destroy and despoil property belonging to another, the state is morally obligated to make restitution for such damage and an award will be recommended to the Legislature.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

On the night of December 5, 1947, there was a forest fire on the property of Lena J. Webb, which property was located at Ramage, Boone county, West Virginia. A Mr. Paxton, an employe of the conservation commission, accompanied by approximately ten teen-age boys, went to the scene of the fire. However, since there was another fire of greater magnitude in this area, Mr. Paxton left the Webb property and went to give his attention to the other fire, the boys remaining to prevent the spreading of the fire on claimant's property. By this time it was apparent that the fire had about spent itself in the drain or hollow some distance away from any buildings on claimant's farm. Several hundred yards from the fire claimant had a tobacco barn, filled with corn fodder. Also there was fodder stacked around the outside of the barn, and there were

four mine car wheels near the barn. During the night the boys rolled the four mine car wheels away, tramped down the fodder and burned some of it to the extent that it was of no further use or benefit to the said owner.

The statute provides that in preventing the spreading of a fire the state fire fighters have the right to burn fences and plow ground. However, there is no statute, or rules and regulations of the conservation commission that gives anyone the right to willfully destroy the property of another. In the instant case the four mine car wheels and fodder were destroyed and rendered useless to the rightful owner. This was a willful taking or destroying of the property of the claimant by employes of the state conservation commission, who were employed for the express purpose of protecting the property of the claimant. From the evidence, they greatly exceeded their authority and the state of West Virginia is morally bound to reimburse the legal owner for the depredation and destruction of such property. Therefore an award of thirty-five dollars ($35.00) is hereby granted to claimant, Lena J. Webb.

(No. 632—Claimant awarded $1600.00)

ISAAC HAYES, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed November 12, 1948

Where one afflicted with silicosis, a compensable disease under our law, is denied compensation because of his failure to apply to the workmen's compensation commissioner within one year after the last exposure to the disease as required by statute, but whose application for relief and compensation was filed within one year

from the date he was first informed of the nature of his disease by attending state physicians, a moral obligation is created on the part of the state and compensation should be allowed accordingly.

Appearances:

Capehart & Miller, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Isaac Hayes was for many years employed as a coal miner in mines located in southern West Virginia, and thus by reason of the very nature of his employment was exposed to the hazards incidental to the work he was called upon to perform. The testimony shows that especially during the last year of his work as such miner he worked on machines, drilled and shot rock and stone, the nature of which employment brought him in contact with large volumes of dust so thick and heavy at times that he could hardly see to continue with his labors. (Record pp. 5-6).

On February 28, 1946, he was obliged to quit his employment and work, apparently suffering from tuberculosis. The coal company physician advised him to consult another physician, without indicating to him the nature of his disease or ailment, and after an examination and further treatment by the second physician, he was advised to apply for admission to the Denmar sanitarium, a state institution, for the treatment of pulmonary afflictions, where no doubt a more detailed examination of his condition could be made, his ailment diagnosed more thoroughly, and treatment given him accordingly.

He entered this institution on April 25, 1946, and remained there as a patient until May of 1947, when he was

dismissed, and for the first time during all the period of his illness was informed that he was afflicted with and suffering from silicosis. Shortly after his admittance into the Denmar sanitarium, to be exact April 29, 1946, the first x-ray examination was made of claimant's lungs and chest, and showed moderately advanced pulmonary tuberculosis with silicosis. However, no information of his condition or the nature of his disease was imparted to the claimant at that time. Subsequently, and during the period of thirteen months that he was a patient in the Denmar institution, more x-rays were made, all tending to confirm the diagnosis of silicosis, but in no instance was the nature of his ailment revealed to him until May, 1947, a short time before his dismissal from the sanitarium.

Within a few months, or July 19, 1947, after he had learned the true nature of his trouble he applied to the workmen's compensation commissioner for relief, silicosis being a compensable disease, but his application was denied because it had not been made within one year after he was last exposed to the hazards of the disease, he having ceased work, by reason of his ailment, in February, 1946, and not having worked since.

Upon the foregoing facts and the theory that he was not at fault or in any manner remiss in filing his application for relief with the workmen's compensation commissioner, he applies to this court for an award commensurate with what he might have received if he had not been barred by the technical provision of the statute governing payments to employes from the compensation fund.

We are of the opinion, from all the facts adduced and presented for our consideration, that had claimant's aplication been presented to the compensation commission within the year from his last exposure to silicon dioxide dust, as required by the statute, assuming of course that the nature and character of his disease had been known in time, that an award would have been made in accordance

with the statutes governing and controlling such payments to employes. He was suffering from silicosis, a compensable disease; he was exposed by the very nature of his work as a miner to conditions that produce silicosis; for many years before he was obliged to quit work his only employment was that of a miner with the coal companies named in the testimony; he worked in rock and stone dust, especially the last year of his employment, and there is every indication that he is the victim of his employment and work, the very nature of which was at all times highly conducive to his contracting the disease from which he now suffers. We have no doubt of the foregoing conclusions.

There remains then the proposition of whether or not a moral obligation rests on the state to make some restitution to claimant or wether the technical provisions of the statute in question shall be strictly followed and an award refused. Surely an application for relief could not have been made before May, 1947, because claimant, up to that time, had no information upon which his claim as a victim of silicosis could be based. Nobody, including all the physicians who had attended him had ever even hinted to him the nature of the disease before May, 1947. They seemingly did not know positively themselves. He had no right to voluntarily assume that he was so afflicted, and upon that assumption base an application for relief; nor could he assume that he would make much progress with his application until such time as he had been definitely informed by the doctors in charge and could have the benefit of their testimony accordingly. In our opinion a more liberal construction should be given to the statute in question, *i. e.*, a construction which would *bar* an applicant for compensation only if he did not apply for relief within one year after being informed of the nature and character of his disease and ailment.

