STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1941-1942

Volume

1

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period July 1, 1941 to November 30, 1942.

By

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

and

JOHN D. ALDERSON
Deputy Clerk

(Published by authority of an order of the State Court of Claims and pursuant to section 25 of an Act entitled "Court of Claims law" approved March 6, 1941.)

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PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE WALTER M. ELSWICK............Presiding Judge

HONORABLE ROBERT L. BLAND............Judge

HONORABLE CHARLES J. SCHUCK............Judge

WM. S. O'BRIEN

Secretary of State and Ex Officio Clerk

JOHN D. ALDERSON

Deputy Clerk

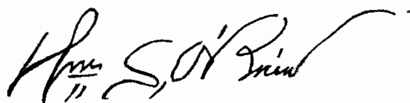
Letter of Transmittal

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

Sir:

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

Respectfully submitted,



Secretary of State and
Ex Officio Clerk.

ORDER OF COURT

For Publication of Report

WHEREAS, The act creating the state court of claims provides for the publication by the clerk of the said court of a biennial report as a public document for submission to the Governor and the State Legislature, and

WHEREAS, The court has been in existence and engaged in hearing and determining claims against the state and various agencies thereof since the 14th day of July 1941, and will continue to hear and determine claims up to and including the October term, 1942, before the next regular session of the State Legislature beginning January 13, 1943, and

WHEREAS, The full biennial period will not have expired from the first term or session of the court before the next regular session of the State Legislature, during which period, however, many awards have been made and others denied, and opinions of the court filed therewith, and

WHEREAS, The said act requires that the said awards so made by the court shall be submitted to the Legislature for its consideration and action and, as allowed, be set forth in the regular biennial budget bill thereof;

THEREFORE, The court is of the opinion that it will be expedient, proper and beneficial both to the claimants involved and the state and its several agencies, and especially so to the members of the Legislature, to submit to the Legislature all awards made and claims denied, together with the opinions rendered by the court, heretofore made and to be made, up to and including the October term, 1942.

IT IS THEREFORE ORDERED, That the clerk shall publish his report as required, including and embracing all awards made and

claims denied, together with the opinions rendered, including, also, the awards to be considered by the court, and the opinions rendered during the October term, 1942, as soon as may be after the 20th day of November next, for submission to the Governor and the State Legislature, and

IT IS FURTHER ORDERED, That the said first report to be so published by the clerk shall consist of 1000 copies, with permanent bindings.

Entered July 30, 1942.

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court July 30, 1941)

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RULES OF PRACTICE AND PROCEDURE OF THE STATE COURT OF CLAIMS

RULE 1.—CLERK, LOCATION OF OFFICE, ETC.

The secretary of state shall be ex officio the clerk of the court. The clerk's office of the court shall be in the office of the secretary of state, in the city of Charleston, and shall be kept open in charge of the clerk, or some competent employee of the clerk duly deputized, each week day, except legal holidays for the purpose of receiving notice of claims and conducting the business of the office, during the same business hours as the office of the secretary of state, except when otherwise required by the court during a general 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 the receipt of a notice of claim shall enter of record in a book indexed and kept for the 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:

(1) Minute book, in which shall be recorded the minutes of all official business sessions of the court, including rules of procedure, orders paying salaries of members; orders paying the expenses of the court, and the salaries, compensations, costs 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, 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 the case.

(3) 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.

RULE 5.—CLAIMS, FORM OF.

All claims and demands must be filed with the clerk of the court in the office of the secretary of state, and may be by letter, petition, declaration, or any other writing, which sufficiently sets forth the nature of the claim or demand and the facts upon which it is based, and the state agency, if any, that is involved. It is understood that technical pleadings shall not be required. The court, however, reserves the right to require further information in writing before hearing, when, in its judgment, justice and equity may demand or require.

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 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.—DOCKET, PREPARATION OF.

The clerk shall prepare fifteen days previous to the regular terms of the court a printed docket showing all claims and demands that are ready for hearing and consideration by the court. 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 representative of record, and a copy furnished the office of the attorney general.

RULE 9.—TESTIMONY, RULES GOVERNING.

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.

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.—STIPULATION OF FACT; INTERROGATORIES TO DETERMINE.

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.

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 presented to and furnished any opposing counsel, the state agency involved, and the attorney general. The court may designate the time within which reply briefs may be filed.

RULE 14.—AMENDMENTS.

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.—CLAIMS, DISMISSAL ON FAILURE TO PROSECUTE.

Whenever any claim shall have regularly appeared on any docket of this court four times and shall not be moved for trial by the claimant and the state shall be ready to proceed with the trial thereof, the judge presiding, upon motion of the state or upon his own motion may dismiss the claim unless sufficient reason is shown by the claimant why such claim cannot be tried. An order dismissing such claim shall not be vacated nor shall

the trial thereof be reopened except by a notice in writing supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated and the trial thereof permitted.

RULE 16.—CERTIFIED COPIES.

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.

Memorandum by the Deputy Clerk

ORGANIZATION OF THE COURT

The law establishing the West Virginia state court of claims was passed by the Legislature March 6, 1941, effective from passage, and the act was approved by Governor M. M. Neely. The Governor prior to July 1, 1941 named the first membership of the court as follows: Honorable Walter M. Elswick of Hinton for a six-year term expiring June 30, 1947, Honorable Robert L. Bland of Weston for a four-year term expiring June 30, 1945 and Honorable Charles J. Schuck of Wheeling for a two-year term expiring June 30, 1943. As these appointments expire all appointments shall be for six years.

The judges qualified and the court convened at the office of the secretary of state in the Capitol Building in the city of Charleston, West Virginia on July 14, 1941, that being the first day of the regular July term 1941. The court organized by electing Honorable Robert L. Bland presiding judge for the ensuing year.

At this term the court formulated and adopted rules of practice and procedure governing proceedings before the court. Also at this time, with the approval of the court, Wm. S. O'Brien, secretary of state and as such ex officio clerk of the court, designated John D. Alderson of Richwood, a regular employee of his office, as deputy clerk, who qualified and began his duties August 1, 1941. Lenore Thompson was employed as secretary-stenographer to the court.

SCOPE OF WORK

Thirty-three claims were filed during August and up to September 15, 1941, of which seven were dismissed for lack of *prima facie* jurisdiction, and twenty-six cases were docketed for hearing at the regular October term 1941, which was the first regular hearing term to be held. The court at the October

term engaged the services of Charles V. Price of Charleston as official court reporter; and at that term Clarence W. Meadows, attorney general, designated Eston B. Stephenson, his special assistant, to represent the state before the court.

Since the October term 1941 the volume of business before the court has steadily increased. At the January term 1942 the number of cases docketed was thirty; at the April term 1942 forty-one cases were placed on the hearing docket, and at the July term 1942 there were forty-two; and at the October term 1942 fifty-three claims were set on the hearing docket and five other claims were dismissed for lack of *prima facie* jurisdiction to entertain them. At a special term in February 1942, held in Wheeling five cases which had arisen in that section of the state were docketed for hearing. The present report covers the time from the organization of the court up to November 30, 1942, a period of approximately eighteen months. During this period a total of 168 claims have been disposed of making demand in excess of $285,000.00. The awards made during this period total $82,496.70 and embrace 127 separate claims. Due to the number of claims filed and the volume of work entailed during the first fiscal year the court was unable to consummate all the business before it within the 150 days allowed for per diem by the court act.

TEMPORARY QUARTERS OF THE COURT

The court of claims being a new court did not have any regular quarters at the capitol. Although the court act specified the office of the secretary of state as the regular meeting place of the court, yet there was not adequate space for a clerk's office and hearing rooms in the suite of rooms occupied by the office of the secretary of state, and it became necessary to obtain quarters elsewhere and designate them by court order with the approval of the secretary of state as a part of his office to meet the requirements of the court act. Honorable R. E. Talbot, state treasurer, Honorable H. N. Martin, superintendent of buildings and grounds and Honorable Cleveland M. Bailey, budget director, were designated by the Governor as a committee to locate and obtain suitable quarters for the court. The committee by arrangement with Honorable J. R. Aliff,

clerk of the House of Delegates, obtained for temporary use, during the period covered by this report, rooms No. 238 and 240 belonging to the House of Delegates as a hearing room and clerk's office respectively.

OPERATING EXPENSE OF THE COURT

The total administrative expenditures of the court of claims for the first fiscal year, July 1, 1941 to June 30, 1942 inclusive, were $15,177.37. The appropriation for the fiscal year being $25,000.00 there remained at the close of the year a net unexpended balance of $9,822.63.

The expenditures for the first fiscal year were classified as follows:

Item	Amount
Judges' per diem	$ 6,750.00
Judges' expenses	1,669.15
Personal services 11 months for secretary-stenographer and janitor-messenger	1,629.51
Law books	230.00
Furniture and fixtures	2,010.95
Court reporter	2,079.00
Current expense—stationery, dockets, etc.	808.76
Total (expenses)	15,177.37
Unexpended balance	9,822.63
Total (appropriation)	25,000.00

Since the second fiscal year does not end until June 30, 1943, it cannot be included in this report.

PAYMENT OF DEPUTY CLERK

The above summary does not include the salary of the deputy clerk, for under the present court act he is required to be a regular employee of the office of the secretary of state. Since the budget for the office of the secretary of state had been made up prior to the date on which the court of claims act was passed, the secretary's budget did not provide for a deputy clerk for the court, and neither did the appropriation for the court nor the court act itself authorize the payment of the

salary of a deputy clerk out of the appropriation made for the operation of the court. The services of a deputy clerk were necessary to the proper functioning of the court and in order that the court might have the full time services of a deputy clerk his salary has been paid monthly by the Governor out of the Governor's contingent fund, excepting a five dollar monthly token payment from the secretary of state so as to classify the deputy clerk as an employee of the secretary's office.

COURTS OF CLAIMS IN OTHER STATES

From general inquiry it seems that West Virginia was the fourth state in the union to enact a court of claims law permitting claims to be filed and prosecuted against the state and state agencies. The other states preceding West Virginia in establishing a court of claims so far as learned were Illinois, Michigan and New York. (There is also a federal court of claims in Washington.)

These courts have been as far apart as the poles on at least one fundamental; they have administered their respective acts with such widely divergent results that the West Virginia state court of claims has had mainly to blaze a new trail and do its own pioneering. This has also been made necessary in part because of new and novel questions arising in a hitherto unexplored field in our state. In Illinois the court of claims refuses to apply the doctrine of *respondeat superior* to the state and consequently denies liability for damages caused by the negligence of the state through its employees.

"The doctrine of *respondeat superior* is not applicable to the State (Illinois) as a sovereign power, and it is not liable for damages, injuries or death, resulting from the negligence of its officers, agents or employees under any theory of law or equity."—*Barica, claimant,* v. *State of Illinois,* respondent, 10 Ill. Court of Claims 47 (Oct. 12, 1937). On the other hand the New York rule has been stated thus ". . . the State (New York) has waived its immunity from liability for the torts of its officers and employees and consented to have that liability

determined by the court of claims in accordance with the same rules of law as apply to an action in the Supreme Court against an individual or corporations."—The court of claims of the state of New York (p. 5)—James J. Barret, presiding judge, May 19, 1938.

FIVE PROCEDURES PROVIDED FOR IN THE COURT ACT

The opinions of the West Virginia state court of claims for the first eighteen months of its existence are reported in full herein. These opinions cover 85 claims filed by claimants under the regular procedure; also 82 claims filed under the shortened procedure section of the court act embodying claims concurred in by the state departments concerned and approved by the attorney general, the records whereof were made up and submitted by the departments involved.

The court being new and in its formative period and the state agencies perhaps not at the outset having become thoroughly familiar with all the various procedures provided for in the act, namely (a) regular procedure, (b) shortened procedure, (c) advisory determination procedure, (d) claims arising under existing appropriations and (e) claims arising under special appropriations, only one advisory opinion—that at the instance of the state auditor—is contained in this report. Section 18 of the court act provides in part that ". . . 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." While the advisory section has not been availed of, with the one exception noted, during the period of this report, yet it is believed that as the various functions of the court become better known the advisory determination procedure promises in the future to provide one of the most practical and useful avenues of service which the court may render to the departments and agencies of the state government.

REPORT OF THE COURT OF CLAIMS
For Period July 1, 1941 to November 30, 1942

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
107	Adkins, Dewey	State Road Commission	$ 680.75	$ 411.95	September 19, 1942
109	Adkins, G. B.	State Road Commission	1,111.25	681.35	September 19, 1942
108	Adkins, Joel H.	State Road Commission	1,233.75	798.56	September 19, 1942
110	Adkins, Walter & D. B. Wilson, d/ba Adkins & Wilson	State Road Commission	1,256.50	756.89	September 19, 1942
73	Ashworth, Vernie E.	State Road Commission	50.00	50.00	June 15, 1942
34-S	Aspinall, William H. & Company, a corporation	State Road Commission	50.54	50.54	November 26, 1941
22	Atkinson, Clarence R.	State Road Commission	20,000.00	4,000.00	December 2, 1941
24	Babb, Roy C.	State Road Commission	257.00	257.00	October 26, 1942
186-S	Bailey, B. D. & Sons	State Tax Commissioner	243.28	243.28	October 29, 1942
56-S	Balsley, George M.	State Road Commission	28.92	28.92	January 24, 1942
129-S	Bennett, C. C.	State Road Commission	89.57	89.57	July 28, 1942
39-S	Biggess, E. R.	State Road Commission	8.00	8.00	January 12, 1942
184-S	Blair Willison Company, Inc..	State Tax Commissioner	570.91	570.91	October 29, 1942
185-S	Blair Willison Company, Inc..	State Tax Commissioner	603.79	603.79	October 29, 1942
1	Brown, James E.	State Road Commission	15,000.00	4,000.00	November 12, 1941
1	Brown, James E., Adm. of the estate of Roxie M. Brown, deceased.	State Road Commission	....	2,000.00	November 12, 1941
76	Brooke County Court	State Auditor	8,292.42	7,760.09	June 15, 1942
204-S	Broyles, Minnie	State Road Commission	50.00	50.00	November 17, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
73	Calvert Fire Insurance Company	State Road Commission	154.11	154.11	June 15, 1942
79	Canterbury, Brookie, Admx. of the estate of Bert Canterbury, deceased	State Road Commission	10,000.00	1,500.00	June 15, 1942
61-S	Carson, Howard	State Road Commission	16.69	16.69	January 24, 1942
41-S	Casto, Harman	State Road Commission	40.00	40.00	January 12, 1942
11	Cecil, George B.	State Road Commission	25,000.00	900.00	April 13, 1942
88-S	Chapman, John	State Road Commission	38.50	38.50	April 13, 1942
75	Chapman, W. W. & Mae	State Board of Control	5,000.00	600.00	August 21, 1942
29	Chesapeake & Ohio Railway Company	State Road Commission	114.35	114.35	December 19, 1941
59-S	Cobb, Hanna (Mrs.)	State Road Commission	7.00	7.00	January 24, 1942
106	Consolidated Engineering Company	State Road Commission	37,632.46	9,750.00	November 23, 1942
85-S	Cottle, A. S.	State Road Commission	87.62	87.62	April 13, 1942
134	Cottle, Curtis	State Road Commission	....	2,750.00	October 23, 1942
206-S	Cox, David	State Road Commission	5.00	5.00	November 17, 1942
72-S	Crabtree, Dock	State Road Commission	50.00	50.00	April 13, 1942
121	Damron, Rebecca	State Road Commission	213.25	50.00	August 21, 1942
95-S	Damron, Wayne, and Calvert Fire Insurance Company, a corporation	State Road Commission	383.48	343.82	August 21, 1942
120	Damron, Zillie	State Road Commission	500.00	100.00	August 21, 1942
187-S	Elliott Brokerage Company	State Tax Commissioner	692.32	692.32	October 29, 1942
19	Ellis, Rosa	State Road Commission	2,500.00	1,500.00	February 3, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
15-S	Fields, Harry (Harrison)	State Road Commission	100.00	100.00	November 12, 1941
132-S	Finley, M. L.	State Road Commission	30.00	30.00	July 28, 1942
145-S	Frankel, Sylvia B.	State Road Commission	9.18	9.18	October 13, 1942
17	Fry, Charles Golden	State Road Commission	....	900.00	December 19, 1941
66-S	Garnette, Pauline	State Road Commission	1.50	1.50	April 13, 1942
122-S	Gentry, Joe	State Road Commission	14.28	14.28	July 28, 1942
113	Gibson, J. R.	State Road Commission	535.00	100.00	August 21, 1942
114	Gibson, Roma	State Road Commission	1,275.00	1,000.00	August 21, 1942
94-S	Gorrell, Wayne	State Road Commission	24.09	24.09	April 21, 1942
123-S	Griffith, James P.	State Road Commission	58.03	58.03	July 28, 1942
162-S	Gulf Oil Corporation	State Road Commission	127.23	127.23	October 13, 1942
199-S	Halsey, R. L.	State Road Commission	3.00	3.00	November 17, 1942
151-S	Hart, Aubrey	State Road Commission	45.14	45.14	October 13, 1942
93-S	Hash, Tom	State Road Commission	179.78	179.78	April 13, 1942
128-S	Heiman, Matthew	State Road Commission	7.95	7.95	July 28, 1942
31	Hershberger, Edward J.	State Road Commission	2,500.00	2,000.00	December 19, 1941
127-S	Hicks, A. H. and General Exchange Insurance Company	State Road Commission	102.89	102.89	July 28, 1942
92-S	Hivick, Edwin	State Road Commission	4.59	4.59	April 13, 1942
26-S	Houchins, Ezekiel	State Road Commission	125.00	125.00	December 4, 1941
86-S	Irons, Charles	State Road Commission	20.75	20.75	April 13, 1942
161-S	Irwin, D. C.	State Road Commission	1.53	1.53	October 13, 1942
89-S	Jewell Tea Company	State Road Commission	25.00	25.00	April 13, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
55	Johnson, Benjamin, Jr., infant	State and Calhoun County Boards of Education	2,000.00	500.00	April 21, 1942
77	Keeley Construction Company, a Corporation	State Road Commission	860.50	860.50	June 15, 1942
78	Keeley Construction Company, a Corporation	State Road Commission	3,360.50	1,810.50	June 15, 1942
126-S	Kelso, Hugh E.	State Road Commission	5.00	5.00	July 28, 1942
144-S	Kettering Baking Company	State Road Commission	8.16	8.16	October 13, 1942
149	Kincaid, Betty Jane, infant	State Road Commission	7,500.00	500.00	November 17, 1942
149-A	Kincaid, E. W.	State Road Commission	100.00	50.00	November 17, 1942
148	Kincaid, Walter Lee, infant	State Road Commission	5,000.00	150.00	November 17, 1942
202-S	Klages, E. C. (Mrs.)	State Road Commission	25.28	25.28	November 17, 1942
200-S	Kolar, Evan	State Road Commission	90.43	90.43	November 17, 1942
182-S	Leggett, C. W. & Co.	State Tax Commissioner	565.64	565.64	October 29, 1942
50	Lively, Charles	State Auditor	3,041.33	3,041.33	February 3, 1942
97-S	Loar, G. I.	State Road Commission	15.13	15.13	April 13, 1942
21	Love, Harry M.	State Road Commission	750.00	500.00	December 5, 1941
84-S	Lowe, Voss R.	State Road Commission	28.10	28.10	April 13, 1942
3	Martin, Arnold L.	State Road Commission	40.00	40.00	November 12, 1941
37-S	Maxwell, Donovan A. (Mrs.)	State Road Commission	25.00	25.00	January 12, 1942
98	Mealey, Callie, Admx. of the estate of James Clarence Mealey, deceased	State Road Commission	----------	4,000.00	August 21, 1942
42-S	Meeks, Lawrence	State Road Commission	6.00	6.00	January 12, 1942
125-S	Minton Chevrolet, Inc.	State Road Commission	49.22	49.22	July 28, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
71-S	Morgan, Bill	State Road Commission	5.36	5.36	April 13, 1942
101	Mullins, Dairl, infant	State Road Commission	....	1,500.00	August 21, 1942
99	Mullins, Ira	State Road Commission	....	2,500.00	August 21, 1942
102	Mullins, Irene, infant	State Road Commission	....	1,500.00	August 21, 1942
100	Mullins, Rosa	State Road Commission	....	200.00	August 21, 1942
62-S	McAllister, J. A. (Mrs.)	State Road Commission	26.00	26.00	January 24, 1942
40-S	McCormick, Walter	State Road Commission	95.00	95.00	January 12, 1942
70	McMillion, Robert Dewey, infant	State Road Commission	1,500.00	250.00	April 30, 1942
171-S	Nicholson, Gail	State Road Commission	18.00	18.00	October 13, 1942
60-S	O'Ferrell, William (Mrs.)	State Road Commission	5.61	5.61	January 24, 1942
91-S	Orndorff, J. Frank	State Road Commission	33.90	33.90	April 13, 1942
130-S	Pennington, C. B.	State Road Commission	10.42	10.42	July 28, 1942
63-S	Perkins, G. H.	State Road Commission	6.53	6.53	January 24, 1942
176-S	Powell, Margaret B.	State Road Commission	19.28	19.28	October 13, 1942
69-S	Raleigh Steam Laundry	State Road Commission	22.30	22.30	April 13, 1942
48	Richards, Ernestine, infant	State and Calhoun County Boards of Education	5,000.00	3,000.00	April 21, 1942
48	Richards, J. C.	State and Calhoun County Boards of Education	....	2,000.00	April 21, 1942
207-S	Riggs, A. C.	State Road Commission	449.00	449.00	November 17, 1942
90-S	Riley, L. O.	State Road Commission	7.00	7.00	April 13, 1942
177	Roberts, Alfred D., II	State Road Commission	1,000.00	400.00	November 23, 1942
178	Roberts, Alfred D., III, infant	State Road Commission	15,000.00	1,000.00	November 23, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
64-S	Rodgers, George	State Road Commission	21.63	21.63	January 24, 1942
111-S	Rollins, W. F., and the Home Insurance Company of New York	State Road Commission	248.92	248.92	July 28, 1942
169-S	Sarver Garage	State Road Commission	13.52	13.52	October 13, 1942
124-S	Shingler Meat Company	State Road Commission	69.37	69.37	July 28, 1942
57-S	Silar, Grady	State Road Commission	65.00	65.00	January 27, 1942
44-S	Smith, L. G.	State Road Commission	5.00	5.00	January 24, 1942
142-S	Smith, Ora	State Road Commission	15.91	15.91	October 13, 1942
58-S	Snodgrass, A. R.	State Road Commission	47.86	47.86	January 24, 1942
47-S	Sovine, N. H.	State Conservation Commission	85.00	85.00	October 13, 1942
36-S	Spencer, J. D. (Mrs.)	State Road Commission	18.36	18.36	January 12, 1942
190-S	Spencer, J. H.	State Road Commission	20.00	20.00	October 13, 1942
43-S	Spencer, Sarah	State Road Commission	28.93	28.93	January 12, 1942
83-S	Steele, L. M.	State Road Commission	10.20	10.20	April 13, 1942
170-S	Strother, W. L.	State Road Commission	53.53	53.53	October 13, 1942
67-S	Swiger, Harry (Mrs.)	State Road Commission	15.30	15.30	April 13, 1942
68-S	Thompson, Elmo H.	State Road Commission	25.00	25.00	April 13, 1942
46-S	Tomich, Louis	State Conservation Commission	31.20	31.20	October 13, 1942
183-S	United Brokerage Company	State Tax Commissioner	14.29	14.29	October 29, 1942
28	Valley Camp Stores Company, a corporation	State Road Commission	7,611.03	4,500.00	December 20, 1941
160-S	Valvoline Oil Company	State Road Commission	32.75	32.75	October 13, 1942

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
135-S	Vandevender, S. G.	State Road Commission	50.00	50.00	July 28, 1942
87-S	Walker, C. J.	State Road Commission	39.40	39.40	April 13, 1942
143-S	Ward, Arzana M.	State Road Commission	50.00	50.00	October 13, 1942
20	Wildman, Ray, Adm. of the estate of H. L. Wildman, dec'd.	State Road Commission	10,000.00	5,000.00	December 5, 1941
65-S	Williams, Hughie A.	State Road Commission	278.64	278.64	April 13, 1942
		TOTALS	202,670.93	81,998.70	

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
131	Doyle, Florence	State Conservation Commission and State Auditor	318.00	318.00	September 19, 1942
141	Elkins Builders Supply Company	State Board of Control	180.00	180.00	September 19, 1942

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

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
25	Beaver, Ed	Workmen's Compensation Commissioner	———	Dismissed	September 24, 1941
45-S	Boley, Jennings C.	State Conservation Commission	200.00	Denied	October 28, 1942
104	Chapman, Robt. D.	State Board of Control	1,608.90	Dismissed	June 16, 1942
117	Clark, L. C.	State Road Commission	550.00	Denied	August 21, 1942
115	Clark, James	State Road Commission	200.00	Denied	August 21, 1942
35	Cottle, F. F.	State Road Commission	1,600.00	Dismissed	February 3, 1942
16	Del Balso Construction Corporation	State Tax Commissioner	133.65	Denied	November 26, 1941
150	Dillon, Mary, infant	Summers County Board of Education	15,000.00	Dismissed	October 12, 1942
103	Dodrill, Herbert	State Road Commission	60.80	Denied	September 19, 1942
2	Dragon, John W.	State Road Commission	3,254.84	Dismissed	February 27, 1942
14	Eary, Charles	Workmen's Compensation Commissioner	———	Dismissed	September 24, 1941
133	Harless, Ada	State Road Commission	15,000.00	Denied	August 21, 1942
12	Harper, Harold R. & Nellie M.	State Road Commission	350.00	Denied	November 24, 1941
188	Harvey, Fred	State Road Commission	600.00	Denied	November 21, 1942
189	Harvey, Rosa	State Road Commission	1,500.00	Denied	November 21, 1942
52	James, L. B.	State Road Commission	75.42	Denied	February 3, 1942
179	James. R. L.	State Road Commission	120.57	Denied	November 21, 1942
137	Johnson, Thomas L.	State Road Commission	15,000.00	Denied	September 19, 1942
23	Jones, J. E.	Workmen's Compensation Commissioner	———	Dismissed	September 24, 1941

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
53	Kidd Lumber Company	State Road Commission	282.00	Dismissed	April 30, 1942
38-S	Knicely, Walter R., d/ba Knicely Florists	State Road Commission	119.25	Denied	January 12, 1942
13	Lambert, Rachel C., Admx. of the estate of Homer M. Lambert, deceased	State Road Commission	----------	Denied	July 22, 1942
74	Lane, Robert F.	County Court of Wood County	----------	Dismissed	March 23, 1942
138	Miller, Jess E.	Lewis County Board of Education	1,000.00	Dismissed	June 16, 1942
5	Miller, Ruth	State Board of Control	350.00	Denied	February 3, 1942
49	Moore, Sarah E.	State Road Commission	2,500.00	Denied	February 3, 1942
8	Mullins, M. A.	Workmen's Compensation Commissioner	----------	Dismissed	September 24, 1941
9	Patton, E. B.	Workmen's Compensation Commissioner	----------	Dismissed	September 24, 1941
18	Peterson, Fred S., and Commerce Insurance Company	State Road Commission	310.71	Denied	December 12, 1941
30	Rader, J. J.	State Road Commission	189.91	Denied	October 26, 1942
112	Reed, Gilbert	State Road Commission	3,500.00	Denied	August 21, 1942
159	Riddle, Forest	State Road Commission	----------	Denied	November 21, 1942
4	Scaveriello, Louisa	State Road Commission	6,500.00	Dismissed	February 3, 1942
7	Shelton, R. L.	Workmen's Compensation Commissioner	----------	Dismissed	September 24, 1941

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
119	Smith, Herman G.	State Road Commission	750.00	Denied	September 19, 1942
118	Smith, Margarite M.	State Road Commission	1,000.00	Denied	September 19, 1942
6	Taylor, Alfred D.	Workmen's Compensation Commissioner	....	Dismissed	September 24, 1941
33	Timms, Wm. Edward, Adm. of the estate of James D. Timms, deceased	State Board of Control	10,000.00	Denied	December 19, 1941
116	University of Omaha	State Board of Control	300.00	Dismissed	June 16, 1942
		TOTAL....	82,056.05		

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
10	Loup Creek Collieries Company	State Auditor	....	Dismissed	December 20, 1941

NOTE: The foregoing list of claims and awards embraced in this report are classified as required by section 25, court of claims law.

Denial of an award was usually made after full hearing on the merits, while a dismissal of the claim usually occurred for lack of the court's jurisdiction to entertain it, in most instances before, but sometimes after, hearing.

At the time this report goes to press the court has completed the hearing on 21 additional claims, and by a majority of the court it has dismissed 4 other claims against school boards for lack of jurisdiction, making a total of 25 claims on which no opinions have as yet been filed. It is expected that opinions on these claims will be filed in time for consideration by the 1943 Legislature.

SPECIAL RECOMMENDATIONS OF THE STATE COURT OF CLAIMS ON RELEASES, ADMINISTRATORS AND GUARDIANS IN RELATION TO AWARDS MADE AND COVERED BY THE OPINIONS HEREIN REPORTED.

The State Court of Claims of West Virginia in each particular case where an award was approved during the period embraced by this report, and covered by the opinions herein reported, also made the following special recommendations to the Legislature and to the state agencies with respect to all such claims wherein awards were made:

1. That before final payment shall be made of any award for which appropriation may be made and payment authorized by the Legislature the claimant shall be required to execute a duly authorized release, releasing the state of West Virginia and the state agency concerned from all other and further demands or liability of every kind whatsoever in relation to the claim made and the matters particularly set forth in said claim, and that said payment shall be in full and complete settlement of said claim; and that such release shall be delivered to the state agency concerned or the agency authorized by the Legislature to make and deliver payment thereof, at or before the time said payment is made and delivered.

2. That, in addition to the recommendation in section one, in all cases where the claimant is a duly appointed administrator or administratrix of the personal estate of a deceased person, such personal representative, before being entitled to receive payment, shall be required to file with the state agency concerned, or the state agency authorized by the Legislature to make and deliver payment, evidence that a bond as such administrator or administratrix has been given and approved by the proper county court in an amount at least equal to the amount of said payment authorized to be made.

It is contemplated that this recommendation shall also apply to cases where the claimant may have died since the making of the award and the appointment of an administrator or administratrix has become necessary in order to receive such payment as may be authorized by the Legislature to be made.

3. That, in addition to the recommendation in section one, where the claimant is an infant, the guardian of such infant before being entitled to receive such payment as may be authorized by the Legislature to be made, shall be required to file with the state agency concerned or the agency authorized by the Legislature to make and deliver such payment, evidence of his or her appointment and qualification as such guardian and evidence that bond in at least an amount equal to the amount of the payment so authorized to be made has been executed and approved by the proper county court.

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

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(Nos. 6, 7, 8, 9, 14, 23 and 25—Claims dismissed.)

ALFRED TAYLOR, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

R. L. SHELTON, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

M. A. MULLINS, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

E. B. PATTON, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

CHARLES EARY, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

J. E. JONES, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

ED BEAVER, Claimant, v. WORKMEN'S COMPENSATION COMMISSION, Respondent.

Opinion filed October 24, 1941

JURISDICTION. The juridsiction of the state court of claims does not extend to any claim for a disability or death benefit under chapter 23 of the code of West Virginia governed by the workmen's compensation commission.

Filed in August and September 1941 and court declined to docket same at special term September 23, 1941.

Appearances:

Eston B. Stephenson, Esq., special assitant to the Attorney General, and *T. C. Townsend,* Esq., for the state.

WALTER M. ELSWICK, Judge.

The facts set forth in each of these seven claims show that each of these claimants request the court to reopen a state compensation claim embraced within the provisions of chapter 23 of the code of West Virginia, and these claims are considered together. Chapter 20, section 14 of the acts of the Legislature of 1941, code chapter 14, section 14, provides that the jurisdiction of the state court of claims shall not extend to any claim for a disability or death benefit under chapter 23 of the code of West Virginia dealing with workmen's compensation claims as well as providing for remedies thereunder. All of these claims falling within the remedial provisions of chapter 23 as appears from the facts stated in the petition of each of said claimants the court finds that it does not have *prima facia* jurisdiction and declines to docket for hearing each of said claims, and it was so ordered.

(No. 1—James E. Brown awarded $4,000.00; James E. Brown, Adm., awarded $2,000.00.)

JAMES E. BROWN, in his own behalf, Claimant, and JAMES E. BROWN, Adm. of the estate of Roxie M. Brown, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 12, 1941

ACT OF GOD. Testimoney shows that the injuries complained of were caused by negligence and the lack of reasonable care in carrying on the road operations at the point or place where the accident occurred, and consequently could not be attributed to an act of God.

An act of God is a direct, violent, sudden or irresistible act of nature which could not by the exercise of reasonable care and diligence have been avoided or resisted.

Joint claim No. 1, filed October 11, 1941.

Appearances:

Messrs. *Watts & Poffenbarger (L. F. Poffenbarger*, Esq. and *Roy S. Sams, Jr.*, Esq.), for the claimants;

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

CHARLES J. SCHUCK, Judge.

This is a joint claim filed by James E. Brown in his own right and James E. Brown as the administrator of the estate of Roxie M. Brown, deceased, in which the joint claim as presented asks for remuneration in the sum of $15,000.00 by reason of an accident occurring on route 60 near Cedar Grove in Kanawha county, West Virginia, on the 17th day of March 1932.

It appears that James E. Brown, who had been employed by the state road commission for some time previous to the accident, was driving with his wife in an automobile between seven-thirty and eight o'clock on the evening of March 17, 1932, and on the said route 60, from a grocery store at Cedar Grove to his home located in Shrewsbury; that while driving on said highway as aforesaid and while passing a certain point on said highway near a deep cut in the mountainside, a boulder, estimated as weighing from sixty to seventy tons, slid or fell from the said mountainside crushing the claimant's automobile, causing injuries to the claimant's wife, from which she died several hours afterwards, and causing him severe and critical injuries necessitating his confinement in the hospital at Montgomery for a period of one month, and subsequent treatment under the care of the physician in charge of said hospital for a period of one month, and subsequent treatment under the care of the physician in charge of said hospital for a period of about eleven months thereafter. By the said accident the claimant, Brown, sustained, among other injuries, a

compound fracture of the skull, the fracture of several ribs, a hemorrhage in the left lung, a hemorrhage in the knee cap of the left leg, which leg was badly crushed, the tearing of the ligaments of the said leg, and other injuries, all of which tended to put the said claimant in a critical condition as shown by the testimony of the physician in attendance. To these claims the state road commission maintains that the falling of the rock, or boulder, was not occasioned by the negligence or lack of reasonable care on the part of the said road department, or any of its duly appointed employees or servants, and could therefore be attributed to an act of God.

This then is the question that concerns us at the very outset of the consideration of this record in determining whether or not the claimants are entitled to any award.

A careful reading of the record of the case shows that the rock in question was suspended at the height of some ten or twelve feet above route 60 on a grade or cut which was inclined approximately forty-five degrees, in a shale formation and that the road commission was called upon frequently, previous to the time of the accident, to clear a ditch which had been constructed beside the highway and some three or four feet therefrom and which ditch, about three feet in width and from twelve to eighteen inches in depth, ran along the toe or foot of the embankment, cut or mountainside, on which the said rock or boulder was lodged or suspended. (Record pp., 79—86, Peters 99-103, Shaffer 120-124). The testimony tends to show further that several employees of the state road commission considered the rock dangerous and hazardous to persons using the highway in question, and that on one occasion at least, as shown by the testimony (record pp. 73-93) of the witness, P. H. Hackney, a former road commissioner employee in charge of equipment, he called the attention of the maintenance foreman employed by the state road commission to the hazardous condition surrounding the suspension of the rock or boulder on the mountainside in question. This witness, as shown by the record in page 95, considered the rock dangerous and especially so in view of the type of formation upon which

it was sitting or lodged, which formation was of a shale composition and in the judgment of the said witness constantly sliding and slipping and undermining the foundation of the rock in question. The opinion of this witness is supported by other witnesses working for the commission at the time of the accident and at the place where the accident occurred. See the testimony of the witnesses Peters and Shaffer already referred to. C. B. Holsclaw, a licensed and qualified civil engineer, and acquainted with the geological formation of the mountainside where the accident happened and who had worked at that particular place and taken cross sections of the hill in question, gave it as his opinion that the cutting away of the toe of the hill caused the boulder or rock to slip onto the said highway. (See record pp. 134-144). The record otherwise shows that employees engaged in their work at the time and place where the accident happened appreciated the hazardous and dangerous condition that existed and frequently discussed the matter among themselves, all of which tended to show that the position of the rock and the formation upon which it rested were of such a type and character as in their judgment to make it highly dangerous to pedestrians and persons passing along or using the said highway at the place where the accident happened.

Under these circumstances and testimony, which seem to be uncontradicted, can the falling or slide of the rock or boulder be attributed to an act of God? We understand an act of God to be a direct, violent, sudden and irresistible act of nature which could not by any reasonable care have been foreseen or resisted.

There was, of course, so far as the record reveals, no direct, violent, sudden or irresistible act of nature, but on the other hand several witnesses have testified, as shown by the record, that there was an almost constant crumbling of the shale formation which was the foundation upon which this rock rested and which crumbling frequently filled the ditch in question with shale, stone and dirt and frequently required the attention of the state road commission or its employees in keeping the said ditch clean in order that the water might be properly

drained from the said mountainside and carried to One Mile creek a short distance away. The hazardous and dangerous condition of the rock, as shown by the record, was appreciated by several of the witnesses who have testified, as shown by the testimony of Charles Shaffer, a former road employee (record pp. 119 to 127); the employees were familiar with the condition presented; that it was a shale formation; that the rock was loose; that in February, 1932, a month before the accident, the ditch in question had again been cleaned immediately under the rock, all of which cleaning and clearing of debris in the ditch had tended to undermine the foundation causing it to slide and fall onto the highway.

In view of this and similar testimony there could be no sudden or irresistible act of nature which would cause the accident and which could not have been avoided by the use of reasonable care on the part of the department in question in removing the said rock and thus eliminating the danger to those passing along the highway at the place where the accident happened.

We are of the opinion in this connection that the testimony and evidence as revealed by the record shows conclusively and without contradiction that the accident was caused by the failure to remove this rock or boulder when it was known to be hazardous and dangerous, and when by reason of the constant falling of the shale and soil foundation it was liable at any moment to fall or slide into and upon said highway and cause damage or injury to anyone who might be passing at the time of said slide or fall. Having disposed of this question the next and important feature of the claim is as to the amount that is to be awarded the claimants for the loss and damage they may have sustained.

As already indicated the claimant, James E. Brown, was critically injured and required medical attention both in the hospital and out of it for a year after the time of the accident, while his wife, who was riding with him at the time, died within a few hours after the accident by reason of the injuries received.