Repeating again that in our opinion claimant would have been given compensation had he been in a position

to comply with the provisions of the statute involved, we find that he was not at fault in any manner, nor remiss in any duty that devolved on him and that he acted with due diligence in making his application to the compensation commission after being actually informed of the nature of his ailment and having been denied compensation, and that a moral obligation rests on the state to make payment commensurate with that allowed if the application to the compensation commission had been considered on its merits. An award is made to claimant accordingly.

In silicosis cases three classifications prevail as to the amount of compensation paid or to be paid, the second class authorizing a gross sum payment of $1600.00. We are of opinion and so find that claimant is properly placed in the second class of the said division, and make an award in the amount of sixteen hundred dollars ($1600.00) for his benefit, and recommend the same to the Legislature for its consideration and action.

(No. 646—Claimant awarded $10,000.00)

J. W. COOLE, Claimant,

v.

STATE OF WEST VIRGINIA, Respondent.

Opinion filed November 12, 1948

When by a miscarriage of justice an innocent person is tried and convicted of a felony and subjected to imprisonment in the peniten-

tiary, the state is morally bound to answer in damages and so far as possible to right the wrong that has been done.

Appearances:

Salisbury, Hackney & Lopinsky (*Emerson W. Salisbury* and *John G. Hackney*) for claimant.

Easton B. Stephenson and *W. Bryan Spillers,* Assistant Attorneys General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant Junior Coole was tried and convicted on the charge of obtaining money under false pretenses by uttering and passing worthless checks. His trial and conviction took place in Jackson county, West Virginia, in November of 1939, and after refusal by the trial court to set aside the verdict of the jury and grant a new trial, the claimant was sentenced to the state penitentiary for a term of from two to ten years. An appeal to the Supreme Court having failed, claimant was conveyed to and received at the penitentiary on or about March 26, 1940, and remained confined there as a prisoner for a period of six months, at which time he was released on parole, and, subsequently, on the seventeenth day of June, 1948, he was granted a full pardon by The Honorable Clarence W. Meadows, Governor of the state of West Virginia. The pardon sets forth the reasons for the Governor's action and contains the statement, in effect, that an investigation, made after the conviction of claimant and his confinement in the penitentiary, indicates a miscarriage of justice which justifies his release and full pardon. Claimant had also been confined in the county jail at Ripley from the time of his arrest in November, 1939, to the day he was taken to the penitentiary, a period of approximately five months, during all of which time he was, of course, treated as a

prisoner and subjected to all the rules and discipline of the jail authorities.

The checks in question, and used as the basis for the conviction of claimant, were similar in handwriting and bore every evidence of emanating from the same source and as having been written by one and the same person. This fact is highly important in the light of subsequent events and the investigation by the state police authorities that had been set in motion prior to the conviction of claimant and continued after his confinement in the penitentiary, and which finally led to his pardon and release. It must also be borne in mind that for several years after claimant was released on parole, and before his pardon, he was subjected to all the rules and regulations applicable to the actions and freedom of a parolee, and was obliged to report to and keep in touch with the proper parole officer and to limit his travel or work to the territory fixed by the parole authorities, all of which added to his disgrace and degradation.

We come now to the startling and extraordinary facts that developed from the investigation heretofore refered to, and which ultimately led the Governor to grant a full and complete pardon to claimant, and which facts have since become the foundation on which claimant bases his claim before this court.

Among the state police officers called to assist in bringing about the arrest and conviction of the person circulating the worthless checks in Jackson county at the time was one R. I. Boone, by rank a master technical sergeant, specializing in firearms, identification and document examination, and commonly known as the handwriting expert of the state police department. He had seen and examined the questionable checks before the trial of the claimant, was subpœnaed as a witness by the state, and yet, for some unaccountable reason, was not used as such by the prosecuting attorney in charge. He had not seen

claimant's handwriting until the day of the trial at Ripley, and after obtaining specimens thereof concluded that the checks had not been written by claimant, and he is now of the opinion that this information was conveyed to the prosecuting attorney at the beginning of or during the trial. (Record pp. 62-63). In any event he was not called as a witness and was dismissed from further attendance.

During the incarceration of claimant in the jail at Ripley and before he was taken to the penitentiary, worthless checks were uttered and passed on several merchants in Ravenswood, located in Jackson county. The then sheriff of Jackson county, one Clarence F. Myers, and a witness before this court, as such sheriff in charge of the custody of claimant, took claimant to Ravenswood, West Virginia, where he was identified as the man who had uttered and passed the worthless checks, when in fact he was then and had been confined in jail at the very time, and it would have been absolutely impossible for him to have committed the acts in question. (Record p. 8). That the merchants at Ravenswood were honestly mistaken there can be no doubt, but that the prosecuting attorney should fail to heed or consider the information obtained by the then sheriff, Myers, and which he imparted to the prosecuting attorney, is beyond our comprehension. Several more such bogus checks made their appearance and were uttered and passed during the period when claimant was confined either as a prisoner at the jail or at the Moundsville prison, and, as testified to by C. A. Hill, the circuit clerk of Jackson county, all this information was passed to the proper authorities, but to no avail. (Record pp. 54-55-56-57).

Another witness, Paul R. Pritchard, a corporal in the state police department, who arrested claimant and later found, as he stated (record p. 121) that the checks "still came out after he went to the penitentiary" concluded that claimant could not possibly be guilty of the crime or crimes for which he was indicted in Jackson county, and has since

concluded, from the investigations made, that the man guilty of the crimes for which claimant was convicted is now confined in the Ohio state penitentiary, at Columbus, Ohio. (Record pp. 115-116).

Returning now to the witness Boone, he testified, in answer to the question as to whether the checks in question had been written by claimant, "That in my opinion he never did. It has always been my opinion that he could not have written them or endorsed them." (Record p. 67). And so, with this opinion in mind, and being an able and conscientious officer, as he must have impressed all who heard him testify before us, he went to the Ohio prison to interview and obtain specimens of the handwriting of the man under suspicion of having uttered and passed the worthless checks in and about Jackson county in our own state, and he unequivocally stated and testified (Record pp. 67-68) that the man who wrote and uttered the checks on which claimant was convicted is now a prisoner in the Ohio penitentiary, and known as Edward Allen, thus exonerating claimant from all guilt insofar as the Jackson county charges were concerned and showing clearly, when connected with the mass of other testimony, that he was unjustly, wrongfully and improperly convicted, and that the witnesses who testified against him though honestly convinced were, nevertheless, honestly mistaken, and that his testimony to the effect that he had never been in Ripley or Jackson county before the day of his arrest is fully borne out by the testimony presented.

Giving due consideration to the foregoing facts, we are forced to the conclusion that the claimant was wrongfully convicted, that he was innocent of the charges set forth in the indictment, and that the person who actually uttered and passed the checks has not as yet been apprehended by the state of West Virginia, but is at the present time an inmate of the Ohio state penitentiary, and that, consequently, claimant was obliged to undergo long imprisonment for a crime he never committed.

We are therefore now concerned in determining whether the foregoing undisputed facts create an obligation on the part of the state sufficient to warrant an award in money which may, in a degree, give some satisfaction and compensation to the claimant for the grievous wrong that has been done to him. The state, being protected by the so-called "immunity" clause of our constitution and not subject to suit in our courts of law except indirectly within very narrow limitations, created the state court of claims as a special instrumentality to hear and determine claims and demands which the state as a sovereign commonwealth should in equity and good conscience discharge and pay; in other words, the payment and discharge of a claim by reason of a moral obligation resting on the state and because of its very nature requiring an award in justice, equity and good conscience.

Our Supreme Court of Appeals in the case of *State ex rel. Cashman* v. *Sims*, 43 S.E. (2d) 805, at page 814, in considering this all-important question now under consideration, states the rule as follows:

> "The sound and just general rule by which a moral obligation of the State in favor of a private person may be recognized, and for the payment of which a valid appropriation of public funds in the interest of the public may be made by the Legislature, requires the existence of at least one of these components in any particular instance: (1) An obligation or a duty, by prior statute created or imposed upon the State, to compensate a person for injury or damage resulting to him from its violation by the State or any of its agencies, or to compensate him for injury, damage, or loss sustained by him in or by his performance of any act required or authorized by such statute; or (2) *an obligation or a duty, legal or equitable, not imposed by statute but created by contract or resulting from wrongful conduct, which would be*

judicially recognized as legal or equitable in cases between private persons." (Italics supplied.)

Now, there being no prior statute created to compensate one for injury or damage as outlined in the *Cashman* decision, *supra,* we must necessarily look to the second part of the rule as stated, namely, "An obligation or a duty, legal or equitable, not imposed by statute . . .," to determine whether or not in the instant case a moral obligation is created, sufficiently founded in justice and equity and by the very nature of the case or claim and the facts upon which it is based, requiring an award for the injuries done. We do not believe that the Supreme Court in the *Cashman* case, *supra,* meant to say that wrongful conduct to create a moral obligation must be vicious and evil in its intent, but rather that an irreparable injury done one by the state or any of its agencies without any element of malice or feeling may be sufficient to impose a moral obligation on the state to make some restitution if possible for the wrongful act complained of by a claimant against the state. If the state commits an act which injures a person and which act is afterward shown to have been wrong, erroneous and unjust, and if the act or acts complained of had occurred between private persons or individuals for which the aggrieved person would have an action at law, then a moral obligation is created which the state should be called upon to discharge and satisfy. Can there be any element of doubt as to a moral obligation having been created by the facts here under consideration? Deprived of his liberty and freedom for a long period of time—a liberty and freedom constituting the greatest and most precious heritage of man in a democracy such as ours, subjected to the lowest form of degradation, branded by the felon's indelible mark, he forever enters the class of the "untouchables"; shunned, avoided and despised by his fellow men and ostracized from the society of those who had hitherto been his companions and friends. No greater harm or more serious

injury could befall any man than the unwarranted, improper conviction of the claimant, innocent as he was of the charges brought against him.

In the case of *State ex rel. Adkins* v. *Sims, Auditor,* 34 S.E. (2d), 585, the Supreme Court held as follows:

> "In order to validate a legislative appropriation of public money for private use it must affirmatively appear that the Legislature in making the appropriation has found that it was necessary in order to discharge a moral obligation of the State."

Again we may ask, what, then, *is* a moral obligation? And the answer seems to be, one that cannot be enforced by action but is binding on the persons who incur it in conscience and according to natural justice. An obligation which one owes in equity and good conscience but which cannot be enforced at law. A duty which would be enforceable at law as between man and his fellow man were it not for some positive rule which exempts the party in that particular instance from legal liability. *Longstreth* v. *City of Philadelphia,* 91 A. 667, 245 Pa. 233; *MacDonald* v. *Tefit-Weller Co.,* 128 F. 381, 385, 63 C.C.A. 123, 65 L.R.A. 106. Words and Phrases, Vol. 27, pp. 551-552, and cases cited.