It is true that the road commission employed the claimant, Brown, for some five or six years from and after the spring of 1933 for which he (Brown) was paid approximately $4,800.00, and it is likewise true that at a session of the state Legislature, 1934, the amount of $569.70 was awarded the claimant, Brown, to pay for his wife's funeral expenses as well as hospital and medical care, and medicine which was required in his own treatment. At least so far as the record reveals this was the distribution made of the amount appropriated by the Legislature. In making our award we have, of course, considered these matters.

The testimony shows that Brown was paid the usual wages of those of his own class at so much per hour for the hours worked and that he rendered services for the amount received during his employment by the road commission from 1933 to the time of his dismissal therefrom. It also appears that on several occasions the claimant, Brown, has appealed to the Legislature for remedial legislation in the shape and form of an appropriation which would compensate him for the loss of his wife and the injuries sustained by himself, and that in each instance, except the amount which has already been herein set forth, the Legislature refused any further award. Since these applications, however, the claimant, Brown, has had his leg amputated, which operation took place in March 1941 (being the present year). Both Dr. Stallard, the physician who first attended him immediately after the accident and who continued his services for nearly a year thereafter, and Dr. Claude B. Smith, the doctor who performed the actual amputation, testified, as shown by the (record pp. 52 to 58 and 104 to 107) that the amputation was occasioned and made necessary by reason of the injuries following the accident; however, an ulcer which had been present on the leg in question of the claimant before the time of the accident, superimposed itself and the condition of the said ulcer aided in bringing about the necessity for the amputation. What percentage or what division of responsibility may be attached to these various physical conditions is not shown by the record and we can simply make our own deductions as to the part that was played by the pres-

ence of the ulcer in causing the amputation. We are of the opinion, however, that the ulcer, which seemed to be aggravated, progressive in its nature, was of the class that would become serious to the health of the said claimant and no doubt contributed in a large degree to bringing about the physical condition which necessitated the amputation of the leg. For this condition and situation, of course, the state road commission would not be responsible. However, the condition of the claimant's skull is such that headaches are frequent and he bears a large indentation on the forehead which the physicians in charge testified he would always have and which was caused by the operation necessary to relieve the pressure on the brain and the brain tissues caused by the injuries in question. Another element that enters into the matter of the amount of the award is the fact that the testimony shows (record at page 70) that the automobile in which the claimant and his wife were riding at the time of the accident was completely demolished and that it was worth about twenty to fifty dollars as junk when turned into the automobile repair agency shortly after the accident. The automobile had cost $517.00 two months previous to the date of the accident, March 17, 1932, and allowing for depreciation we still are of the opinion that the claimant sustained a loss of approximately $400.00 in this regard by reason of the accident.

There were no minor children dependent on the wife at the time of her death. So far as the record reveals no children had been born to the claimant, Brown, and the wife who was killed. They were in humble circumstances, with the claimant, Brown, earning at times as high as $120.00 per month, but we feel that a fair deduction from the testimony would indicate that his average income extending over a period of years would be seven or eight hundred dollars a year. The record does not show any loss of love or affection on the part of the children of the wife, Roxie M. Brown; in fact their whereabouts or addresses are not definitely known and none of them appeared before the court in support of the claim filed on behalf of their mother's estate. Under these circumstances, feeling that the evidence warrants and impels an award to the Roxie M. Brown

estate, by reason of her wrongful death, we fix the amount of said award at two thousand dollars ($2,000.00) and recommend that the said sum be duly appropriated and paid to the administrator of the estate, upon the signing and execution of a proper release, relieving the state from any further liability or claim of any kind to the said Roxie M. Brown estate, by reason of the accident in question.

In the matter of the individual claim of James E. Brown, we feel that an award of four thousand dollars ($4,000.00), including the loss of the automobile, would be proper and adequate to compensate him for all injuries sustained, and we so find.

Judges Robert L. Bland and Walter M. Elswick both concur.

(No. 3—Claimant awarded $40.00.)

ARNOLD L. MARTIN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed November 12, 1941

Award for damages for injuries to an automobile driven and occupied by the claimant while driving on the highway from Lockbridge toward Elton, in Summers county, West Virginia, and near what is known as Elton Mountain, and caused by a slide rushing in and upon the said automobile and causing damages thereto.

Appearances:

Arnold L. Martin, in his own right;

Eston B. Stephenson, Esq., special assistant to the Attorney General, on behalf of the state road commission.

CHARLES SCHUCK, JUDGE.

This claim was duly filed with the court, asking that claimant be reimbursed in the amount of $75.00 for damages to his automobile, while being driven on the highway referred to above and occasioned by a slip or slide suddenly falling from the mountainside. No claim for personal injuries is made and apparently no such injuries of any consequence were suffered by the claimant, as shown by the record pages 11-12-13-14.

The special assistant attorney general announced at the beginning of the hearing of the case that in the matter of the claim in question an agreement had been reached between the claimant and the state road commission by virtue of which the claimant was to be paid the sum of $40.00 in full settlement of any and all claims of any kind that he may have against the state or the state road commission by reason of the said accident. The said amount to include not only property damages but as well any injuries that he may have personally suffered by reason of the said accident. The claimant also informed the court that he was willing to accept the aforesaid amount in full settlement as indicated, and having been duly sworn and having described fully by his testimony, the circumstances surrounding the accident, the damage to his automobile and all other facts necessary to prove his claim, and the attorney general recommending the settlement as agreed upon by the parties hereto, as shown by page 14 of the record, the court after due consideration is of the opinion that the said amount of $40.00 is a just and adequate settlement in full satisfaction of any claims of any kind or character that the claimant may have against the state or the state road commission, either for property damage or personal injuries occasioned by the accident referred to.

It is therefore recommended that the Legislature make an appropriation in the amount of forty dollars ($40.00), payable to the said Arnold L. Martin, upon the signing and execution of a full release by him to the state of West Virginia and the state road commission.

(No. 15—Claimant awarded $100.00.)

HARRY (HARRISON) FIELDS, Claimant

v.

STATE ROAD COMMISSION, Respondent

Opinion Filed November 12, 1941

Award for the loss of a mule caused by the said animal falling into an unprotected pit previously used as a toilet, and under the control of the state road commission at the time of the accident, and located on a certain right-of-way owned and controlled by the said road commission at and near Lenore, Mingo county, West Virginia.

Appearances:

Eston B. Stephenson, Esq., special assistant to the Attorney General, and *J. H. Feingold,* Esq., of the state road commission.

CARLES J. SCHUCK, Judge.

The claimant and the representative for the state road commission made known to the court at the time the above claim was called for hearing that an agreement had been reached by virtue of which the amount of $100.00 was fixed as the value of said mule, and which amount the claimant represented he would accept in full settlement of any and all claims he had against the state or the state road commission by reason of the above occurrence. After hearing the statement of the special assistant attorney general, and as well the statement of the representative of the state road commission, the court finds that the pit or excavation in question and heretofore used as a toilet by the workingmen engaged in the road improvement near Lenore, in Mingo county, was unprotected, the building or structure erected thereon having been removed before the time of said accident, and that the sum of one hundred dollars ($100.00) is just and adequate, and so finds, and makes its recommendations that at the next session of the legislature the amount of one hundred dollars ($100.00) be appropriated for the use and benefit of the said Harry (Harrison) Fields, and be

paid to him upon the signing and execution of a full and complete release to the state and the state road commission by reason of the accident herein referred to.

(No. 12—Claims denied.)

HAROLD R. HARPER, and NELLIE M. HARPER, his wife, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed November 24, 1941

An award will not be reommended in a case where it appears from the evidence that the claimant has not heeded warnings and circumstances attendant to the hazards of travel on a highway being repaired by state road employees in the application of tar and slag, and has failed to exercise ordinary care and caution for the safety of himself and fellow travelers upon the highway, and where it is found from the evidence that the state road employees were exercising due care and caution in the performance of their work as well as to warn travelers of the hazards of travel attending the work being done.

Appearances:

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

Eston B. Stephenson, Esq., special assistant to the Attorney General, for the state, and *J. H. Feingold*, Esq., of the state road commission.

WALTER M. ELSWICK, Judge.

The claimant, Harold R. Harper, accompanied by his wife and brother-in-law, was driving on state route 250 a short distance after leaving the town of Hundred, on August 7, 1941, when he came to a portion of the road that was being tarred

and slagged by state road employees. Before coming to the tarred portion of the road he passed, as the evidence shows, a sign "fresh oil" and a sign "men working" with a state road metal flag on top of same. And before entering the tarred portion of the road he came to a spreader box used in spreading road materials where a flagman was standing and who flagged him to a stop or slow down. It would appear from the evidence that this spreader box was located a distance of from 300 feet to 500 feet back from a narrow bridge in the direction of his travel. (Darrah record p. 100, Wiedebusch record p. 109). There was also a sign "one way bridge" on the right side of the road near where the spreader box was standing. (Weidebusch record p. 109, Phillips record p. 60).

There is a conflict in the testimony as to whether the flagman indicated by a signal for him to drive on, but at any rate claimant continued to drive on past the flagman and spreader box with his car in high gear until he reached the tarred portion of the road where he continued on in high gear as he testified, at the rate of about fifteen miles per hour, to a point where he skidded and collided head-on into another car coming from the opposite direction, owned and operated by John Grandon, at the end of said bridge, the impact of the two cars causing the damages complained of. Grandon testified that the Harper car, in his opinion, was being driven at a speed of from twenty-five to thirty miles per hour when it hit his car.

The Grandon car was being driven over the bridge and had been slowed down to almost a stop at the time of the collision. Tar had been spread on the right side of the road from this bridge some distance toward the spreader box and the Harper car was then being driven on Harper's left side of the road which would have been in the pathway of the Grandon car.

This collision occurred while the sun was shining in the afternoon with clear vision and an unobstructed view of the attendant circumstances. One witness (O'Leary record p 88) testified that one could have seen the Grandon car coming as far back as one tenth of a mile or better. Harper could have

seen the Grandon car before it came to the bridge. (Phillips record p. 61). The claimant beyond question was put on notice that the road was being tarred and that due care and caution should be exercised in traveling thereon, as well as to keep a lookout for cars approaching from the opposite direction.

Soon after the collision occurred the claimant admitted that the collision was due to his fault and agreed to settle the damages to the Grandon car. (Record pp. 18, 73, 82, 83 and 85).

There was evidence adduced that there was a berm on each side of the road of sufficient width to have enabled the two cars to pass practically all the distance back from the bridge to the slagged portion of the road. The Harper car was pushed out of the road onto the right berm of the road after the collision. (Darrah record p. 104). Only one side of the main roadway between the spreader box and bridge had been tarred. (Record pp. 57, 64, 73, 100). The road was twenty feet wide and tarred portion eight feet wide. (Record p. 88).

While there is some conflict from the testimony as to the width of the berm on each side of the main traveled portion of the road and as to whether or not the claimant could have driven outside of the tarred portion and either come to a stop or passed the other car, it appears from the evidence that the claimant could have either come to a stop when he saw, or should have seen, the approaching car or pulled over on the berm of the road and stopped to let the other car pass; that under all the circumstances in the case the claimant was not exercising ordinary care and caution in keeping his car under control when his car skidded on the tarred portion of the road, causing the damages incurred. He owed this duty not only to himself, but to fellow travelers and employees who may be upon the highway. It appears from the evidence that the state road employees were exercising due care and caution in the performance of their work, as well as to warn travelers of the hazards of travel attending the work being done, and that the work was being done in a careful manner, and as was usual in the neighborhood; that the collision occurred by reason of the

claimant's failure to exercise due care and caution to keep his car under control required under the attendant circumstances of the case. The failure of the claimant to exercise such care was the direct and proximate cause of the collision.

The state is not an insurer as to the condition of its roads and highways, nor as to the acts of its agents and employees. The claimant was not found to be entitled to recover damages based upon the evidence, and no award is recommended by the court.

(No. 16—Claim denied.)

DEL BALSO CONSTRUCTION CORPORATION, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion Filed November 26, 1941

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.

Appearances:

David Biasotti, Esq., for the claimant;

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

WALTER M. ELSWICK, Judge.

In this case the claimant, Del Balso Construction Corporation, filed a claim for refund of $133.65 for taxes paid on gasoline purchased during the month of May 1941 used as a motor

fuel for diesel engines not operated upon the public highways or streets of this state. It appears from the evidence that no claim for refund was filed with the state tax commissioner within sixty days from the date of purchase or delivery of the same, the most recent purchase and delivery having been made approximately sixty-three days prior to date of filing for refund. The state tax commissioner refused to make payment of refund for the reason that application for refund had not been filed within the sixty-day period as provided by chapter 11, article 14, section 20 of the code of West Virginia, as amended and reenacted by acts of the legislature 1939, chapter 124.

The right to receive a refund of taxes in certain instances where the gasoline purchased is not used in motor vehicles upon the public highways or streets of this state is given to the user under said section 20, article 14, chapter 11 of the code as reenacted by acts of 1939, chapter 124, which provides for a refund of tax on gasoline used for certain specific purposes to be made by the state tax commissioner, conditioned on application being filed, by the person using same, with the tax commissioner within sixty days from the date of purchase or delivery of the gasoline, which specific uses are set forth in the present statute as follows:

> "Any person who shall buy in quantities of twenty-five gallons or more, at any one time, gasoline as defined by this article, for the purpose of and the same is actually used (a) as a motor fuel for diesel engines not operated upon the public highways or streets of this state, or (b) as a motor fuel to operate tractors and gas engines or threshing machines for agricultural purposes, when such operation is not, in whole or in part, upon the public highways or streets of this state, or (c) as a motor fuel to operate aeroplanes or other aircraft, or (d) by any railway company subject to regulation by the public service commission of West Virginia, for any purpose other than upon the public highways or streets of this state, or (e) in the business of manufacturing, or in the production of natural resources, either as a motor fuel or for any other purpose except upon the public highways and streets of this state, or (f) as a cleaning fluid in any laundry or

> dry cleaning business, or (g) as a motor fuel in motor boats or other water craft operated upon the navigable streams of this state, may, if the gasoline tax imposed by this article shall have previously been paid upon such gasoline, be refunded a sum equal to the amount of such tax, upon presenting to the tax commissioner an affidavit, . . . 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 commissioner . . . within sixty days from the date of purchase or delivery of the gasoline."

The claimant asks this court to make an award with recommendation that the Legislature direct refund of this amount paid and to disregard said section 20 of article 14, chapter 11 of the code as amended and reenacted by chapter 124 of the 1939 acts of the Legislature.

To determine such right of the claimant on its contention herein it is necessary to observe the apparent policy of the Legislature relative to refunds on gasoline in uses of this nature as will appear from an examination of the several changes made in the statute permitting refunds from time to time since the passage of the gasoline tax act and the adoption of the section relating to the refund provision now contained in said section 20.

The first act imposing an excise tax upon gasoline was chapter 34 of the acts of the Legislature of 1923, which insofar as it pertains to the imposition of the tax read as follows:

> "A state tax of two cents for each gallon, is hereby imposed on all gasoline sold in this state at wholesale as the words 'at wholesale' are hereinafter defined."

There was not any exemption as to any quantity, or use of the same provided for, nor was there any provision for refund made for any purpose in the 1923 act.

The 1923 act was reenacted by chapter 2 of acts of the Legislature of 1925, extraordinary session, which imposed a tax of three and one-half cents per gallon thereon upon every person

a distributor, retail dealer or importer under the terms of the act based on the quantities of all gasoline sold, purchased or used in this state, which act by section 17 thereof provided for a refund of tax paid on gasoline used for certain specified purposes, provided that application for refund was made as set forth therein, as follows:

> "Any person who shall buy, in quantities of twenty-five gallons or more at any one time, any gasoline as defined in this act for the purpose of, and the same is actually used for operating and propelling boats, tractors used for agricultural purposes, or who shall purchase and use any of such gasoline for cleaning or dyeing or other commercial uses, except in motor vehicles operated, or intended to be operated in whole or in part upon any of the public highways, streets or alleys of this state, which gasoline shall have been previously included in the measure by which the excise tax imposed by this act is determined, shall be reimbursed and repaid a sum equal to the amount of such tax, upon presenting to the tax commissioner an affidavit . . .; provided, that application for refund as provided herein must be filed with tax commissioner within sixty days from the date of sale or invoice, on forms prepared and furnished by the tax commissioner, or not at all."

Said chapter 2 of the 1925 acts was reenacted by chapter 18 of the 1927 acts which enlarged the classifications prescribing uses of gasoline on which refunds were permitted but retained a proviso requiring that application for refund should be made within sixty days, which refund provision of the 1927 acts was adopted by the official code of 1931 as chapter 11, article 14, section 20, and then appeared as follows:

> "Any person who shall buy, in quantities of twenty-five gallons or more at any one time, any gasoline as defined in this article, for the purpose of, and the same is actually used for, operating and propelling boats, aeroplanes, tractors used for agricultural or other purposes, road rollers, steam shovels, compressors, pumps, stationary gas engines, threshing machines or other gasoline-operated machinery, except motor vehicles; or who shall purchase and use such gasoline for cleaning

> and dyeing or for manufacturing or other commercial uses, except in motor vehicles, which gasoline shall have been previously included in the measure by which the excise tax imposed by this article is determined, shall be reimbursed and repaid a sum equal to the amount of such tax, . . .: Provided, That the tax commissioner shall cause refund to be made under authority of this section only when application for refund, as herein provided, is filed with the tax commissioner, upon forms prepared and furnished by the tax commissioner, within sixty days from the date of purchase or delivery of the gasoline: . . ."

By chapter 110 acts of the Legislature 1937, said section 20 was reenacted and so limited as to exclude any provision for a refund of tax on gasoline used for any purpose except when the same was purchased "for the purpose of and the same is actually used for, operating and propelling tractors and gas engines used for agricultural purposes and threshing machines, . . ." This act reenacting said section 20 contained the same proviso that the tax commissioner shall cause refund to be made only when application for refund is filed with the tax commissioner within sixty days from the date of purchase or delivery of the gasoline.

Under the limited user classification of the 1937 act no right was given to receive a refund for taxes on such uses made of gasoline as the claimant had under the 1939 act of the Legislature in the instant case if application had been filed with the tax commissioner within the sixty-day period. A refund could be made under the 1937 act by the tax commissioner only on taxes on gasoline purchased for the purpose of and actually used for agricultural purposes and threshing machines without further exceptions and that done only when application for refund was filed with the tax commissioner within sixty days from the date of purchase or delivery of the gasoline.

However, said section 20 of the code (under which claimant seeks refund) was amended and reenacted by acts of the Legislature of 1939 chapter 124 as hereinbefore set forth to include the uses made of gasoline as in the instant case by the

claimant and to enable it to secure a refund 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 commissioner within sixty days from the date of purchase or delivery of the gasoline. It is further to be noted by this amendment that the uses of gasoline to entitle one to file application for refund are limited and specified under seven specific classifications and uses and does not include all stationary engines. The privilege of filing for and the right to receive a refund is personal with the person so using the gasoline, for the amendment provides:

> "The right to receive any refund under the provision of this article shall not be assignable, and any assignment thereof shall be void and of no effect. Nor shall any payment be made to any person other than the original person entitled thereto using gasoline as hereinbefore in this section set forth: . . ."

The right or privilege to receive any refund being conditioned upon the person entitled thereto to file application with the tax commissioner for refund within the sixty-day period specified in all the acts since and including 1925, permitting in such instances a right to claim refund, tends to show a definite policy of the Legislature to deny a right to receive a refund by provisions of general law when the person who might have been entitled to a refund failed to comply with the provisions of the statute granting such right, and no award can be recommended for a special act enabling the claimant to receive such refund in conflict with the provisions of the general law.

This view seems to be more convincing since the Legislature did not see cause, while from time to time reenacting this law, to permit all persons to receive refunds on taxes on gasoline not being used in motor vehicles on public highways or streets of the state, but has from time to time changed the classification as to the uses of gasoline for which claim could be filed.

In view of the foregoing changes of the law it is believed that the Legislature deemed the sixty-day period a reasonable one for all users of gasoline permitted to receive refunds under

said section 20 of the code, and that it is the policy of the Legislature to deny the right to receive same unless the person so using gasoline complies with the conditions required by the general law. Award denied.

(No. 34-S—Claimant awarded $50.54.)

WILLIAM H. ASPINIALL & COMPANY, a corporation, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed November 26, 1941

ROBERT L. BLAND, Judge.

Claimant, William H. Aspinall & Company, a corporation, seeks reimbursement for the sum of $50.54 which amount it was obliged to pay for the repair of one of its trucks which was damaged by a state road commission truck. The accident occurred about nine o'clock in the morning, on March 8, 1941. Claimant's truck was parked, facing west, in front of a grocery store on the right side of West Second street, in the city of Weston. State road truck 730-22, with a snowplow attached, was being driven by one of the employees of the state road commission, out of Depot street into West Second street. When the driver of the road commission truck turned east into West Second street he observed a car starting out from behind a parked truck on West Second street; and, in order to avoid what he thought might result in a collision, he drove the state road commission truck to the left of the street and ran into the front part of the claimant's parked car, thereby causing the damage for which said sum of $50:54 is asked.

The state road commission does not contest the claimant's right to an award for said sum, but concurs in the claim for

that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid.

We have carefully considered the case upon the record submitted, and are of opinion that it should be entered as an approved claim and an award made therefor.

We, therefore, make an award to the claimant, William H. Aspinall & Company, a corporation, in the sum of fifty dollars and fifty-four cents ($50.54), subject to the approval and ratification of the Legislature.

(No. 18—Claim denied.)

FRED S. PETERSON and COMMERCE INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 2, 1941

Where the evidence makes it purely speculative or highly conjectural as to whether or not a state driven truck operated by and for the state road commission caused the injuries and damages complained of, an award will not be made.

Appearances:

Dorr Casto, Esq., for the claimants;

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

CHARLES J. SCHUCK, Judge.

Claimants seek to recover damages for injuries to an automobile heretofore owned by the claimant, Fred S. Peterson, and insured by the said Commerce Insurance Company, the contention being that the said automobile was struck and

damaged sometime during the night or morning of December 20, 1940, while it was parked on Seventh street in the city of Parkersburg, in front of the home of the said Fred S. Peterson. It was a 1940 model of Plymouth make, a four-door sedan. Complainants seek to charge the state road commission with damages, alleging that early on the morning of said December 20, a road truck owned and operated by the said road commission negligently collided with the said Plymouth automobile causing the damages complained of, severely injuring the automobile and scattering the contents of the rear or turtle back of the car in and upon the said street on which the automobile was parked. From the evidence it seems to have been a rainy, dreary morning with visibility poor and at a time when automobilists on the street in question were not yet aided with the natural daylight but had to rely on the street lights to guide and protect them. The evidence clearly shows that there were at least two collisions with the said Plymouth car, one by another Plymouth car, owned and operated at the time by one Ed Van Camp, and the other by the state road commission truck in question.

Considering first the case as submitted by the claimants nowhere is it revealed that any testimony was presented on their part upon which an award could be based or a recommendation made by the court so far as showing any negligence on the part of the employee (driver) of the state road commission. The claimant, Peterson, did not see the collision, nor did he hear the noise or sound made by any impact; he was awakened by his family, and shortly afterward made his appearance on the street to learn, if possible, the details of what happened so far as the collision with and damages to his car were concerned. The only other witness testifying for the claimants was unable to identify the truck and failed to place any responsibility on the driver thereof; she heard two distinct noises which she concluded had been made by collisions of cars, the first of which was the loudest; and she testified further that the first crash to which her attention was attracted could have been the impact sufficient to drag claimant's car upon and across the terrace on the said street, and some

twenty feet away from the Peterson home (record pp. 36-37). That there were two collisions is shown by the evidence; the first by the car known as the Van Camp automobile, and the second, at least a slight collision involving the state road truck in question. It must be reasonably assumed that the first collision was by the Van Camp car. If this be true, and damages were caused by this first crash, then under no circumstances could the state road commission be held for any improper or negligent operation of its truck; and if the said first crash was sufficient to drag the said Peterson car over and upon the pavement and some twenty feet away from the Peterson home, then again, the state road commission could not be held, since this impact and dragging of the car would no doubt be sufficient to inflict the damaged alleged.

After these impacts or collisions both the driver of the Van Camp car and the state road truck returned to the place of the accident. It was then found that the Van Camp car as shown by the testimony of Peterson himself (record p. 8) was damaged to the extent of having the right fender bent as well as having the rear bumper torn loose, all of which would tend to show that there had been a rather severe impact between these two cars. Immediately upon the return to the scene of the accident of persons involved, with the exception of Peterson himself but including police officials of Parkersburg who had arrived on the scene, they made what they deemed a careful, thorough investigation and searched for any marks or scratches or any other evidence that would be shown on the truck and which would indicate that it had had a collision with the Peterson car in question. No marks, indentations, or even scratches were found, save only that there was a dry spot on the rear right tire where that part of the truck had come in contact with the Peterson car. Considering the severity of the injuries to the Peterson car and the apparent force of the impact or collision that caused the injuries and damages, we are of the opinion that the state road truck could not have caused the said injuries and consequently could not have caused the said damages, and that if it had been involved some marks or indentations, or at least scratches, would necessarily have been

found somewhere on the said state road truck. An attempt was made by the testimony of Peterson to show some evidence of yellow paint particles being mixed with the grey of the Peterson car which, as Peterson himself testified, was found a day or two after, while his car was in the garage. We are of the opinion that if such a condition existed the yellow paint (the truck having been painted yellow) did not come from the truck in question, since there was no mark or indentation of any kind on the bumper of the truck. The bumper was silverized or of nickel and not painted yellow, and, therefore, any collision with the truck bumper could not have left yellow particles of paint on the Peterson car, to be noticed several days after the accident. If any other part of the truck had struck the Peterson car, by reason of which there could be particles of the yellow paint imbedded in the color of the Peterson car, then surely there would have been some marks or abrasions of some kind on the truck in question showing that it had collided with the Peterson car and caused the injuries complained of. No such marks or indentations or even scratches could be found, notwithstanding the examination referred to and made not only by the truck driver and the driver and occupant of the Van Camp car, but especially so by the police officers of the City of Parkersburg, and to which one of said officers testified.

We appreciate that the testimony shows that the road truck was very closely following the Van Camp car at the time of the collision between the Peterson car and the Van Camp car, perhaps too close for safety, but cannot conclude from all the circumstances that the road truck was being driven in such a manner as to be the proximate cause of the injury.

Under all of these circumstances the testimony is purely speculative and we would be carried into the field of guess and conjecture if we were to determine that the driver of the state road truck was responsible for the damages complained of and the injuries inflicted to the Peterson car. This position, of course, is impossible for us to assume in determining whether there was any negligence on the part of the truck driver, and therefore we hold that no award should be made.

(No. 22—Claimant awarded $4,000.00.)

CLARENCE R. ATKINSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 2, 1941

1. Where the evidence shows that claimant, who was employed on a road project in Preston county, was paid for his services by the Federal Government, but was working under the control, supervision and direction of a foreman or supervisor of the state road commission, he is not a fellow servant of the said foreman or supervisor and cannot be treated as such in the instant case.

2. In view of the apparent reasons and purposes for the creation of this court as manifested by the Legislature in the act creating it, the court does not concede that the fellow-servant rule as formerly understood or construed by the courts will govern it in determining claims submitted to it for decision; and therefore holds that the decision in the case of *Corrigan* v. *The Board of Commissioners of Ohio County*, 74 W. Va. 89, and relied upon by the state in its motion to dismiss, cannot control in deciding the merits of this claim.

3. In our opinion the evidence fails to reveal any contributory negligence on the part of the claimant and therefore, this defense is not sustained.

Appearances:

L. V. Everhart, Esq., and *Frank B. Everhart*, Esq., for the claimant;

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

J. H. Feingold, Esq., representative of the state road commission.

CHARLES J. SCHUCK, Judge.

In August 1934 the claimant, Clarence R. Atkinson, was employed on a road Project in Preston county whereby it was

sought to improve a certain road between Terra Alta and Cranesville, and which work, by reason of the stony and rock foundation and formation, necessitated the use of dynamite for blasting purposes. The men employed on the project were paid for their labor by the Federal Government but were under the direction and supervision of foremen or bosses employed and paid by the state road commission. The testimony shows that the handling of the dynamite, which was under the control of one of the said foremen, was carried on in a reckless and negligent manner, was exposed along the roadside in open containers, was handled by different persons, and at times sticks of dynamite were allowed to lie along the roadside previous to being used for blasting purposes. The claimant among other duties was called upon to drill holes in the rock formation in which the sticks of dynamite were afterward inserted and then exploded, in order that the stone or rock could be more easily removed from the bed of the road in question preparatory to preparing said road for the improvement contemplated. It was when drilling one of such holes that an explosion occurred by reason of which the claimant was permanently blinded and sustained other severe injuries from which he still suffers at the present time.

The road operation in question was carried on by drilling the holes, then filling them with the necessary dynamite, to which wires were attached, which wires in turn were attached to a battery and through the manipulation of the battery an electric current was communicated to the dynamite, causing an explosion and shattering the rock for the purposes of removal. The testimony also shows that during this operation, traffic was allowed to go over the road at times under highly dangerous conditions when the dynamite had already been inserted in the holes and just before an intended explosion.

On the day on which the accident happened it had been raining to such an extent as to interfere with the work of the men employed, and during one of the rainfalls in the morning of that day it was concluded by the foreman in charge of the work that the men employed could eat their noonday meal and then

return to their work after the rain had ceased. During this interim it seems that the rain had washed sand and dirt into the holes already partially drilled, filling them to some extent and causing cleaning and further drilling to properly prepare them in order that the dynamite could be inserted and exploded for the purposes intended.

The evidence shows that the foreman on the work, one Matheny, and employed by the state road commission designated a certain hole to be drilled deeper after the rainfall, and ordered the claimant to do the drilling, in the process of which the claimant was injured as herein stated; during the period when the men employed were resting or eating at or near noon and before the drilling of the hole was resumed, some one had carelessly and negligently inserted the dynamite in the said hole, and without any notice to the claimant at the time he began to drill it deeper, in accordance with the order of the said instructions given him by the said foreman Matheny. Matheny was in full charge of this work, and, consequently, charged with the duty of knowing that the hole in question did not contain any dynamite likely to explode at the time he ordered the claimant to drill the hole deeper.

The state contends that Matheny was a fellow servant or a fellow employee of the claimant and therefore it could not be held responsible for any injuries caused to claimant by reason of the negligence and carelessness of the said Matheny in charge of the said project. We cannot agree with this proposition since the claimant was paid wholly by the Federal Government and not by the state road commission; and since his work seemingly was under the absolute control and supervision of the foreman, Matheny, who stood in a superior position as compared to the claimant and who (Matheny) was paid for his service not by the Federal Government but by the state road commission. The evidence also shows that the men employed on the project and in the same status as the claimant could be and were ordered from one part of the project to another by the said foreman as he would see fit to direct; and no doubt a failure to comply with such orders and directions would have meant dismissal from work.

The hole in question was drilled under the supervision of the foreman, Matheny, and then was marked by him for further drilling, and under his specific instructions, claimant proceeded to drill said hole deeper. The evidence shows that this particular work had theretofore been carried out by one Sines, but that he was not working on the project on the day in question, and the only inference that can be drawn from the testimony is that the foreman himself inserted the dynamite in the said hole and for the time being forgot about such action when he ordered it to be drilled deeper by the claimant. In any event, in view of the fact that this part of the work was carried on under the personal supervision of the foreman, whether he actually inserted the dynamite or not, he would be responsible for the condition presented at the time he ordered the claimant to do that particular kind of work. To give this order without the proper inspection to ascertain whether the hole in question could be drilled deeper without any harm or injury to the claimant was negligence; and as herein indicated, since the said foreman was not in any sense a fellow servant of the claimant, the latter would not be bound by the rules sought to be invoked as a defense by the state.

A careful reading of the act creating this court, as manifested by the Legislature, undoubtedly shows that the intent of the Legislature was that the narrow interpretation as formerly used in connection with the employment of fellow servants was not to control or govern, and that in considering a claim for an award this rule, as formerly invoked, was not to be carried into effect. Rather, it would seem, a more liberal construction was to be given where fellow servants were involved, consistent, however, with the moral rights of all parties, including the state or any of its agencies.

Realizing the fact that in many instances innocent servants were injured by reason of the carelessness and negligence of a fellow servant with whom they were obliged to work and labor, and over whom they had no control, the Legislature in its wisdom passed the workmen's compensation act by virtue of which a fund is now provided for the relief and assistance of

injured employees; and providing that the individual employer must make certain payments into a fund to take care of such cases and providing further that if the employer does not take advantage of the privileges thus afforded by the provisions of the act, he is barred from interposing as a defense to any action for injuries the so-called common law defense, including the fellow-servant defense. Should the state compel an individual employer to take these steps to protect himself and escape its own responsibility when injuries come to its own employees through the carelessness and negligence of another employee? It seems to us that unless the state specifically exempted itself or its various agencies by the provisions of the act creating this court, it should and must, in equity and good conscience be obliged to reasonably compensate an innocent or guiltless claimant for the negligence and carelessness of one who might be commonly termed a fellow employee of the injured claimant.

As indicated herein, however, we do not feel that the relation of fellow servant, as understood by the courts when laying down the rule heretofore governing, existed in the instant case.

We also fail to find anywhere in the record that the claimant was guilty of any negligence that contributed to his accident. Under the circumstances he had the right to assume, when ordered to drill the said hole deeper, that the foreman or supervisor on the work had taken all necessary and reasonable precautions to avoid an accident, and that he would not be ordered to work in a highly dangerous place without the proper steps being taken to protect him in such work. The claimant simply followed as a workman the directions of his superior, and by reason of such act was injured, as alleged in his petition asking for an award.

The claimant has heretofore been paid the sum of $3500.00 by the Federal Government, five hundred of which sum was used in the payment of his hospital, physicians' and doctors' bills, and other expenses incidental to his injuries, but has received no payment whatever from the state. It is true that he is a world war veteran, at present about forty-nine or fifty years

of age, and that he is receiving a pension of $30.00 per month for his support and maintenance. He has a wife and family of five children, the youngest of whom is eleven years of age at the present time. Owing to the condition brought on by his blindness, he has not been able to work since the accident. An effort has been heretofore made on several occasions to have the Legislature recognize the justness of his claim, and on several occasions, bills were introduced seeking to pay out of the state treasury to the claimant the sum of $3,000.00. These bills, however, for some reason never made much progress in the Legislature, and were never passed for payment by that body, and no appropriation made. No doubt the claim was not as fully developed as when presented before this court, and in view of the fact that a year has elapsed since the bill was introduced and that the complainant must wait until the next session of the Legislature before any award can be paid, we feel that our conclusion with reference to the amount is just and equitable.

Considering all of the circumstances and the fact that there is in work of this kind and character a certain amount of risk on the part of the employee, we feel that an award of four thousand dollars ($4,000.00) is proper, and we recommend to the Legislature that an appropriation be made accordingly for the benefit of the claimant, and that he be paid the said amount upon the execution of a full and complete release to the state road commission for any further claims or demands agains the state or state road commission by reason of the injuries complained of and suffered by the claimant through the accident.

(No. 26—Claimant awarded $125.00.)

EZEKIEL HOUCHINS, Claimant

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 4, 1941

ROBERT L. BLAND, Judge.

On the afternoon of October 22, 1937, a sorrel mare, aged seven years and weighing approximately twelve hundred pounds, owned by Ezekiel Houchins, of Huntington route No. 2, stepped through a hole in the floor of a wooden bridge loacted on secondary road No. 24, in Barboursville district of Cabell county. As a result of the accident the mare's right front leg was badly broken above the knee; and as there was no chance for the animal's recovery it was immediately killed and sent to the Huntington Rendering Company. The hole in the bridge through which the mare stepped had existed for several days prior to the date of the accident. This defect in the bridge had been observed by a foreman of the state road commission, but no action was taken to repair the bridge.

The state road commission concurs in the payment of the sum of $125.00 as compensation to the claimant for the loss sustained by him, and the attorney general approves that sum as the amount which should be paid in settlement of the claim.

We are of opinion that the claimant is entitled to the above amount; and therefore award to him, the said Ezekiel Houchins, the sum of one hundred twenty-five dollars ($125.00) against the state of West Virginia in full settlement of his claim as filed, subject to the ratification of the Legislature.

(No. 20—Ray Wildman, Adm., awarded $5000.00.)

(No. 21—Harry Love, awarded $500.00.)

RAY WILDMAN, Adm. of the personal estate of H. L. WILDMAN, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

HARRY LOVE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 5, 1941

Where it appears from the evidence that the state road commission kept a warning sign on a suspended bridge for a long period of time to the effect that the bridge was unsafe for over a three-ton gross load without making inspection of or repairs to the bridge, as provided by general law, to keep it safe for a three-ton gross load; and it appears that the persons who are injured or killed by the collapse of the bridge did not take particular care and caution as to the weight of the load carried thereon and such weight cannot be arrived at with definite certainty, such evidence should be weighed and considered in the light of all the circumstances to reduce the amount of the award to be made.

Appearances:

H. Roy Waugh, Esq., for the claimants;

Eston B. Stephenson, Esq., special assistant to the Attorney General, and *J. H. Feingold*, Esq., chief clerk of the state road commission, for the state.

WALTER M. ELSWICK, Judge.

The evidence in these two claims was heard together and the damages arising being brought about by the same cause both claims are treated in the one opinion.

These claims grow out of the collapse of a section of a swinging bridge which spanned the Little Kanawha river from the

hard-surfaced state road running from Glenville toward Burnsville and connected with a secondary road across the river leading to Gilmer Station in Gilmer county, West Virginia. The bridge in question was constructed in 1924 (record p. 67) by wooden framework fastened to iron rods attached to cables, with wooden stringers and wooden floors, with an iron or sheet of metal runways on top. (Record p. 68). There was a sign hanging on the cross beams overhead of the bridge which read "not safe for over three tons gross load" (Love record p. 106), although there is no evidence in the record to show that this bridge had been inspected or for what particular reason this sign was displayed. (Record pp. 177. 179).

It further appears from the evidence that about midday on the 24th day of March 1939. Harry Lowe, one of the claimants, was driving his truck across this bridge in the direction of Gilmer Station with H. L. Wildman riding with him in the cab of the truck and one Clifton Taylor riding on the truck bed when one section of the bridge collapsed causing the truck and the occupants to fall through into the Little Kanawha river about 30 to 40 feet below the bridge. The cab of the truck turned upside down and H. L. Wildman was killed by the fall, he being found dead when his body was soon thereafter rescued from the river. The said truck owned by the said Harry Love was a V-8 Ford 1937 model two-ton truck and had a value of from seven hundred to nine hundred dollars (record pp. 27 and 66) and was completely demolished leaving a salvage value of about $25.00 (Love record p. 28). Harry Love received a cut or tear of one ear and an arm injury (Darnell record p. 65), and testified that he expended from $7.50 to $9.50 on treatment by a physician and was disabled from work from thirty-five to forty days (Love record p. 89).

It appears from the evidence that the truck fully equipped with steel bed body was registered or rated with the road commission as weighing 5060 pounds (Mitchell record p. 144), and that the steel bed body which was not being used at the time of the bridge collapse weighed from 1600 to 1800 pounds (Love record p. 133). The truck bed being used at the time was of

wooden framework and as testified by Harry Love was approximately 7 feet wide, 13 feet long and 16 inches high (Love record p. 129), or as testified by R. Hardman was 12 feet 8 inches long, 6 feet 8 inches wide and 2 feet deep (Hardman record p. 161); but the weight of this wooden bed body does not appear from the evidence. When crossing the bridge Harry Love testified that he was hauling stovewood blocks cut approximately 18 inches long from green oak slabs and had them piled in loosely with the bed about two-thirds full without an endgate on the truck bed (Love record pp. 26, 56 and 127); that he might have had a cord of slab wood on the truck and in his opinion the stovewood which he was hauling would have weighed 1700 or 1800 pounds (Love record p. 55), and that the weight of himself and two passengers was approximately 445 pounds (Love record p. 55); that in the year 1937 he had hauled two and three tons of coal over the same bridge (Love record p. 54). There was evidence adduced that there is a wide variance in the weight of different kinds of wood (Darnell record p. 119 and Lewis record p. 182). With the exception of an offhand opinion (record p. 182) of one witness, deemed somewhat speculative due to an expressed lack of familiarity of the variances of wood weights (record pp. 175, 176, 181 and 182) there was no evidence adduced showing that the wood on the truck weighed more than 1700 or 1800 pounds.

On the day before the bridge collapsed a number of truck loads of lumber had been hauled over this bridge by other persons, (Darnell record p. 74). The bridge had been weakened by hauling lumber across it (Dye record p. 150).

Before approaching the bridge it appears from the evidence that Harry Love made a remark to Wildman, the decedent of some nature such as "The bridge might break down with you" (Love record p. 38) and Wildman replied with a remark of some nature such as "He will go down if I did" (Love record p. 38) or "If we go down, we all go down together." (Love record p. 51).

However, from the evidence we find that the cause of the collapse of the bridge was the decay of the support timbers called crossbeams permitting the rods suspended to the cables to pull through the crossbeams at the section where the truck fell through and causing the whole section to collapse. (Love record p. 44 and p. 98, Darnell record pp. 72, 73, Lewis record p. 184 and Hudnall record pp. 200, 201). Some of the crossbeams had badly decayed at the ends where the rods ran through the beams. A piece of one of these crossbeams was sawed off and produced as an exhibit, marked "exhibit E" (record p. 90). It was partially decayed or rotten (Darnell record p. 90), badly decayed (Lewis record p. 184). From the evidence of the witnesses Hudnall and Darnell it appears that there were other beams similarly decayed. The witness Hudnall testified that most of the beam ends were defective, probably half of them on the bridge decayed like the exhibit presented to the court (Hudnall record pp. 199, 201). The witness Lewis, an inspector of bridges, testified that if he had made an inspection of the bridge and found these timbers in this decayed condition he would have condemned the bridge for decayed timber, (Lewis record p. 189); that there would have been no difficulty for an inspector to discover rotten crossbeams (Lewis record p. 192). The witness Hudnall, an assistant road maintenance foreman, testified that he had notified Mr. Gainer, the superintendent of roads of Gilmer county, of these defective and decayed timbers and that there would be no difficulty to see or locate these defective timbers. This notice was given the last time he made repairs on the bridge about five to six months before it collapsed. (Hudnall record pp. 201-202).

It appears from the evidence that this bridge was in constant use by the public (Dye record p. 155, Hardman record p. 165) and that it was the only outlet at the time across the river to Gilmer Station (Darnell record p. 73).

By chapter 84 of the acts of the legislature of 1941 it was declared that:

"Whereas on March 24, 1939, and for some years prior to that date, the state road commission and the state road commissioner had jurisdiction and were charged with the maintenance of said public road or highway, in Gilmer county, West Virginia, leading from state highway number 5, formerly state highway number 35, over and across the Little Kanawha river to Gilmer Station in said county; and

"Whereas, included in said public road, described as aforesaid, and as a part thereof, was a suspension bridge suspended across said Little Kanawha river; and

"Whereas, because of its defective condition said bridge collapsed on March 24, 1939, while H. L. Wildman was lawfully traveling on said road and bridge, and said H. L. Wildman as a result of the collapse of said bridge sustained injuries resulting in his instant death;"

And by said act of the Legislature it was provided:

"The state road commission is hereby authorized and empowered, in its discretion, to pay to Ray Wildman, administrator of the estate of H. L. Wildman, deceased, a sum not to exceed ten thousand dollars to be distributed by the said administrator as provided in section six, article seven, chapter fifty-five of the code of West Virginia."

Chapter 85 of said acts of the Legislature of 1941 contained a similar declaration and recital as contained in said chapter 84 describing the cause and resulting personal injuries to Harry Love and the destruction of his truck, and provided:

"That the state road commission is hereby authorized and empowered, in its discretion, to pay to Harry Love a sum not to exceed seven hundred and fifty dollars as and for damages sustained by him in the collapse of a public road or highway bridge near Gilmer Station in Gilmer county."

No particular fund is designated by either of these acts from which any payment may be made and no listings were

made under the general budget appropriations bill by the Legislature. Hence it would appear that there are no funds available with the road commission during the fiscal biennium from which any payments could have been made under said acts.

From a consideration of the evidence we are of the opinion that the bridge was in a decayed and defective condition at the time of its collapse, and that an inspection of this bridge by the road commission would have revealed its condition, necessitating repair of the bridge under the law; that the road commission was negligent in failing to inspect and repair the bridge and that its collapse was caused by the decayed condition at the time. But we are further of the opinion from the evidence that both the decedent, H. L. Wildman, and the claimant, Harry Love, were aware of the fact that there was a certain amount of risk and hazard involved in crossing the bridge as they undertook to do, considering their conversations immediately prior to entering the bridge, its known and obvious condition apparent to them when using same, the uncertainty as to the weight-load of the truck, and all circumstances surrounding the case. As to the decedent, Wildman, it might be said that while he had the right to travel on the bridge and highway a truck of the kind loaded with green oak slabs would not be construed as a passenger vehicle when for his own safety in view of the warning sign he could have walked across the bridge having a span of from 180 to 200 feet. And as to the claimant, Love, he knew that the bridge "wiggled and wabbled around" under a truck load and the weight of the truck body and bed and the load and the warning sign should all have been heeded and observed; all should have been within his knowledge and considered for his safety; the court cannot say with definite certainty from the evidence just what was the weight of the load and wooden bed.

However, since there is some question as to whether the bridge would have been safe for a weight of less than three tons we are of the opinion that there is liability upon the part of the state road commission but such liability should be lim-

ited and considered in respect to the risk and hazard assumed by the decedent H. L. Wildman and the claimant Love in crossing the bridge without heeding the warning sign, the apparent condition of the bridge, and having in mind at the time some certainty as to the weight or burden placed upon the bridge. Tests of the strength of a bridge bearing a warning sign should not be made by those using same as a gamble on the weight of the load. That justice and equity may be done between the parties in such a case we are of the opinion that contributory negligence should not be considered as a complete bar of reilef or of liability when it appears from the evidence that there is negligence and neglect on the part of the employees of the road commission and such negligence contributed to and was the proximate cause of the injuries suffered by claimants. In our opinion such evidence should be weighed and considered in the light of the circumstances in fixing the amount of the damages on which to make an award to which claimants may be entitled; and it is thought that this was the intent of the Legislature when it was left to the discretion of the road commission to determine the amount of damages, if any, as just and proper to be paid in these cases considered herein.

Considering the wise and just policy of the Legislature in the passage of these acts and other acts involving similar relief we are of the opinion that while our courts in the cases of *Phillips* v. *Ritchie County Court,* 31 W. Va. 477, 7 S. E. 427 and *Watkins* v. *County Court,* 30 W. Va. 657, 5 S. E. 654, no doubt cautiously considered the statutes existing at the time, we find nothing in these decisions to prevent the Legislature from granting relief for injuries sustained by reason of the negligence and neglect of employees of the state road commission to comply with the general law; nor do we find any principle involved in these cases to have prevented the Legislature from imposing by statute such additional duties and liabilities upon the county courts respecting the maintenance of roads and bridges.

It appears from the evidence that the decedent H. L. Wildman left surviving him a widow and nine children, the young-

est of whom was born June 10, 1934; that he was a sober and industrious man of modest financial circumstances, in apparent good health, and was 58 years, 11 months and 11 days of age at the time of his death. He had earned at times as much as $200.00 per month, and for six or seven years prior to his death had earned about twelve to thirteen hundred dollars per year.

From all the evidence adduced in the Wildman case, weighed in the light of the foregoing views, we are of the opinion that an award of five thousand dollars ($5000.00) should be made to Ray Wildman, as administrator of the estate of H. L. Wildcan, deceased, as a just and reasonable award of damages under the circumstances of the case for the death of the said H. L. Wildman, conditioned that such an award be paid only after evidence is produced to the state road commission that said administrator has entered into an additional bond in an amount equal to said award, with security to be approved by the county court of Gilmer county, West Virginia, and that said administrator shall execute and deliver a full and complete release, releasing and discharging said state road commission from all claims, demands and damages whatsoever by reason of the said death of the said H. L. Wildman, deceased, and it was so ordered.

And from all the evidence adduced in the Harry Love case, weighed in the light of the foregoing views, we are of the opinion that an award of five hundred dollars ($500.00) should be made to Harry Love as a just and reasonable award of damages under the circumstances of the case for personal injuries suffered by him as well as damages to his truck by reason of the collapse of said bridge, conditioned that the said Harry Love shall execute and deliver a full and complete release, releasing and discharging said state road commission from all claims, demands and damages whatsoever sustained by reason of personal injuries and damages sustained to his truck arising from the collapse of said bridge, and it was so ordered.

And it appearing that no appropriations were made available for the payment of these damages by the road commis-

sion for the fiscal biennium, it is recommended that such appropriations be listed in the appropriation budget bill of the next regular session of the Legislature for the payment of said awards.

(No. 33—Claim denied.)

WILLIAM EDWARD TIMMS, Adm. of the personal estate of JAMES D. TIMMS, deceased, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion Filed December 19, 1941

Where the evidence shows that one is fatally injured while in the course of his employment as an employee of a department of the state and such state department at the time of the injury is a subscriber to the state workmen's compensation fund, has paid the premiums and complied with all the provisions of chapter twenty-three of the code, the court of claims is without jurisdiction to make an award for the death of such employee although there were no dependents of the employee within the classification of dependents contained in the general law under said chapter twenty-three of the code which denies death benefits to all who are not dependents of the employee within the class therein specified.

Appearances:

J. P. Malloy, Esq., for the claimant;

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

WALTER M. ELSWICK, Judge.

James D. Timms was employed as an attendant in ward seven at West state hospital for the insane on the 11th day of November 1938, and while in the course of his employment

as such attendant he was fatally injured by one of the inmates of said ward seven of said hospital striking him with a mop on the back of his head near the crown of his head and producing an intercranial hemorrhage of which he died the following day. The injury occurred between seven and eight o'clock in the morning while he, the said James D. Timms, had the sole care and custody of twenty-three inmates in the ward. There were fifty-one male inmates occupying ward seven and the said James D. Timms and Minor S. Fleming were the only persons serving said ward as attendants. Mr. Fleming had taken twenty-eight of the inmates to the dining hall for the breakfast meal. The twenty-three who remained in said ward under Mr. Timms' care were "untidy or unclean" and were to be fed later in their ward. A number of them were of the criminally insane type and some, or at least the one who struck the decedent, had homicidal records. The decedent, James D. Timms, had been an employee of said hospital for about forty years prior to his death. It was customary at the hospital to have the sweeping and mopping of the ward done by the inmates to give them exercise.

William Edward Timms qualified as administrator of the estate of James D. Timms, deceased, and filed claim for $10,-000.00 for the wrongful death of said James D. Timms, deceased, alleging in his notice that it was unsafe to leave only one attendant in the ward with said inmates and that the decedent's death was caused by the negligence of those having control and supervision of the Weston state hospital by not retaining a sufficient number of attendants to care for the inmates of said ward.

There is a conflict of testimony in the evidence as to whether or not there had been an enforced rule or order issued to attendants prohibiting inmates from having mops or brooms or to do any mopping while only one attendant was on duty in the ward but the result of our decision governed by the statutes applicable in this case, considered in the light of all the evidence, does not prompt a determination of those issues on the question of liability as fixed by the general law. For at the

time that the decedent received the fatal injury the state board of control of West Virginia, under whose control and supervision the Weston state hospital was operated, was a subscriber with premiums paid to workmen's compensation under chapter 23 of the code of West Virginia, and had complied with the provisions of said code relative to posting of notice and reporting the accident. (Record pp. 52 and 53). Application papers were mailed to the West Virginia board of control at Weston state hospital, Weston, West Virginia by the compensation commissioner on November 18, 1939, for the use of the dependents of James D. Timms in filing claim for compensation. The only paper filed with the commissioner was a claim for the funeral bill prepared by Sweeney and Toothman, undertakers at Weston, West Virginia, for the sum of $379.07. The sum of $150.00 (the maximum sum allowed on funeral expenses) was paid by check of the workmen's compensation commission to the undertakers, who, having been paid their bill in full by the Timms family before receipt of said check, endorsed same over to William Edward Timms who received payment on same. (Record pp. 10 and 53).

The said James D. Timms left surviving him two sons, said William Edward Timms and James Mathew Timms, as sole heirs at law and sole distributees of his estate. Both of said sons were adults and neither was dependent upon their father's earnings for their support, nor was there any other person dependent in whole or part for his or her support upon the earnings of the said James D. Timms at the time of his death who could qualify as the word "dependent" is defined in chapter 23 of the code.

The state of West Virginia by the attorney general filed a written plea to the notice of claim filed herein, alleging that the jurisdiction of this court does not extend to a hearing and determination of the claim of the nature filed since it is a claim for a death benefit under chapter 23 of the code and that jurisdiction is expressly excluded by virtue of chapter 14, article 2, section 14 of the code. A replication in writing was filed by the claimant to said plea and issue joined, and the

court proceeded to hear the testimony adduced by and on behalf of both the claimant and the state. After hearing the evidence we are of the opinion that the court does not have jurisdiction, under the statute, and deem it necessary to set forth those portions of chapter 23 of the code in effect at the time of the fatal injury pertaining to the state of West Virginia and all its governmental agencies or departments as an employer, the exoneration of liability of employers paying into the compensation fund and complying with the law relating thereto, the provisions relative to waiver of an employee of certain rights of action continuing in service after notice of the relationship given as prescribed by said statute, and the limitation on death benefits to dependents payable as set forth therein.

Chapter 23, article 2, section 1 of the 1937 code of West Virginia, Michie's code section 2511, provided:

> "The state of West Virginia and all governmental agencies or departments created by it are hereby required to subscribe to, and pay premiums into the workmen's compensation fund for the protection of their employees, and shall be subject to all requirements of this chapter, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments . . . The premium and actual expenses in connection with governmental agencies and departments of the state of West Virginia, shall be paid out of the state treasury from appropriations made for such agencies and departments, in the same manner as other disbursements are made by such agencies and departments, and such premiums of state agencies and departments shall be paid into the fund in the same manner as herein provided for other employers subject to this chapter."

Chapter 23, article 2, section 6 of the code, Michie's code section 2516, provided:

> "Any employer subject to this chapter who shall elect to pay into the workmen's compensation fund the

> premiums provided by this chapter shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during any period in which such employer shall not be in default in the payment of such premiums and shall have complied fully with all other provisions of this chapter: Provided, That the injured employee has remained in his service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have."

Chapter 23, article 4, section 1 of the code, Michie's code section 2526 provided:

> "The commissioner shall disburse the workmen's compensation fund to the employees of such employers as are not delinquent in the payment of premiums . . ., or to the dependents, if any, of such employees in case death has ensued, according to the provisions hereinafter made; . . ."

Chapter 23, article 4, section 10, Michie's code section 2535 provided:

> "In case the personal injury causes death . . . the benefits shall be in the amounts, and to the persons, as follows:
>
> (a) If there be no dependents, the disbursements shall be limited to the expense provided for in sections three and four (Michie's code sections 2528 and 2529) of this article; . . ."

Said section three (Michie's code section 2528) provided for disbursements for medicine, hospital treatment, artificial limbs, etc., and said section four (Michie's code section 2529) provided for payment of funeral expenses of decedent not to ex-

ceed $150.00. There was not any further provision for the payment of benefits in case of death where there are no dependents as defined in section ten (g) article four chapter 23 of the code, and there was no person within that classification to claim benefits by reason of the death of James Timms as in the instant case.

But claimant in this case insists that since there were no persons who were dependents upon the decedent James Timms who could receive benefits under the workmen's compensation act embraced in chapter 23 of the code, a liability for damages for wrongful death exists irrespective of chapter 23 of the code and that this court has jurisdiction to determine and to make recommendations as to the merits of his claim; that by reason thereof section 14, article 2, chapter 14 [Michie's code 1147 (9)] excluding this court from jurisdiction as to any claim for a disability or death benefit under chapter 23 of the code is not applicable to claimant's claim. In theory he would say that when the act was first adopted it was left optional with the employer to pay into the fund, and optional with the employee to waive the right of action by continuation in his employment, but that with the prevalence of employers paying into the fund by the popularity of the act with employers there is no choice left with the employee but to continue in the employment.

While we do not undertake to rule upon the reason or wisdom of the general statute for denying benefits to children of a decedent who are not classified as dependents under the code, we are compelled to bear in mind the provisions of section 6 of article 2, *supra*, specifically stating that any employer shall not be liable to respond in damages at common law or by statute for the injury or death of any employee however occurring when such employer has elected to pay into the fund the premiums provided by chapter 23. The general statute by said chapter 23 of the code specifically provides that continuation in the service of such employer with notice of such relationship shall be deemed a waiver by such employee of such rights of action. This having been so treated by the general law under chapter 23 of the code, regardless of the merits

of an individual claim, chapter 14, article 2, section 14, excluding this court from jurisdiction of such a claim, would govern.

We find from an examination of chapter 23 article 4, sections 15 and 16, that the time therein prescribed has expired for filing application for benefits to dependents as well as granting a final award by the commissioner or appeal therefrom and claimant's position in this case would necessarily have the same status, under said general statutes, as a case having had a final decision denying benefits by the workmen's compensation commissioner, with request that the claim be reopened and reheard under a special act granting specific relief to the claimant. By a recent decision of the Supreme Court, not as yet reported, in six cases against the workmen's compensation commissioner, in which Truax-Traer Coal Company and others were plaintiffs the court held that such a special act violates the provision of the state constitution against the enactment of special laws where a general law would be proper and can be made applicable; that the "due process" and "equal protection" provisions of the state and federal constitutions interdict such a special act of the Legislature, and that the constitutional separation of the departments of government inhibits the Legislature from nullifying or modifying by a special act a final decision of a quasi-judicial tribunal which has been regularly made and become final under the general law relating thereto.

We are therefore of the opinion that this court is without jurisdiction to make an award, and an order will be entered denying an award for the reasons herein stated.

(No. 17—Claimant awarded $900.00.)

CHARLES GOLDEN FRY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 19, 1941

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

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

Appearances:

M. J. Ferguson, Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

The claimant, Charles Golden Fry, while returning to his home about ten o'clock at night on the 9th day of April 1940, from the town of East Lynn in Wayne county, and along state route No. 37, was injured by stepping off or falling over an abutment from eighteen to twenty feet high, forming part of the approach to a certain bridge on the said route 37, and crossing what is known as Little Lynn creek. The claimant sustained a compound fracture of his jaw, lost some twelve to fifteen teeth, was in the hospital about ten days, and at the present time has trouble in masticating his food.

It appears from the evidence that the road leading to the approach of the bridge in question makes a decided bend or turn shortly before the traveler thereon reaches the said approach, and that if one is not acquainted with this situation and would continue straight along the said road, he would come to the place where the claimant fell off, as the traveler must make the bend or turn in the road to properly approach the bridge. Claimant had lived in that vicinity for several years and knew the condition that existed; he knew that there were no barriers or guardrails at the place in question where the accident happened, notwithstanding its dangerous condition. In fact, his own father, several years before, had fallen off the same abutment at almost the same place and been killed. In view of this situation and his knowledge of the attendant conditions, the state, among other defenses, charges the claimant with contributory negligence and asks that no award be made to him.

The evidence shows that the night was dark, that the claimant had been to the town of East Lynn earlier in the evening, and had remained at a tavern or saloon until shortly before ten o'clock, when he started home. The evidence further shows that there was no other way for him to return to his home except by the road and bridge in question, and that according to his own testimony he had used precaution in approaching the said bridge by walking slowly and feeling his way with his feet as best he could. He had no lights of any kind, nor did he take any precaution to obtain a lantern or flashlight in his endeavor to find his way home over the said bridge and road. That the place where he fell was highly dangerous to the traveling public, there can be no question; in fact, the pictures of the scene of the accident introduced in evidence show conclusively the highly dangerous condition of the approach to the bridge, and fully establish the fact that the state road had not discharged its duty to the traveling public when it failed to construct and erect barriers or guardrails at the place in question.

Previous to the year 1933, when by virtue of the act passed by the Legislature, the state road commission took over the care and control of all primary and secondary roads in the state,

the several counties had imposed upon them the legal obligation of making these roads reasonably safe for travel thereon both by day and by night. In the case of *Wells* v. *County Court of Marion County*, 85 W. Va. 663, 102 S. E. 472, and which was a case almost on "all fours" with the instant case, the court held

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

In assuming control and authority over these roads, and including, of course, the one involved here, the state road commission must necessarily be charged with a duty equal or tantamount to that which was heretofore imposed upon the several counties, and consequently must of necessity guard all dangerous places on the highways by suitable railings or barriers so as to render travel thereon reaonably safe both by day or by night. Reason and justice, equity and good conscience require us to put this charge upon the road commission, and we do so accordingly.

The question now arises as to whether or not the claimant can be charged with contributory negligence, and, if so, in what degree.

It is true that he knew about the dangerous situation on the road and at the approach to the bridge; that there was a turn in the road close to the said approach; that his father had been killed at about the same point; that he had lived in that vicinity for several years previous to the time of the accident, and that he was fully acquainted with the danger incident to the use of the road, especially in the nighttime. He had gone to the town of East Lynn to learn whether or not he was expected to work in the mine the next day. He could only travel by the road in question. Surely there was nothing illegal in these acts, and it must be assumed that up to the time that claimant started his homeward journey, he was entirely within his legal rights in all of his acts and movements that evening. The question of

any negligence is somewhat involved, since it can be assumed that some men, under the circumstances, would have provided themselves with a lantern or a light of some kind in making the return journey. In this regard, however, we hold that the claimant could not have been guilty of contributory negligence in not exercising the same judgment that some other traveler would have done, but if so guilty, such negligence could only be considered in making a reduction in the award that may be found just and equitable under all the circumstances. If the contributory negligence relied on is such as to confuse the minds of men and cause them to reasonably differ, then it is a question which must be considered in connection with all of the circumstances surrounding the injuries; and where claimant may not be entirely free from making contribution to his injuries, and where he may be charged with not exercising the degree of care and caution that some other traveler would exercise under the same conditions, these circumstances should be taken into consideration in making an award. In the instant case, claimant suffered a compound fracture of his jaw, the loss of ten or twelve teeth, confinement in a hospital for about ten days, and from his own testimony still suffers from his injuries by reason of his inability to properly masticate his food. All doctors' bills and hospital charges have been paid by the relief agencies and, consequently, cannot enter into the matter of an award by this court.

We are of the opinion that under all the circumstances, considering again the highly dangerous place at which the accident happened, and at which place barriers or guardrails should have been constructed to protect the traveler, especially so at night, and in view of the fact that if there was any contributory negligence on the part of the claimant, it was reduced to a minimum, that there should be an award of nine hundred dollars ($900.00), and we recommend that an appropriation accordingly be made by the Legislature, and the amount in question paid to claimant upon the execution of a full and complete release to the state and the state road commission for all damages of every kind occasioned by reason of the accident in question.

(No. 31—Claimant awarded $2000.00.)

EDWIN J. HERSHBERGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 19, 1941

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

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

Appearances:

H. G. Muntzing, Esq., and *Paul J. Hartman,* Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

Edwin S. Hershberger, the claimant, was injured on September 21, 1940, by falling off the approach to a certain bridge that spans the north fork of the south branch of the Potomac, at and near the town of Circleville, in the county of Pendleton. The accident happened in the nighttime and resulted in a fracture of the left leg of claimant, by reason of which his left leg is shorter than his right leg by an inch to an inch and a half. He was confined in the hospital at Harrisonburg, Virginia, for about sixteen days, and he claims that he is now incapacitated from doing the work he was able to perform previous to the

time of the accident. He expended the sum of $150.00 in hospital and doctors' bills. The point in the road where he fell is approximately from seven and one-half to ten feet above the level of the surrounding ground, and at or near a curve or bend in the road leading to the said bridge. There were no guardrails or barriers to protect the traveler at night, nor were there any lights of any kind to show him the way when traveling on the said road or approach to the bridge after dark. It is true that some attempt was made to show that the lights reflected from the windows and business places in Circleville some distance away might help the traveler at night, but this testimony was uncertain and does not aid us in the determination of the issues presented by this claim.

The claimant was traveling along said road as has been stated, in the nighttime, and seemed to be taking every precaution reasonably required of him. It is true that he didn't have any light or lantern to assist him in finding his way, and that he had passed over this road at least on several occasions before. He was not, however, a resident of the community where the accident happened, but rather lived some six or seven miles from there, and occasionally came to the town of Circleville, at which time, however, he usually drove in his automobile. Since the new improved state highway located near the highway in question has been completed some four or five years ago, he testified that he has not used the road on which the accident happened until the night of September 21, 1940. We fail to find anywhere in the evidence that the claimant was guilty of any contributory negligence, and taking into consideration all the circumstances, as revealed by the evidence, we find that he was taking all the reasonable, necessary precautions that his duties as a traveler on the road at the time in question required of him. Barriers or guardrails had at one time been constructed along this road, but for some purpose not revealed in the evidence, had been removed; and since the state road commission took charge of the road after 1933, there have been no guardrails or barriers to protect the traveler on the road. That this condition was highly dangerous is evidenced further by the fact that several accidents have happened at and near

the point where claimant was injured. A truck went over the abutment near this point, and on several occasions cattle have fallen off the approach to the bridge to the nearby ground. Claimant had the lawful right to be on the said road at the time in question, and we hold that the proximate cause of the injury was the failure of the state road commission to provide proper guardrails and barriers, especially so at the dangerous place where the accident happened, thereby rendering the said road and approach to the bridge unsafe for travel thereon either by day or by night.

We reaffirm the law as set forth in *syllabi* one and two in the claim of *Charles Golden Fry* v. *State Road Commission,* and hold that the law there announced specifically applies to the instant case. And we find further that the claimant was not guilty of any contributory negligence such as would have tendency to deny or lessen an award to be made.

For several years past, claimant has been earning about $18.00 per month, together with his board and laundry, as a farm employee; all of which would probably mean an income of about $60.00 per month in some other occupation. He also maintains in his testimony that he could earn more if he was not handicapped and incapacitated by the injuries caused by the accident. He is forty-eight years of age and from appearances and the general condition of his health, would seem to have an earning power for some years to come.

Considering all the evidence and circumstances adduced, we are of the opinion that the claimant is entitled to an award of two thousand dollars, ($2,000.00) and so recommend to the Legislature at its next session. We further recommend that the said amount, so found as damages, be paid to the said claimant upon the execution of a full and complete release by him to the state and the state road commission for all damages occasioned by his injuries and brought about by the accident in question.

(No. 29—Claimant awarded $114.35.)

CHESAPEAKE AND OHIO RAILROAD COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed December 19, 1941

Where a common carrier delivers a car on a sidetrack or switch, in the usual and customary place for unloading, and has used the proper degree of care in placing the car for unloading purposes, and the car is equipped with brakes and appliances that are safe and sound when properly used, the carrier is relieved of further responsibility, unless there is a contract enlarging its duty in this respect; the consignee then becomes responsible for the skill and care of its employee in unloading the car or replacing it for unloading purposes; and if the car is damaged by reason of the lack of skill or care on the part of such employee of the consignee when so replacing it or unloading it, the consignee is liable for the damage caused.

Appearances:

Tom T. Baker, Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

On August 22, 1939, the claimant company, through its train crew, placed on a siding or switch at Lookout, Fayette county, two certain cars loaded with material consigned to the state road commission; one of which cars was provided with what is commonly termed a stem brake; while the other was provided with what is known as the ajax brake. The evidence shows that in order to expedite the unloading of the cars, they had to be placed at a certain point over a pit which allowed the unloading to the best advantage; that the first of these cars, or the one equipped with the stem brake, was placed at this par-

ticular point, and that after it was unloaded it was moved a sufficient distance along the said spur or switch in order that the second car could be properly placed for unloading purposes. It was while this second car was being placed for this purpose by an employee of the state road commission that the said second car got out of the control of the said employee, collided with the first car, which had been moved and unloaded, and caused the damage complained of by the railroad company.

Several questions, of course, are involved, both of law and fact; and the first of these is the question of the duty of the common carrier in making delivery of the cars to the consignee.

A careful consideration of the adjudicated cases, as well as the text of law writers on the subject, tend to hold that where a carrier is not required or expected to remove the freight from cars, as in the case of grain in bulk, coal, lumber, and so forth, delivery of the car in a safe and convenient position for unloading, either at a warehouse, elevator, or other place designated by the contract, or where no place of delivery is thus designated or fixed, on its sidetrack in the usual and customary place for unloading by consignees, and it is found that the brakes and appliances when properly used are sufficient and safe, then the carrier has discharged its full duty to the consignee so far as the delivery and unloading of the car is concerned, unless there is a contract to the contrary which enlarges the duties of the carrier, but which does not concern us so far as this claim is concerned, since there is no contract to that effect in the evidence. Michie on carriers, vol. 1, sec. 845, p. 530; Corpus Juris, vol. 10, sec. 326, p. 233, and also sec. 364, p. 253.

Such delivery places the cars under the dominion of the consignee, and it then becomes the duty of the consignee to have persons of proper skill and care to handle the cars to replace them for unloading purposes, if it is found that the cars are to be moved to a more advantageous place on the switch previous to unloading; and if, by reason of the lack of skill and care, the

cars in question are injured or damaged then the consignee is responsible to the carrier for such damages.

We adopt this view of the law in its application to the circumstances surrounding the claim presented. The conductor and brakeman that placed the car in question both testify that the brakes were in good order, and that the car was securely placed and held when the brakes were properly set. This testimony is further supported by the member of the train crew that moved the cars after the collision complained of, and found that the brakes were in perfect order. The mechanic of the railroad company who made the repairs likewise testifies that the brakes were in perfect order when tested by him previous to making the repairs. The trainmaster of the claimant company testifies among other matters that this particular car on which the employee of the road commission lost control was equipped with the ajax brake, the most modern used by railroad companies on freight cars, and a brake that has never been known to jam or cause trouble.

That the cars were properly and securely set on the said switch is sustained by the testimony of the state road commission employee who tried to replace the car in question for unloading purposes, when he stated that they were obliged to use a pinch bar after the cars had been uncoupled and before the car in question could be moved to the desired place, and that the pinch bar was used on this car on which the state road commission alleges the brakes were defective (record p. 63).

Was the state road employee who was seeking to properly place the car in question qualified to do the work; did he have sufficient skill to do the work he was called upon to perform in replacing the car for unloading purposes? We do not think so. It seems that he had been selected because of the fact that he had been employed for a goodly number of years on what is commonly termed as a road gang of the railroad company, and that while his duties were those of a laborer, and did not include the handling or placing of any cars for unloading purposes, that nevertheless he had moved cars on several occa-

sions. This statement is contradicted by the claimant's trainmaster, who states, among other things, that when cars are involved and are to be unloaded for track maintenance purposes, that a train crew is always present for the purpose of placing the cars to be unloaded. The state road employee had never been a brakeman nor employed in a position that would give him the necessary experience so far as his connection with the railroad was concerned.

The extent to which the brake is released, the distance the car is to travel in being replaced, the time necessary to rewind the brake to stop the car at the place desired, or to "spot" it, to use a railroad term, are all elements entering into the proper and safe handling of a car, and of necessity require experience and a certain degree of skill to successfully complete the operation of placing or replacing the car.

Under all the circumstances and the evidence in the case, we conclude that the claimant company is entitled to an award of one hundred fourteen dollars and thirty-five cents ($114.35), and herewith recommend that the Legislature at its next session shall make an appropriation accordingly, upon the execution of a release by the claimant company to the state or the state road commission, in full satisfaction of all damages claimed by reason of the damages to it, occasioned by the occurrence or accident which has been made the basis of this claim.

(No. 10—Advisory Opinion.)

LOUP CREEK COLLIERIES COMPANY, a corporation, Claimant,

v.

STATE OF WEST VIRGINIA, at the relation of EDGAR B. SIMS, Auditor, Respondent.

Opinion Filed December 20, 1941

Advisory opinion by ROBERT L. BLAND, Judge.

To the Auditor of the State of West Virginia:

Your request for an advisory determination whether or not the auditor of the state of West Virginia is authorized to execute and deliver to the Loup Creek Collieries Company, a corporation, a release of that certain judgment of the state of West Virginia, at the relation of *Edgar C. Lawson, auditor,* v. *George Chambers, et als,* dated February 27, 1933, for the principal sum of fifteen thousand thirty-three dollars and ninety-seven cents ($15,033.97), with interest and costs, which judgment is docketed in the clerk's office of the county court of Wyoming county, West Virginia, in judgment lien docket 6, at page 2, insofar as said judgment may constitute a lien against the property acquired by the Loup Creek Collieries Company, a corporation, as set out in the petition filed by said company against the state of West Virginia at the relation of Edgar B. Sims, auditor of the state of West Virginia, suggests the propriety of the following observations in relation to such procedure.

The jurisdiction of the state court of claims extends to and embraces only 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; to like claims and demands which may be asserted in the nature of setoff or counterclaim on the part of the state; and the legal

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

Section 18 of the court act, relating to advisory determination, should be read in connection with subsection 3 of section 13. Said section 18 allows the Governor or the head of a state agency to refer to the court of claims for an advisory determination the question of the equitable or legal status, or both, of a claim against the state, or one of its agencies, apparently means a claim which the state as a sovereign commonwealth should, in equity and good conscience, discharge and pay. It is, we think, claims of this nature that may be properly referred to us for advisory determination. The statute expressly provides that the advisory determination procedure shall apply only to such claims as are within the jurisdiction of the court.

Does the instant case come strictly within the advisory jurisdiction of the court of claims? Treating the petition of the claimant, filed with the clerk, in which its contentions are clearly set forth, as the record and nature of its claim, and upon which an advisory determination is sought, we deduce the following facts:

By deed dated October 22, 1937, Ashton File and others conveyed to the claimant, Loup Creek Collieries Company, a corporation, the undivided one-half interest formerly owned by George Chambers in four certain tracts of land in Oceana district, Wyoming county, West Virginia, containing in the aggregate 329.86 acres, more or less; that the state of West Virginia, suing for the benefit of Will P. Cook, Sheriff of Wyoming county, obtained judgment in the circuit court of said Wyoming county, on the 16th day of July 1930, against George Chambers and others, for the principal sum of eighty thousand three hundred twenty-three dollars and seventy-eight cents ($80,323.78), which said judgment was duly docketed in the office of the clerk of the county court of said county; that by reason of said judgment on March 21, 1933 a chancery suit was instituted in the circuit court of Wyoming county, under the style of *County Court of Wyoming County* v. *George Chambers,*

et als, for the purpose of subjecting to the lien of said judgment the one-half undivided interest in the aforesaid tracts of land situate in Oceana district of said Wyoming county; on March 4, 1933, prior to the institution of said suit there was docketed in the clerk's office of said county court a judgment dated February 27, 1933, obtained by the state of West Virginia, at the relation of *Edgar C. Lawson, auditor*, v. *George Chambers, et als*, for the principal sum of fifteen thousand thirty-three dollars and ninety-seven cents ($15,033.97) with interest and costs; that in the said chancery suit brought by the county court to subject said property of George Chambers to the lien of said judgment for eighty thousand three hundred twenty-three dollars and seventy-eight cents ($80,323.78) the state of West Virginia was not named as a party defendant, nor was there an order of publication or of reference, nor did the state of West Virginia file any answer therein; that pursuant to orders and decrees made and entered in said chancery cause the property of George Chambers, after due advertisement, was sold at public auction, and in accordance with said sale, which was confirmed by decree entered in the case, R. D. Bailey, special commissioner, conveyed said property to the county court of Wyoming county, by deed dated October 11, 1933, the purchase price at said sale being the sum of one thousand six hundred thirty-five dollars ($1,635.00), which amount was insufficient to discharge the said judgment in favor of the county court of Wyoming county in the amount of eighty thousand three hundred twenty-three dollars and seventy-eight cents ($80,323.78), and that the county court, in the manner provided by law, made sale of said property to Ashton File; that the proceedings in said chancery suit of *County Court* v. *George Chambers and others*, in the Circuit Court of Wyoming county, appear not to have been in strict compliance with the provisions of article 3 of chapter 38 of the code of West Virginia, especially in that no notice was given to the state of West Virginia, a lien creditor, prior to the distribution of the proceeds realized from the sale of said property in said suit; that while the first lien judgment of the county court, for eighty thousand three hundred twenty-three dollars and seventy eight cents ($80,-323.78) was far greater in amount than the actual value of the

said real estate and there was no equity in said real estate in favor of said second lien judgment of the state of West Virginia for fifteen thousand thirty-three dollars and ninety-seven cents ($15,033.97), and while the proceeds from said sale were insufficient to pay off said first lien against said property, which lien was set out in said suit as the only lien against said property of George Chambers, the failure to give said notice constituted a cloud upon the title of said property now owned by claiment, Loup Creek Collieries Company, a corporation.

From the foregoing statement of facts it will be seen that the claim of the Loup Creek Collieries Company, a corporation, is not such a claim as the state of West Virginia as a sovereign commonwealth should discharge and pay. It is rather a claim to have a supposed cloud upon title to real estate removed. It is not a claim that is embraced within the jurisdiction of the court of claims, under the act creating the court. We have neither power to deal with it nor authority to advise concerning it. We must, therefore, respectfully decline to answer the specific question referred for the court's consideration.

(No. 28—Claimant awarded $4500.00.)

VALLEY CAMP STORES COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

1. When the state road commission has charge of the maintenance of a national highway, as in the instant case, on which there is a culvert constructed across a stream, the failure of the commission to remove accumulations of dirt and debris in the stream bed to maintain the clearance or opening under the culvert as originally constructed and of sufficient size to permit the stream in times of ordinary flood or freshet, reasonably expected, to flow through the clearance as fast as the stream does, an award will be made for damages to property of another ap-

proximately caused by the negligent damming and the consequent overflow of the stream.