We repeat that in our opinion a consideration of the facts fully justifies the finding of a moral obligation devolving upon the state which in equity and justice should be discharged. Can the Legislature make a valid appropriation to cover an award, if made, in favor of the claimant? Courts generally have held that while the Legislature may not sanction a gift of public moneys for private purposes, it may in certain instances acknowledge the justice of a private claim against the state and provide for its audit and allowance by a court of claims, providing that the claim appears to the judicial mind and conscience to belong to a class of claims concerning which in the exer-

cise of a wide discretion the Legislature might reasonably say are founded in equity and justice and involve a moral obligation upon the part of the state which the state should satisfy. *Farrington* v. *State,* 248 N. Y. 112. To the same effect are *Williamsburg Savings Bank* v. *State,* 243 N. Y. 231; *Munroe* v. *State,* 223 N. Y. 208.

With the foregoing decisions we are constrained to agree and feel that courts generally throughout our country sustain this view.

The state relies upon and has submitted for our consideration the case of *Allen* v. *Board of State Auditors,* 122 Mich. 324, a case in some respects resembling the one under consideration. However, there are a number of distinguishing features, namely, in the Michigan case no appeal was asked for after conviction; the pardon granted was not on the ground of the innocence of the accused as in the instant matter; the application for relief was made nine years after claimant was released; it was an apparent attempt to have the board of auditors find whether or not claimant was guilty or innocent, whereas in the instant case the innocence of the claimant is definite and unquestionable and so regarded by all, including the Governor and officers and officials who have had any contact with the case or claim in any way or manner.

We come now to the matter of damages, and while in our judgment no award can be sufficient to pay the claimant for the unwarranted, deplorable and irreparable injury that has been done to him, we feel that a substantial award is required to satisfy the ends of justice. In considering the amount of the award we are not unmindful of claimant's subsequent plea of guilty, conviction and imprisonment in Ohio for failure to have sufficient funds on deposit to meet the amount of a check drawn thereon, and while this conviction may mitigate damages it cannot relieve the state of West Virginia of its obligation to claimant. It is within the range of possibility to assume from all the facts that if claimant had not been falsely charged

and convicted in Jackson county he would perhaps not have been called upon to answer the charge in Ohio, but would have been allowed to settle for the difference between the amount on deposit in the bank on which the check was drawn and the amount of the check itself.

After a most careful consideration of all questions and matters involved, reviewing the facts, the nature of the charges, the conviction, sentence and imprisonment of claimant, the great and irreparable injury to him, and his absolute innocence, we are of the opinion that an award in the amount of ten thousand dollars ($10,000.00) should be made, and we therefore recommend to the Legislature (1) either the necessary appropriation to cover the amount of the award, or (2) the passage of a special act, as was done in New York state recently in a case based on similar facts. *Bertram M. Campbell* v. *State of New York.*

ROBERT L. BLAND, JUDGE, concurring.

This claim presents a case of first impression in West Virginia. Bearing in mind the rule that taxes may be levied and collected only for public purposes, after a rather extended examination of authorities relating to the power of the Legislature to make appropriations of public revenues and due consideration of the record of the trial court in which claimant was convicted of a felony as well as the record made in this court upon the investigation and hearing of the claim under consideration, I have reached the conclusion that an award should be made in favor of claimant, for the reasons hereinafter set forth, and accordingly agree with my colleague, Judge Schuck, to that extent and effect.

I deem it advisable to observe at this juncture that claimant is a nonresident of West Virginia and a citizen of Ohio. He was arrested in that state, confined in prison there, and subsequently brought to this state by West Virginia officers and placed in the Jackson county jail. He was indicted by a grand jury of that county and later

convicted of an offense alleged to have been committed there, and sentenced to a term of imprisonment in the penitentiary at Moundsville. Upon his trial in the circuit court of Jackson county he testified that he had never been in that county prior to the time he was brought there to the jail. He gave like testimony in this court.

After claimant was incarcerated in the Jackson county jail and before his trial, investigation was made by members of the West Virginia department of public safety, leading them to believe that claimant was innocent of the offense charged against him and upon which he was to be prosecuted, and they so informed the prosecuting attorney of Jackson county. That official had definite information as to the findings and conclusions of the West Virginia officers. If their information had been allowed to be considered by the jury it is possible, and it seems to me also probable, that the verdict rendered would have been one of acquittal rather than conviction. If the prosecuting attorney of the county, an officer of the sovereign state of West Virginia, failed in the discharge of his duty to give the defendant, the claimant here, that consideration to which he was entitled, when charged with so heinous an offense, and his failure may have been a determining factor in the verdict rendered by the jury, then is the state not responsible? All of the people within its boundaries constitute the state—the *state* is actually the *people.*

In 23 Corpus Juris Secundum, at page 276, we find the following pertinent authority:

> "While officials connected with detection and prosecution of crime should be diligent in ferreting out and prosecuting the guilty, they should be fair to accused and evidence pointing to his innocence should not be suppressed. *People* v. *Reed,* 81 P.2d 162, 27 Cal. App. 2d 484."

I am persuaded that a great and irreparable wrong has been done to claimant by the state of West Virginia,

by reason of his conviction in a West Virginia court and his imprisonment in the West Virginia penitentiary. He suffered not only the stigma and ignominy incident to a felon's conviction, but in addition thereto the loss of an established business which theretofore had yielded him an income of from five to seven thousand dollars annually.

His pardon, after due investigation as to his innocence of the offense for which he was tried in this state, was recommended by the superintendent of the department of public safety, and an unconditional pardon was given to him by the Governor of West Virginia.

To my mind it seems clear that the claim is based upon the strongest ground of equity and justice.