2. Where it appears from the evidence that there are circumstances bearing upon the reasonableness of an award presenting a mixed question of law and fact, and on which reasonable minds may differ, and such circumstances are of a mitigating nature such as would justify a reasonable reduction of damages recoverable, then such circumstances will be considered in determining whether or not an award should be made, and if made the amount thereof.

Appearances:

Albert Laas, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, and *J. H. Feingold,* Esq., chief clerk of the state road commission, for the state.

WALTER M. ELSWICK, Judge.

On the 12th day of September 1938, there was a heavy rainfall in the hilly area drained by Gashell's run, a branch of Little Wheeling creek, in Ohio county, West Virginia, which caused a marked rise or freshet in the waters of Gashell's run branch. The state road commission of West Virginia having charge of the maintenance and repair of national route 40 had permitted an accumulation of debris and dirt to remain under a culvert spanning Gashell's run and it appears from the evidence adduced that by reason of this partial filling of the opening of said culvert there was not sufficient clearance under the culvert to carry the water underneath and the water of said run dammed up against said culvert and overflowed its banks. This overflow of said stream extended on the north side of said highway a distance of 354 feet west from the culvert to a storehouse owned by Valley Camp Stores Company where the water entered its basement doing material damage to a stock of merchandise stored therein upon which loss the claimant bases its claim for damages herein.

About two weeks before the overflow of the run an official of the Valley Camp Stores Company reported the condition of

the bed of the stream under the culvert, and probable damages, to the then county superintendent at the district highway commission office at Triadelphia, about two and one-half miles distant from Gashell's run, but no action was taken by the commission to remove the dirt and debris accumulation until after the aforesaid heavy rain and overflow of the stream's banks had caused the damage for which claimant files claim. (Record pp. 7, 8, 45 and 128). The testimony adduced by the claimant was to the effect that the accumulation of dirt and debris in the stream bed on the north or inlet side of the culvert had left a clearance of only eight inches between the accumulation of the fill and the base of the span of the culvert. (Record p. 38). From the state's evidence it certainly appears that there was a sufficient accumulation of dirt and debris to reduce the clearance under the culvert to a dimension entirely inadequate to permit the full flow of the stream's rise from a heavy rain to go under the culvert. For it would appear from its evidence that this filling in of debris and dirt had reduced at least one-third of the clearance (record pp. 124, 130, 136), and that was a clearance of only three feet on the north or inlet side of the culvert (record pp. 131, 135). The culvert had a span of 23 feet and the area drained by Gashell's run was approximately 685 acres and such area would require an opening under the culvert of four feet by twenty feet sufficient to drain the area of Gashell's run. (Record p. 162). The fill under the culvert was excavated by state road commission employees after the overflow to leave an open clearance of 5 feet high with a span of 23 feet and it is reasonable to conclude from the evidence that these were the original dimensions of the open clearance when the culvert was constructed.

It further appears from the evidence that the rainfall in the area drained by Gashell's run and the rise of the stream on September 12, 1938, the date of its overflow, was probably the greatest that had been known in twenty-eight to thirty years, the rise of the stream being from five to six feet, but it is found that the proximate cause of the overflow and resulting damage to the Valley Camp Stores Company was the failure and neglect of the then state road commission officials and employees to

keep a sufficient clearance or opening under the culvert to permit drainage of the area in question in times of heavy rains.

The net loss or cost to the Valley Camp Stores Company of the merchandise damaged to the extent of its value being destroyed was the sum of $7,611.03, based upon the claim filed and evidence adduced, after allowing a salvage value of approximately $1500.00. The court is of the opinion that an award should be made to claimant but not for the full amount claimed. There is much authority holding individuals liable in damages to another for obstructing the natural flow of a water course during freshets or ordinary flood, among which are the following cases decided by our Supreme Court: *Neal* v. *Ohio River Railroad Company,* 34 S. E. 914, 47 W. Va. 316; *Uhl* v. *Ohio River Railroad Company,* 49 S. E. 378, 56 W. Va. 494, 68 L. R. A. 138, 107 Am. St. Rep. 968; *Taylor* v. *Chesapeake and Ohio Railroad Company,* 100 S. E. 218, 84 W. Va. 442, 7 A. L. R. 112; *Trump* v. *Bluefield Waterworks and Improvement Co.,* 129 S. E. 309, 99 W. Va. 425. An analogous decision holds that a city cannot escape liability for consequential damages to abutting property in the performance of a public work under maxim *damnum absque injuria* since the common law rule in that respect has been changed by article 3, section 9, of the constitution of West Virginia. *Javins* v. *City of Dunbar,* 157 S. E. 586, 110 W. Va. 271. A county court was held liable for acts of state road commission in changing the course of a stream, *Carden* v. *Nicholas County Court,* 157 S. E. 411, 110 W. Va. 195. From all the evidence and circumstances before the court we are of the opinion that an award of $4500.00 would constitute a reasonable recommendation in this case, and in reducing the amount as claimed we give the following explanations applicable to the evidence adduced at the hearing of the case:

From the evidence in this case it appears that the Valley Camp Stores Company did not make report of its damages to the state road commission until January 1939 when a claim was filed at the 1939 session of the Legislature. The road commission had no opportunity to view the damages or to assist in salvaging any of the merchandise. There was also evidence

to the fact that laborers of the Valley Camp Stores Company were careless in handling the salvaged goods which no doubt reduced the salvage value.

It further appears from the vidence that the grade level of Gashell's run between the culvert and Little Wheeling creek is practially the same as Little Wheeling creek and approaches said creek at practically right angles raising some question as to a practical depth of grading of Gashell's run to prevent a backing up of Little Wheeling creek in the run in times of a freshet such as the evidence in this case revealed. The evidence reveals that Little Wheeling creek did back up into Gashell's run in 1937 during a flood in that valley and caused similar damages to the Valley Camp Stores. It also appears from the evidence that from the general lay of the land and the construction of the present buildings and premises surrounding the culvert and Gashell's run that it would be practically impossible to raise the bridge without creating liability in damages to others by reason of a change of the grade of the highway. This being a national highway, no doubt such course would not be required of the state road commission under its maintenance supervision.

While it appears from the evidence that a concrete curb was constructed around the top surface of the opening to the basement windows of the claimant company's store building, after the 1937 flood, there is a question as to whether a larger amount of salvage could not have been realized from the stock of merchandise if the concrete curbs had been constructed on a higher pitch from the surface of the ground, there being no explanation made as to the heights of the curbs as constructed. But this would not be controlling as to the reduction of the amount of the award if another feature did not appear from the evidence. From the evidence it appears that the Valley Camp Stores Company had permitted one of its affiliates to dump mine gob on the southern side of the highway which covered the outlet opening of a smaller culvert about 600 feet west of the Valley Camp Store No. 3. It appears from the testimony that this outlet opening had been covered by about

three feet of mine gob. (Record pp. 147, 148, 167). The overflow waters subsided within a short time, it appearing that the basement had drained within 45 minutes, (record p. 60).

It also appears that after Gashell's run overflowed if this smaller culvert had been open a part of the overflow water would have drained in that direction by all probability reducing the amount of damages sustained by the claimant.

An award of four thousand five hundred dollars ($4500.00) is recommended and an order was entered accordingly.

(No. 36-S—Claimant awarded $18.36.)

MRS. J. D. SPENCER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

The record of the above styled claim was referred to the court of claims by the state road commission in pursuance of section 17 of the court act. The claim is for the sum of $18.36. The state road commission concurs in the payment of the claim. The attorney general approves its payment. The claim grows out of a wreck between state road commission pickup car No. 338-18 and claimant's private Plymouth automobile, at Grantsville, in Calhoun county, on June 15, 1941.

In view of the recommendation of the state road commission and the approval of the attorney general, we are of opinion that the award should be made.

We, therefore, award to the claimant the sum of eighteen dollars and thirty-six cents ($18.36).

(No. 37-S—Claimant awarded $25.00.)

MRS. DONOVAN A. MAXWELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

It appears from the record of this claim, which was referred to this court by the state road commission, with recommendation for the payment of $25.00, which recommendation is supported by the attorney general, that on the 22nd day of August 1939, a collision occurred between state road commission truck 430-49, operated by Paul Ringler, and an automobile owned by claimant. The accident occurred on U. S. route No. 119, in Taylor county, West Virginia. The operator of respondent's truck, not seeing claimant's car which had drawn up behind and stopped, backed the state truck to enter a side road and into claimant's car, inflicting damage to it. The record shows that the operator of the state truck was at fault. The claim is one that should be paid.

We, therefore, award the claimant the sum of twenty-five dollars ($25.00.)

(No. 39-S—Claimant awarded $8.00.)

E. R. BIGGESS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

On October 10, 1941, claimant's Plymouth coupe automobile was parked on East Washington street, in the city of Charles-

ton, West Virginia. State road commission distributor truck No. 130-90, driven by Joe Taylor, ran into claimant's car, damaging both left fenders. The actual cost of necessary repairs amounted to $8.00. The record shows claimant to be entitled to an award for that sum. Its payment is recommended by the state road commission and approved by the attorney general.

An award is, therefore, accordingly made in favor of claimant for said sum of eight dollars ($8.00.)

(No. 40-S—Claimant awarded $95.00.)

WALTER McCORMICK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

This claim was referred to the court of claims by the state road commission. The amount of the claim is $95.00. The state road commission recommends its payment. The attorney general approves its payment.

The claim is the outgrowth of a collision which occurred at Henshaw, in Kanawha county, on July 27, 1941, between state road commission truck No. 130-48 with an automobile owned by claimant, a resident of Julian, West Virginia. In consequence of the collision the frame of claimant's car was broken, its body smashed, and its left front springs and tie rods broken.

Upon the record of the claim presented for our consideration the claimant is entitled to an award in the sum of ninety-five dollars ($95.00) which is now accordingly made in his favor.

(No. 41-S—Claimant awarded $40.00.)

HARMAN CASTO, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

The accident which is the basis of this claim occurred in front of state garage R-62, in Mason county, on the 7th day of February 1941. The driver of state road commission truck No. 138-21 failed to observe the approach of claimant's private Dodge automobile, and drove in front of it, and the Dodge car slid on the snow on the road into the state truck. Claimant's car was damaged by the collision. Its fenders were mashed, two front springs broken, and frame and tie rods bent. Claimant seeks an award for damages in the sum of $40.00. The claim is referred to this court by the state road commission in which it concurs. The attorney general approves its payment.

It is, therefore, ordered that claimant, Harmon Casto, be awarded the sum of forty dollars ($40.00) in full settlement of his damages.

(No. 42-S—Claimant awarded $6.00.)

LAWRENCE MEEKS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

On June 5th, 1941, Ervin Asbury was driving state road commission truck 130-127 on Central avenue, in the city of

Charleston, Kanawha county, West Virginia. He stopped on account of traffic at Patrick street. Claimant, driving in his automobile, was also waiting on traffic on Central avenue. He was behind the state truck. When the state truck backed up to allow a car approaching from the right to enter the avenue it struck the front end of claimant's automobile, damaging its emblem and moulding. The state truck proceeded out on Patrick street toward South Charleston, the driver not knowing that he had backed the truck into claimant's car and caused the above mentioned damage.

Claimant is, therefore, allowed an award of six dollars ($6.00.)

(No. 43-S—Claimant awarded $28.93.)

SARAH SPENCER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

On June 19, 1941, in the city of Charleston, West Virginia, state road commission roller 124-11, backed into an automobile owned and driven by claimant, causing damages for which a claim of $28.93 is made. It appears from the record that claimant unsuccessfully endeavored to avoid the accident, for which faulty brakes on the state vehicle was responsible. The state road commission concurs in the claim, which has the approval of the attorney general.

It is, therefore, ordered that claimant, Sarah Spencer, be, and she is, awarded the sum of twenty-eight dollars and ninety-three cents ($28.93.)

(No. 38-S—Claim denied.)

WALTER R. KNICELY, d/ba KNICELY FLORISTS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 12, 1942

ROBERT L. BLAND, Judge.

This is a claim filed October 10th, 1941, in the court of claims, for determination upon the record prepared by the state road commission under the provisions of section 17 of the act of the Legislature creating the court. It appears from this record that the claim is for "damage to flowers and plants by dust and gravel blown by the wind while cleaning and sweeping U. S. route No. 11, in Berkeley county." The record discloses the following pertinent matters:

"What payment recommended: Full amount, if state is liable, $119.25."

"Reason for compensation: State road forces were working on U. S. route 11, widening pavement and exercising all possible precaution to prevent damage, but while sweeping a sudden gust of wind rained a cloud of dust which settled on flowers alongside of road."

The payment of the claim so recommended as above stated by the head of the state agency concerned, is approved by the special assistant to the attorney general.

What should be our determination in the premises? When a claim is submitted to the court under the "shortened procedure" provisions of the court act the statute makes it the duty of the court to consider the claim informally upon the record; and the statute expressly provides: "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 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."

As a general rule an award will be made when the payment of a claim is concurred in by the head of the state agency concerned and is approved by the attorney general as a claim which should be paid; but we think that where it appears from the record that such a claim should not be paid, it is the duty of the court of claims to reject the claim.

The claim under consideration is only conditionally concurred in by the state road commission. It recommends the payment of the claim if the state is liable therefor. Is the state liable for the payment of the claim? We think it is not. In its work upon the highway in question the state was engaged in the performance of legitimate duties. The employees of the road commission were not guilty of any negligent acts. They were, according to the record under consideration, "exercising all possible precaution to prevent damage, but while sweeping, a sudden gust of wind rained a cloud of dust which settled on flowers alongside of the road." For this happening the workmen were not responsible. They could not anticipate a "sudden gust of wind," or that such wind would "rain a cloud of dust" on the claimant's flowers. They were not responsible for this force of nature. They could not prevent it. No acts on their part constituted a proximate cause of the damage for which this claim is made. The state is not liable for an act of God. This law is well settled. In the case of *Brown* v. *State Road Commission,* decided at the October term 1941, of this court, we held: "An act of God is a direct, violent, sudden or irresistible act of nature which could not by the exercise of reasonable care and diligence have been avoided or resisted."

The award is therefore denied and the claim dismissed.

(No. 44-S—Claimant awarded $5.00.)

L. G. SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942.

WALTER M. ELSWICK, Judge.

The record of this claim was referred to the court of claims by the state road commission in pursuance of section 17 of the court act. The claim is for the sum of $5.00. The state road commission concurs in the payment of the claim, and the attorney general approves its payment. The claim is for damages to the fender and hub caps of claimant's automobile, caused by state road commission truck to No. 150-74 sliding on snow and striking claimant's car on February 27, 1941.

After reviewing the record and finding no reason for rejecting payment, in view of the recommendation of the state department involved and the approval of the attorney general, we are of opinion that the award should be made.

We, therefore, award the claimant, L. G. Smith, the sum of five dollars ($5.00.)

(No. 56-S—Claimant awarded $28.92.)

GEORGE M. BALSLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

WALTER M. ELSWICK, Judge.

The record of the above styled claim was referred to the court of claims by the state road commission in pursuance of section 17 of the court act. The claim is for the sum of $28.92. The state road commission concurs in the payment of the claim and the attorney general approves its payment. The claim is for loss of the value of a practically new Royal DeLuxe White-wall tire casing and a Royal DeLuxe tube which were cut and ruined when plaintiff's car struck an iron block on the highway used as a warning sign by a painting crew. When struck the iron block was on claimant's side of the road, while it is customary to have them placed on the painted line. The accident took place on route No. 50 near Evansville, West Virginia, on September 26, 1941.

After reviewing the record and finding no reason for rejecting the claim, in view of the recommendation of the state road commission and the approval of the attorney general, we are of opinion that the award should be made.

We, therefore, award to the claimant the sum of twenty-eight dollars and ninety-two cents ($28.92.)

(No. 58-S—Claimant awarded $47.86.)

A. R. SNODGRASS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

WALTER M. ELSWICK, Judge.

On May 12, 1941, state road truck No. 130-72, attempting to turn around, backed into claimant's 1937 model Chevrolet car, which had stopped, and as a result crushed the grill, bent radiator and fan, damaging claimant's car to the extent of $47.86 for which amount claim is made. It appears from the investigation made by the state road commission that the state road truck driver was at fault, that the operator of claimant's car had stopped at the time of the collision. The state road commission concurs in the claim and has referred the same to the court of claims in pursuance of section 17 of the court act. The attorney general approves its payment.

After reviewing the record and finding no reason for rejecting an award, in view of the recommendation of the state road commission and the approval of the attorney general we are of the opinion that the award should be made.

We, therefore, award to the claimant the sum of forty-seven dollars and eighty-six cents ($47.86.)

(No. 59-S—Claimant awarded $7.00.)

MRS. HANNA COBB, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

WALTER M. ELSWICK, Judge.

On September 25, 1942, near Bridgeport, claimant's car ran over a metal flag left in a curve in traffic lane inside newly painted white line where metal flag could not be seen in time to avoid striking it when claimant's tire and tube was punctured and left in such condition that it was necessary to purchase a new tire and tube at a cost of $13.55, and fifty cents for changing tire. The claim is presented for $7.00, after allowing depreciation by wear and tear of tire and tube damaged. The claim was referred to the court of claims by the state road commission in pursuance of section 17 of the court act, and the state road commission concurs in the payment of the claim for $7.00. The attorney general approves its payment.

After reviewing the record and finding no reason for rejecting an award, in view of the recommendation of the state road commission and the approval of the attorney general, we are of the opinion that the award should be made.

We, therefore, award to the claimant the sum of seven dollars ($7.00.)

(No. 60-S—Claimant awarded $5.61.)

MRS. WILLIAM O'FERRELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

CHARLES J. SCHUCK, Judge.

It appears from the record of this claim, which was referred to this court by the state road commission, with recommendation for the payment of $5.61, which recommendation is supported by the approval of the Attorney General, that on the 2nd day of October 1941, a collision occurred between state road commission truck No. 938-37 and an automobile owned by claimant. The accident occurred on route 60, about three miles west of Lewisburg, West Virginia. From the statements submitted, it appears that the operator of respondent's truck, in violation of a rule, attempted to turn the said truck past the flagman in one-way traffic, and by so doing, collided with claimant's automobile, damaging the fenders thereto to the extent of the amount herein claimed. The record shows that either the operator of the state truck or the flagman in question was at fault. The claim is one that should be paid.

We, therefore, award the claimant the sum of five dollars and sixty-one cents ($5.61.)

(No. 61-S—Claimant awarded $16.69.)

HOWARD CARSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

CHARLES J. SCHUCK, Judge.

It appears from the record of this claim which was referred to this court by the state road commission, with the recommendation for payment of $16.69, which recommendation is supported by the attorney general, that on the 25th day of September 1941, a collision occurred between state road truck No. 930-17, operated by Milton B. Taylor, and an automobile owned by claimant. The accident occurred in Fayetteville, Fayette county, West Virginia. From the record submitted, it appears that the operator of the state road truck had stopped at a red light signal on the highway going into Fayetteville from Oak Hill, and when the signal turned green, the operator of the said truck attempted to go forward. His truck, by reason of defective brakes, started backward, striking claimant's automobile, and causing the damages in question. The claim is one that should be paid.

We therefore award the claimant the sum of sixteen dollars and sixty-nine cents ($16.69.)

(No. 62-S—Claimant awarded $26.00.)

MRS. J. A. McALLISTER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

CHARLES J. SCHUCK, Judge.

It appears from the record of this claim, which was referred to this court by the state road commission, with recommendation for the payment of $26.00, which recommendation is supported by the approval of the attorney general, that on the 9th day of March 1941, a collision occurred between a snowplow, operated by the said road commission, and the automobile owned by the claimant. The accident occurred on U. S. highway No. 60, in Greenbrier county, West Virginia. From the statements submitted, it appears that the snowplow, operated by the said road commission, while on the highway in question, slipped across the white or division line on the said highway and collided with claimant's automobile, coming in the opposite direction, inflicting damages to the amount claimed. Under all the statements and the consideration of the circumstances surrounding the collision, the claim is one that should be paid.

We therefore award the claimant the sum of twenty-six dollars ($26.00.)

(No. 63-S—Claimant awarded $6.53.)

G. H. PERKINS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

CHARLES J. SCHUCK, Judge.

It appears from the record of this claim which was referred to this court by the state road commission, with recommendation for the payment of $6.53, which recommendation is supported by the approval of the attorney general, that on the 21st day of March 1941, a collision occurred between state road truck No. 930-18 and an automobile owned by the claimant. The accident occurred on state route 41, in Nicholas county, West Virginia. The operator of respondent's truck, not hearing the horn or signal warning of the claimant's car, crowded or drove to the left of the said highway to avoid rough pavement on the right, and by so doing, struck the right front fender and wheel of claimant's automobile as he was passing from behind, and inflicting damage to the said claimant's car. The record shows that the operator of the state truck was at fault. The claim is one that should be paid.

We therefore award the claimant the sum of six dollars and fifty-three cents ($6.53.)

(No. 64-S—Claimant awarded $21.63.)

GEORGE RODGERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 24, 1942

CHARLES J. SCHUCK, Judge.

It appears from the record of this claim, which was referred to this court by the state road commission, that the claimant should be given an award by this court, but that the amount of damage claimed, to-wit, $21.63 is too high. The justness of the claim is approved by the attorney general. The accident occurred near Petersburg, in Grant county, West Virginia, and was occasioned by a collision between respondent's truck No. P-30-60 and claimant's automobile. A review of the statements submitted for consideration by this court clearly indicates that the collision was caused in the operation of the respondent's truck; the said truck having been loaded with a protruding grader which collided with claimant's parked automobile at the place in question.

It appears that the only matter in controversy between the claimant and respondent is the amount of damages to claimant's automobile. A careful examination of the record reveals that the only statements submitted show the damages in the amount of $21.63, and since to reduce this amount would be pure conjecture or guess on our part, we make an award for the amount in question, with the recommendation that the same be paid to the claimant.

We therefore award the claimant the sum of twenty-one dollars and sixty-three cents ($21.63.)

(No. 57-S—Claimant awarded $65.00.)

GRADY SILAR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed January 27, 1942

WALTER M. ELSWICK, Judge.

On August 23, 1941, state road truck No. 138-27 was being driven by a state road employee on the state highway in the town of Whittaker in Kanawha county, West Virginia, following about 400 feet behind claimant's car. Claimant's car pulled off the road into a highway leading to his home, giving the proper signal that he was making the turn off the highway, at which time the truck was about 30 feet distant behind him. The truck driver, without heeding the warning, continued on and struck claimant's car, damaging both right front and rear fenders and the door on the right side, necessitating repairing of door and fenders, at a cost of $65.00. Claimant's car was a 1938 model Dodge. It would appear from the record that the driver of claimant's car was not at fault, but that the driver of the state road truck failed to heed the warning signal that the operator of claimant's car had given.

The payment of the costs of repairing claimant's car is recommended by the state road commission, which recommendation is approved by the attorney general. The claim was filed and submitted by the state road commission, with the clerk, on December 18, 1941. Additional proof was submitted on January 26, 1942.

From the record submitted, we are of the opinion that an award should be made and an order will be entered recommending an award of sixty-five dollars ($65.00.)

(No. 35—Claim dismissed.)

F. F. COTTLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 27, 1942

The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Appearances:

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

WALTER M. ELSWICK, Judge.

The allegations of the petition filed in this case, insofar as they are material to the question of jurisdiction of this court are as follows:

That claimant, a resident of Cabell county, West Virginia, is the owner of real estate abutting on fifth street road, state road route No. 52, about one-half mile from Huntington city limits; that in December 1936, the state road commission constructed the said highway in front of claimant's house, and that "the construction of this highway caused the channel of a stream to be so diverted that it has been and will continue to damage the complainant's property and during highwater endangers his home."

The state road commission, by the attorney general, filed a special plea to the petition alleging that the cause of action of claimant, if any, can be determined by a mandamus proceeding in the proper circuit courts of this state against the state road commission, and that by reason thereof said claim is thereby excluded from the jurisdiction of the state court of claims, by

virtue of subsection 7, section 14, chapter 20, acts of the Legislature 1941.

A copy of said special plea filed was mailed to Robert S. Starcher, Huntington, West Virginia, attorney for the claimant, on the 17th day of January 1942, and the claim came on for hearing on the question of jurisdiction of the state court of claims on the 26th day of January 1942. On said date no appearance was made by claimant either in person or by counsel, and the court took the question of jurisdiction of the claim under consideration.

Prior to the passage of chapter 20 of the acts of the Legislature of 1941, the Supreme Court of our state in the case of *Riggs* v. *State Road Commission*, 120 W. Va. 298, 197 S. E. 813, affirming *Hardy* v. *Simpson, Road Commissioner*, 118 W. Va. 440, 191 S. E. 47, held that where highway construction or improvement results in probable damage to private property without an actual taking thereof, and the owners in good faith claim damages, the state road commissioner has statutory duty to institute proceedings within a reasonable time after completion of work to ascertain damages, if any, and, if he fails to do so, after a reasonable time, mandamus will lie to require the institution of such proceedings.

These decisions are based upon the imperative provision of our constitution, article 3, section 9, that "private property shall not be taken or damaged for public use, without just compensation." While the remedy provided for therein remains unchanged these decisions would remain as precedents for the courts of our state as to the procedure followed, and so long as the same exist, the jurisdiction of the state court of claims does not extend to any claim upon which a proceeding may be maintained by a claimant in the courts of the state, as provided for in subsection 7, section 14 of chapter 20 of the acts of 1941. It appears from the petition in this case that the claim of F. F. Cottle filed herein is such a claim as may be proceeded on under the decisions in the *Riggs* and *Hardy* cases, and being a claim of such nature it is excluded from the jurisdiction of this court, and an order was entered accordingly.

(No. 4—Claim dismissed.)

LOUISA SCAVERIELLO, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 27, 1942

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state.

John D. Downes, Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

The claimant, Louisa Scaveriello, has heretofore filed her petition in this court, asking for an award of $6500.00 for damages caused to certain lots and buildings located on what is known as Deckers Creek road, Sabraton, Monongalia county, West Virginia. Claimant maintains that the damages were caused by reason of the state road commission taking certain parts of claimant's property in carrying out state project No. 3274, and entailing further, the removal of certain buildings located on said lots or property. The record further shows that this project was carried out, and the damages, if any, to the property in question, caused prior to May 16, 1933, the time at which the state, through its state road commission took over the control, maintenance, and upkeep of highways in the state of West Virginia. The state has filed a special plea to the jurisdiction of this court, setting forth that no cause of action lies against the state road commission, but that the remedy, if any, is exclusively against the county court of said Monongalia county, in which the real property in question is located. No

replication has been filed or answer of any kind been made to this plea, notwithstanding notice of its filing having heretofore been given in ample time to the claimant through her attorney of record.

Assuming that all matters set forth in the plea are true, we must, under the law, sustain the plea and dismiss the claim from further consideration.

Previous to May 16, 1933, the right of action under our law for damages to land, growing out of the construction or repair of a state road, was exclusively against the county court of the county in which the land lay. See *Trump* v. *State Road Commission*, 116 W. Va. 625, which was decided November 26, 1935.

The claimant had the right, and was vested with the power at the time that the damages were caused to her property, to take action in the circuit court of Monongalia county against the county court of the said county, and having failed to do so, is now, in our opinion, barred from having the matter of her claim considered by this court.

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. We are of the opinion that the claim under consideration falls within the class excluded by said section 14 of the act, and are, therefore, constrained from further consideration.

(No. 19—Claimant awarded $1500.00.)

ROSA ELLIS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 27, 1942

During the course of repairing and reconstructing a bridge, which bridge is kept open to pedestrians and travelers while said repairs are being made, it is negligence on the part of state road commission employees to throw a hot rivet used in connection with the making of said repairs while a pedestrian is crossing the said bridge and in close proximity to where the said rivet is being thrown, and which, if improperly thrown, is likely to strike and injure such pedestrian. If injury results from such negligence, the state road commission is liable.

Appearances:

Clarence J. Benson, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, for the state; *J. H. Fiengold,* Esq., and *John Gillespie,* Esq., for the state road commission.

CHARLES J. SCHUCK, Judge.

On or about the 10th day of February 1932, the state road commission was engaged in repairing a certain bridge crossing the Guyandotte river at Gilbert, West Virginia. As part of the work of making said repairs, the workmen engaged thereon were obliged to use hot rivets in welding certain brackets or supports to the said bridge for the purpose of constructing the sidewalk thereon to be used by pedestrians. During the time that said repairs were being made, the walk on said bridge could not be used, and pedestrians were obliged to use that part of the bridge theretofore used for vehicle or automobile travel. It was while a pedestrian on said bridge that the claimant was struck by a hot rivet being thrown from one workman to another and which rivet was to be used in connection with the aforesaid repairs.

It appears that the custom was to heat the rivets and then to throw them from the workman using the furnace for heating the rivets to another workman who was known as the "catcher" previous to inserting the rivet in the steel work of the bridge, and which "catcher" used a bucket for the purpose of receiving the rivet. The evidence shows that on the occasion in question the receiver, or "catcher" missed the rivet, the rivet striking the bed of the bridge and bounding in the direction of the claimant, striking her on the leg, inflicting a severe burn which required medical attention both at her home and at a hospital, and requiring as well her confinement to her home for several months.

The evidence clearly shows that the claimant had passed the "catcher" going in the same direction in which the rivet was thrown, and was in such close proximity to the operation in question that she could easily be seen, or ought to have been seen, previous to the time of the throwing of the rivet. In view of the fact that the bridge was open to pedestrians and travelers, and considering the nature of the work that was being carried on, it became the duty of the state road commission and its employees to exercise the highest care in protecting pedestrians and travelers from injuries during the time that the said bridge was in the course of repair.

The evidence of the several witnesses, including one of the witnesses offered by the state, and who was engaged in the work at the time, conclusively shows that the claimant was in the exercise of her rights in crossing the bridge at the time and place in question, and had exercised all necessary care as such pedestrian and that the employees as hereinbefore noted, especially so the employee who was throwing the rivet at the time, had not taken the necessary precaution to protect the claimant as such pedestrian. The act of throwing the rivet, under the circumstances, before the claimant had gotten a sufficient distance from the "catcher" to be safe from any injury, was negligence on the part of the employee, for which the state road commission is liable.

The claim filed is in the amount of $2500.00. The evidence shows that claimant entailed expenses, including doctors' and

hospital bills, in the amount of approximately $300.00; that she was obliged to have a maid in her home for a period of four months to do the work and to render the service which the claimant had theretofore done, and which she could not do by reason of her injuries. The evidence further shows (record pp. 33-54), that she suffered severe pain for a long period; that her suffering at times was acute and intense. Under all of these circumstances and conditions, and considering the evidence adduced in the hearing of the cause, we feel that an award for fifteen hundred dollars ($1500.00) is just and proper, and therefore recommend the said amount to the Legislature accordingly, in full payment and satisfaction for claimant's injuries and damages.

(No. 52—Claim denied.)

L. B. JAMES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 27, 1942

When, upon the hearing of a claim for an award for reimbursement for money paid for repairs to an automobile driven by claimant into a tree blown by storm upon a public highway, proof offered in support of such claim fails to show negligence on the part of the state road commission, or establish a right of action for such damages, a motion of the attorney general to dismiss the claim will be sustained, an award denied and the claim dismissed.

L. B. James, claimant, *pro se;*

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

ROBERT L. BLAND, Judge.

On the evening of September 5, 1941, claimant, L. B. James, a minister of the gospel, was driving his 1937 model Chevrolet automobile on state route No. 15, between Bergoo and Cherry Falls, in Webster county, West Virginia. He was enroute to Cherry Falls, about one and one-half miles above Webster Springs, where he was engaged in conducting a revival meeting. About five o'clock P. M. of that day, and before his departure from Bergoo, a very heavy and severe rain and wind storm occurred and continued for perhaps an hour. The road traversed a more or less mountainous and wooded section, with fair grade a part of the way and curves at intervals. The day had been warm and after the subsidence of the storm, steam formed from two to three feet in height upon the hard-surfaced highway. This vapor was very heavy close to the road and a traveler thereon could not see more than fifteen feet in front of him, but above the mist visibility extended for quite a distance. This condition of the road was described in the evidence as "fog" and prevailed from the time claimant left Bergoo. He was accompanied in his car by a companion and was driving at a speed of from twenty-five to thirty miles per hour. When he arrived at a point about three and one-half miles east of Webster Springs he ran his car into a tree which had been blown by the storm into the highway. This tree, having been shorn of its foliage, was around ten or twelve inches in diameter, its length not being shown, and laid partially across the paved portion of the road. It fell from the side of the road on the right as claimant traveled. It would appear from the evidence that it did not occupy the full width of the pavement. When the car hit the tree, its axle, right front wheel, frame and springs were damaged. In order to repair this damage and place the car in proper condition claimant paid $75.42. He seeks an award for the reimbursement of that amount.

The claim is predicated upon the theory that failure to remove the tree from the highway, or to give proper warning of its danger, constituted negligence on the part of the road commission for which the state is liable.

Where negligence is relied upon it must be fully proven, and the burden rests upon the claimant. When alleged negligence is not proved there cannot be an award made on that ground.

The evidence does not disclose when the tree was blown by the storm upon the highway, how long it had remained there, or that the road commission had received notice that it had fallen on the road, or had a reasonable time to remove it from the highway before the accident occurred. All sections of a state highway cannot be patrolled at the same time and the road commission cannot be held negligent for failing to anticipate just when and where a tree may be blown by storm upon highways under its control. Such responsibility would be unreasonable. Safety in traveling on a public road in time of storm—or at any other time—cannot be guaranteed by the state.

It appears from the testimony of claimant himself that although the highway traveled by him passed through a heavily wooded section on both sides for a part of the way and all the way on one side, and that the steam or "fog" on this road was so heavy that he could not see for a distance of more than fifteen feet ahead, and that the road was "pretty curvy" he, nevertheless, drove his car at a rate of speed of from twenty-five to thirty miles an hour and was driving at that speed when he drove into the tree. In view of the storm, with its attendant dangers, and the obscured vision of the road on account of the steam or fog arising from its surface, was this careful driving? Can it be said that claimant was without contributory negligence on his part? When asked by a member of the court if he did not feel that it was highly dangerous driving under all the circumstances to which he had testified, he answered: "Yes, sir." Where it appears from the testimony of claimant himself that he is guilty of contributory negligence in driving on the highway in question under circumstances shown by the evidence in the instant case, an award will not be made.

When claimant concluded the offering of evidence in support of his claim, the assistant attorney general moved to dis-

miss said claim for failure to establish negligence on the part of the road commission.

The evidence offered and relied upon by claimant in support of his claim does not prove negligence on the part of the state road commission. We think claimant was guilty of contributory negligence in the premises. The evidence is insufficient to justify an award upon the facts proved.

The motion of the assistant attorney general is, therefore, sustained, an award denied and the claim dismissed.

(No. 49—Claim denied.)

SARAH E. MOORE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed February 27, 1942

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

Cecil B. Dean, Esq., for the claimant;

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

ROBERT L. BLAND, Judge.

By her complaint filed herein on September 28, 1941, claimant, Sarah E. Moore, a resident of Little Hart creek, in Lincoln county, West Virginia, asks an award of $2500.00 damages to compensate her for personal injuries received in an accident which she sustained on January 28, 1936. She contends that a

day or two prior to that date employees of the state road commission, while working on state route No. 10, in Lincoln county, about two miles west of the town of Ranger, removed the snow from the surface of said road, and while removing the snow from the ditch line of the highway, with a road grader, placed, or caused to be heaped, a ridge or layer of snow, ice and mud from twelve to fourteen inches in height, upon and across the highway, path and steps leading from claimant's home to said highway. She further claims that the said highway, path and steps, blocked by the said snow, mud and ice was the only usable way or road of getting to said highway from her home; and that due to such negligent act in placing and heaping said snow, mud and ice as aforesaid, and leaving the same so placed and heaped, while she was using said highway, path and steps leading from her home to said state route No. 10, in an attempt to go to said highway, she stepped on top of said pile or heap of snow, mud and ice, and the same being frozen into a crust on top, broke under her weight and caused her to fall, breaking both bones in her left leg between the ankle and knee.

Respondent has filed a general denial of liability. Claimant must prove her claim by a preponderance of the weight of evidence. She must show that her claim is one for which an award may be made. To do this she testified on her own behalf, and introduced as witnesses her husband, Francis Leet Moore, and her two daughters, Siddy Midkiff and Ruby Black, who gave evidence in support of her claim. Beyond showing her unfortunate accident, which has undoubtedly caused her much pain and suffering and necessitated the expenditure of money for medical and surgical treatment, the evidence on which she relies is vague, unsatisfactory and without probative value, and falls far short of establishing a case of negligence on the part of respondent.

It appears from the record that on either the 24th or 25th day of January 1936, there was a heavy snowfall in the vicinity of claimant's home. This snow fell upon state route No. 10. For the convenience and safety of traffic it was necessary to remove this snow from the highway. A motor patrol grader was used

for the purpose of doing so. It removed the snow from the highway and deposited it in a windrow, at least two feet outside of the edge of the paved portion of the road. This deposit of said snow formed a small ridge, claimant and her witnesses not being in agreement as to its actual height. In her complaint claimant alleges that it was from twelve to fourteen inches in height, and the evidence does not show it to have been higher than fourteen inches. This snow was distributed uniformly along the side of the road.

Claimant's property abutted for its full width upon state route No. 10. The dwelling house thereon was located from twenty-five to thirty yards from the highway. The lawn between this dwelling house and highway was, according to claimant's statement, "slanting." A walk or pathway led from the house to the road. At the point where the premises abutted on the highway there was a small bank. From this bank to the thoroughfare were three flagstone steps. The snow on the walk or pathway from the dwelling house to the highway had been swept by claimant's husband. On the day of the accident claimant and her husband had walked down this pathway to route No. 10 on their way to visit a nearby neighbor. Claimant's husband stepped from the third flagstone over the small ridge of snow deposited upon the edge of the highway. Claimant, however, stepped onto the snow and broke her leg. Apparently neither claimant nor her husband regarded the windrow of snow as dangerous at the time they attempted to enter upon the highway, nor does it appear from the evidence that it was in fact dangerous. The evidence does not show that claimant's husband warned her against danger in crossing to the highway, or offered her assistance in doing so. Both claimant and her husband knew that this small windrow of snow was on the outer edge of the highway. It presented no impediment to claimant's access to the highway. Claimant's husband testified that he had swept the pathway from the house to the road, including the three flagstone steps. This ridge of snow was two feet from the outer edge of the pavement and between the pavement and these steps, evidently leaving a distance between the snow and road right-of-way. It therefore appears

from the evidence that claimant had an unobstructed outlet from her premises to the highway before the ridge of snow was reduced.

The mere fact of injury received on a state highway raises no presumption of negligence on the part of the state road commission. Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made. In this case it is not shown by the evidence that claimant's injury resulted from the road commission's negligence. Negligence has not been established.