May the Legislature make a valid appropriation to claimant, a private person, within the meaning of the law authorizing it? I think it may. In 51 Am. Jur. Taxation, Sec. 326, this broad rule is laid down:

> "It is stated generally that a tax may not be levied to pay a claim for which no legal or moral obligation exists. *However, the public necessities are not the sole purposes to which the public reveues may be applied, but, on the contrary, considerations of natural equity, gratitude, and charity are never out of place, even in determining the imposition of the public burdens. Claims against the state founded in equity and justice in the largest sense, or in gratitude or charity, will support a state tax, provided the payment thereof is directly in the public interest.*" (Italics supplied.)

In the case of *Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 213, 318, 6 L. Ed. 606, Mr. Justice Trimble, in his opinion on page 317, defines the far-reaching meaning of a moral obligation in this language:

> "Moral obligations are those arising from the admonitions of conscience, and accountability to the Supreme Being. No human law-giver can

> impair them. They are entirely foreign from the purposes of the constitution."

In *Fairfield* v. *Huntington,* reported in 205 Pac. 814 and 22 A.L.R. at page 1438, the Supreme Court of Arizona held that a statute to reimburse a state employe for an accidental injury arising out of and in the course of his employment is not special legislation, since *it is to satisfy an obligation resting upon all the people who constitute the state.*

On the power of the Legislature to make an appropriation to satisfy an award in favor of claimant, it is pertinent to cite the New York case of *Williamsburg Savings Bank* v. *State,* 243 N. Y. 231, wherein it is held:

> "The State may voluntarily recognize just obligations which it fairly and honestly ought to pay even though they do not constitute purely legal claims. When a claim is presented which securely rests upon a foundation of equity and justice and which involves a moral obligation, it may be recognized without infringing upon constitutional provisions protecting taxpayers against waste and extravagance. But the decision to pursue this course is a privilege and not an obligation, and the State alone, through its Legislature, can decide which course it will pursue. It cannot delegate to the courts or some other agency the duty of determining what its decision ought to be."

May it not be said that the instant case or claim is one which rests upon a foundation of equity and justice? And does not an obligation rest upon all of the people of the state to make some reparation for the great wrong which claimant has suffered?

Our own Supreme Court in the *Cashman* case, cited by Judge Schuck, lays down the rule that a moral obligation is an obligation or a duty, legal or equitable, not imposed by statute but created by contract or resulting from wrong-

ful conduct which would be judicially recognized as legal or equitable in cases between private persons. If the claimant is entitled to recover in this case his award must be based on some wrongful act done by the state. We thus come to the point where we must decide what is meant by the term wrongful act. As between *individuals* there is certainly no necessity for the existence of an evil intent in order for one individual to commit a wrong upon another. Should there then be any distinction between *state* and *individual* as to what is meant by a wrongful act? I think not. It is true that the state is sovereign in its power. It is also true that the individual is supreme in his right.

Fiat justitia ruat coelum!

MERRIMAN S. SMITH, JUDGE, dissenting.

Thanks to American jurisprudence this is a claim that rarely ever confronts our courts, however, it is one of momentous importance. I do not know of any circumstance except the taking of life itself that would create a greater appeal to the heartstrings than the conviction and incarceration of an innocent victim. Oftentimes we are prone to let our heart get the best of our better judgment.

I have a deep and profound respect for the experienced and learned opinions of the majority of this court, and it is with reluctance that I cannot concur in an award in the instant claim. However, in all fairness and justice to myself and the great state of West Virginia in this particular class of claim no award should be made unless there be a prior statute. After a careful and diligent search of the authorities I do not find a single instance of reparation being made by the state in such cases except where there is a prior statute. There is at least one claim, and doubtless more in former years, that was introduced in the 1931 regular session of the West Virginia Legislature—house bill No. 14, wherein the Legislature was asked to pass a claim in the sum of one thousand dollars to compensate

Frank Howell of New Martinsville, West Virginia, because he was wrongfully convicted and confined in the penitentiary at Moundsville for fourteen months, after which the guilty party made a voluntary confession of the crime, which has not been done in the instant claim. The bill was killed in the senate.

The majority opinion of this court bases its finding of an award largely upon what constitutes a moral obligation as defined in our Court of Appeals in *Cashman* v. *Sims*, cited in the majority opinion, ". . . or an obligation or a duty, legal or equitable, not imposed by statute but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons." There is no analogy in the instant claim between a private person and a sovereign state where an obligation arises in the performance of this governmental function. The sovereignty of the state must be upheld and maintained at all times. It cannot be sucessfully denied that claimant was given a fair and impartial trial. He had the benefit of his self-employed private counsel and was tried before a jury of twelve men selected among his peers. There is no evidence of any persecution by the state and no rights under the constitution or laws of the state were denied him. I repeat I do not think an award can be made unless there be an obligation imposed by prior statute, where there has been absolutely no negligence on the part of the agency involved in the regular performance of its governmental function, which power in this instance is the very essence of the sovereignty of the state. If a reward be bestowed upon an innocent person convicted of a crime, by the same token by whom and to whom is a penalty to be inflicted when a guilty person is acquitted?

An award in the instant claim would be the bestowal of a gratuity out of the public revenue for a private purpose, unless such moral obligation be so recognized by a prior statute.