We think that lack of caution and the exercise of ordinary care on the part of claimant was responsible for the accident which she sustained and not the action of the road commission in removing the snow from the surface of the highway in a windrow along the side of the road, which under all the circumstances disclosed by the record was necessary to be done in the interest of the public use of the road, and which work would appear to have been performed in the usual approved manner observed by respondent in cleaning snow from highways.

Under the facts proved by claimant she has failed to establish negligence on the part of the road commission. Under this evidence we cannot make an award in her favor.

An award is, therefore, denied.

(No. 5—Claim denied.)

RUTH MILLER, Claimant

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed February 27, 1942

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

Appearances:

Messrs. *Rollins & Lilly* (*Lawrence E. Rollins*, Esq. and *David Lilly, Jr.*, Esq.), for the claimant;

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

CHARLES J. SCHUCK, Judge.

On the 6th day of April 1940, one Lloyd Adkins, Jr., then sixteen years of age, was adjudged a delinquent within the meaning of the laws of the state of West Virginia, by the Kanawha county juvenile court, and as his parents were unable to properly care for, protect, and discipline him, he was ordered to be committed to the West Virginia industrial school at Pruntytown; the superintendent of the said school was designated as the guardian for the said Lloyd Adkins and was directed to receive him into his custody as such superintendent, to hold, care for, train, and educate him until such time as he should attain the age of twenty-one years. Before his commitment to the said reform school it was found and known by the Kanawha county juvenile authorities that Adkins was afflicted with syphilis, and information to that effect was some time later conveyed to the board of control of the state of West Virginia and to the authorities at said industrial school as well. Thereupon the state director of the department of pub-

lic assistance was advised by the state board of control that the said Adkins would be accepted at the industrial school only on certain conditions, which included a statement from the county health officer or some medical officer to the effect that the said Adkins had reached a noninfectious state, and detailing the treatment that he had already received, as well as recommending the treatment which he should receive after being admitted to the said industrial school. A further condition before his admission, was the requirement that the West Virginia industrial school for boys should have an examination made of the said Adkins by Dr. C. M. Ramage, superintendent of the Fairmont emergency hospital, a state institution, to ascertain whether his disease was noninfectious; and for the purpose of conducting the said examination and continuing any necessary treatment, the said Adkins was taken to the said hospital at Fairmont, where he was admitted on February 11, 1941, and where an examination disclosed that he was suffering from the disease in question, although no lesions were present to indicate that the disease was infectious to others.

Under Dr. Ramage, the superintendent of the said hospital, the treatment was continued for several weeks and had reached the point where, from the evidence, Adkins was still confined to his room and bed, yet, nevertheless, by reason of his improved condition, was in the beginning of March, 1941, allowed bathroom privileges. On March 3, 1941, having in some manner secured clothing, he was discovered by the head nurse to be dressed in the said clothing, and was immediately ordered to his room to undress and go to bed. He entered the room and closed the door, seemingly obeying the order of the head nurse, and shortly thereafter leaped through a window and escaped. On the same day of the escape, and shortly thereafter, the said Adkins stole a DeSoto automobile belonging to the claimant, Ruth Miller, and at or near Shinnston, West Virginia, wrecked and damaged the said automobile to the amount set forth in the petition filed herein for an award. The said Adkins was subsequently tried in the criminal court of Marion county for stealing the said automobile, and upon

a plea of guilty, was sentenced to the state penitentiary. Upon this statement of facts, this court is asked to make an award for the damages suffered by the claimant in the loss and injury to the said automobile, occasioned by the said Adkins, as herein shown and set forth.

At the very outset of the consideration of the claim, a number of questions present themselves in the determination of how far, if at all, the state or its agency, the board of control, would be liable for acts of negligence, if any, or nonfeasance on the part of the hospital authorities or those who had Adkins in custody at the time of his treatment at the Fairmont hospital. A careful search of the authorities and decisions failed to reveal any adjudicated cases which would fit the facts presented in the instant case, although a number can be found in which states, counties and municipalities are held not liable for the acts of agents or officials, assuming that such acts were negligent in their character.

The act creating the court of claims, in our opinion, contemplates a broad, wide and liberal construction, and places a moral liability on the state, so far as an award may be concerned, when heretofore, as herein indicated, states and their governmental agencies were in no sense liable for the acts of negligence or nonfeasance of agents or officers. However, assuming for the purpose of our decision that the interpretation that we place on the act creating the court is correct, are we not still bound to find further that the acts of those in charge of the hospital at Fairmont were of such a negligent character and nature, as under ordinary conditions would make the said officials and agents personally guilty of negligence and answerable in damages for the injury to claimant's automobile?

It is true that the Adkins boy, as shown by the evidence, had been guilty of a number of automobile thefts, that he had made several escapes from custody, that for one of his age he had already shown criminal tendencies to a marked degree, and that he was likewise suffering from the disease in ques-

tion as heretofore noted. He had been confined to his bed in the said hospital for about three weeks, when, by reason of the progress that he had made toward recovery, so far as the communication of his disease to others was concerned, he was allowed what are commonly termed bathroom privileges.

In the very beginning, we must recognize that the institution involved, and where Adkins was held in custody, is a hospital and not a prison or reformatory; that those in charge were physicians and nurses, not law enforcement officers. That the board of control as a state agency, so far as the evidence reveals, had not yet accepted Adkins as a ward of the state and could not, therefore, be charged with the full responsibility, so far as his custody was concerned, until all the conditions and requirements for his acceptance had been fully met and satisfied. He was still, in our opinion, in the care and custody of the juvenile court of Kanawha county, and not in the absolute custody of the state board of control.

However, putting all these matters aside, has negligence on the part of the attendants at the Fairmont hospital been shown? —a factor which is necessary before the state or its agency, the board of control, could be held liable for an award by this court. We do not think so.

At the beginning of March of the year of his confinement at the hospital, to be exact, on the 3rd day of March, he was found to be clothed, having obtained the clothing in some manner not known to the authorities in charge of the hospital. He was immediately ordered to undress and return to his room and bed, and seemingly entered his room for that purpose, and after having closed the door, he made his escape.

The hospital authorities were obliged to exercise ordinary care in controlling the custody of the said Adkins, and it being an emergency hospital under the control of the state, and having, no doubt, many cases for treatment and observation, it could not be expected that the hospital would be put on the same basis as a penal institution or obliged to exercise the same

vigilance as is exercised in the ordinary penal or reform institution in controlling the custody of prisoners confined therein; nor did it have the means at its command, so far as the evidence reveals, to prevent such escape.

The nurse in question had the right to assume that, under all circumstances, Adkins was about to obey her command. And while it may have been a mistake to allow him to enter the room without an attendant, yet this act of itself could not be construed as negligence since, under all the circumstances, reasonable minds could well differ as to what should have been done in the exercise of ordinary care; and considering further the season of the year, can we say that the nurse did not act properly and discreetly, and that she was not exercising ordinary care under all the attendant circumstances?

With these facts in mind, we fail to find that there was such negligence as would make the attendants or those in charge of the hospital guilty of such negligent acts or such nonfeasance as would make the board of control liable. We repeat that, while the act creating this court is broad and wide in its scope, and while we conclude that a liberal interpretation and construction must be placed on its various provisions, yet the state cannot be held liable merely because someone theretofore not fully in its custody had committed a tort, by reason of which a citizen suffered damage. There still must be negligence, as herein indicated, on the part of the state agency, department or employees to justify the finding of an award.

(No. 50—Claimant awarded $3,041.33.)

CHARLES LIVELY, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed February 27, 1942

Where it appears from the record and evidence applicable to a claim, that the Legislature by successive appropriation acts makes reference in each instance to a former act of the Legislature which former act also refers to a concurrent resolution specifically directing that certain items in the costs of printing and binding, such as maps and half-tone illustrations and circular matter necessarily used in the completion of the work directed to be done, shall be paid out of the appropriations for printing, binding and stationery fund, known as the legislative printing fund appropriation, and said successive acts, by construction placed thereon by officers charged with their execution have been interpreted to include such costs, when such interpretation is the plain meaning of such acts, an award will be made to one who has been refused payment of such costs out of such appropriations, by the auditor, and has personally paid for same, when it is found that no part of said claim has been repaid to such claimant or to anyone for him.

Appearances:

Charles Lively, claimant, in his own behalf;

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

WALTER M. ELSWICK, Judge.

Charles Lively, the claimant, by acts of the Legislature first extraordinary session 1933, the regular sessions 1935, 1937 and 1939 was intrusted by said sessions of the Legislature to edit, compile and publish the "West Virginia Blue Book" formerly known as the "West Virginia Legislative Hand Book and Manual and Official Register" for the years 1934, 1935, 1936, 1937, 1938, 1939 and 1940, under the same provisions as to distribution as were adopted in the legislative sessions of 1921,

including all expenses incurred in the employment of contributors, preparation of matter, clerical hire, stenographic services and proofreading. While editing, compiling and publishing the said blue book for said years the said Charles Lively was put to personal expense in providing for cuts, engraving, half-tone illustration, and circular matter for which he billed and filed requisitions with the state auditor for payment. The state auditor refused payment for these expenses. It appears from the evidence and records presented to the court that the state has not, during the years that the claimant edited the blue book, paid for any such expenses. However, it does appear that the state paid the former editors for such expenses including photographs used in the publishing of said blue book from the year 1921 to and including the year 1933, the acts being so interpreted by the editors and auditor as to include such expense for the editions published prior to 1934. The wording of the legislative appropriation acts from the year 1921 to and including the year 1933 was of the same subject and nature used in the appropriation acts for the said years during which the claimant edited the blue book.

The appropriation act passed at the 1941 session of the legislature also contained the same provisions for printing the blue book for the years 1941 and 1942 by reference to the first act of 1921. It also appears from the evidence that from the present interpretation of said current act of 1941 the auditor is of the opinion that said appropriation included the costs of such cuts, engraving, half-tones and circular matter, and that he has approved a requisition by the present editor of the blue book, the successor to the claimant, Charles Lively. Such expenses for editing and publishing the 1941 edition of the blue book as provided for in the 1941 session of the Legislature were included in the printer's bill, the same not having been billed directly to the editor.

It further appears from the evidence that during the time the claimant was editor of the blue book such cuts, engraving and half-tones were prepared by the Charleston Engraving

Company and billed directly to Mr. Lively, the claimant, and he, the editor, delivered same to the printer. Prior to the time that the claimant, Lively, became the editor of the blue book the procedure had been for such cuts to be delivered to the printer and to be billed to the auditor by the printing company, and that was the procedure which the claimant undertook to follow, but the auditor refused to approve any billing or requisition including such expense for engraving, cuts, half-tones or circular matter.

When the claim came on for hearing the chief clerk in the auditor's office, as will appear from the evidence, made a search of the auditor's office to ascertain whether or not any part of this claim had been paid by the state to any printer by such expenses having been included in the printer's bill and it appeared after such search being made that no part of the claim as presented has been paid by the state of West Virginia. The claimant in presenting his claim had credited the state with $119.46 for the value of cuts the printer had purchased for the 1941 edition which amount was included in the printer's bill for the year 1941 and the claimant also has turned over to the present editor, Hon. A. Hale Watkins, a master plate for the state seal, and a plate for the state flag, including all copper plates or whatever cuts he now has that were included within the particular items set forth in his claim herein for the use and benefit of the state in future publication of said blue book.

It also appears from a letter addressed to the court of claims under date of November 13, 1941, signed by the state auditor, enclosing the bills submitted by the claimant, aggregating a net amount of $3,041.33, that the auditor admits that he refused to allow reimbursements to the claimant for such expenditures when he first came into office as auditor, under a misapprehension of the law, and continued such course during all the time that Mr. Lively, the claimant, performed this work. The auditor, however, states in this letter that:

> "In the light of what I have learned about the law and accounting generally of the state, I am inclined to

believe that I perhaps erred in denying Mr. Lively reimbursements for these claims.

"I refer this matter to you for recommendation and your decision as to whether the Legislature should approve a sum to pay this claim at the next session of the Legislature."

It further appears from the evidence and the acts examined that the appropriations heretofore made had lapsed and reverted for all the previous years so as to prevent any payment on such requisitions by the auditor at this time.

The general appropriations act of 1921, chapter 1, section 73-a mentioned and referred to in all of said acts, specifically refers to Senate concurrent resolution No. 7, when making appropriations for the printing of the hand book for the years 1922 and 1923. Herein specified amounts are included in the appropriation for each of said years, but the intent of the Legislature seems to be clear by reference to Senate concurrent resolution No. 7 that the costs of printing and binding the hand book, including any maps, engraving and half-tone illustrations therein and circular matter necessary in connection with the work of preparing and distributing the book shall be paid out of the appropriation for printing, binding and stationery and not out of the specified funds set aside to the editor for editing, compiling and publishing the hand book. Said Senate concurrent resolution No. 7, adopted April 21, 1921 provides:

"The cost of printing and binding the hand book, including any maps and half-tone illustrations used therein, and circular matter necessary in connection with the work of preparing and distributing the book, shall be paid out of the appropriations for printing, binding and stationery."

It further appears from the evidence that the claimant, Lively, has not included in his claim an expense of from $400.00 to $500.00 which he has incurred in the use of photo-

graphs in editing the blue book during his years of service, while a former editor charged and received payment for the expense of photographs from the appropriation of legislative printing.

The construction given the series of acts of the Legislature following the year 1921 up to and including the year 1933 as well as the interpretation placed upon the 1941 act, all passed making reference to the 1921 act, which embodied Senate concurrent resolution No. 7, should have great weight in the decision of this case as would appear from the decision of our Supreme Court in the following cases: *State ex rel. Brandon* v. *Board of Control*, 100 S. E. 215, 84 W. Va. 417; *Mortgage Company of Maryland* v. *Lory*, 160 S. E. 1, 110 W. Va. 520, and cases cited.

In view of the evidence and the wording of all of said acts of the Legislature we are of the opinion that the claim is one based on simple justice and right, and is such claim that the state of West Virginia should pay. From the proof submitted the claim of three thousand forty-one dollars and thirty-three cents ($3,041.33) has been personally paid by the claimant which was an expense intended to be covered by former appropriations, for which said sum an award for reimbursement is made by order duly entered.

(No. 2—Claim dismissed.)

JOHN W. DRAGON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed March 23, 1942

Where upon motion of the attorney general to dismiss claim for want of jurisdiction, no answer is made by claimant to rule to show cause why his claim should not be dismissed, and it appears from the record that he is without right to maintain his claim, such claim will be dismissed.

No appearance by claimant;

Eston B. Stephenson, special assistant to Clarence W. Meadows, Attorney General, for respondent.

ROBERT L. BLAND, Judge.

Claimant filed his original claim herein on August 11, 1941. On August 21, 1941, the attorney general and the special assistant to the attorney general filed an objection in writing to the jurisdiction of the court to entertain said claim, but the said claim was placed on the trial calendar of the regular October term, 1941, for investigation and hearing on October 22, 1941. The claim was, at said term of the court, continued, on motion of claimant, with leave to amend his petition. Claimant's amended petition was duly filed on February 15, 1942. Claimant alleges, substantially, that he is a resident of Weirton, an unincorporated town or city in Hancock county, West Virginia; that the streets and alleys of Weirton are secondary roads of the state of West Virginia; that on June 16, 1938, and for a long time prior to that date there was a large hole in the 3000 block of Elm street in said town or city of Weirton four feet wide, two and one-half feet deep and fifty or more feet in length; that on said last mentioned date his mother, Katie Dragon, fell into said hole and dislocated her shoulder; that his said mother was a diabetic and by reason of said fall into said hole she became bedfast and that her death occurred on November 24, 1940; that after said accident claimant was obliged

to leave his employment at the Weirton Steel Company in order to give his said mother proper nursing and attention and sustained loss of wages at the rate of twenty-five dollars per week from December 29, 1939, until June 23, 1941; that it was necessary to administer insulin to his said mother three times a day; that he administered such insulin, purchased her medicine, paid her medical and other bills and defrayed her funeral expenses; that he was obliged to expend $2,054.84 for medicine, doctor bills, funeral expenses and other necessary expenses incident to his mother's sickness and death; that failure to repair said hole in Elm street constituted negligence on the part of the state road commission for which the state of West Virginia is liable. He seeks an award for an amount sufficient to compensate him for expenses incurred and paid by him on account of his mother's sickness and death, and for the loss of time which he sustained in his employment at the Weirton Steel Company, and fixes the sum at $3,254.84. A plea denying liability was filed by the attorney general. The claim was placed on the trial docket for hearing on February 24, 1942, at a special term of the court of claims held in Wheeling, the county seat of Ohio county, West Virginia. At said special term of the court the attorney general filed a special plea to the jurisdiction of the court to entertain said claim on the ground that Elm street was not a part of the state highway system on June 16, 1938, and that the state road commission has never maintained said Elm street or designated it as a part of the highway system of West Virginia. When said claim was called for investigation and hearing on said 24th day of February 1942, said claimant did not appear in person or by counsel to prosecute the same. By leave of the court, respondent was permitted to introduce evidence showing that Elm street in Weirton was never at any time a part of the highway system of the state of West Virginia, and the attorney general moved to dismiss said claim. A rule was issued and served upon the claimant requiring him to show cause, if any he could, why said claim should not be dismissed. Having failed to make any return to said rule or to show any cause why the claim should not be dismissed, said motion of the attorney general was sustained and the said claim dismissed.

(No. 30—Claim dismissed; reinstated—see subsequent opinion.)

J. J. RADER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed March 23, 1942

Where a claim is duly filed in the court of claims and twice placed upon its trial docket for hearing, without appearance on the part of claimant to prosecute the same or show reason for his failure so to do, such claim will be dismissed, subject to the right of claimant to have the same reinstated upon showing to the court proper reason for such reinstatement.

No appearance by Claimant;

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

ROBERT L. BLAND, Judge.

Claimant, J. J. Rader, filed his petition in this proceeding on September 22, 1941, and therein alleged substantially the following facts: That he is damaged and has suffered loss by reason of a highway accident in Grant county, West Virginia; that on the 27th day of July 1938, in the course of his usual business, he was traveling on that road or highway located in Grant county, between the towns of Greenland and Scheer, said highway being under the care, supervision and control of the state road commission of West Virginia, and kept and maintained by it for public use and travel; that he was traveling and operating on said road or highway at about 12:30 in the afternoon on said 27th day of July 1938, a light mail truck, and that despite careful and cautious operation of said truck by him said truck was damaged and rendered unfit for use and he was bruised and injured in a head on collision with a heavy lumber truck, driven and operated by one Ernest Rotruck; that said collision or accident occurred on a curve in said road where the

state road commission had permitted said road to become unsafe for ordinary, reasonable and lawful use by reason of brush and undergrowth growing into and on the borders of said road, overhanging said road, so as to make it impossible for the driver of either of the trucks so involved to see the other and avoid the collision; that at the time of said collision or accident the view ahead from the place of said collision or accident was limited to a space of not more than thirty feet; that within two days after said collision occurred the said road commission, by its agents and employees, had cut and cleared away such bush and undergrowth to a reasonable distance from the borders of said road, affording a view ahead at the point of said collision of at least three hundred feet; that said collision occurred without negligence or fault on the part of petitioner and without negligence on the part of said Ernest Rotruck, the driver and operator of said other truck involved, and was caused solely by the obstructed view and dangerous condition of said road or highway as permitted to exist by said road commission, and that the damage to petitioner's truck amounted to the sum of $118.91, and that he is justly and equitably entitled to have an award for said amount. It further appears from the record that on February 4, 1941, a bill was introduced in the House of Delegates of the Legislature of that year, being House Bill No. 145, to provide for the authorization of the payment by the state road commission to said claimant of the said sum of $118.91. No action having been taken on said bill by the Legislature, the same was certified by the clerk of the House of Delegates to the court of claims. But, being required so to do by this court, claimant filed a new claim as above stated. The special assistant attorney general filed a general denial of liability of said claim on November 15, 1941. Said claim was placed upon the trial calendar of this court, at its regular October term 1941, for hearing on November 17. When the calendar was called there was no appearance on the part of claimant in person or by counsel, although the court reporter was in attendance as were also witnesses summoned on behalf of the state, and no reason was assigned at that time for failure of claimant to appear and prosecute his said claim. Claimant was thereafter notified that said claim would not be placed

upon the trial calendar for hearing until he should ask to have it fixed for hearing and be ready to proceed with proof in support of his claim, which he accordingly did. Said claim was then placed on the trial calendar for hearing on the 26th of February 1942, at a special term of this court held in the city of Wheeling, the county seat of Ohio county, for the convenience of the parties concerned. When said claim was reached on the calendar of the court at said special term, the claimant did not appear in person or by counsel to prosecute his said claim, and the special assistant to the attorney general moved that said claim be dismissed for failure of prosecution after having been placed upon the court's calendar for hearing upon two separate occasions. While it is the policy of the court of claims to give every claimant whose claim falls within the *prima facie* jurisdiction of the court a full hearing upon its merits, when a claim is placed upon the court's calendar for investigation and hearing he will be required to appear and prosecute the same or show satisfactory reason for his failure so to do; and when a claim is twice placed upon the trial calendar for hearing and the claimant fails to appear and prosecute the same it will, on motion of the attorney general, be dismissed on condition that it may be reinstated provided such claimant shall show satisfactory cause to the court why such claim should be reinstated upon the court's calendar for investigation and hearing, and such order was made in the instant case.

(No. 24—Claim dismissed; reinstated—see subsequent opinion.)

ROY C. BABB, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed March 23, 1942

Where a claim is duly filed in the court of claims and twice placed upon its trial docket for hearing, without appearance on the part of claimant to prosecute the same or show reason for his failure so to do, such claim will be dismissed, subject to the right of claimant to have the same reinstated, upon showing to the court proper reason for such reinstatement.

No appearance by claimant;

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

ROBERT L. BLAND, Judge.

By his claim filed in this proceeding on September 13, 1941, Roy C. Babb seeks an award of $257.00 to reimburse him for the amount expended by him for hospital and dental bills on account of his daughter, Barbara Babb, a minor under the age of twenty-one years. It appears from his said claim that on July 27, 1938, claimant's said daughter, Barbara Babb, was riding in a light mail truck, driven by J. J. Rader, on a state secondary dirt road, near Greenland, in Grant county, West Virginia; that at a point approximately one-tenth of a mile east of Greenland said mail truck collided with a heavy lumber truck, driven by Ernest Rotruck; that said accident occurred at Greenland Gap at a point where there was a sharp curve in the road, where the overhanging bush and trees at or near the edge of the road, and on both sides of the road, obscured vision straight ahead; and, on account of such lack of visibility, neither the driver of the light mail truck nor the driver of the lumber truck could see the other approaching; that the trucks, respectively, were being driven at a speed of from ten to fifteen

miles per hour; that the mail truck in which claimant's daughter was riding was on the inside of the curve in the road, and the lumber truck, loaded with gravel, was on the outside of the curve of the road, and that on account of said collision between said two trucks claimant's said daughter, the said Barbara Babb, suffered personal injuries and loss of several teeth. It further appears from the record that on February 4, 1941, a bill was introduced in the House of Delegates of the Legislature of that year, being House Bill No. 145, to provide for the authorization of the payment by the state road commission to said claimant of the said sum of $257.00. No action having been taken on said bill by the Legislature, the same was certified by the clerk of the House of Delegates to the court of claims. But, being required so to do by this court, claimant filed a new claim as above stated. The special assistant attorney general filed a general denial of liability of said claim on November 15, 1941. Said claim was placed upon the trial calendar of this court, at its regular October term, 1941, for hearing on November 17. When the calendar was called there was no appearance on the part of claimant in person or by counsel, although the court reporter was in attendance as were also witnesses summoned on behalf of the state, and no reason was assigned at that time for failure of claimant to appear and prosecute his said claim. Claimant was thereafter notified that said claim would not be placed upon the trial calendar for hearing until he should ask to have it fixed for hearing and be ready to proceed with proof in support of his claim, which he accordingly did. Said claim was then placed on the trial calendar for hearing on the 26th of February 1942, at a special term of this court held in the city of Wheeling, the county seat of Ohio county, for the convenience of the parties concerned. When said claim was reached on the calendar of the court at said special term the claimant did not appear in person or by counsel to prosecute his said claim, and the special assistant to the attorney general moved that said claim be dismissed for failure of prosecution after having been placed upon the court's calendar for hearing upon two separate occasions. While it is the policy of the court of claims to give every claimant whose claim falls within the

prima facie jurisdiction of the court a full hearing upon its merits, when a claim is placed upon the court's calendar for investigation and hearing he will be required to appear and prosecute the same or show satisfactory reason for his failure so to do; and when a claim is twice placed upon the trial calendar for hearing and the claimant fails to appear and prosecute the same it will, on motion of the attorney general, be dismissed on condition that it may be reinstated provided such claimant shall show satisfactory cause to the court why such claim should be reinstated upon the court's calendar for investigation and hearing, and such order was made in the instant case.

(No. 11—Claimant awarded $900.00.)

GEORGE B. CECIL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

Where it appears from the hearing that there was not a meeting of the minds between the claimant and the department concerned upon what appears from the evidence to have been nominal awards for compensation for personal injuries sustained by claimant, through negligence of employees of the department in the course of their employment, and it appears from the evidence that claimant is entitled to additional compensation for the injuries sustained, an award will be recommended to the claimant taking into consideration amounts heretofore paid as compensation.

Appearances:

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

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

WALTER M. ELSWICK, Judge.

This case was heard by the court at a special term held at Wheeling, West Virginia, on the 25th day of February 1942. It appears from the evidence that on October 27, 1936, the claimant, George B. Cecil, was employed as a day laborer by the state road commission at a stone quarry on Riley hill, above Middle Grave creek, in Marshall county, West Virginia. On the morning of said day claimant had been transported from Moundsville to the stone quarry in the cab of a state road truck operated by a state road employee. In the evening, about four-thirty o'clock, when their day's work was complete, another state road truck drove up to where claimant and a companion were standing and stopped for the purpose of offering to furnish claimant and his companion transportation back to Moundsville. Claimant testified that when the truck stopped, his companion, Robert Darrow, entered the bed of the truck, but at which time claimant failed to enter same. After the truck had been driven ten to fifteen feet further down the hill and again stopped, claimant entered the bed of the truck. The driver of the truck, Burson Davis, testified that on the evening in question he had two companions in the cab of the truck with him, and that upon arriving at the place where Mr. Cecil and his companion were standing, he stopped. He testified that he thought they motioned for him to go ahead and he continued to drive on not knowing that the two men had entered the back end of his truck until one of the companions in the cab announced that the accident complained of had occurred. Robert Darrow, claimant's companion, was in the United States Army on the day of the hearing and was not produced as a witness. Neither were the truck driver's two companions in the cab produced as witnesses. From the evidence it appears that the driver drove the truck down the road from Riley hill toward Middle Grave creek at a modeate rate of speed until he left the hill and then upon a straightaway he picked up speed from twenty-five to thirty miles per hour. Claimant testified that the truck bed did not have any seat, and contained mud and water which did not permit him and his companion to sit down. They stood up leaning on to the cab of the truck until it came to a sharp curve turning first to right then to the left. When the truck

made the turn to the right claimant by the swing of the truck was thrown against his companion standing on his left, and as the truck swung to the left claimant was thrown out of the truck backwards, falling into the roadway and was thereby injured, for which he claims compensation. Claimant was not acquainted with the road, and it appears from the evidence that the driver did not slow down his speed when approaching the curve in question. It appears from the evidence that a reasonable and safe rate of speed around this curve would have been from ten to fifteen miles per hour while the driver was exceeding that rate of speed. After the injury claimant was taken by the road employees to Dr. S. F. Yoho of Moundsville, West Virginia, who rendered him first aid, and then sent him to Reynolds memorial hospital at Glendale, West Virginia. He had received a laceration at the back of his head and a fractured vertebra. Claimant was x-rayed on October 28, 1936, by Dr. Haislip of said hospital. From the x-ray it appeared that claimant had received a fracture of the first lumbar vertebra and lower dorsal, (record p. 6). Other x-ray pictures were taken on November 16, 1936 and on December 6, 1936. The latter radiographs of the lumbar and lower dorsal spine showed a compression fracture of the first lumbar vertebra body in good position and alignment and showing healing. The ninth thoracic spine also showed a compression fracture, and good position and alignment. Dr. Haislip by profession a roentgenologist and radiologist with wide experience in treatment of such injuries (record p. 13) testified that persons sustaining fractures such as the one which claimant received usually have some limitation of motion in their spines, and while some do continue working, others don't. "It just depends on how badly they can stand the pain and how badly they need the work and various other factors" (record p. 15). It also appears from his evidence that the injury received is "a permanent compression of the bodies and when they are mashed down, unless you can get them right out right away, they stay mashed down"; that it would interfere, so far as the full proper function of it is concerned and would cause pain frequently or most of the time throughout life (record p. 17). Dr. Haislip further testified in his opinion

claimant would have some pain, but as to how much, "it's more likely a personal item." It also appears from the testimony of said physicians that the age of the person injured would be a factor considered, the older the person is the longer the period of recovery.

The claimant remained at the hospital for a period of seven weeks, and during the first week was unconscious or delirious. At the end of seven weeks he was removed to his home where he received further treatment by Dr. Yoho during the year 1937.

He was carried on the payroll of the state road commission until the 15th day of April 1937, receiving approximately $160.00 as wages during all of which time he was unable to work. It would appear that he was then dropped from the payroll and still remained unable to work. However, he was permitted to perform some light work for the road commission for a short time in 1938.

Before sustaining the injuries complained of it appears that the claimant was an able-bodied man and a good worker. He had worked on farms most of his life, but had also worked as a teamster several years receiving wages from one dollar to six dollars per day. At the time of the injury he was employed at a stone quarry receiving $3.20 per day. He was then approximately fifty-one years of age, married and the father of four children, and is the father of another child born since said time. The children's ages now range from two to eighteen years. Since the injury claimant has been unable to perform the labors which he had been accustomed to do. He can only perform light work today and such work is likely to be accompanied by pain. This view is substantiated by his testimony, his wife, and the physicians attending him following the injury heretofore referred to.

There was an appropriation made by the Legislature, under the general appropriation act of 1937, to George Cecile, who is the same person as claimant, for the sum of $304.18. From

the record it appears that said sum was applied as follows: To Reynolds memorial hospital for hospitalization of claimant $157.50; to Dr. S. F. Yoho for medical services rendered claimant $55.00; and to claimant was paid the sum of $91.68 in the year 1937 as appears by receipt signed by claimant filed in evidence as "exhibit B."

There was another appropriation made by the Legislature, under the general appropriation act of 1939 to claimant, as George Cecile, for the sum of $332.59, which amount was receipted by him on April 19, 1939, but from which sum the wages he had drawn from date of injury until April 15, 1937 were deducted when the check was endorsed and delivered for payment. From these two appropriations it appears that a total of $636.77 has been paid to and on behalf of claimant on account of said injury.

The state road commission, by the attorney general, filed a general denial of liability on the claim and a special plea of release. It appears that both receipts signed by claimant, namely, the one for $91.68 in 1937 and the one for $332.59 in 1939, contain the words "in full settlement." The receipt taken under the 1937 appropriation calls for "Claim No. 128" while the receipt for the 1939 appropriation calls for "Claim No. 53." The latter receipt contains a sentence which reads "The state road commission is hereby released from further liability in connection with above numbered claim."

Claimant testified that he didn't file a claim with the road commission or Legislature and didn't have any knowledge of any claim being before the Legislature until sometime in June 1937 he received a notice by mail to come to Moundsville to endorse a check that had come to pay his doctor and hospital bills, that being a notice of the arrival of the check for $304.18 included in the general appropriation act of 1937, (record pp. 32 and 33). He says that he was not consulted about his claim, had no conversation with any of the state road officials, and

had no representative to present his claim before either the state road commission or the Legislature and the road commission was unable to show how the claims were presented, by whom, or that Cecil, the claimant, knew the same were before the Legislative Committees. (Record p. 108). The next notice the claimant had was by a note handed to him in 1939 by a neighbor boy asking him to come into the road shed at Moundsville to get the balance of his compensation, this being notice of the arrival of a check for the $332.59 included in the general appropriation act of 1939. He testifies that he knew nothing about the matter having been before the Legislature. (Record p. 29). On the following day, June 19th, he went to the office of the road commission at Moundsville and conferred with Mr. J. N. Pyles, the then maintenance superintendent of Marshall county. He testifies that the check for $332.59 was presented to him, with request that he endorse it and sign a receipt for the full amount to be sent back to the state road commission, but to permit the maintenance superintendent to deduct from the amount of the check the amount of wages the claimant had received from the date of his injury to the 15th day of April 1936, which was done, and it appears that the amount so deducted was forwarded by the maintenance superintendent to the state road commission (record pp. 29 and 106). Claimant testifies that he could not read print without his glasses and that he did not have his glasses with him. He says that he asked what the paper was and was told "That it was nothing but a receipt to be sent back to the state road commission to show that you received your money off of the payroll—your balance." (Record p. 30). Claimant testifies that he could not read the receipt or release and that it was not read to him when he signed it, but relied upon what he was told, as above stated, it represented. Mr. Pyles, the maintenance superintendent, testified that he read the receipt or release over to the claimant when he signed it. He says that "Mr. Cecil, if I recall, asked me to read it over to him, which I did at that time." (Record p. 109). It doesn't appear that he had any specific instructions concerning the delivery of the check except to see that the deduction was made for wages paid Cecil during his confinement from the injury. He did not

know at whose suggestion Cecil had come to the office, but says that Cecil told him he had received a notice to come to the office. (Record p. 105). Such matters were usually handled through the district engineer's office, and the matter pertaining to the delivery of this check was the only connection which he had concerning the Cecil case. (Record pp. 107 and 110). It appears that two men by the names of John Jefferson and George Kelly were in the office when the check was endorsed and the release signed. (Record pp. 29 and 77). John Jefferson, who was foreman on the job when Cecil was injured, testified that he didn't remember whether the release was read to Cecil. (Record p. 76). Kelly was not produced as a witness.

The appropriations made to Cecil by the Legislatures of 1937 and 1939 were not founded upon a bill showing a recital of facts or other memorandum indicating that the Legislatures had knowledge of the details concerning the nature of claimant's injuries or the factors concerning their cause. There is nothing to indicate from these appropriations that either was made in contemplation of a full release and discharge of liabilities for his injuries. Cecil's claim was not a contractual one, but in the nature of an unliquidated tort, and the road commission could not have settled his claim without the approval of the Legislature and from funds designated by it. The Legislature did not direct a form of release as settlement and it does not appear that claimant was consulted about the claims or had knowledge of any intention on the part of the Legislatures to make a final award of compensation to him, nor does it appear that the road commission at any time sought to obtain his consent to a final award for approval by the Legislature.

Furthermore, it doesn't appear that claimant contemplated or intended to release his claim in full. For within thirty days from the date he received the check authorized by the 1939 appropriation he came to the office of the road district engineer to file his claim for compensation. He was instructed by the road engineer to present it in writing and later, on May 19, 1939, he by letter addressed to the road engineer set forth his claim for compensation which letter was filed as state's "ex-

hibit No. 1." A reply was made to this letter on May 24, 1939 without reference to any release signed by claimant, but requesting claimant to call at the office again for a personal discussion relative to making recommendation on the claim to the Charleston office. Pursuant to said request the claimant met with the district engineer and was requested to have a physical examination made by three physicians. He conferred with Dr. Yoho and Dr. Ashworth at Moundsville and was advised to go to Dr. Wiler at Wheeling for an x-ray. When he went to Dr. Wiler he learned that he could not secure an x-ray without a permit from the state road commission, or by payment of the fee of $15.00 which he says he did not have. He didn't pursue the course of securing examinations further. Near the beginning of the hearing the state, by its attorney general, made a request for a physical examination of claimant, but the request was withdrawn near the conclusion of the hearing. (Record pp. 54 and 114).

We are of the opinion from the evidence that the amounts paid to claimant and on his behalf are not adequate compensation for his injuries; that the road commission employees were negligent in the manner of his transportation at the time of the injury, and that it was its custom and practice to transport its employees to and from their work; that there was not a meeting of the minds of the claimant and officials of the road commission as to any full and final settlement being made to him for the compensation which he was entitled to receive. We are of the opinion, from the evidence, that claimant is entitled to an additional award of nine hundred dollars ($900.00), and an order will be entered accordingly.

Under the procedure prescribed for the court of claims, we trust that the complications relative to consultation of departments with claimant as well as the question of the purpose and intention of appropriations involved in this case, can be avoided, when awards upon a full hearing, or consent agreements under the shortened procedure, are recommended.

(No. 65-S—Claimant awarded $278.64.)

HUGHIE A. WILLIAMS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Hughie A. Williams, of McMechen, Marshall county, West Virginia, seeks reimbursement in the sum of $278.64, which amount represents the damage to a truck owned by the said claimant and damaged by a state road commission shovel, together with the damage for the loss of the use of the said truck during the time that the repairs were made to it. Claimant's truck was stopped near the top of the hill or cut known as the Reilly hill detour in said Marshall county, on June 28, 1941, and while stopped as aforesaid, a state road shovel coasted down the hill, hitting and crashing into the said truck and causing the damages aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of two hundred seventy-eight dollars and sixty-four cents ($278.64).

(No. 66-S—Claimant awarded $1.50.)

PAULINE GARNETTE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Pauline Garnette, seeks reimbursement in the sum of $1.50 for damages caused to her car, which was parked at and near what is known as Crown Hill, in Kanawha county, and the fender of which car was scraped and injured by a state road commission truck—130-48—pulling a tar pot, and used in connection with repairing the highway on which the accident took place. The accident happened December 11, 1941. The state road commission truck caused the damages in the aforesaid amount.

The state road commission does not contest claimant's right to an award for the said sum of one dollar and fifty cents ($1.50), but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award made therefor.

(No. 67-S—Claimant awarded $15.30.)

MRS. HARRY SWIGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Mrs. Harry Swiger, of Shinnston, West Virginia, seeks reimbursement in the sum of $15.30 for injuries to her car caused by state road truck 430-87, which collided with and ran into the claimant's car while stopped at a red traffic light on Main street, Shinnston, on July 18, 1941. It appears that claimant had stopped her car in obedience to a red traffic light on said Main street, at the time aforesaid, and while so stopped, the said road commission truck, through the fault of the driver thereof, ran into the rear of claimant's car, causing the damages aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of fifteen dollars and thirty cents ($15.30).

(Case No. 68-S—Claimant awarded $25.00.)

ELMO H. THOMPSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Elmo H. Thompson, seeks reimbursement in the sum of $25.00, which amount he was obliged to pay for damages to his car, caused by state road shovel No. 1025-2, which drifted back and collided with another state truck, which in turn collided with and damaged claimant's parked car, and caused damages to the front fender, grill, and hood thereof. It appears that the said state road shovel got out of control of the driver thereof and backed into another state truck, which truck collided with and damaged claimant's car. No fault or negligence is found on the part of the claimant.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of twenty-five dollars ($25.00).

(No. 69-S—Claimant awarded $22.30.)