REFERENCES

ASSUMPTION OF RISK

A person in accepting an assignment in a state mental institution, knowing he would be placed in contact with mentally deranged and incapacitated patients "assumed risk" of injury which might result from such association. *Goins* v. *Board of Control* 25

AUTOMOBILES

Where a guest passenger who, with another passenger, protested to the driver regarding the speed of the truck, after having made several stops affording him ample occasion to alight from the truck, fails to avail himself of such opportunity, thereby assumes the risk, and an award will be denied. *Neville* v. *State Conservation* 32

Negligence in maintaining the traveled portion of a highway in a reasonably safe condition, thereby causing claimant's automobile to be wrecked and damaged, without any contributory negligence on his part, entitles claimant to an award. *O'Connor* v. *State Road* 23

Where the evidence clearly shows that claimant's negligent acts were the cause of the accident for which he seeks damages an award will be denied. *Bess* v. *State Road* 83

A case in which the evidence introduced upon the investigation of the merits of a claim asserted against the state shows the existence of a moral obligation on the part of the state to make reparation by way of money compensation in view of the purpose of the act creating the state court of claims. *Short* v. *State Road* 40

See also

Moore v. *State Road* 102

Thompson v. *State Road* 74

Whitaker v. *State Road* 160

BILLS (invoices) unpaid, see Contracts

BLASTING OPERATIONS

The state is morally bound to reimburse an owner of property for damages thereto caused by blasting operations in a road improvement and the deposit of rocks and dirt over and upon claimant's property causing a spring theretofore used to be destoyed and of no further value to

claimant. *Light* v. *State Road* 194

See also

Bennett v. *State Road* 21

Cochran v. *State Road* 100

Hendrickson v. *State Road* 39

BRIDGES AND CULVERTS

When a pedestrian while crossing a culvert or bridge on a highway of the state steps off thereof and falls into a creek or run and sustains personal injuries and it appears upon the hearing of the claim prosecuted by her for damages on the grounds of negligence on the part of the road commission that she could easily have avoided the accident by stepping off the pavement of the road onto the berm on either side thereof and that no negligence on the part of the road commission or the state is disclosed by the evidence in the case, an award will be denied. *King* v. *State Road.* 107

Where the evidence in a claim seeking an award for damages to private property on the alleged ground that a bridge crossing a state highway was inadequate to take care of the water flowing thereunder and caused such water to overflow and inundate such private property shows that the source of the trouble was not at the bridge but due to natural causes for which the state is in no way responsible an award will be denied. *Morrison* v. *State Road.* 152

The statute requiring inspection and proper maintenance of bridges controlled by the road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Saunders* v. *State Road.* 143

An award will be denied upon failure to prove by a preponderance of the evidence the justness and merit of a claim against the state or any of its governmental agencies. *Loveless* v. *State Road.* 19

See also

Breedlove v. *State Road* 134

Davis v. *State Road* 4

Farley v. *State Road* 81

Jackson v. *State Road* 175

McGrady v. *State Road* 86

Meeker v. *State Road* 10

Sidell v. *State Road* 180

Slayton v. *State Road* 38

Weir-Cove v. *State Road* 1

Young v. *State Road* 174

CONTRACTS

Where purchases are made by a state institution and the state derives the benefit from such purchases, an award will be made although the requisitions were not made in the prescribed form or manner. *Galperin* v. *Board Education* 199

Checks mailed to the unemployment compensation department and received into the custody of an employe duly authorized to receive them, which checks were in payment of contributions due the unemployment compensation fund from an employer and which were subsequently fraudulently embezzled and uttered by the said authorized employe, are nevertheless payment to the state by the employer for the amounts of the checks and for the purpose intended.

Where the employer complying with the demands of the department of unemployment compensation makes a second or further payment under protest of the amounts of the said original checks, it is entitled to be reimbursed in the full amount thereof, in a claim properly and duly presented in this court, and an award will be made for any unpaid balance not paid back to the employer by the state. *Utilities Coal* v. *Unemployment Compensation* 110

The facts as shown by the record and stipulations filed herein are identical with those disclosed in the claim of *Utilities Coal Company* v. *Department of Unemployment Compensation*, except as to the amount of the check involved, and the opinion of the court rendered in *Utilities Coal Company, supra*, therefore controls in the instant case. *Buffalo-Winifrede* v. *Unemployment Compensation* 114

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, and the Legislature in regular session by special act authorizes and appropriates money from the general school fund for the payment of said legal notices, it becomes a just obligation and an award will be recommended. *Evening Journal* v. *Auditor* 116

The evidence presented in support of the claim under consideration and the fects adduced show such a breach of the contract by the department involved as to justify an award to claimant. *Wisman, et al* v. *State Road* 124

See also

Alt v. *Auditor* 11

Brodhead-Garrett v. *Board Education* 184

Daugherty v. *Auditor* 132

Kings, Inc. v. *Public Safety* 15

Musgroves Wholesale v. *Board Control* 64

COUNTY BOARDS OF EDUCATION—See also Jurisdiction

The court of claims is without jurisdiction to hear and

COURT ACT, Effective date

DRAINAGE OF ROADS, INUNDATION

FIRES

IMPRISONMENT, FALSE

JURISDICTION

MORAL OBLIGATION

If the state commits an act which injures a person and which act is afterward shown to have been wrong, erroneous and unjust, and if the act or acts complained of had occurred between private persons or individuals for which the aggrieved person would have an action at law, then a moral obligation is created which the state should be called

upon to discharge and satisfy. *Coole* v. *State* 206 at page 212

A claim properly filed with the court for the refund of gross sales taxes mistakenly and erroneously paid to the state tax commissioner, will be allowed where there is a moral obligation on the part of the state to refund the payment so made and where in equity and good conscience, and upon the facts as presented, the claim should be allowed; provided, of course, that it is filed within the five year rule governing the consideration of claims by the court. *Eastern Coal Sales* v. *State Tax* 68

Where one afflicted with silicosis, a compensable disease under our law, is denied compensation because of his failure to apply to the workmen's compensation commissioner within one year after the last exposure to the disease as required by statute, but whose application for relief and compensation was filed within one year from the date he was first informed of the nature of his disease by attending state physicians, a moral obligation is created on the part of the state and compensation should be allowed accordingly. *Hayes* v. *State Board Control* 202

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, and the Legislature in regular session by special act authorizes and appropriates money from the general school fund for the payment of said legal notices, it becomes a just obligation and an award will be recommended. *Evening Jaurnal* v. *Auditor* 116

An award may be made for the payment of public revenues to a private person in discharge of an obligation or duty of the state, legal or equitable, not imposed by statute, but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons, and the Legislature is the judge of what is for the public good. *Catron* v. *State Road* 185

The state is morally bound to reimburse an owner of property for damages thereto caused by blasting operations in a road improvement and the deposit of rocks and dirt over and upon claimant's property causing a spring theretofore used to be destroyed and of no further value to claimant. *Light* v. *State Road* 194

When by a miscarriage of justice an innocent person is tried and convicted of a felony and subjected to imprisonment in the penitentiary, the state is morally bound to answer in damages and so far as possible to right the wrong that has been done. *Coole* v. *State* 206

A case in which the evidence introduced upon the investigation of the merits of a claim asserted against the state shows the existence of a moral obligation on the part of the state to make reparation by way of money compensation in view of the purpose of the act creating the state court of claims. *Short* v. *State Road* 40

NEGLIGENCE

PRIVATE PROPERTY, damaged, etc.

An award may be made for the payment of public revenues to a private person in discharge of an obligation or duty of the state, legal or equitable, not imposed by statute, but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons, and the Legislature is the judge of what is for the public good. *Catron* v. *State Road* 185

The state road commission of West Virginia, in the operation of motor vehicles on the highway of the state, is chargeable with the duty of so equipping and using such vehicles as not to cause injury to the property of other persons, and a failure to observe such duty, in circumstances, may warrant an award in the interest of the public welfare. *Bowling* v. *State Road* 89

The evidence presented in support of the claim under consideration and the facts adduced show such a breach of the contract by the department involved as to justify an award to claimants. *Wisman, et al* v. *State Road* 124

The state is obliged to compensate a landowner from whose property sand, gravel and other materials were wrongfully taken, to be used in the building of a nearby secondary public road. *Clark* v. *State Road* 162

An award will be made when the evidence shows that the employes of the state road commission entered upon private property without authority and felled some twenty trees and otherwise damaged the property. *Gribble* v. *State Road* 17

The state is morally bound to reimburse an owner of property for damages thereto caused by blasting operations in a road improvement and the deposit of rocks and dirt over and upon claimant's property causing a spring theretofore used to be destroyed and of no further value to claimant. *Light* v. *State Road* 194

Where it is shown by the evidence that property damage sustained by the claimant, if any, was not caused by any act or acts of the state road commission, an award will be denied. *Mize* v. *State Road* 62

The mere loss by theft in a state emergency hospital of personal belongings of a registered nurse employed in such hospital does not constitute ground or warrant for the ap-

PROOF OF CLAIM

award refused. *Thompson* v. *State Road* 74

PROSECUTING ATTORNEYS, duties of

See Coole v. *State* 206 at page 216

RIGHT OF WAYS AND ROADS

When a pedestrian while crossing a culvert or bridge on a highway of the state steps off thereof and falls into a creek or run and sustains personal injuries and it appears upon the hearing of the claim prosecuted by her for damages on the grounds of negligence on the part of the road commission that she could easily have avoided the accident by stepping off the pavement of the road onto the berm on either side thereof and that no negligence on the part of the road commission or the state is disclosed by the evidence in the case, an award will be denied. *King v. State Road* ... 107

Where by reason of an inadequate drainage system, as maintained by the state road commission, surface water is collected and cast in a mass or body on adjoining property, the owner of such property is entitled to an award. *Wilson* v. *State Road* 56

The state is morally bound to use reasonable care and diligence in the maintenance of a state controlled highway, and failure to use such reasonable care and diligence in allowing a hole to exist in the highway for several years, thereby causing injuries to a person lawfully using said highway, presents a claim for which an award should be made. *Presson* v. *State Road* 92

Negligence in maintaining the traveled portion of a highway in a reasonably safe condition, thereby causing claimant's automobile to be wrecked and damaged, without any contributory negligence on his part, entitles claimant to an award. *O'Connor* v. *State Road* 23

An award will be made when the evidence shows that the employes of the state road commission entered upon private property without authority and felled some twenty trees and otherwise damaged the property. *Gribble* v. *State Road* 17

A case in which the facts justify the finding of a moral obligation on the part of the state to reimburse claimants for their loss. *Starcher, et als* v. *State Road* 54

The state is obliged to compensate a landowner from whose property sand, gravel and other materials were wrongfully taken, to be used in the building of a nearby secondary public road. *Clark* v. *State Road* 162

See also

Bailey v. *State Road* 105

Knisely v. *State Road* 79

SILICOSIS

Evidence to sustain a claim that death was caused by exposure to silicosis must be certain and definite, otherwise an award will be denied. *McGraw* v. *Board Control* 178

Where one afflicted with silicosis, a compensable disease under our law, is denied compensation because of his failure to apply to the workmens' compensation commissioner within one year after the last exposure to the disease as required by statute, but whose application for relief and compensation was filed within one year from the date he was first informed of the nature of his disease by attending physicians, a moral obligation is created on the part of the state and compensation should be allowed accordingly. *Hayes* v. *Board Control* 202

STATE EMPLOYES

The mere loss by theft in a state emergency hospital of personal belongings of a registered nurse employed in such hospital does not constitute ground or warrant for the appropriation by the Legislature of public funds to reimburse such nurse for the value of the stolen property. *McNeil* v. *Board Control* 65

A person in accepting an assignment in a state mental institution, knowing he would be placed in contact with mentally deranged and incapacitated patients "assumed risk" of injury which might result from such association. *Goins* v. *Board Control* 25