RALEIGH STEAM LAUNDRY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, the Raleigh Steam Laundry, of Beckley, West Virginia, seeks reimbursement in the sum of $22.30, which amount it was obliged to pay for the repairs to one of its trucks, damaged by a state road truck. The accident occurred November 21, 1941, while claimant's truck was parked at the side of Johnson road, Beckley, West Virginia. State road truck 1030-36 was parked on the opposite side of the road about fifty feet from claimant's truck, and while the driver of the state road truck was absent therefrom, the brakes on the same released, causing the said state road truck to collide with and damage the claimant's truck in the amount aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of twenty-two dollars and thirty cents ($22.30).

(No. 71-S—Claimant awarded $5.36.)

BILL MORGAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Bill Morgan, seeks reimbursement in the sum of $5.36 for injuries to his Dodge sedan, caused by state road truck No. 430-139, in December 1941. It appears that the said state road truck, hauling broom drag, which said drag extended over the sides of the truck, scraped the left side of claimant's car, causing the damages in the amount aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of five dollars and thirty-six cents ($5.36).

(Case No. 72-S—Claimant awarded $50.00.)

DOCK CRABTREE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, Dock Crabtree, seeks reimbursement in the sum of $50.00, which amount represents the damages caused to the property occupied by the claimant on route 37, in Wayne county, West Virginia. The damages were caused on June 6, 1941. It appears from the record that the W.P.A., working under the direction and supervision of the state road commission, and engaged in widening a culvert located near the property of the claimant, blocked the said culvert in such a manner as to cause water to be diverted from a nearby stream into and upon the premises of the claimant, and flooding his grounds, cellar and well. The claim, as presented, was in the amount of $100.00. A compromise agreement was entered into for the sum of $50.00, in full settlement of all damages caused as aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, to-wit, fifty dollars ($50.00), but concurs in the claim for that amount; and the said claimant agrees to receive the said amount in full settlement of his claim; and the claim is approved in said amount by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly.

(No. 83-S—Claimant awarded $10.20.)

L. M. STEELE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

CHARLES J. SCHUCK, Judge.

Claimant, L. M. Steele, of Charleston, West Virginia, seeks reimbursement in the sum of $10.20, which amount claimant was obliged to pay for repairs to his trunk, caused by state road truck 130-18 backing into claimant's car on the 13th day of February 1942, in the city of Charleston, and causing the damages aforesaid.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of ten dollars and twenty cents ($10.20).

(No. 84-S—Claimant awarded $28.10.)

VOSS R. LOWE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

It appears from the record of this claim, referred to this court by the state road commission, with recommendation for the payment of $28.10 which recommendation is supported by the approval of the attorney general, that on the 19th day of July 1939, a collision occurred on the Harrisville-Pullman road, about two miles from Harrisville, between state road truck trailer No. 330-56 and an automobile owned by claimant and operated by L. E. Miller. A three-inch board extended from the trailer on left side in the passway of claimant's vehicle. As the two vehicles approached each other, claimant's car collided with the board so extending and was damaged as follows:

The fender was badly damaged, and the horn, bumper and radiator were damaged. It appears that the operation of the trailer in such manner by the road commission employee was the cause of the collision. An itemized statement of the costs of making the repairs filed with the claim amounted to the sum of $28.10. The claim is one that should be paid. We therefore recommend an award of twenty-eight dollars and ten cents ($28.10).

(No. 85-S—Claimant awarded $87.62.)

A. S. COTTLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

The record of this claim was referred to this court by the state road commission, with recommendation for the payment of $87.62, which recommendation is supported by the approval of the attorney general. It appears from the record of the claim presented that on the 17th day of January, 1941, at about seven o'clock A. M., a collision occurred between a state road commission truck and claimant's car at an intersection of U. S. routes 19 and 21 with a side road, about two miles from Fayetteville, West Virginia. It appears from the record that claimant's car was not going over thirty-five miles per hour at the time of the collision and that the state road truck, without using precaution, backed out of the road intersection into the main highway directly in the path of claimant's car, without giving any warning. It appears from the record that several investigations were made by officials and employees of the road commission. Claimant's car was a 1937 model Ford. He sustained damages to his car from the collision as shown by an itemized statement made by King Coal Chevrolet Company of Oak Hill, West Virginia, as follows: Damage to left door, left quarter panel, left running board, left rear fender, hub cap, right door, right rear fender, right running board. Said statement shows the costs of making repairs aggregated the sum of $87.62. From the record it appears that the driver of the state road truck was at fault and that the claim should be paid.

Therefore, we recommend payment to the claimant of the sum of eighty-seven dollars and sixty-two cents ($87.62).

(No. 86-S—Claimant awarded $20.75)

CHARLES IRONS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

On March 5, 1941, state road truck No. 430-38 being driven by a state road employee out of Gregorys Run road onto old route 50 at Wilsonburg in Harrison county, West Virginia, the driver had come to a full stop at a stop sign near the main road. He saw a truck coming in his direction and ventured onto the highway in third gear. Upon entering the highway he then saw a passenger car coming in his direction. He then applied his brake but failed to stop, and cut the truck to the left as much as he could, but the truck bumper caught the claimant's car on the left rear. It appears from the record that the truck driver was negligent. The record shows that the driver had been using the same truck on the day of the collision and from his own statement it appears that he had stopped the truck at the stop sign immediately before the collision. Investigation showed brake line had cracked and brake fluid had slowly leaked out. It should have been observed if the truck had been driven cautiously.

Claimant's car was damaged as follows: Damaged left rear fender, dent and cut in left door and cut in left rear fender. Claimant's car was a 1936 Chevrolet coach. The costs of making repairs as appears from an itemized statement by Schulte-Layfield Body Company amounted to $20.75. The state road commission concurs in the payment of the claim and has referred the same to the court of claims in pursuance of section 17 of the court act. The attorney general approves the payment. We are of the opinion that the sum of twenty dollars and seventy-five cents ($20.75) should be paid to claimant and award said sum to him.

(No. 87-S—Claimant awarded $39.40.)

C. J. WALKER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

On February 22, 1941, state road truck No. 430-138 was being used on route 20 to haul cinders just outside the city limits of Clarksburg, West Virginia, where road employees were engaged in spreading cinders on a slippery road. Some cars and trucks were stalled on both sides of the road at a curve. As the truck was being driven almost out of the curve it suddenly skidded sideways to the lower side of the road and hit claimant's car that was stalled. The truck bed striking claimant's car damaged the right door, panel and hood. The costs of making the repairs as shown by an itemized statement by Schulte-Layfield Body Company of Clarksburg amounted to the sum of $39.40. Upon investigation made by the state road district engineer and maintenance engineer it appeared that the collision could have been avoided and that the claim should be paid. The state road commission concurs in the payment of the claim and has referred the same to the court of claims in pursuance of section 17 of the court act. The attorney general approves its payment.

After reviewing the record and finding no reason for rejecting an award, we are of the opinion that the award should be made in the sum of thirty-nine dollars and forty cents ($39.40) and an order was entered accordingly.

(No. 88-S—Claimant awarded $38.50.)

JOHN CHAPMAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

On November 26, 1941, the state road commission was blasting rock in Birch River Road No. 30 in Webster County, West Virginia, near the residence of the claimant. A rock thrown by the blast fell through the roof of claimant's residence, scattering sand, rock and dust practically all over the house. One bed was broken, rug damaged and the wallpaper and boards torn from ceiling. It appears from the record that claimant, the owner, should be reimbursed for damages. An itemized statement of the damages furnished by the claimant amounts to the sum of $38.50. The state road commission has made investigation and recommends payment of the claim which has the approval of the attorney general.

We are of the opinion that the claim is one that should be paid and, therefore, award the claimant the sum of thirty-eight dollars and fifty cents ($38.50).

(No. 89-S—Claimant awarded $25.00.)

JEWELL TEA COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

On July 28, 1941, state road truck No. 230-42 was parked on left side of road near the city of Huntington, West Virginia. Claimant's car had pulled in behind the truck and stopped. The driver of the state road truck, without looking, backed into claimant's car splitting hood and denting grill. The costs of making the repairs as found by investigation of the district engineer and maintenance engineer amounted to the sum of $25.00. The state road commission concurs in the payment of the claim, which has the approval of the attorney general. From the record it appears that the driver of the state road truck was at fault and that the claim should be paid.

We, therefore, make an award to the claimant for the sum of twenty-five dollars ($25.00).

(No. 90-S—Claimant awarded $7.00.)

L. O. RILEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

WALTER M. ELSWICK, Judge.

On July 14, 1941 the operator of state road truck No. 230-8 stopped at a road sign in Wayne county, West Virginia. Without looking, he backed up the truck a few feet to relocate the road sign and struck claimant's car. In doing so he did damage to both headlight lens, rims and bulbs of claimant's car, also made a scratch on right front fender. Upon investigation made by the district engineer and maintenance engineer of the road commission it appears that the state road truck driver was at fault, and that the costs of making repairs on claimant's car amounted to $7.00. The state road commission concurs in the payment of the claim which has the approval of the attorney general. We, therefore, award the claimant the sum of seven dollars ($7.00).

(No. 91-S—Claimant awarded $33.90.)

J. FRANK ORNDORFF, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

ROBERT L. BLAND, Judge.

Claimant, J. Frank Orndorff, of Opequon, Virginia, seeks an award of $33.90. The state road commission concurs in the claim and its payment is approved by the attorney general. The claim grows out of the following facts as disclosed by the record of the case made by the state road commission and filed in the court of claims on March 14, 1942. A state road was under construction in Hardy county, West Virginia. It appears that on November 26, 1941, state road commission shovel P 25-4 was being operated alongside of said road, about four miles from Wardensville. This shovel had picked up a large rock on dipper points. As the dipper was being swung across the road to deposit the rock over a hill on the lower side of the road, the operator of the shovel observed a pickup truck approaching alongside of the shovel. This truck was owned by claimant and was a 1937 Ford model, bearing Virginia license No. T 54-211. The operator of the shovel stopped the dipper suddenly and the rock rolled off right in front of claimant's approaching truck. When the rock landed on the road it struck claimant's truck causing such damage to it that necessary repairs amounted to the said sum of $33.90. Claimant's truck had been signalled ahead by a state road commission inspector who was without knowledge of the shovel operation. Respondent admits responsibility for the accident. From the facts set forth in the record we find the claim to be just and proper.

An award is, therefore, made in favor of the claimant, J. Frank Orndorff, for the sum of thirty-three dollars and ninety cents ($33.90).

(No. 92-S—Claimant awarded $4.59.)

EDWIN HIVICK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

ROBERT L. BLAND, Judge.

On June 2, 1941, a 1940 Ford truck, bearing license No. 214-329, owned by claimant, Edwin Hivick, of Jerryville, West Virginia, was parked on Main street, in Richwood, Nicholas County, West Virginia. As a truck of the prison labor division of the state road commission, license No. P 30-41, driven by William P. Harkins, and loaded with stoves and supplies, passed along this street, a stove plate lid fell from the truck and struck claimant's car, damaging its right rear fender. The cost of repairing such damage amounted to $4.59, for which the claim involved in this case is made. The driver of the state owned truck admitted the accident. We are of opinion that from the facts shown by the record that the claim in question should be allowed.

An award is accordingly made in favor of claimant for four dollars and fifty-nine cents ($4.59).

(No. 93-S—Claimant awarded $179.78.)

TOM HASH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

ROBERT L. BLAND, Judge.

The claim involved in this case is based upon an accident which occurred on a small wooden bridge on secondary road No. 30, in Cabell county, West Virginia, at a point about one hundred feet south of the junction of secondary road No. 28. On August 10, 1941, one Odell Thompson was driving a 1940 Ford 1½-ton truck, owned by claimant, Tom Hash, of route No. 1, Barboursville, West Virginia. He was returning with the truck from North Carolina with a load of bulk peaches for delivery at the Hash farm about a mile from where the accident occurred. As he was crossing the bridge about nine o'clock on the night of the above mentioned date the floor of the bridge first gave way under the left rear wheel of the truck, causing the truck to tilt sidewise and thereby spill its load of peaches in the creek bed. Thereafter the right rear wheel of the truck broke through the bridge. The collapse of the bridge damaged the truck badly and caused the loss of the peaches with which it was loaded. It appears from the record that the bridge was in a state of decay and badly in need of repairs. The accident was the direct result of rotten log stringers. No notice was posted on either end of the bridge indicating maximum safety weight of load, as required by law.

The necessary cost of repairing the truck amounted to $39.78. It is shown that the truck carried one hundred and fifty bushels of peaches. The value of the peaches was $1.00 per bushel. Twenty bushels, of the value of fifty cents per bushel, were salvaged. The claimant's actual total damages are $179.78. Respondent recommends the payment of this amount. Such

payment is approved by the attorney general. We find the claim to be meritorious.

Award is, therefore, entered in favor of claimant, Tom Hash, for the said sum of one hundred and seventy-nine dollars and seventy-eight cents ($179.78).

(No. 97-S—Claimant awarded $15.13.)

G. I. LOAR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 13, 1942

ROBERT L. BLAND, Judge.

This case comes to the court of claims under the "shortened procedure" provision of the court act. Its record was prepared by respondent and filed herein March 14, 1942. Claimant seeks an award of $15.13. Respondent concurs in the claim. The attorney general approves it as a claim that should be paid. On January 7, 1941, a state road commission snowplow, working on secondary road No. 9, near Tallmansville, in Upshur county, West Virginia, threw a piece of ice upon an automobile owned by claimant while it was parked on the right side of the road, breaking its windshield, to repair which claimant paid $15.13, as shown by itemized, receipted bill.

In view of the showing made by the record, an award is now made in favor of claimant, G. I. Loar, for the sum of fifteen dolars and thirteen cents ($15.13).

(No. 94-S—Claimant awarded $24.09.)

WAYNE GORRELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion Filed April 21, 1942

ROBERT L. BLAND, Judge.

The original record of this claim prepared by respondent, was referred to and filed in the court of claims on March 14, 1942. It was supplemented by an affidavit made by J. H. Feingold, chief clerk of the state road commission, on the 15th day of April 1942. It appears from the record that on October 10, 1941, a Buick sedan automobile, bearing Ohio license S278X, owned by claimant, Wayne Gorrell, of route No. 1, Steubenville, Ohio, was parked under Weirton overhead bridge, at Weirton, in Hancock county, West Virginia, which was a public parking place where it was the custom of the public to park motor vehicles. Notwithstanding a very heavy wind was blowing on that day employees of the road commission engaged in the work of painting underneath said bridge without taking any precautionary measures to provide against accident to cars placed under the bridge. While this wind was blowing the painters attempted to move the ladder and the wind forced the ladder from their hands and it fell on the hood of claimant's automobile parked under the bridge. The actual cost incurred by claimant in repairing this automobile as the necessary result of this accident, shown by an itemized bill therefor, was $24.09, for which sum he asks an award. The payment of this amount is recommended by the state agency concerned, and approved by the attorney general. Since the record discloses that it was the duty of the employees of the road commission to have had some person remain at the foot of the ladder to prevent it from falling on motor vehicles or pedestrians beneath said bridge, their failure to do so constitutes such negligence as will authorize an award in this case.

In view of all the facts disclosed by the record, the concurrence of the state road commission in the claim and the approval of the attorney general of its payment, we are of opinion to, and do now, award the claimant the sum of twenty-four dollars and nine cents ($24.09).

(No. 48—Claimant awarded $5,000.00.)

J. C. RICHARDS, Claimant,

v.

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

Opinion Filed April 21, 1942

Where no remedy is provided by general statute, against the county boards of education for failure to provide safe equipment used in the public schools, an award will be recommended to the Legislature to appropriate funds for the medical care and treatment and compensation to a pupil permanently injured by burns received by reason of a defective and unsafe open-flame gas stove used in a public school where such pupil was attending, as a matter of justice and right and as contemplated in the thorough and efficient system of free schools directed to be provided for by the Legislature in article XII of the constitution.

Appearances:

Louis Reed, Esq., for the claimant;

L. C. Hamilton, Esq. and *Harold Proudfoot*, Esq., for the board of education of Calhoun county, West Virginia;

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

WALTER M. ELSWICK, Judge.

On the second day of October 1940, while attending, as a pupil, a one-room public school known as the Klipstine school near Big Springs, in Calhoun county, West Virginia, Ernestine Richards, a child then eight years of age, was seriously burned when her clothing caught on fire from an exposed open-blaze gas stove. The stove used was not equipped with any brick, gratings, screens or other protection from the open flame, it appearing from the evidence that the brick or grating had been broken and removed. The defective condition of the stove had

been reported by the teacher in charge to both a repairman employed by the board of education of Calhoun county and to the assistant county superintendent of said county some several weeks prior to the time said child was burned, with request that the stove either be repaired or replaced with a new one. (Record pp. 44 and 45). It had not been repaired on the day the child was burned. There was no supervision of the schoolroom at the time the child was burned, though the injury occurred during school hours.

Ernestine Richards, prior to receiving the burns was a normal child in general good health. (Record pp. 20 and 68). The burns extended from a point midway on her thighs covering the back of her body up to her shoulders and over parts of her arms and legs with an extended strip on the front of her body up to her breast, those from the point midway on her thighs to her shoulders consisting of second and third degree burns. (Record pp. 21 and 36). The burned portions of her back were exhibited to the court. She was treated for burns at St. Joseph's hospital at Parkersburg, West Virginia, for three months during which time three nurses were required each day to nurse and care for her by succeeding shifts. Later she was removed to a private apartment rented by her father and nursed by two aunts and her mother daily for ten weeks while still receiving treatment for burns by physicians of said St. Joseph's hospital. She is still required to wear a cotton padding over her burns to which applications of oil are made daily to prevent cracking and crusting. She sustained burns over the kidneys and is now suffering from an abscessed kidney. Her temperature rises abnormally and she is affected by excessive urination and becomes delirious at times. She complains of pains in her side and head and is affected mentally. The burns are of a permanent nature, of which she will not by all probability recover.

J. C. Richards, the father of Ernestine Richards, filed a claim for compensation for the injuries with the court of claims on October 6, 1941, and notice was mailed by the clerk of the court to the state board of education that such claim had been

filed; a copy of such notice was mailed to the board of education of Calhoun county, and a copy mailed to the attorney general of the state of West Virginia. The case was docketed for hearing on January 21, 1942, and evidence adduced by the claimant and state on said date.

The claimant, by counsel, filed a statement or bill of particulars of the claim for hospital bills, medical attention, nursing, compensation for injuries, etc., showing the nature of the claim, which is in the sum of $5000.00. From the evidence it appeared that the father had incurred indebtedness for more than $1002.00, exclusive of doctor and hospital bills, and of special care and attention required by the father and mother and their family. It also appears that the hospital bill amounted to $284.00 and that a bill for her treatment by Dr. Harris amounts to $150.00. The father is an oil and gas worker of modest financial circumstances and has exhausted all of his funds and credit in the care and treatment of said child since said injury.

The attorney general, on behalf of the state, moved to dismiss the claim on the ground that the state court of claims was without jurisdiction to hear evidence and make recommendations as to the merits of an award in the case on the ground that a state agency was not involved within the meaning of the jurisdiction of the court of claims. We were therefore confronted with the question of interpretation of article 2, chapter 14 of the code as amended by the 1941 acts of the Legislature, pertaining to the purpose and jurisdiction of the court of claims.

Section 1 reads as follows:

> "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."

The first subsection of section 13, defining the jurisdiction of the court, states that jurisdiction 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."

It is conceded that this is such a claim that no action can be maintained in a court of law or equity against the board of education of Calhoun county for the reason that it is a part of the educational system of the state established in compliance with article 12, Section 1, of our constitution for the purpose of administering the state system of public education.

> "The exemption of the government from liability is based on the theory of sovereignty. The acts of the government were those of the king. In our state, instead of the king being the sovereign, the powers of government reside in all the citizens of the state. The idea was also that certain things worked for the good of the many, and the welfare of the few must be sacrificed in the public interest." *Krutili* v. *Board of Education of Butler Dist.*, 99 W. Va. 466, 129 S. E. 486.

In a worthy case the king, however, must have been impressed by the fallacy shown by the petition on which he granted equitable relief in the first instance thereby creating a basis for what we now have, known as equity jurisdiction in the judicial sense.

The free school system which the Legislature is directed to provide by article 12 of the constitution, is a matter of general state concern, and not a municipal or district affair, as much or more so than its highway system. The word "system" itself imports a unity of purpose as well as an entirety of operation, and the direction to the Legislature to "provide, by general law, a thorough and efficient system of free schools"

means one system. *City of Ardmore* v. *State,* 109 Pac. 563, 26 Okla. 366; *Kennedy* v. *Miller,* 97 Cal. 429, 32 Pac. 558.

And the idea of unity of purpose and entirety of operation is emphasized and made more apparent by the term "the free school system of the state" found used in section 9 of article 12 of the constitution.

Webster's new international dictionary, second edition, defines the word "system" as follows:

> "An aggregation or assemblage of objects united by some form of regular interaction or interdependence; a group of divers units so combined by nature or art as to form an integral whole, and to function, operate, or move in unison and, often, in obedience to some form of control; the body considered as a functional unit."

An excerpt from the opinion in the case of *State* v. *Ogan,* 63 N. E. 227, 228, 159 Ind. 119, quoting from *City of Lafayette* v. *Jenners,* 10 Ind. 70, 77, is *apropos* here:

> 'And we have seen that common schools, as a whole, are made a state institution,—a system coextensive with the state, embracing within it every citizen, every foot of territory, and all the taxable property of the state.' 'Essentially and intrinsically,' said the court in State v. Haworth, 122 Ind. 462, 465, 23 N. E. 946, 7 L. R. A. 240, 'the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local, jurisdiction. In such matters the state is a unit, and the legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one, to be exercised by local instrumentalities, but, on the contrary, is a central power, residing in the legislature of the state.'

Section 5 of said article 12, of our constitution, reads as follows:

> "The Legislature shall provide for the support of free schools by appropriating thereto the interest of the invested 'School Fund,' the net proceeds of all

> forfeitures and fines accruing to this State under the laws thereof; the State capitation tax, and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws."

This section of the constitution makes it obligatory upon the Legislature to provide for the support of free schools, and it is given plenary, if not absolute, power for this purpose. *Kuhn* v. *Board of Education*, 4 W. Va. 499, 508. In this case the court said:

> "The establishment of such schools is, therefore, not merely permissive, but obligatory, on the legislature. The system 'provided for' by them is required to be 'thorough and efficient.' Who is judge of the thoroughness and efficiency? Certainly, the legislature. When the people, through the constitution, delegated that power to the legislature, they made the legislature sole judge of the kind or kinds of free schools that should be established and supported. It was not left to the caprice of an individual, or any number of persons that might be influenced by personal motives or local prejudice, but was wisely confided to the wisdom of the united representatives of the people who, coming from all sections of the State, could best devise a system 'thorough and efficient.' . . . From this clause (now section 5) it is plain, the people intended that the 'thoroughness' and 'efficiency' of the system of free schools, adopted by the legislature, should in no wise be prejudiced by the want of ample means. They make it obligatory upon the legislature to provide for the support of such schools, not only 'by appropriating thereto the interest of the invested school fund' etc., but also by 'general taxation on persons and property or otherwise,' thus placing in the hands of the legislature, for that purpose, plenary, if not absolute power."

While said section 5 of article 12 of the constitution, gives the Legislature such plenary power to provide for the support of free schools by appropriations and also by general taxation

on persons and property or otherwise, it is to be observed, however, that only in the last part of said section, referring to such a proportion of the amount required for the support of free schools to be raised in each county or district, where situate, by authority of the people thereof, is found the qualifying term of expression, applicable only to the counties or districts, "as shall be prescribed by general laws." Hence it would appear that if compensation is made in the instant case it should be by a direct act of appropriation by the Legislature, since no remedy has been prescribed by general laws to enable county boards to raise funds for such compensation for injuries. See *Jarrett* v. *Goodall*, 168 S. E. 763, 113 W. Va. 478; *Krutili* v. *Board of Education, supra.*

Under our laws, every person who has a legal or actual charge of a child or children no less than seven nor more than fourteen years of age shall cause such child or children each year to attend a free day school for the full school term of the district or independent district in which such person resides, under penalty of punishment of fine or imprisonment for failure to comply with this provision of law. Code of West Virginia chapter 18, article 8, section 1. Provision is made for adequate means of transportation of all children of school age, at public expense, who reside more than two miles distant from school, and for insurance against negligence of drivers of school busses and other vehicles operated by the board. Can it be said that the responsibility on the part of the state should cease the moment the child enters the schoolroom? There is no question from the evidence, that the stove used in the instant case was unsafe and dangerous for use by small children. The claim in question is one ex delicto against the state which the state as a sovereign commonwealth should in equity and good conscience discharge and pay, as provided for a hearing as to its merits under chapter 14, article 2, section 13 of the code.

The state owes a duty to safeguard and protect the life, health and well-being of a child intrusted to its care by its parent or guardian under the law compelling its attendance

as a matter of the welfare of the state. It has plenary power to make appropriation to compensate the injured child while the local board has no such power under existing general laws.

The Legislature 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. It is the general doctrine that the Legislature is the sole judge whether a provision by a general law is possible under the provision in the constitution to the effect that no special law shall be enacted, in all cases where a general law can be made applicable. *Woodall* v. *Darst,* 71 W. Va. 350, 44 L. R. A. (N. S.) 83, 77 S. E. 264, Ann. Cas. 1914 B, 1278, and authorities cited. In this case the court said:

> "We must assume that the legislature considered, whether or not its purpose in making the appropriation to relator could best be accomplished by a general, or by a special, act, and determined in favor of the latter; and, having so determined, the court is not at liberty to say that it abused its discretion, unless it clearly appears from the character of the appropriation that a general law would have answered the purpose as well. This is not clear; there are many matters that might very justly and properly be considered by the legislature in determining the merits of claims of the same general nature as relator's, which could not well be embodied in a general law. For instance the needs of the claimants and those dependent upon them might very properly influence the legislature in determining the amount it would apply to discharge an obligation purely moral. The most that we can say is, that it is doubtful if a general law would be as proper to accomplish the purpose which the legislature had in view as the special appropriation and we must resolve the doubt in favor of the validity of the act."

In a recent case of *Glover* v. *Sims,* 121 W. Va. 407, 3 S. E. 2nd 612, involving a principle of simple justice and right, our Supreme Court in upholding the constitutionality of appropriation made by the Legislature to pay a printer's claim against

the athletic department of the state university as an incidental expense of the department, the court said:

> "Emphatically are we impressed that the legislative action of 1937 and 1939 making the appropriations to cover the plaintiff's claim and others against the athletic department of the University, was based on 'simple justice and right', because the underlying facts are declaratory of a strong moral obligation of the state to pay these debts . . . The physical welfare of young men and women cannot with propriety be ignored. Education is a proper function of state government and includes appropriate physical development as well as mental and moral."

While constitutional inhibitions prohibit a right of action to be provided for against the state, or against its governmental agencies delegated to perform its governmental duties, appropriations have been made and upheld from time to time, by the Legislature, to persons sustaining injury from the performance of governmental functions by other departments of the state, where the interests of the state were immediate and direct and justice demanded such action. While the same latitude of supervision may not be exercised by the state board of education over the conduct of public schools as is exercised by other state departments, it would seem that the same right exists, and the same remedy is available, to those injured through negligence of school officials in the performance of the duties of the state toward children attending public schools, as is being awarded to others injured by other state agencies, for similar nonfeasance or malfeasance. Where it would be proper for the Legislature to make an award in any case, no other exception as to jurisdiction is found under section 13 of the act entitled "The Jurisdiction of the Court" which contains the following specific expression: "The jurisdiction of the board, except for the claims excluded by section fourteen, shall extend, etc." Certainly such claims of the nature of claimant's claim were not within the classes of claims excluded from the jurisdiction of the court enumerated in said section fourteen of the act and expressly referred to in said section thirteen.

County boards of education are not made self-sufficient agencies under the system provided for by the constitution and the statutes as is provided for the counties and municipalities. The system of education provided for and intended by the constitution is one co-extensive with the boundaries of the state. It cannot be said that cities and counties were placed in the same category with the system of free schools directed to be provided by the Legislature by the emphasis of article XII of the constitution. Said article is devoted exclusively to the subject of education. While section 6 of article X provides that the credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person, nor shall the state ever assume or become responsible for the debts or liabilities of any county, city, township, corporation or person, no such restriction or limitation is found as to the aid or support of the educational system of the state. On the contrary, in the affirmative, we find in section 5 of said article X of the constitution that the power of taxation of the Legislature shall extend to the support of free schools within the state.

In the opinion of a majojrity of the members of the court, this claim is one coming within subsection 1 of said section 13 of the act, not specifically excluded by section 14 of the act, against the state, which, as is expressed by said section 13 of the act, the state as a sovereign commonwealth should in equity and good conscience discharge and pay. The evidence fully justifies an award for the full sum of five thousand dollars ($5000.00) sought by claimant and an award for said amount is recommended by a majority vote.

Judge Schuck dissents and files a statement of his views.

CHARLES J. SCHUCK, Judge, dissenting.

A county board of education is not a state agency as contemplated by the act creating the court of claims, and therefore, the said court has no jurisdiction over a claim arising against such county educational unit or board.

On October 2, 1940, Ernestine Richards, a child of tender years, to-wit, eight years of age, was a pupil in what is known as Klipstine school in Calhoun county, West Virginia. The school building was a one-room country school in which the pupils of all grades were kept and taught in the same room, and which schoolroom was heated by two open-face stoves burning natural gas, and so far as the evidence shows, with no screen or protection of any kind whatsoever encircling or around either of said stoves to protect the children in the said school from injury by fire. During the morning recess period on the said day, the Richards child, in some manner, came in contact with the open flame from one of the said stoves and was terribly burned and scarred on her back, hips and limbs, so much so that she is permanently injured and made subject to disease which, in the opinion of the medical witness, may have a tendency to shorten her life. Being a child of such tender years, of course no negligence can be imputed to her so far as her acts may be concerned, and this claim, at its very outset presents, to my mind, an intolerable situation which must ultimately be cured by proper and appropriate legislation, as hereinafter referred to.

The board of education of Calhoun county was, in my judgment, negligent in allowing these stoves to be unprotected, especially so in view of the fact that children of tender years were compelled to attend the school under our state law, and were entitled to every protection so far as a safe and secure place for obtaining their early education was concerned. The evidence undoubtedly shows negligence on the part of the board of education of Calhoun county.

The attorney general, through his assistant, moved to dismiss the proceedings against the state board of education, named as one of the respondents, and against the county board of education, on the ground that a state agency was not involved, and, therefore, this court was without jurisdiction in determining the issue or in making an award.

It is true that the state board of education is named as one of the defendants or respondents, but in my opinion, under all

the facts and circumstances in this case, was not a party to the infliction of the injuries in question, had no connection whatever, in law or in fact, with the accident, and cannot be considered as an involved agency. The all important question that presents itself, then, is as to whether or not the board of education of the county of Calhoun is such a state agency as is contemplated in the act creating this court.

The act passed March 6, 1941, and duly approved by the Governor, contains, among other provisions, the following:

> "Sec. 2. . . . 'State agency' means a state department, board, commission, institution, or other administrative agency of the state government."

Section 13 of the act provides that the jurisdiction of the court, except for claims of a certain nature, shall extend, among other things, to the following matters:

> "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."

The jurisdiction of the court is therefore limited, in my opinion, to claims against the state, state agencies, departments or institutions.

It is true that our state constitution provides that the Legislature shall provide by general law for a thorough and efficient system of free schools. We have been endeavoring throughout the years to carry this provision into effect by the establishment of county units in the nature of county boards of education which, by the recent acts of the Legislature, have been given full county-wide powers so far as their prerogatives and functions were concerned, and county-wide control of the educational administration affairs of the county, with a few exceptions, so far as the control of the state board of education is concerned. It is contended by counsel for the claimant that our Supreme Court of Appeals in the case of *Krutili* v. *Board,*

99 W. Va. 466, had held that a school board is an agent of the state and acts as such when carrying out its duties. A careful reading of the case in question will reveal that this language is but dictum and that the case turned on an entirely different proposition, to-wit, that there was no statutory authority in the sate of West Virginia by which an action could be maintained for negligence or nonfeasance against the county board of education as such, where injuries resulted to a pupil or student in one of its schools by reason of said negligence or nonfeasance.

What did the Legislature intend by the use of the language "state agency"? An examination of the authorities shows that as a general proposition, a state agency is one over which the state, as such, through its Governor or other properly elected or appointed officers, has charge and control, and which agency is not subject to the whims or caprices of any individual municipality, county, or locality. State agencies or state institutions have also been defined as those belonging to, or owned by, or under control of the state and not such as might belong to, or be controlled by, any county units. And this is true, even although the local unit has been established by act of the Legislature and has been the recipient of contributions for its support and assistance from the state.

In *Chalfant* v. *State*, 37 Ohio State 60-61, the state of Ohio, in dealing with a similar question, held "state institutions" as set forth in the Ohio constitution, providing that the trustees of benevolent and other state institutions should be appointed by the Governor, meant institutions belonging to and owned by the state, and not to such as might belong to the particular municipalities or counties, although established under the legislative authority of the state, and receiving contributions for their support from the state and governed by state laws.

In *Brock* v. *Bruce*, 2 Atlantic 598-606, 58 Vt. 261, it was held: "The constitutional provision requiring every officer, whether judicial, executive, or military, *in authority under this state*, . . . to take and subscribe the oath of office" does not apply to a

school district officer—such officers are *"in authority under their respective municipalities,"* and are not regarded as in authority under the state. If, under this decision school district officers are not officers of the state, and consequently not agents thereof, how can it be maintained that a county educational unit would be an agency or institution of the state?

In *State* v. *Dillon,* 2 S. W. 417-419, 90 Mo. 229, it was held that the words "state officer" as used in the Missouri constitution, were to be understood as having been used in their popular sense and refer only to such officers whose official duties are coextensive with the boundaries of the state and not to officers whose functions are confined to counties or townships.

If the matter of state-wide boundaries is to govern us in the instant claim, as held in the Missouri case, then officers who function merely for counties, towns or townships are not state officers, and applying the same reasoning, we must be forced to the conclusion that county units of education, being limited so far as the boundaries are concerned, in carrying out their functions, are not state agencies and therefore, excluded from the jurisdiction of this court by the provisions of the act creating it.

In Massachusetts the Supreme Court held *in re* opinion of *Justices,* 46 N. E. 118-119, 167 Mass. 599, which was a proceeding in which the Supreme Court of that state was called upon to render an opinion to determine whether or not a county commissioner was an officer of the commonwealth, and therefore subject to impeachment under the provisions in the Massachusetts constitution, relating to the impeachment of state officers, the court said:

> "The office of county commissioner is created by statute and the Legislature can by statute determine in what manner an incumbent may be removed from office. They have some duties or functions which concern the people of the state at large. But it seems to us that they are essentially a local body. They are elected by the people of a county, and their duties re-

> late chiefly to the affairs and interests of the county. ... We have been unable to find any plain intimation by legislatures, courts, or writers of authority, that county commissioners have ever been . . ." treated as state officers.

If not state officers, then, of course, they cannot be state agencies. And if the board of county commissioners, although subject to much control by the state, cannot be held to be a state agency, then much less, in my opinion, is a local board of education a state agency and subject to the provisions of the act creating this court.

A strong analogy of statutory construction is found, in my opinion, in the case of *Webster* v. *Board of Education of Raleigh County*, 116 W. Va. 395, which held that the workmen's compensation act does not apply to employees of the county board of education, nor does it give a right of action for injuries received in the course of their employment, occasioned by the negligence of the employer. I think it must be fairly assumed that the court's decision clearly indicates that a county board of education is not a state agency or department and, therefore, does not come within the general designation of the statute relating to relief under the workmen's compensation act. If the county board of education is held not to be a state agency in this respect, then it naturally follows that it cannot be held to be a state agency in any other respect, and consequently, does not come within the provisions of the act creating the court of claims.

In the 36 Cyc., page 852, state officers and agents are defined as follows:

> "State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state.
>
> They are in a general sense those whose duties and powers are coextensive with the state, or are not lim-

> ited to any political subdivisions of the state, and are thus destinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality, and from county, city, town, and school district officers."

I most reluctantly adopt the foregoing view and give the assurance that I had hoped that it could be found that the board of education of Calhoun county was a state agency and could be held liable. It is a claim that should be considered by the Legislature and I would recommend:

> First: That if at all possible, an enabling act should be passed by the next Legislature, by reason of which adequate compensation will be given to the claimant and her father for the damages occasioned by her injury, which in turn was occasioned by the negligence of the board of education of Calhoun county;
>
> Second: I further recommend the passage of the necessary legislation that will enable a citizen, a student or pupil to bring an action in tort against any county board of education where injuries and damages are caused by reason of the negligence or nonfeasance of the said board. This legislation, of course, is suggested also in *Krutili* v. *Board of Education, supra.*

For the reasons herein set forth, I would be constrained to allow the motion to dismiss.

(No. 55—Claimant awarded $500.00.)

BENJAMIN JOHNSON, Jr., an infant, whose claim is filed and prosecuted by BEN JOHNSON, Sr., his father and next friend, Claimant,

v.

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

Opinion Filed April 21, 1942

This claim is controlled by the opinion of a majority of the court of claims filed in the case of claim No. 48, *J. C. Richards* v. *Board of Education of Calhoun County and State Board of Education.*

Messrs. *Townsend & Townsend*, by *W. J. Thompson*, Esq. and *Joseph Thomas*, Esq., for the claimant;

Clarence W. Meadows, Attorney General, *Eston B. Stephenson*, special assistant to the Attorney General, and *Claude A. Joyce*, prosecuting attorney of Logan county, for respondents.

ROBERT L. BLAND, Judge.

Claimant, Benjamin Johnson, Jr., seven years of age, whose claim is filed and prosecuted by Benjamin Johnson, Sr., his father and next friend, was a pupil in the elementary department of Holden central school, at Holden, in Logan county, West Virginia, during the school year of 1940-41. He seeks to obtain an award in damages for personal injuries sustained on June 10, 1941, a few days before the end of the school term. He was in the second grade of the school, in room No. 10, taught by Miss Ethel Taylor. For the accommodation and use of the pupils of this room the school officials had installed a series of five connected metal wall lockers, in the hallway leading from the balcony on the second floor of the building over the gymnasium. In these lockers the pupils kept their books,

clothing, etc. They were approximately five feet in height, twelve inches deep, and at least twelve inches wide. When L. H. Hutchinson, principal of the school, was asked how the lockers were secured or safeguarded, he answered: "They were not fastened to the top of the wall, but they had a little stick on the bottom that kind of slanted them back a little bit, probably three inches to half an inch thick." The lockers were not fastened or anchored to the wall, but stood in an insecure position on this small piece of board on the concrete floor. On the morning of the accident, about ten or fifteen minutes before school opened, Miss Taylor, the teacher, was in the school room and heard children screaming. She ran to the hallway and found that this section of five connected metal wall lockers had fallen on two of the pupils, claimant Benjamin Johnson, Jr., and a companion, George Brand. The Johnson child was standing near the fallen lockers, with blood on his face, while the other boy was still under the lockers, from which position he was extricated by the teacher with the assistance of other pupils. The Johnson boy was hurried to the hospital of Dr. J. W. Lyons, in Holden, where he was given necessary surgical attention. It was found that the child had received a bad and ugly wound of the forehead and scalp, extending from his right eye to the crown of his head. The upper eyelid was lacerated and there was also a laceration below his right eye. The wound was through the scalp down to the skull. The skull was exposed almost the entire length of the wound. A great number of stitches were rendered necessary—one witness testifying that there were one hundred and eight. Notwithstanding the skillful aid of the surgeon given to the child, the scars in his scalp, forehead and eye constitute a permanent disfigurement, and he has suffered pain and still experiences headaches.

It appears from the record that the accident was the direct result of the negligence of the officials of the school in failing to safeguard said metal wall lockers and properly and adequately anchor and fasten them to the wall of the room or compartment in which they were located. This duty the officials of the school owed to the pupils.

An award is made to the claimant, Benjamin Johnson, Jr., in the sum of five hundred dollars ($500.00), by a majority of the court for the reasons and upon the grounds set forth in the opinion of a majority of the court filed in the case of claim No. 48, *J. C. Richards* v. *Board of Education of Calhoun County and State Board of Education.*

Judge Schuck dissents for reasons set forth in the statement of his views filed *in re* the above mentioned claim.

(No. 74—Claim dismissed.)

ROBERT F. LANE, Claimant,

v.

COMMISSIONERS OF THE COUNTY COURT OF WOOD COUNTY, Respondent.

Opinion Filed April 21, 1942

Appearances:

Lon G. Marks, Esq., for the claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, on behalf of the state.

WALTER M. ELSWICK, Judge.

It appears from the petition filed herein that on October 13, 1941, the claimant, while serving a ten-day sentence for drunkenness, fell from his berth in a cell of the Wood county jail to the concrete floor of said jail, which fall he alleges was caused by the breaking of a chain supporting the said berth, and that by reason of the said occurrence, he suffered permanent injuries to his hip and leg. The jail in question was in charge of,

and under control of, the sheriff of said Wood county, insofar as the management and control of the said jail was concerned, as appears from claimant's petition.

The question that immediately presents itself for consideration is whether or not the claim, as presented, is such as can be entertained or investigated by this court. The injuries complained of having arisen while the claimant was confined in a county jail, under the exclusive control and supervision of the county, the remedy, if any to be provided, must necessarily be against the county or county officials in charge, for it is specifically provided by section 6, article 10 of the constitution of this state, that:

> "The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; . . ."

Assuming the allegations of claimant's petition to be true, as they are therein set forth, it does not appear that he would have a right to maintain his claim before the Legislature under the constitution. This being so, certainly the claim, on the facts presented, is such as cannot with propriety be entertained or investigated by this court.

By analogy, we are further persuaded that the Legislature did not intend that this court should have jurisdiction over claims such as the one under consideration, as section 14 of the court of claims act specifically prohibits this court from hearing any claim arising from injuries or death to an inmate of a state penal institution. As inmates of state penal institutions cannot have any claim for damages caused by the negligence of those in charge of the state institutions heard or entertained by this court, much less, then, in our opinion can an inmate of a county jail receive consideration of any claim that he may have for damages occasioned while he was an inmate of said jail.

We, therefore, refuse to entertain the claim as presented.

CHARLES J. SCHUCK, Judge, concurring.

I concur in the conclusion reached by Judge Elswick with reference to the claim in question, but assign the reason for my concurring to be, namely: That the court of claims is without jurisdiction to entertain a claim for damages resulting from injuries occasioned to one while confined as an inmate in a county jail, as the county court, or commissioners of said county, or the sheriff thereof in charge of said jail, are not, in my opinion, "state agencies" as contemplated by the act creating this court.

I concur fully in the reasoning set forth in the last paragraph of Judge Elswick's opinion.

(No. 70—Claimant awarded $250.00.)

ROBERT DEWEY McMILLION, an infant, whose claim is filed and prosecuted by GEORGE D. McMILLION, his father and next friend, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 30, 1942.

The state road commission is charged with the duty of keeping the bridges on highways in reasonably good repair, and the failure to do so, by reason of which a child of tender years is injured, makes the road commission liable, even though the injured child may have had occasion to use the bridge in question a number of times while the bridge was out of repair. Such child of tender years cannot be charged with contributory negligence.

Appearances:

The *Claimant* in person and by *George D. McMillion,* his father and next friend;

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

CHARLES J. SCHUCK, Judge.

Robert Dewey McMillion, a boy ten years of age, while riding a bicycle in and upon a bridge spanning what is known as Cabin creek, near Leewood, Kanawha county, West Virginia, on or about the 14th day of June 1941, was thrown with said bicycle off said bridge into said Cabin creek, by reason of a defect in the flooring of said bridge, there being no guardrails to protect the said infant from falling into the creek as aforesaid. The evidence shows that one of the planks in the floor of the said bridge was loose and elevated at one end from three to four inches above the general bed or floor level of the bridge. The evidence also shows that there were no guardrails on the bridge in question, except that there was a rail about eighteen inches in height on either side of the bridge as the only means of protecting pedestrians or vehicle travel. The evidence shows that the claimant, while riding on his bicycle on the said bridge, on the day in question, in the morning of the said day, struck the said projecting plank and was thrown or catapulted over the said bridge into the creek below, and sustained a fracture of his arm which required hospital and medical treatment for a period of some five or six weeks, during which the claimant suffered, to a greater or lesser degree, by reason of the injury inflicted.

The state attempted to show that the claimant had crossed the bridge on a number of occasions, and knew of the defect in question; that claimant was obliged to pass over the bridge several times daily on his way to school, and that if he did not notice the defect, he ought to have noticed it because of the numerous times he passed over said bridge. The evidence shows that the defect in question was allowed to remain five or six weeks before the injury to the claimant or before the plank or board was nailed down to be even with the general level or floor of the bridge. The evidence also shows that the work of

nailing down the plank or making the necessary repair was done by one who lived near to or adjacent to the bridge and in no way connected with the road commission. The evidence also shows that claimant has fully recovered.

Assuming that the evidence would be such as to sustain the state's contention, which, however, is not the case, yet the tender age of the claimant would free him from any charge of contributory negligence. Under these circumstances, there is no question in our minds of the liability of the state road commission to compensate the claimant for the damages caused.

The evidence shows conclusively that the father of the infant claimant, who presented this claim, was under no expense whatever, either for hospital or doctors' services, the said expenses having been covered by his insurance, the premiums of which were not affected in any way by reason of the accident in question. The father, therefore, suffered no loss whatsoever by reason of the accident to his son, and, in our opinion, is not entitled to any part of the award which is hereinafter made.

We are of the opinion, from all the circumstances and the evidence adduced, considering the pain and suffering of the claimant, and the time he was inconvenienced by reason of the injuries in question, that the sum of two hundred and fifty dollars ($250.00) should be paid him as damages; and we recommend an award in the said sum accordingly. We further recommend that this sum be paid to the guardian appointed for the claimant by the proper court, upon the giving of a bond in a sufficient amount to cover the award, and upon the execution of a full and complete release, to be signed by the father and the guardian, showing payment in full settlement of any and all damages that may have resulted by reason of the injury in question.

(No. 70—Claimant awarded $860.50.)

KEELEY CONSTRUCTION COMPANY, a corporation, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 15, 1942.

Where the state road commission, by its contract may or may not furnish road metal (stone or other material) to keep lanes of traffic open to the traveling public, during the construction and improvement of a highway, and the testimony shows that it has been the custom of the said road commission to furnish such material or metal at its own cost or expense, on other road projects, then the contractor is entitled to a reasonable charge or claim for gathering and furnishing the said road metal or material so used on a highway during the improvement and construction thereof.

Appearances:

Messrs. *Wyatt and Randolph (Byron B. Randolph,* Esq.) for the claimant;

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

CHARLES J. SCHUCK, Judge.

On or about the 23rd day of May 1939, the state road commission entered into a contract with the claimant, a contracting company, for the purpose of building, improving, and making a certain public road in Randolph county, West Virginia, running from what is known as Valley Head to Monterville, about four miles in length, and known as project No. F. A. 205-B (1). Work was commenced on this project during the summer of 1939, and not having been completed, the work was carried on through part of the winter and the project finished in the summer of 1940. During the said winter and spring of 1939-40 a

lane was kept open for traffic, and it became necessary to use stone as a base in order that traffic could pass, since the season of the year had made it impossible to use the said lane without using what is commonly termed road metal, meaning thereby stone or similar material, to form a base for the said road, in order that it could be used for traffic. The evidence shows that a number of very heavy trucks were passing over this lane daily, and thereby cutting deeply into the road and making it necessary to use the material aforesaid to make the road passable. In its attempt to take care of the highway in question for traffic purposes, the state furnished and the contractor spread on the said lane some ten or twelve tons of what is known as No. 6 stone, a stone about three-fourths of an inch in diameter, and which evidently was found inadequate for the purpose intended. It became necessary to have larger and more substantial stone for the base of the traffic lane, and this material was furnished by the contractor, for which it makes it claim. The state refuses to pay the claim, maintaining that a provision contained in the standard specifications concerning road construction, which said specifications were made part of the contract in question, exempts the state from payment. The specifications contain the following provision, to-wit:

> "All temporary facilities herein provided shall be at the expense of the contractor, except that the commission may reimburse the contractor for the furnishing and placing of suitable road metal for stabilizing traffic lanes or temporary detours, or may do such work with its own forces as may be directed by the engineer."

That it was necessary to have other and different material than that furnished by the state to stabilize the lane in question and make it usable for traffic, there can be no question; and there is further no question that, so far as the contract was concerned, that the contractor was not specifically charged with the duty of supplying at its own cost and expense the road material or stone necessary to be used to stabilize the traffic lane.

There was some controversy in the evidence as to whether or not the state had theretofore made allowance to contractors for supplying what is termed as road metal, but we feel that a fair analysis of the testimony submitted, including the testimony adduced by the state, clearly shows that where the state desires a traffic lane to be stabilized and kept open for the traveling public, it has assisted the contractor in bringing about the desired result and has paid the expense of furnishing the material and the contractor has been obliged to stand the expense of spreading the material and thus putting the road in proper condition. The evidence shows that it was a difficult road, by reason of its location in the hilly or mountainous sections of Randolph county, to be kept passable during the winter months, and that it required considerable attention, so far as material was concerned, in stabilizing the said traffic lane. Evidence is also produced by the claimant that its superintendents in charge of the work were specifically ordered by those in charge of the work for the state to supply the material necessary to keep the said lane passable, but this part of the testimony is denied by the state's witnesses. However, we repeat that a fair deduction, from all the evidence, leads to the conclusion that under similar circumstances the state has heretofore paid contractors for supplying the said road material or metal when the state desired to keep the road open and stabilized for public travel and traffic, and we feel that the contracting company had the right to rely on this custom in supplying the necessary material to properly stabilize the traffic lane. Its claim is in the amount of $860.50. In fact, the claimant, by its witnesses, maintains that the work and expense entailed in gathering the material necessary to keep the said lane open to traffic was many times the amount that is here claimed. Under all the circumstances, we feel that in justice to all parties an award should be made to the claimant and therefore, find accordingly in the amount of eight hundred sixty dollars and fifty cents ($860.50).

(No. 78—Claimant awarded $1810.50.)

KEELEY CONSTRUCTION COMPANY, a corporation,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 15, 1942

Where the state road commission contracts for the making and building of a public road or highway and requires the work to be completed in a certain number of working days, and the contractor is subsequently prevented from carrying out his part of the contract through no fault of his, but by reason of the failure of the state road commission to consummate and complete a contract with a railroad company for the removal and relocation of the tracks of said railroad company, and which tracks, as located, prevent the carrying out of the said highway improvement and the contractor is thereby delayed for a long period of the best working days, considering the season of the year in which the said project is being carried on, the contractor is entitled to be reimbursed for any actual expenses and damages he has suffered by reason of the said delay.

Appearances:

Messrs. *Wyatt and Randolph (Byron B. Randolph*, Esq.) for the claimant;

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

CHARLES J. SCHUCK, Judge.

The claimant company, on or about the latter part of February 1940, entered into a contract with the state road commission for the improving and building of a certain public road in Lewis county, West Virginia, extending from the city of Weston to Deanville, and known as project No. F. A. 220-B (1). The contract provided that the work should be completed and the improvement finished within 175 working days, and involved certain rights of way then held and owned by the Baltimore

and Ohio Railroad Company, and used by the said company for its road bed and tracks in that particular locality. It was necessary in carrying out the work, as contemplated by the contract, to have the said railroad company remove its tracks to a new or adjacent location, which new rights of way for the railroad company were to be obtained by the state road commission by purchase or condemnation from the owner or owners thereof; and which said new rights of way were necessarily to be obtained in ample time and thus not interfere with the work of the road improvement. It was necessary to have the railroad company's tracks removed in order that the road improvement could be carried on as contemplated by the contract with the claimant company. From the evidence it appears that the contract between the railroad company and the state road commission had been executed on or about December 1935, and that later, in 1939, condemnation proceedings were instituted to obtain title to the several tracts involved. Within a few weeks after the contract for the road improvement had been executed and bond given by the claimant company, as required, the claimant proceeded with the work, rented space and ground for the storage of its grading and paving equipment, and seemingly did all things necessary to carry out its part of the contract. The work proceeded until about the 23rd day of July 1940, when, by reason of the fact that there were some difficulties between the said railroad company and the state road commission in obtaining title to the tracts of land involved, it became necessary to stop and halt the work until such time as the tracks of the railroad company could be moved to their desired location. With the contract between the railroad company and the state, the claimant, of course, had nothing to do, was not a party to the same, and could not in any way be held accountable for the delay occasioned by the failure to have the said contract executed and the tracks removed to the new location. In consequence of this situation, the claimant was obliged to remain idle on the work for a period of nearly a month, to be exact, from July 23 to August 20, of the year 1940; naturally, a month of the best and most profitable working days of the season. During this delay the claimant kept considerable of

its equipment on the ground and location, and now is asking damages occasioned by the delay during the time it was unable to do any work and could not remove any of its equipment to any other work or job, since, as the testimony shows, there was a possibility that, daily, work would be resumed when the contract in question between the state and the railroad company was executed. The evidence shows that the claimant was carrying on another road project at and near Clarksburg, West Virginia, and some twenty-five or thirty miles from the work or project herein concerned, and that eventually part of the equipment was moved from the Lewis county project to the Clarksburg project. Claimant also maintains that it is entitled to damages by reason of the fact that it was unable to contract for any other job or project during the time of the delay, since, as herein set forth, work might be resumed at any day, and, consequently would prevent the claimant from carrying out any other work or project. The evidence does not disclose that the claimant company had the opportunity of obtaining other work of a similar kind or character, and at best claiming damages in this respect would be only problematical and speculative and therefore cannot be considered by us in determining the matter of an award under the facts as presented. The claimant company's claim, as filed, is in the amount of $3360.50, made up of a number of items of the rental value of the equipment located at Weston and idle during the said period of the delay or "shutdown" of the project. From the evidence it is apparent that some of the equipment for which rental charge is made could, at much less expense than the charge, have been removed to the Clarksburg project, and that in fact some equipment was so moved.

Shortly after the project in question had been fully completed, and while the matter of damages caused by delay was fresh in the minds of all parties concerned, the claimant company presented to the road commission an itemized bill or statement in the amount of $1810.50 as damages caused by the delay or suspension of the work and asking payment in the said amount. The claimant company now maintains that this state-

ment did not include the rental value of the equipment used for paving purposes, and that, therefore, the increase, as now claimed, should be allowed. However, the evidence shows (record pp. 52-53) that at the time the work was stopped and the "shutdown" took place, the excavating had not yet been completed, and was not fully completed until the latter part of September of the same year, as shown (record pp. 53-54). Assuming that it would have taken some days to complete the grading after the day when the delay began, and taking into consideration the date when the grading was actually completed, we must arrive at the conclusion that if the work had not been interfered with or delayed, it would still have been the latter part of August or the beginning of September before all grading had been finished and completed, and the project made ready for paving. The delay, therefore, so far as the paving equipment was concerned, did not interfere with any of the claimant company's other projects, since such equipment could not have been used at Clarksburg, owing to the fact, as shown (record pp. 54-55) that no paving was to be done on the Clarksburg project until the spring of the following year, and the evidence further fails to show any other job or project where such paving equipment could have been used; we feel, therefore, justified in holding that, so far as the paving equipment on the Weston project was concerned, no damages were sustained by the claimant, and no rental value should be allowed therefor.

In consequence of these deductions, we hold that the statement or bill in the amount of one thousand eight hundred ten dollars and fifty cents ($1810.50), submitted by the claimant against the state shortly after the project in question was fully completed, reflects the only damage to which the claimant company is entitled, and we recommend an award accordingly to the Legislature.

(No. 73—Vernie E. Ashworth, awarded $50.00; Calvert Fire Insurance Company, awarded $154.11.)

VERNIE E. ASWORTH, and CALVERT FIRE INSURANCE COMPANY, a Corporation, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 15, 1942.

Where it appears from the evidence that one using a state owned public bridge in a careful manner sustains personal property loss by reason of the defective condition of the bridge, an award will be made to such person and his assignee for compensation of such loss.

Appearances:

Herman Bennett, Esq., for the claimants;

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

WALTER M. ELSWICK, Judge.

From the evidence in this case it appears that on August 20, 1941, an automobile owned by claimant Vernie E. Ashworth was being driven by his son Vernie E. Ashworth, Jr., on a state road leading out of the village of Kayford in Kanawha county, West Virginia. While the car was being driven about ten miles per hour across a bridge, a board from the runway flooring of the bridge flew up and hit the left wheel of the automobile causing the driver to lose control of the steering wheel. The automobile turned over and rolled into the creek below and sustained damages necessitating repairs to the same. It was taken to Prichard Motor Company and the costs of making necessary repairs on the automobile amounted to the sum of $204.11. The owner of the automobile carried collision insurance with Calvert Fire Insurance Company, a corporation, with a fifty dollar deductible clause policy. The insurance company

paid the claim subject to said deductible clause policy and has filed claim for $154.11, and the owner of the automobile has filed claim for the fifty dollar loss sustained for which he has not received compensation. From investigations made by the state road commission, the attorney general admits that the bridge in question was under the supervision of the state road commission and that the actual damages to the automobile was the sum of $204.11. The state road commission also made investigation as to the merits of the claims and found that the collision was caused by the defective condition of the bridge.

From the evidenced adduced we are of the opinion that the state road commission should be held liable in damages for the collision occasioned by the defective condition of the bridge, and therefore recommend awards based upon the evidence as follows: To Vernie E. Ashworth the sum of fifty dollars ($50.00); to Calvert Fire Insurance Company, a corporation, the sum of one hundred fifty-four dollars and eleven cents ($154.11), and orders on each claim were entered accordingly.

(No. 79—Claimant awarded $1500.00.)

BROOKIE CANTERBURY, Admx. of the personal estate of BERT CANTERBURY, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 15, 1942.

The state road commission will be held liable in damages for the negligent and wrongful acts of its agents and employees toward a W. P. A. employe while doing special services on a state project which services are distinguished from the services of other W. P. A. employees. where it appears from the evidence that the W. P. A. employee was receiving special orders from state road foremen and bosses and was no longer under the supervision of his W. P. A. foremen while engaged in such work with state road employees.

Appearances:

W. H. D. Preece, Esq., for the claimant;

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

WALTER M. ELSWICK, Judge.

On the morning of September 10, 1940, near the hour of seven, Bert Canterbury was picked up by a state road truck driver in front of Canterbury's home at the mouth of Goodman Branch, three miles below the City of Williamson, in Mingo county, West Virginia. The cab of the state road truck was occupied by the driver, Clyde Hardin, and Ralph Allen, both employees of the state road commission of West Virginia. They were on their way to work on a state road project on Trace creek in said county.

At that time there was also a W. P. A. project in operation about one to three miles below the state road project on said creek. Bert Canterbury for some time prior thereto, and on said 10th day of September, 1940, was a W. P. A. employee and had orders from both the W. P. A. foreman and the state road foreman on said projects to work at the state road project as driller under the supervision of Ralph Allen one of the occupants of the state road truck in which he, Canterbury, was being driven.

After the said state road truck had traveled eight or nine miles toward their place of work and came to a sharp down grade curve, upon approaching Naugatuck bridge the driver lost control of the truck, where it skidded against the bridge abutments, turned over, and fell about thirty-eight feet into Pigeon creek. Bert Canterbury was riding in the back end or body of the truck, and the truck with its contents of cement, oil drums and cans fell upon him, killing him instantly.

From the evidence it appears that on the morning in question it was raining and the road over which the truck was being driven was wet and slippery. It also appears that the driver of the truck was at the time of the collision and for some time

prior thereto driving the truck at a reckless rate of speed, although he knew the condition of the road and that "the worst curve that there was on that stretch of road" was at the point where the collision occurred (record p. 123). Ralph Allen, the occupant of the cab of the truck, testified that he had protested and requested the driver not to drive so fast, down the road about a mile before coming to the bridge where the collision occurred; that he had then remonstrated the driver that the road was slippery and dangerous; that the driver replied that there was no danger, and that the road was all right. (Record p. 89). Other witnesses who were along the highway where the truck had passed testified that in their opinion the truck was being driven, when passing them, from 50 to 55 miles per hour. (Record pp. 14 and 28). One witness who viewed the collision, was attracted by the noise from the truck, and speed it was making, immediately prior to the collision. He had had experience as a driver of automobiles and taxis and estimated the speed of the truck when coming around the curve down the hill toward the bridge to have been from 50 to 55 miles per hour. (Record p. 54).

It appears further from the evidence that the decedent, Canterbury, was not placed in a position to view the road or to make protest against the reckless manner of driving the truck although it is doubtful, if such protest had been made, whether the driver would have heeded, when it appears that he had disregarded protests made by Allen, a short time before the time of the collision, who was in the cab and who could view the road in the direction of travel. From the evidence it appears that the truck was making a loud noise, and that there were bars around the back window of the cab of the truck.

It also appears from the evidence that the decedent, Bert Canterbury, was engaged in special work for the state road commission which distinguished his work from that of other employees of the W. P. A. project. The W. P. A. crew was digging ditches, and the state road crew was "taking a cliff off." (Record p. 97). Canterbury was working with the state road crew, drilling rock, running the air hammer or drill (record pp. 82,

97). His immediate superior was Ralph Allen, who occupied the extra seat in the cab of the truck at the time Canterbury entered the truck, and when the same skidded and fell from the bridge. The state undertook to prove that state road commission officials had a standing enforced rule or regulation prohibiting truck drivers from carrying persons other than employees of the commission, unless it was equipment that it carried insurance on, such as passenger cars and pickups. The truck in question was a ton-and-a-half truck with dump body. The same truck had been used by the same truck driver to carry Canterbury home from the same project a number of times, even on the evening before he was killed. There was no evidence indicating that the truck driver had been warned against the use of the truck for the purpose, and he testified that he had not received any specific instructions not to permit the decedent to ride in the back end of the truck. (Record p. 120). Furthermore, the truck drivers had received instructions a number of times to go and get Canterbury at the W. P. A. project and transport him in the same type of truck to the state project where Ralph Allen worked. On the return trips home if another person was in the cab of the truck with the driver, Canterbury would ride in the back end of the truck (record p. 119). It doesn't appear from the evidence in the case that Canterbury had been instructed not to ride the truck in either its cab or bed. The commission had a rule that only one person could occupy the cab with the driver which seems to explain why Canterbury was riding in the back end of the truck at the time he was killed.

It also appears from the evidence that the W. P. A. officials had regulations which prohibited its employees from being transported in vehicles which were not equipped with seats and covers. To come within their regulations dump truck beds had to be securely chained to the chassis. It appears from the evidence that neither the state nor W. P. A. regulations were enforced as to the decedent. Considering the special type of work which the decedent was doing and the instructions given him, as well as the manner in which he had been previously transported to and from the project we are of the opinion that the

decedent was not chargeable with contributory negligence with reference to violation of any such rules or regulations issued by either the state department or the W. P. A. Under the circumstances he no doubt believed that he was expediting his duties as an employee by reporting to work with his boss and returning to his work with the same driver who had transported him home on the evening before. And he was riding in the truck with the person to whom his W. P. A. foreman had intrusted his care while away from the W. P. A. project. He was no longer to be classified with the other W. P. A. employees in regard to the state road commission's duty toward him. Furthermore, it was not the nature of the truck, but the careless manner by which it was being driven that caused decedent's death.

Brookie Canterbury, as administratrix of the estate of Bert Canterbury, deceased, filed claim for the wrongful death of decedent for the sum of $10,000.00. At the close of the hearing of evidence in the case, the state of West Virginia, by its attorney general, moved that the petition be dismissed for the following grounds:

First, that the principal, state road commission, is not liable to third persons for negligence, if any, of agents who act outside the scope of their employment.

Second, even if negligence does exist, which the state road commission denies, still the evidence is uncontradicted, and corroborated in this case that the claimant was negligent in not bringing home to the truck driver a notice of the reckless way in which the truck driver operated the truck.

A third ground, namely, that the W. P. A. employee in question cannot recover in this case, as his injury was the direct result of his own disobedience of orders and regulations given to him by the W. P. A. and state road commission foremen in charge of this particular project.

As to the first ground so assigned, we are of the opinion from the evidence for the reasons hereinbefore set forth that the

truck driver was at the time of the collision acting within the course of his employment.

As to the second ground assigned we are of the opinion from the evidence that the truck driver was negligent and that his acts were the direct and proximate cause of the collision; the truck driver had been requested to slow down within a mile of the scene of the collision by Ralph Allen who occupied the cab with the driver and who could view the road ahead; the decedent was not placed in a position to view the road or to remonstrate with the driver.

As to the third ground assigned we do not find from the evidence that the decedent had received orders or regulations not to ride on the truck while working on the state project, but it appears from the evidence that he at times had received orders to ride on the truck in question by the foreman of the particular state project; that while working on the state project he was doing special work which distinguished his services from that of other W. P. A. employees who worked on the W. P. A. project.

Having found that Bert Canterbury met his death by reason of the negligence of the truck driver, in assessing the damages, we have considered evidence in the record that the Federal Government through its compensation department has been paying to Brookie Canterbury, since decedent's death, the sum of $22.50 per month; that out of said sum $4.00 is payable to their son Evert Canterbury until he arrives at the age of 18 years; that Brookie Canterbury will continue to receive the sum of $18.50 compensation so long as she remains the widow of Bert Canterbury, deceased.

It further appears from the evidence that Bert Canterbury was 52 years of age at the time of his death; that he left surviving him his widow, Brookie Canterbury, and three children, namely: Octavia Canterbury, a daughter, 23 years of age, Sadie Canterbury, a daughter, 20 years of age, and Evert Canterbury, 17 years of age, who were all of his heirs and distributees. At the time of his death he was earning wages of $42.00

per month, and his family did not have any other income or means of support during his lifetime.

From all the evidence in the case we are of the opinion that the sum of fifteen hundred dollars ($1500.00) would be a fair and just award and recommend that said sum should be paid to his administratrix upon the execution of a proper bond by her to be approved by the clerk of the county court of Mingo county, West Virginia, and an order was entered accordingly.

(No. 76—Claimant awarded $7,760.09.)

COUNTY COURT OF BROOKE COUNTY, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed June 15, 1942.

Where the evidence establishes that a former commissioner of school lands obtained funds from the sale of property sold for delinquent taxes, and after deducting the costs of the sale, remitted the balance of the funds to the state auditor, and no disbursement or distribution was ever made of the said fund, as required by law, then an order will be entered by this court, making an award and ordering distribution accordingly.

Appearances:

Walter E. Mahan, prosecuting attorney of Brooke county, and *Abraham Pinsky*, assistant prosecuting attorney of Brooke county, appearing for the claimant;

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

CHARLES J. SCHUCK, Judge.

On the 24th day of June 1931, in a suit styled the *State of West Virginia* v. *Sara B. Ennis, et al,* the commissioner of school lands reported to the circuit court of Brooke county that he had sold at public auction a tract of land belonging to the Aetna Development Company, the larger portion of which was located in Brooke county, and a contiguous part in Hancock county, for a sum of $8,970.60; the said tract having been delinquent for taxes for the years 1926-1928-1929; that after deducting the expenses of sale there was a net balance of $8,292.42, which amount was subsequently remitted to the then state auditor by the check of the said commissioner of school lands, dated July 21, 1931. The sale of the said lands was confirmed by an order subsequently entered by the circuit court of Brooke county, West Virginia, and a later and diligent search of all the records, both in the state auditor's office, as well as the records of the office of the sheriff of Brooke county, covering the years that were involved, and up to the present time, failed to reveal any distribution of the fund in question to the various public bodies entitled thereto. The fact being that so far as the evidence reveals, the amount in question is still reposing in the office of the state auditor, no distribution of any kind ever having been made. The matter of the failure of distribution was discovered by the present assistant state auditor, and after communicating with the proper authorities in Brooke county, namely, the prosecuting attorney and sheriff thereof, and finding no distribution had been made, so far as any examination of the books of the offices in Brooke county reveal, this claim is presented accordingly on the part of Brooke county, asking that the refund be made to it from the funds now claimed to be still in the hands of the state auditor. A photostatic copy of the check from Robert L. Ramsey, the then commissioner of school lands, and payable to Edgar C. Lawson, the then state auditor, in the amount of the claim, is in evidence together with a photostatic copy of the endorsement on that check showing payment to the auditor through the then treasurer of the state of West Virginia. The testimony of both the assistant state auditor, Hugh N. Mills, and the testimony of Abraham Pinsky, assistant prosecuting attorney of Brooke county, shows, after a diligent search of all the records avail-

able in the offices of the various officials concerned, that no distribution of the fund was ever made and no return or refund thereof made to Brooke county, as intended under the laws of the state. No order showing disbursement had ever been entered by the circuit court of Brooke county in the matter, and in order to fully protect the present state auditor, this court insisted on testimony that would show how and to whom the amount in question should be disbursed and distributed. Considering all the evidence we are of the opinion that Brooke county is entitled to the refund in question, and an award is made accordingly, by virtue of which distribution is to be made as follows, to-wit:

To the state auditor for the benefit of school fund representing publication fees	$ 4.00
To the state of West Virginia, on the basis of the 1926-28-29 levies	528.33
On the basis of the 1926-28-29 levies, to the county of Brooke	2,840.18
For the support of Brooke county schools	4,235.66
For retirement and interest on school bonds for Brooke county	684.25
	$8,292.42

It is further recommended that the next legislature take appropriate and proper action to carry into effect the award hereby made.

(No. 53—Claim dismissed.)

KIDD LUMBER COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 22, 1942.

Messrs. *Sayre & Bowers*, for the Claimant;

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

CHARLES J. SCHUCK, Judge.

This claim was first filed December 15, 1941, and at the following January term (1942) was formally placed on the docket and a day set for trial, the claimant having been duly and properly served with notice. On the day fixed for hearing the claim, claimant failed to appear notwithstanding the fact that the state road commission, the department involved, was ready to proceed, and the hearing or trial was by the court continued to the April 1942 term.

In March 1942 the claim was again set for hearing, the trial day fixed, being Thursday, April 30, 1942, and the claimant through its attorney duly notified. Acknowledgment of the notice was later received by the clerk of the court and duly filed.

On the day set for the trial neither claimant nor any person or attorney acting for it appeared, and thereupon the state road commission moved to dismiss the claim from further consideration by the court, and after due deliberation and considering all the circumstances, we sustain the motion, modifying it, however, to the extent that the dismissal of the claim shall be without prejudice and with the right to have the claim reinstated if good cause is shown. An order will be entered accordingly.

(No. 104—Claim dismissed.)

ROBERT D. CHAPMAN, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 22, 1942.

Where it appears from the notice or petition of claimant filed that from the facts stated no liability exists on the part of the state, the court of claims does not have *prima facie* jurisdiction and will refuse to docket the claim for hearing upon such notice or petition.

WALTER M. ELSWICK, Judge.

Notice of this claim was filed with the court of claims on March 27, 1942. The notice states that on and before November 5, 1933, claimant was the superintendent of the colored boys' industrial school at Lakin, West Virginia, a state institution governed, by statute, by the state board of control. The notice also states that claimant, as such superintendent, was required to live on the premises of said industrial school in quarters owned and maintained by the state. Because of this situation, he alleges, claimant stored his furniture in a building owned by the state of West Virginia and located on said industrial school premises. Claimant also stored in said building clothing and personal effects belonging to himself and his family.

While said furniture, clothing and personal effects were so stored in said building owned by the state, the notice states that said storage building was destroyed by fire on November 5, 1933, and that all of said furniture, clothing and personal effects were destroyed and lost by claimant. He files an itemized list of the furniture, clothing and personal effects stored in said building which were so destroyed by the fire. The amount of the loss alleged to have been sustained by the claimant was the sum of $1,608.90.

There is not any allegation of negligence on the part of any state agency asserted. Nor is there any allegation of facts such as to show the existence of any relationship between the claimant and the state or any of its agencies such as would create a liability for the loss sustained by claimant. At most, from the facts stated in the notice it might be implied that the board of control was a gratuitous bailee of the property. However, there is not any allegation that any representative of the board of control, except the claimant, had possession, custody or control of the building or the contents therein destroyed. Even in the case of a gratuitous bailment for the sole benefit of the bailor slight care only is required of the bailee, and such bailee is not liable unless guilty of fraud or gross negligence. *Heatherington* v. *Richter*, 8 S. E. 609, 31 W. Va. 858.

Under the facts stated, there appears to have been nothing done on the part of the state agency to have prevented the claimant from carrying insurance on the property destroyed by fire, as he would have been required to have done for his own protection if the property had not been moved on to the state's premises. The state agency would not have been required to carry insurance on the property and was not an insurer. From the facts stated in the notice of the claim filed, it appears that no liability would rest upon the state to pay the claim asserted and that the court of claims would not have *prima facia* jurisdiction. For that reason we refuse to docket the claim for hearing, and an order is entered accordingly.

(No. 116—Claim dismissed.)

UNIVERSITY OF OMAHA, Claimant,

v.

MARSHALL COLLEGE, and STATE BOARD OF CONTROL, Respondents.

Opinion filed July 22, 1942.

An athletic board or department of a state controlled college is not a state agency as contemplated by the act creating the court of claims and a contract entered into with such board or department is not enforceable in said court, the court being without jurisdiction to hear and determine a claim based on the provisions or conditions of the contract in question.

W. R. King, Esq., (Omaha, Nebraska) for the claimant;

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

CHARLES J. SCHUCK, Judge.

This is a claim for damages arising under a contract entered into between the University of Omaha of Nebraska and the athletic board or authorities of Marshall College and occasioned by the failure of the said Marshall College athletic authorities to play a certain basketball game, thereby failing to carry out the provisions of the contract in question and as alleged causing damages to the University of Omaha in the sum of three hundred dollars.

Without considering the merits of the claim, we are of the opinion that the athletic board of Marshall College is not a state agency under the act creating this court; not being an administrative agency of the state government and not having the power to bind the state as such, by any agreement or contract which in equity and good conscience would be enforceable against the state. The functions of the said athletic board are not controlled by the state, nor are its contracts subject to the approval of or supervision by a state agency. Under these circumstances we dismiss the claim as being without our jurisdiction.

(No. 13—Claim denied.)

RACHEL C. LAMBERT, Admx. of the personal estate of HOMER M. LAMBERT, deceased,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 22, 1942.

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

Messrs. *Showalter & Boggess,* for the claimant;

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

ROBERT L. BLAND, Judge.

It appears from the record of this case that on October 14, 1940, Homer M. Lambert was instantly killed in an automobile accident in Monongalia county, West Virginia, on route No. 73, at the foot of the hill south of Pisgah Church. This is a claim filed by Rachel C. Lambert, administratrix of the personal estate of the said Homer M. Lambert, deceased, for an award in damages for the death of her said decedent. The claim is prosecuted upon the theory that the failure of the state road commission to keep and maintain said road in good condition for public travel was responsible for the accident and death. Claimant and respondent have submitted the case upon a duly signed stipulation of facts. We are met at the threshold of our examination of these facts by the question whether they show a cause of action against the state. A cause of action must exist before liability arises. *Yeager* v. *Bluefield,* 40 W. Va. 484; *Williams* v. *Main Island Creek Coal Company,* 83 W. Va. 464.

In re claim No. 49, *Sarah E. Moore* v. *State Road Commission*, we held:

> "The mere fact of injury received on a state highway raises no presumption of negligence on the part of the state road commission. Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made."

The only occupants of the automobile at the time of the accident were Miss Ruth Carroll and the said Homer M. Lambert. The petition alleges that "the car in which they were riding was being driven twenty-five miles per hour and on the extreme right of the road to avoid traffic coming in the opposite direction, when it dropped off the hard surface abruptly into a ditch or low place on the berm of the road and turned over twice down the embankment." It is charged that "the low place on the berm immediately next to the concrete surface existed for a distance of two hundred feet or more along the bend or curve in the road and varied in depth from six to ten inches. The state road commission had negligently suffered this defect to exist for several weeks, but repaired it immediately after the accident."

Miss Carroll is shown to be a driver of some five years' experience; and, according to her estimate the automobile was being driven at the time of the accident at about twenty-five miles per hour. It is disclosed by the stipulation of facts that in endeavoring to get the vehicle under control after getting back on the hard surface it again left the road and turned over down an embankment. James Thomas, who was following about thirty feet behind the Lambert car, states that it was traveling between thirty-five and forty miles per hour, and that when its right rear wheel dropped off the edge of the road it swayed to the other side of the road and came across the road and over the hill. Miss Carroll, the driver, remembers that she got the car back on the highway after dropping off the berm but has no recollection of what happened after that. When aid reached her she was found to have sustained a blow and bruise on the

head in addition to a broken back. The Lambert car was not being approached by another vehicle or pedestrian traveling the highway at the time and place of the accident from the opposite direction.

Trooper W. D. Sergeant of the West Vriginia department of public safety made an official investigation of the accident on the date of its occurrence. He found that the tire marks of the automobile on the highway began sixty-one feet south of the north end of the white line on the road and ran south along the west edge of the hard-surface for a distance of forty-nine feet. This tire mark came back on the highway and ran toward the east side of the highway in a curve line and thence back across the road to the west side. The length of this tire print was one hundred and fifty feet to the west edge of the hard-surface and extended on west for a distance of twenty feet to the edge of the berm. Number two tire mark began where a number one tire mark came back on the highway and ran parellel with number one tire mark to the west edge of the berm. The car was sitting upright, headed north, seventy-nine feet from the west edge of the hard-surface to the right rear wheel of the vehicle. The decedent was lying on his back forty-two feet west from the left rear wheel of the automobile, with his head south.