One who is summoned or drafted by a state forester or protector to assist in fighting a forest fire is entitled to all reasonable protection when complying with such summons, and if injured while so engaged without fault or negligence on his part is entitled to an award. See *Bailey* v. *State Conservation Commission*, 2 Ct. Claims (W Va.) 70. *Robinson* v. *State Conservation Commission* 120

See also

STATE INSTITUTIONS

See

Brodhead-Garrett v. *State Board of Education* 184

Hayes v. *Board Control* 202

McNeil v. Board Control 65

STATUTE OF LIMITATIONS

A claim properly filed with the court for refund of gross sales tax mistakenly and erroneously paid to the state tax commissioner will be allowed where in equity and good conscience there is a just obligation on the part of the state to make refund for the payment so made, provided of course that it is filed within the five-year rule governing the consideration of claims by the court. *Pinnell, et al* v. *State Tax* 167

Where a gross sales tax is paid voluntarily and without filing any protest since there was no question as to the validity of the exemption and such tax was improperly accepted by the state tax commissioner there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations. *Raleigh County Bank v. State Tax* 42

Where purchases are made by a state institution and the state derives the benefit from such purchases, an award will be made although the requisitions were not made in the prescribed form or manner. *Galperin* v. *Board Education* 199

When the State Supreme Court rendered a decision exempting the furnishing of linens, towels and similar articles from the provision of the business and occupation tax, there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations. *Davis* v. *State Tax* 137

Where gross sales tax is paid voluntarily and without filing any protest, under a mistake of fact, and erroneously paid to the state tax commissioner, and there is no question as to the validity of the exemption, and such tax is improperly accepted, there is a moral obligation imposed upon the state to refund the amount not barred by the court of claims statute of limitations. *Raleigh County Bank* v. *State Tax Commissioner* and *Eastern Coal Sales Company* v. *State Tax Commissioner. Bonded Oil* v. *State Tax* 95

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline, as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refund unless such application is filed as provided by the statute permitting refunds on gasoline used for cer-

tain specific purposes. *Huntington Excavating* v. *State Tax* 155

See also

Brodhead-Garrett v. *Board Education* 184

Galperin v. *Board Education* 199

TAXES

1. Checks mailed to the unemployment compensation department and received into the custody of an employe duly authorized to receive them, which checks were in payment of contributions due the unemployment compensation fund from an employer, and which were subsequently fraudulently embezzled and uttered by the said authorized employe, are nevertheless payment to the state by the employer for the amounts of the checks and for the purpose intended.

2. Where the employer complying with the demands of the department of unemployment compensation makes a second or further payment under protest of the amounts of the said original checks, it is entitled to be reimbursed in the full amount thereof, in a claim properly and duly presented in this court, and an award will be made for any unpaid balance not paid back to the employer by the state. *Utilities Coal* v. *Unemployment Compensation* 110

The facts as shown by the record and stipulations filed herein are identical with those disclosed in the claim of *Utilities Coal Company* v. *Department of Unemployment Compensation*, except as to the amount of the check involved, and the opinion of the court rendered in *Utilities Coal Company, supra*, therefore controls in the instant case. *Buffalo-Winifrede* v. *Unemployment Compensation* 114

A claim properly filed with the court for the refund of gross sales taxes mistakenly and erroneously paid to the state tax commissioner, will be allowed where there is a moral obligation on the part of state to refund the payment so made and where in equity and good conscience, and upon the facts as presented, the claim should be allowed; provided, of course, that it is filed within the five year rule governing the consideration of claims by the court. *Eastern Coal Sales* v. *State Tax* 68

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline, as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refund unless such application is filed as provided by the statute permitting refunds on gasoline used for certain specific purposes. *Huntington Excavating* v. *State Tax* 155

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Syllabus in re Eastern Coal Sales Company, a corporation, v. *State Tax Commissioner,* decided by this court September 17, 1947, adopted and affirmed. *American Oil* v. *State Tax* 139

When a foreign corporation pays its license tax in advance of its due date for the fiscal tax year and prior to the beginning of the license tax year said corporation dissolves and ceases to do any operations within the state a refund of the amount so paid will be recommended. *Crescent Brick* v. *Auditor* 118

A claim properly filed with the court for refund of gross sales tax mistakenly and erroneously paid to the state tax commissioner will be allowed where in equity and good conscience there is a just obligation on the part of the state to make refund for the payment so made, provided of course that it is filed within the five-year rule governing the consideration of claims by the court. *Pinnell, et al* v. *State Tax* 167

Chapter 11, article 13, section 2c, of the code contemplates only sales of *tangible* property and fixes the rate of taxation accordingly. It does not include sales of services as such, nor does it fix the rate of taxation for such services, but such services are governed by the rate fixed and set forth in section 960(8) Michie's code, official code section 2h. *Richmond* v. *State Tax* 76

Where a gross sales tax is paid voluntarily and without filing any protest since there was no question as to the validity of the exemption and such tax was improperly accepted by the state tax commissioner there is a moral obligation imposed upon the state to refund the amount not barred by the state court of claims statute of limitations. *Raleigh County Bank v. State Tax* 42

Where a gross sales tax is paid voluntarily and without filing any protest since there was no question as to the validity of the exemption and such tax was improperly accepted by the state tax commissioner there is a moral obligation imposed upon the state to refund the total amount of the exempted tax. *Raleigh County Bank* v. *State Tax* 42

Syllabus in re I. S. Davis, d/b/a *Fairmont Linen Supply Company,* v. *State Tax Commissioner,* decided April 21, 1948, reaffirmed and adopted. *Caplan* v. *State Tax* 164

WORKMEN'S COMPENSATION