The automobile was a 1934 Ford Tudor vehicle, bearing West Virginia license No. 142-886, and was the property of the decedent and subject to his direction and control. It does not appear from the record why it was being driven by Miss Carroll.

Can it be said that the highway was "unsafe for reasonable use in the ordinary methods of travel" on the day of the accident?

The state is not an insurer against accidents upon its public highways. Claims against the state for injuries or death upon its public roads should be based upon legal or equitable right. For such claims only may awards properly be made. It appears

that West Virginia route No. 73 is an improved, hard-surface road, with concrete and cement top, eighteen feet in width.

The road commission is not required to make the traveled part of the highway the whole width of the road as laid out. It has the power to determine how wide the road shall be extended and used for public travel. By placing the concrete on this road of the width of eighteen feet it fixed the limits of the road. It determined that part of the road appropriated to the use of automobiles, vehicles and public travel generally. The width of eighteen feet of hard-surface road would seemingly be sufficient to accommodate public travel with convenience and safety. It is not expected that travel will occupy all parts of a road. The width of eighteen feet is sufficient to allow for passage of vehicles.

The defect, if it may be called a defect, was not on the traveled part of the road or that part of the road appropriated to public use. The complaint is directed against the berm of the road. It is charged that there was a depression or low place in this berm, but it is not shown that such depression or low place constituted an impediment to safe travel on the road. There was no obstruction of the road. The berm of the road is not used for travel. It is for the support and protection of the stone base and hard-surface.

Can it be said that the depression in the berm of the road was the direct or proximate cause of the accident? The occupants of the car were not forced onto or off the berm of the road for the purpose of avoiding a collision. There was, as above stated, no traffic coming from the opposite direction. It was not necssary to travel on the extreme right of the road. The improved portion of the road was sufficient to accommodate the reasonable and necessary requirements of the Lambert car. The duty to keep the highway in condition reasonably safe for travel thereon extends only to the traveled portion of such highway. Although the petition charges that the reason for traveling on the extreme edge of the road was to avoid traffic, the facts show no reason for doing so, since there was

no approaching traffic. Can it be said that the decedent was in the exercise of reasonable care at the time of the accident? The depression or low place in the berm did not constitute a defect in the road used for travel. Under the facts disclosed by the record the accident would have occurred if the road had been twice its width of eighteen feet. We are of opinion that the loss of control of the car by its driver was the immediate cause of the accident.

The claim has been carefully and ably presented by counsel, but upon the agreed statement of facts we are unable to see that claimant has a cause of action against the state. Where the record of a claim fails to show cause of action against the state for damages for the death of a person killed in an automobile accident on a public highway of the state such claim will be denied and dismissed.

The claim is accordingly denied and dismissed.

(No. 122-S—Claimant awarded $14.28.)

JOE GENTRY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

ROBERT L. BLAND, Judge.

Claiming that the operator of a state road commission truck was at fault and responsible for an accident which occurred to his 1941 model Pontiac Coach on February 27, 1942, one-half mile west of Logan county line on U. S. route 52, in Mingo county, West Virginia, claimant made claim against the state road commission for $14.28, which amount he was obliged to incur in repairing and painting the left front fender and left rear fender of his said automobile. Respondent prepared a record of the claim and filed it with the clerk of this court on May 26, 1942. After the road commission had made a satisfactory investigation of the circumstances out of which the claim arose it concurred in its payment. The attorney general, upon an examination of this record, approved the claim as one that should be paid. It is shown that on the above mentioned date state road commission truck No. 230-27 collided with claimant's car and was at fault in the premises. The state truck, while being driven around an elevated curve in the road, skidded into claimant's car and caused the damages in question. Our examination of the record shows the claim to be a proper one for an award.

We, therefore, award Joe Gentry the sum of fourteen dollars and twenty-eight cents ($14.28) in full settlement of the damages sustained by him to his said car by reason of said accident.

(No. 123-S—Claimant awarded $58.03.)

JAMES P. GRIFFITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

ROBERT L. BLAND, Judge.

The record of this claim was prepared by respondent and filed with the clerk of the court of claims on March 26, 1942.

On March 7, 1942, at approximately 8:00 o'clock A. M., Earl Conaway, a foreman for the state road commission, was driving state road commission pickup truck No. 638-11 west on U. S. route 250, between Littleton and Cameron, in Marshall county, West Virginia. There was snow and ice on the highway which was being removed by the road commission truck. Approximately two miles east of Cameron the driver of respondent's vehicle ran into a snowbank, and the rear end of the pickup truck skidded on the ice into claimant's Chevrolet two-door automobile, bearing West Virginia license No. 141-969, driven by Vincent Griffith. The left side of claimant's car was damaged in consequence of this collision. To repair this damage claimant paid the sum of $58.03 as shown by itemized invoice accompanying the record of the claim. The investigation made of the accident by the road commission discloses its responsibility for the occurrence. Upon such investigation, and being satisfied with the correctness of the claim as filed, the road commission concurs in its payment. The attorney general has approved the claim as one that should be paid. Upon our examination of the record we are of opinion that said claim should be entered as an approved claim and an award made therefor.

An award is, therfore, accordingly made in favor of the claimant, James P. Griffith, for said sum of fifty-eight dollars and three cents ($58.03) in full satisfaction of all damages sustained by him as a result of said collision.

(No. 124-S—Claimant awarded $69.37.)

SHINGLER MEAT COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

ROBERT L. BLAND, Judge.

On March 5, 1942, state road commission truck 130-128, operated by Tom Strader, collided with claimant's Chevrolet truck bearing license No. B12-287, two miles west of Ivydale in Clay county, West Virginia, on route 19. As a result of this collision the body of claimant's said truck was badly damaged and its left rear fender severed. To repair this damage claimant incurred costs amounting to $69.37, made up of the following items: Replacing left rear fender, $12.00; replacing left rear hub cap, $1.00; repairs to radiator, $4.00; repairing left front fender, $2.00; repainting body, $32.00; repairing inside panel, $4.00; repairing hood, $1.00; paint for new and repaired parts, $12.00; tax $1.37. Claim for this amount was presented to the state road commission. Upon investigation of the circumstances attending the accident the road commission concurred in the claim and filed a record thereof with the clerk of this court on May 26, 1942, as authorized by section 17 of the court act. Said claim has been approved by the attorney general as one that should be paid. On the day of the accident only one-half of the road was open for traffic on account of the heavy snow that prevailed. The road was covered with snow and ice and the driver of the road commission truck admits responsibility for the collision. Under all of the circumstances disclosed by this record, the concurrence in the claim by the state agency involved and the approval of the payment of the claim by the attorney general, we are of opinion that it is a proper claim to be entered as an approved claim and an award made therefor.

We, therefore, award to the claimant, Shingler Meat Company, the said sum of sixty-nine dollars and thirty-seven cents ($69.37) in full settlement of all damages sustained by said claimant on account of said collision.

(No. 125-S—Claimant awarded $49.22.)

MINTON CHEVROLET, INC., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

WALTER M. ELSWICK, Judge.

The Minton Chevrolet, Inc., filed claim against the state road commission for the sum of $49.22. From the facts stated it appears that on March 16, 1942, a state road truck drove to right side of road near George Creek Coal Company store in the village of Hetzel, Logan county, West Virginia. The truck pulled in and stopped behind a parked vehicle to allow approaching traffic to pass. A Pontias car owned by claimant, Minton Chevrolet, Inc., and driven by Willard Mayborne pulled up behind the state road truck and stopped. While the Pontiac car remained parked, the state road truck, driven by Otis Kinser, a state road employee on duty, was backed into the Pontiac car causing damages aggregating $49.22 as shown by an itemized invoice filed with the claim.

It appears from the record submitted that the state road truck driver was at fault. The state road commission concurs in the claim, which has the approval of the attorney general.

An order will, therefore, be entered awarding to claimant, Minton Chevrolet, Inc., the sum of forty-nine dollars and twenty-two cents ($49.22).

(No. 126-S—Claimant awarded $5.00.)

HUGH E. KELSO, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

WALTER M. ELSWICK, Judge.

On September 2, 1941, a state road truck driven by a state road employee on duty from the direction of Bethel Church to Gardner Quarry in Mercer county, West Virginia, collided with claimant's car. Claiamnt's car had just approached a sharp curve and had little opportunity to avoid the collision. From the records submitted it appears that the state road truck was close on inside of curve which was the proximate cause of the collision.

It appears that claimant expended the sum of $5.00 for repairing the left front fender to his car by reason of the collision. The payment of the costs of repairs is recommended by the state road commission, which recommendation is approved by the attorney general.

We are of the opinion that an award should be made and an order will be entered recommending an award of five dollars ($5.00).

(No. 128-S—Claimant awarded $7.95.)

MATHEW HEIMAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

WALTER M. ELSWICK, Judge.

On February 28, 1942, a state road truck driven by a state road commission employee skidded and collided with claimant's car near the Junior Pocahontas Coal Corporation property in McDowell county, West Virginia. The glass was broken in the left door of claimant's car. Claimant's car was a 1939 Chevrolet sedan owned and driven by claimant. It appears from the record that the driver of the state road truck was at fault and that the costs of replacing the glass amounted to the sum of $7.95.

The claim was referred to the court by the state road commission, with recommendation for the payment of seven dollars and ninety-five cents ($7.95) to claimant, which recommendation is supported by the approval of the attorney general.

We are of the opinion from the statements submitted that the claim is one that should be paid in the amount submitted and an order will be entered with recommendations accordingly.

(No. 129-S—Claimant awarded $89.57.)

C. C. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, C. C. Bennett, seeks reimbursement in the sum of $89.57 for injuries to his Packard automobile caused by state road truck No. 930-66, on January 6, 1942. It appears that the state road truck, hauling chips on what was known as the Sam Black-Meadow Bluff road at Meadow Bluff, West Virginia, skidded across the icy highway and in the path or in the front of the automobile being driven by the claimant; that claimant, who seemed to be driving at the rate of from ten to twelve miles an hour could not stop his car in time to prevent it colliding with the state road truck, and consequently suffered the damages complained of to his car. An invoice showing the damages in the amount aforesaid, and the payment of said amount, is filed with the claim.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid.

After carefully considering the case upon the record submitted we are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of eighty-nine dollars and fifty-seven cents ($89.57).

(No. 130-S—Claimant awarded $10.42.)

C. B. PENNINGTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, C. B. Pennington, seeks reimbursement in the sum of $10.42 for injuries to his Terroplane automobile caused by state road truck No. 1030-78, on the 18th day of February 1942. It appears that the state road truck in question collided with claimant's car, the driver of the said state road truck having failed to see or notice claimant's car approaching on the proper side of the said road and consequently bumping into and colliding with the said car, causing the damage in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. The district engineer for the state road commission further states that the driver of the state road truck was largely responsible for the damage to claimant's car, and likewise recommends payment.

We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of ten dollars and forty-two cents ($10.42).

(No. 132-S—Claimant awarded $30.00.)

M. L. FINLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, M. L. Finley, seeks reimbursement in the sum of $30.00 for injuries to his Chevrolet truck caused by state road commission truck No. 130-81, at and near Macel mountain, March 10, 1942. It appears that the said state road truck working over and near a state road shovel was operated in a careless manner and without regard to the privately owned truck of the claimant. It sems that the driver of the state road truck was relying on a flagman employed by the state road commission, who, in turn, was also negligent in occupying his proper place where both the road truck driver and the claimant could have been properly directed and the accident avoided. By reason of the negligence in question claimant's truck was damaged and necessitated repairs in the amount as shown by the invoice filed with the claim.

The state road commission does not contest claimant's right to an award for the said amount; and the claim is approved by the special assistant to the attorney general as one that should be paid.

We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of thirty dollars ($30.00).

(No. 135-S—Claimant awarded $50.00.)

S. G. VANDEVENDER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, S. G. Vandevender, seeks reimbursement in the sum of $50.00 for injuries to his Oldsmobile car caused by state road truck No. 830-80 on January 8, 1942. It appears that the said state road truck, spreading limestone chips on an overhead crossing at Elkins, West Virginia, threw the said chips so violently against and upon claimant's car, which from the record appears to have been a new automobile, so as to damage it to the extent of requiring claimant's car to be repaired. It appears from the record that the amount of settlement, to-wit, $50.00, is the estimated cost of repairing and replacing the car in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid.

We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of fifty dollars ($50.)

(No. 111-S—W. F. Rollins, awarded $100.00; Home Insurance Company of New York, awarded $148.92.)

W. F. ROLLINS, and the HOME INSURANCE COMPANY of New York, a corporation, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

ROBERT L. BLAND, Judge.

On April 14, 1942, claimants, W. F. Rollins and the Home Insurance Company of New York, filed their petition in the state court of claims against the state road commission praying for an award of $248.92. By their petition said claimants represented that on March 20, 1941, said W. F. Rollins was the owner of a 1941 model Oldsmobile hearse, motor number 417, 773, serial number 11,717, and bearing West Virginia license plates 120-501; that said Rollins carried a one hundred dollar about 10:00 o'clock A. M., said Rollins was driving said vehicle with said Home Insurance Company of New York, being policy number AC 2194, said policy indemnifying said Rollins against loss on account of damage to said vehicle as result of collision, less one hundred dollar deductible item. By their said petition said claimants further represented that on March 20, 1941, at about 10:00 o'clock A. M., said Rollins was driving said vehicle from Terra Alta, West Virginia, to Kenova, West Virginia; that at a point on the main highway about two miles out of Terra Alta said vehicle collided with a snowplow owned and operated by the state road commission of West Virginia; that at the time of said collision there was considerable snow on said highway and a high wind was blowing; that said Rollins was operating his said vehicle on his right side of the road and collided headon with said snowplow which was on the snowplow's left or wrong side of the highway, and traveling in the opposite direction from which said Rollins was proceeding; that

said Rollins was unable to see said snowplow and avert said collision for the reason that his vision was obstructed by a cloud of snow caused by the high wind and the action of the snowplow. Claimants further represented that as a result of said collision the vehicle of said Rollins was badly damaged, was repaired by Blair Motors, Inc., of Huntington, West Virginia, the total cost of said repairs being $248.92, a copy of the itemized invoice covering said damage and repairs being made a part of said petition as "exhibit A."

Claimants further represent that pursuant to the provisions of said insurance policy the said Home Insurance Company of New York did pay unto W. F. Rollins the sum of $148.92, covering the amount of said damage less the one hundred dollar deductible provision; that by reason of said payment said Home Insurance Company of New York was subrogated to the rights of said W. F. Rollins to the extent of $148.92, the amount paid by it as aforesaid.

Claimants charge that on account of said damage done by the state road commission they were entitled to be reimbursed therefor in the total amount of $248.92, of which amount said W. F. Rollins was entitled to $100.00 and the Home Insurance Company of New York was entitled to $148.92, and prayed that said claim might be held to be a valid and just claim against the state road commission of West Virginia and for the payment of same.

On June 4, 1942, respondent, state road commission, filed with the clerk of the court of claims a record of said joint claim and its concurrence therein. This record so prepared by respondent and filed as aforesaid shows the approval of said joint claim by the special assistant to the attorney general, as a proper claim for which an award should be made, so that the claim is heard under the provisions of section 17 of the court act, and without contest or any evidence or proof sustaining the right of the claimants to an award other than that contained in said record so prepared by the state road commission, which includes a letter addressed to claimant,

W. F. Rollins, under date of March 21, 1941, by W. L. Moore, safety director of the road commission, district No. 4, in which he states that his investigation showed that the road commission was responsible for the accident.

In view of the road commission's admission of liability, the concurrence of the road commissioner in the claim and the approval of said claim for payment by the attorney general, an award is hereby made in the sum of two hundred forty-eighth dollars and ninety-two cents ($248.92) in settlement of said claim; one hundred dollars ($100.00) thereof in favor of said W. F. Rollins, and the residue thereof, or one hundred forty-eight dollars and ninety-two cents ($148.92) to said Home Insurance Company of New York.

(No. 127-S—Claimant awarded $102.89.)

A. H. HICKS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1942.

WALTER M. ELSWICK, Judge.

On February 7, 1942, a state road truck was plowing snow on Kanawha street in Buckhannon, Upshur county, West Virginia. Two cars were parked on the right side of the street in the pathway of the truck. As the truck was driven down the hill by a state road commission employee it swung out to pass the parked cars and collided with claimant's car, which was being driven up the hill. It appears that claimant was without fault but that the state road employee could have avoided the collision.

Claimant owned a 1939 Chevrolet sedan. The front end of the same was smashed in the collision necessitating repairs as shown by an itemized invoice filed with the claim amounting to $102.89. From the record submitted it appears that claimant carried collision insurance with General Exchange Insurance Company and that the award should be made payable to claimant, A. H. Hicks, and General Exchange Insurance Company.

The payment of the costs of repairing claimant's car is recommended by the state road commission, which recommendation is approved by the attorney general.

From the record submitted we are of the opinion that an award should be made and an order will be entered recommending an award of one hundred two dollars and eighty-nine cents ($102.89) to claimant, A. H. Hicks, and General Exchange Insurance Company.

(No. 138—Claim dismissed.)

JESS E. MILLER, Claimant,

v.

THE BOARD OF EDUCATION of Lewis County, a Corporation, Respondent.

Opinion filed July 29, 1942.

A county board of education is not a "state agency" within the meaning of the act creating the state court of claims.

A. Jerome Dailey, for the claimant;

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

ROBERT L. BLAND, Judge.

This is a claim filed by Jess E. Miller, claimant, on the 10th day of June 1942, against the board of education of the county of Lewis, a corporation, for injuries sustained by him on the 7th day of October 1941, while he was regularly employed by said board and engaged as a laborer in work being done on the Junior high school (Weston Central School) building. In his petition claimant avers that previous to said 7th day of October 1941, he had been regularly employed by said board of education, receiving the sum of forty cents per hour for his services, his wages or earnings while so employed amounting to $4.00 per day; that on the date last aforesaid and while so employed, and acting under the direction and instruction of the superintendent of laborers, engaged in said work, he was, without fault on his part, injured by being struck by a large "jim pole" used in and about certain construction being done by said board of education on said school building, in the city of Weston, Lewis county, West Virginia. He alleges that while in the course of his employment said "jim pole" left its mooring or base, and fell, striking him, knocking him to the

ground, breaking his leg just below the knee joint, causing a compound fracture, and doing him other bodily injury from which he still suffers. He further alleges that he was removed to the City hospital in the city of Weston, for treatment of his injuries, where he remained as a patient for three weeks, at which time he was allowed to return to his home, using crutches. He avers that from the date of his injury until April 28, 1942, he was under care of physicians, and when discharged from the hospital he was informed that he could do light work only. He claims that on account of his injuries he has lost, in actual time, work that would have yielded him $708.00 in wages, and incurred hospital bills amounting to $133.00. Claimant says that said two sums totaling $841.00 do not include his mental suffering and physical pain caused by said injuries, nor take into consideration his head injury and suffering therefrom.

Claimant asks an award of $1000.00 which sum he avers "is wholly due him, is unpaid, and is, as claimant is advised, a proper claim for damages against the board of education of Lewis county, a corporation, and as such is a state agency, and by reason of the statute a proper claim to be presented to the state court of claims for consideration and action."

It is apparent that said claim is asserted and sought to be maintained against the state upon the theory that the board of education is a "state agency." The statute creating the court of claims is limited specifically to claims "against the state or any of its agencies," acts 1941, chapter 20, section 15, subsection 1. Such claims must be deemed to be claims against the state of West Virginia and the several departments of the state government, and not to those of local government.

The question raised by claimant's petition, therefore, is whether personal injuries chargeable to the board of education of Lewis county is a claim "against the state or any of its agencies."

As said by Judge Woods, in the opinion in *Krutili* v. *Board of Education*, 99 W. Va. 466, "School districts in this state are a

part of the educational system of the state, established in compliance of article 12, section 1 of our constitution, which makes it the duty of the Legislature 'to provide, by general law, for a thorough and efficient system of free schools.' They are involuntary corporations, organized not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the state, for the sole purpose of administering the state system of public education." Such a board is a quasi municipal corporation, "a public agency and an arm of the law," but it is not a direct governmental agency.

Although a board of education is a unit or subdivision of the state and exercises sovereinty as a branch of the state government, it seems clear that an act charged to a county board of education does not come within a claim against the state. The statute defines the words "stage agency" as meaning "a state department, board, commission, institution or other administrative agency of the state government." Acts *supra* chapter 20, section 2, and among other matters extends the jurisdiction of the court of claims to those claims "against the state or any of its agencies which the state as a sovereign commonwealth should, in equity and good conscience discharge and pay." Acts *supra*, chapter 20, section 13, subsection 1.

The court act covers claims against the state as a sovereign entity only and not against the state and its several branches and subdivisions, except, of course, the state agencies specifically brought within the act and defined in section 2 thereof.

For the reasons herein set out we are of opinion that the claim in question is not *prima facia* within the jurisdiction of the court of claims, and an order was accordingly so made, and the said claim dismissed.

WALTER M. ELSWICK, Judge, dissenting.

A majority of the court refused to docket this claim, and after doing so refused to permit the claimant to show cause

that the claim should be docketed, and assigned as the reason for its action that a county board of education is not a state agency within the meaning of the act creating the state court of claims. No effort was made to distinguish between the status of an employee of a board of education who is injured while in the course of his employment and a pupil injured while attending one of the public schools of the state. In the case of an employee contracting for employment it can be said that he assumes the risk and hazard of his employment, and since the Legislature has not provided by general law for a remedy he is presumed to know the law. It cannot be said that a pupil or his parents assume the risk and hazards of being injured by negligence of the officers and employees of the free school system of the state, in view of the provisions of article 12, section 1 of the constitution, namely: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools," and in view of code of West Virginia chapter 18, article 8, section 1, making it compulsory for a child between the ages of seven and sixteen years to attend a school.

It has been the practice of the Legislature to provide a remedy by special laws to employees of boards of education injured during the course of their employment. The gist of these special acts of the Legislature was to authorize individual boards of education, in their discretion, to make settlement with the employees injured as will appear from the following special acts of the Legislature of 1941, namely: (1) House Bill No. 185, chapter 138 authorizing Gilmer county board of education to make settlement with Rolla Yerkey for injuries received while an employee of said board; (2) Senate Bill No. 85, chapter 139 authorizing Greenbrier county board of education to settle claim of Mabel Fulwider for injuries received from the explosion of a stove while employed as janitor of said board; (3) House Bill No. 11, chapter 140 authorizing Jefferson county board of education to compromise and make settlement with Mrs. W. P. Engbrecht for the death of her husband, who fell while he was washing windows in the high school building in Harpers Ferry district of said Jefferson county; (4) House Bill No. 279, chapter 132, authorizing Boone county

board of education to pay James Midkiff a monthly sum for life, or to make a settlement with him, for permanent injuries received by him while in the employment of said board.

Article 12, section 5 of the constitution pertaining to raising in each county or district a *proportion* of the amount required for the support of free schools provides that the same *"shall be prescribed by general laws."* It is, therefore, doubtful if such special acts comply with this provision of the constitution although our courts have held that this provision was not applicable to a special act providing for the *establishment* of a high school. *Casto* v. *Upshur County High School Board,* 94 W. Va. 513, 119 S. E. 470.

As pointed out in the majority opinion in the claim of *J. C. Richards, et al,* (Court of Claims, Case Number 48) there is no such limitation or restriction in the constitution requiring appropriations by the Legislature to be made by general laws. The Legislature has the discretion as to whether or not its purpose in making an appropriation could be best accomplished by a general or by a special act. See cases cited in the *Richards* case, *supra.* It is also to be observed that the constitution makes a distinction with reference to aid and credit between counties and boards of education. Article 10, section 6 of the constitution provides:

> "The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; . . ."

It is to be observed that a district board of education is a part of the state educational system created by the Legislature under article 12 and does not come within the limitation of section 6, article 10 quoted above. On the contrary, article 12, section 5 makes it mandatory for the Legislature to provide for the support of free schools by direct appropriations to be levied by general taxation of persons and properties or otherwise throughout the state.

This court by majority decisions has made two awards to claimants who were pupils injured while attending the public free schools of the state, whose claims were filed in the same manner and form as the claim in the instant case, being claim of *J. C. Richards, et al,* number 48, in which case I wrote the majority opinion, and claim of *William Johnson, Jr.,* number 55, in which case Judge Bland wrote the majority opinion confirming the opinion in the *Richards* case by stating that the award was made for the reasons and upon the grounds set forth in the opinion of a majority of the court filed in the case of claim number 48, *J. C. Richards, et al,* v. *Board of Education of Calhoun County and State Board of Education.* The district boards of education involved in each of these claims were named respondents along with the state board of education, and these claims were filed in the same manner as the instant claim of Jess E. Miller. In this case the claimant, Jess E. Miller, was injured in the course of his employment while engaged as an employee in the construction of a high school building in Lewis county. There is nothing appearing from claimant's petition to show that the state was not interested in the work being done, that the state was not contributing or did not owe a duty to contribute its proportion of the amount required for the support of free schools therein as is required by article 12, section 5 of the constitution. This section makes it obligatory upon the Legislature to provide for the support of free schools, and it is given plenary, if not absolute, power for this purpose. *Kuhn* v. *Board of Education,* 4 W. Va. 499.

There was nothing appearing from the pleadings to indicate that claimant had a remedy under chapter 23 of the code of West Virginia.

The reasoning of the majority opinion filed in this case cannot be reconciled with the majority opinion in the *Richards* and *Johnson* cases, *supra.* The issue was clearly drawn by the reasoning of Judge Schuck in his dissenting opinions in these cases. They were cases of such grave importance that where there was a diversity of thought, issues should be made clear and explicit, with the hope, as expressed in the minority

opinion, that the Legislature would see cause to enact laws affording a remedy in those and like cases. Certainly that should be our aim regardless of the mode or manner of the remedy that may be afforded. It can be said that he is consistent in his view for the majority opinion in this case is based upon the reasoning expressed in his dissenting opinion in the *Richards* and *Johnson* cases.

The majority opinion in this case does not undertake to distinguish the decisions in the *Richards* and *Johnson* cases or to reconcile them with the majority opinion filed herein and therefore, the issue is left befuddled and the question as to the status of the *Richards* and *Johnson* cases is left in doubt and confusion. Claimants who are pupils injured in like manner as in the *Richards* and *Johnson* cases, through negligence of officers and employees of the public free school system of the state while attending public schools, would not know whether to file claims in the face of the majority opinion in this case adopting the reasoning of the dissenting opinion filed in the *Richards* and *Johnson* cases. Such claimants, having similar claims, although just, would be persuaded not to file their claims, by every logical conclusion of the reasoning in the majority opinion in this case. This situation would work an injustice upon them if the awards in the *Richards* and *Johnson* cases should be ratified by the Legislature and paid. Can it be said with reason when a claim is filed, without permitting a claimant to be heard upon the pleadings or otherwise, that a district board of education is not a state agency as contemplated by the act creating the court of claims, and for that reason alone this court does not have jurisdiction, and in other cases that the court has jurisdiction to hear claims arising through negligence of the officers and employees of such board? I recognize a distinction between that of an emplyee who contracts for employment with a board of education and, who, it might be said, assumes the risks and hazards of his employment, and that of a pupil, under the compulsory attendance law who is compelled to attend school without discretion on the pupil's part as to the assumption of risks and hazards by his or her presence at the school.

The Supreme Court of our state in the case of *Rogers* v. *Jones*, **115 W. Va., 320, 175 S. E. 781 ha dto deal with the question as** to whether the terms of county school officers, including members of county or district boards of education should commence on the first day of January as provided for county officers under the constitution of West Virginia, article 4, section 7, when the act of 1933 creating county or district units, as interpreted by the court, fixed the first Monday in July as the beginning of the official term of members of the board. In that case the petitioner contended that the statute made county officers of members of the board. The court in its opinion referring to section 7 of article 4 of the constitution said:

> "That section provides that the terms of county officers 'not elected, or appointed to fill a vacancy, shall, unless herein otherwise provided, begin, on the first day of January.' We are not in entire accord on whether the board members are *county officers* within the meaning of the constitution. We consider accordance thereon not of major importance, however, in view of the following provisions of article 12 of the constitution: Section 1. 'The Legislature shall provide, by general law, for a thorough and efficient system of free schools' . . . We cannot conceive that the constitution would repose such absolute confidence in the judgment of the Legislature as Article 12 demonstrates, yet at the same time disallow legislative discretion regarding the one minor matter of when the terms of certain school officers should commence. Section 7, *supra,* itself, contemplated that the beginning of official terms would be 'otherwise provided' by the constitution. We are of opinion that the sweeping terms of Article 12, Sections 1 and 3, make such *other provision*."

As was said by our Supreme Court in the *Rogers* case, *supra,* when the court stated that the members were not in entire accord on whether the board members are county officers, we should not consider accordance thereon of major importance in carrying out the intent of the Legislature with respect to creating the court of claims and complying with the

sweeping and mandatory terms of article 12, sections 1 and 3 of the constitution.

It certainly should be of interst to the Legislature that we be consistent with our reasoning or at least reconciling our views, in making our reports to it, and to the public when decisions are announced, to enable all claimants of the same class injured by negligence of the same class of agency to be of equal status in all our decisions and recommendations, so that there shall not be confusion among those within the same class, as to whether or not they have a right to file their claims before this court for final determination to be made by the Legislature.

For the reasons herein set forth I dissent to the majority opinion filed in this case.

(No. 98—Callie Mealey, Admx., awarded $4000.00; No. 99—Ira Mullins awarded $2500.00; No. 100—Rosa Mullins awarded $200.00; No. 101—Dairl Mullins, infant, awarded $1500.00; No. 12—Irene Mullins, infant, awarded $1500.00.)

CALLIE MEALEY, Admx., of the personal estate of JAMES CLARENCE MEALEY, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

IRA MULLINS,

ROSA MULLINS,

DAIRL MULLINS, an infant, whose claim is filed and prosecuted by IRA MULLINS, his father and next friend,

IRENE MULLINS, an infant, whose claim is filed and prosecuted by IRA MULLINS, her father and next friend,

Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

Where a bridge controlled by the state road commission has been condemned as unsafe for public use or travel, and the uncontradicted evidence shows that the supports and girders on said bridge were very rotten and decayed, the commission must take all necessary means to effectually close and barricade the bridge as a protection to the public; and a failure to do so, by reason of which persons traveling on the bridge under the conditions mentioned are injured, is negligence on the part of the commission and must be considered as such in connection with determining the validity of a claim, even though the injured persons may have had a load slightly in excess of that allowed on the bridge.

Appearances:

Messrs. *Salisbury, Hackney & Lopinsky* (*D. L. Salisbury*, Esq. and *Emerson W. Salisbury*, Esq.), for the claimants;

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

CHARLES J. SCHUCK, Judge.

The matters here involved, by agreement of counsel, embrace the joint claims of Callie Mealey, administratrix of the estate of James Clarence Mealey, deceased, and the claims of Ira Mullins, Rosa Mullins, Dairl Mullins and Irene Mullins, the two latter being minors.

It appears from the evidence that on October 29, 1939, the said James Clarence Mealy, together with the Mullins family, was riding on a certain truck owned by one George Koch, on which truck there was also a load of household goods belonging to the claimant, Ira Mullins, and that while said truck was passing over and upon the state road bridge spanning the Elk river at Elkhurst, in Clay county, West Virginia, the bridge collapsed, precipitating the truck and its occupants into the Elk river below, causing the death of the said Mealey, and injuries to the four Mullins claimants. Ira Mullins was moving his family to Elkhurst from Blue Knob, near Maysel, West Virginia, said town being located on the south side of the Elk river and requiring the crossing of the said bridge to reach the town of Elkhurst. The evidence further shows that there was a circuitous route or road which may have been used for travel from the said town of Maysel to the town of Elkhurst, but it, as evidence further shows, was inconvenient, rough, seldom used, and entailed an additional travel of some nine or ten miles between the points or places in question. It can hardly be maintained that the failure to take this second mentioned route would be negligence on the part of the said claimants, in view of all the evidence and attendant circumstances, and we are of the opinion in this regard to hold accordingly, that the failure of the claimants to take the circuitous route in question, considering its condition and location, was not negligence on their part.

The evidence shows that the bridge in question had been condemned, and that an attempt had been made by the state authorities to prevent passage or travel over the bridge, although it had to be kept open for the school children living on

the south side of the Elk river and attending school at Elkhurst. The state maintains that there was a notice on the bridge to the effect that the capacity of the bridge was three tons gross load, and that to exceed this capacity would be negligence on the part of the persons using the bridge with an overload. There is a conflict as to whether or not signs showing the bridge to have been closed were properly erected to warn the traveling public of the unsafe condition of the bridge. Also, one witness says (record p. 9) that the word "closed" was the word used on the sign, while another (record p. 77) maintains that the word "unsafe" was used. In any event, we feel that the evidence fails to reveal that the proper steps were taken to effectually close the bridge to the traveling public, and that means could have been employed by virtue of which it would have been made impossible for a truck such as the one in question to have attempted to cross the bridge that collapsed. There is a conflict of testimony as to the weight of the load, namely, the truck in question together with the household furniture, and the weight of the persons who were riding thereon. A careful analysis of all of the testimony so far as the claimant case is concerned, shows that the weight of the truck, the household goods and the occupants of the truck failed to reach three tons, while, on the other hand, the evidence of the state tends to show that the combined weight of the truck; household goods and occupants, including the claimants, exceeded a three-ton load by possibly five hundred to one thousand pounds. There is also a conflict between the witnesses for the claimants and the witnesses for the state as to the actual weight of the truck at the time of the accident, and while we are inclined and have carefully weighed the evidence as given by the witnesses for the state with reference to the involved matters, we are, however, further persuaded that by the extremely rotten and decayed condition of the timbers of the bridge, as exhibited and shown in the evidence, that the bridge was incapable of holding a load of any weight much less than a three-ton load, and, therefore, should have been effectually closed to the traveling public. At least the situation presented in this regard compels us to hold that the evidence presented by the claimants and all the attendant circumstances at least favor the contention

of the claimants, and, at best, could only be used in charging the deceased Mealey, Ira Mullins and his wife, Rosa Mullins, with a certain degree of negligence, which has been considered by the court in making the award hereinafter set forth. Such negligence, of course, could not be charged to the minor children, Dairl Mullins and Irene Mullins.

As indicated, James Clarence Mealey was killed by reason of the injury occasioned by falling through the said bridge. He had been a carpenter, as well as conducting a small farm, and had earned at various times as high as eighty cents per hour for his work and labor. He was fifty-eight years of age, and at the time of his death was employed as a concrete mixer at Clay, West Virginia. He was earning about $15.00 a month, together with meals, for about six months previous to his death (record p. 148). He was the father of five minor children ranging in ages from two to thirteen. The evidence further shows that he was incapacitated by the loss of his right hand. The evidence shows also, that his hospital bill was approximately $115.00 and that his funeral bill amounted to approximately $262.35, neither of which have been paid. Under all the circumstances, taking into consideration his physical condition, his earning capacity, and all other attendant facts, we feel that an award of four thousand dollars ($4,000.00) should be made to his estate, to be divided among his family on the basis of one-third to his wife and the remaining two-thirds to be divided among his five children and paid to a duly and legally appointed and qualified guardian.

Ira Mullins sustained serious abdominal injuries, the fracture of four ribs, injuries to his back and spine, a crushed breastbone and other injuries; was confined and treated in a hospital at Charleston for approximately a week, and as a result of the injuries was unable to perform his work as a sawyer for about twenty months. He was earning approximately $125.00 at the time of his injury. His wife, Rosa Mullins, suffered comparatively slight injuries, sustaining a cut on her head and injuries to her back, which, however, caused her to be confined in a hospital a little over a day, but according to her

testimony, incapacitated her for housework for a period of some three weeks. She also testified that she suffered severe pains.

Irene Mullins had a very serious laceration and cut on her leg, and suffered generally from the shock of the accident. She was confined in the hospital at Charleston for a period of over a month and may suffer in the future by reason of the injuries received. Dairl Mullins sustained a broken shoulder and broken collarbone and injuries to one of his kidneys, which injury may affect him in later life. The hospital bills and doctors' bills, together with the costs of the ambulance which conveyed the claimants from the scene of the accident to the city of Charleston, amounted to approximately $500.00; the loss of their furniture to approximately $100.00. Taking into consideration all the facts and circumstances surrounding the claims, and as indicated, charging Ira Mullins and his wife, Rosa Mullins, for some careless conduct in crossing the bridge at the time in question, and in mitigation of any amount of damages that would have been due and payable to them as compensation for their injuries, we feel that a fair allowance to Ira Mullins would be the sum of twenty-five hundred dollars ($2500.00); to his wife, Rosa Mullins, the sum of two hundred dollars ($200.00); and to Irene Mullins and Dairl Mullins, the infant children, aged twelve and ten years respectively, to whom no negligence could be charged, the sum of fifteen hundred dollars ($1500.00) each. The payment to the said Irene and Dairl Mullins of $1500.00 each is made on condition that a guardian shall be appointed and qualified by the court before such payment will be made.

(No. 112—Claim denied.)

GILBERT REED, Cliamant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

Where it appears from the evidence that the special and peculiar benefits accruing to claimant by reason of a construction project performed by the state road commission on his land exceeds the amount of damages, if any, which claimant has susainted, an award will be denied.

Appearances:

Arlan W. Berry, Esq., and *G. C. Belknap,* Esq., for the claimant;

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

WALTER M. ELSWICK, Judge.

The claimant, Gilbert Reed, is the owner of a valuable farm lying on each side of the Little Kanawha river near the Braxton-Gilmer county line at Gilmer Station, Gilmer county, West Virginia, containing about three hundred acres. Two-thirds or more of the farm lays across the Little Kanawha river from the state road route No. 35 (now known as route No. 5). In the year 1938 the state road commission sponsored the construction of a new bridge at 1/16 of a mile below the Reed farm, known as the Gilmer bridge, spanning the Little Kanawha river connecting with a road leading from the state road across the river to the Gilmer Station side of the river so that this road would run near the farm owned by claimant. On October 1, 1938, the claimant entered into an agreement with the state road commission whereby he agreed that the state road commission could quarry one thousand cubic yards of stone from an undeveloped quarry site on his lands for the construction of project "Gilmer

bridge, route Copen Run, Glenville district, Gilmer county, West Virginia, said quarry site being located at the mouth of Long Shoal run, Braxton county."

The consideration for the payment of said stone is recited in the agreement as being the sum of one dollar ($1.00), cash in hand paid, and of the further consideration that the state road commission agreed to deposit surplus waste materials from quarry at junction of Long Shoal Run road and state road route 35; also to install forty (40) feet of culvert at said junction of Long Shoal Run road and state road route 35, and to reset fence along quarry site after quarry is abandoned; the state road commission further agreed to remove waste from barn lot below quarry site to a depth of three and one-half (3½) feet on upper side and slope toward run; also to preserve spring near upper end of quarry. The contract further provided that the road commission should have ingress and egress to and from the Reed lands at convenient points with machinery and equipment necessary for the proper construction of the work in said quarry and could operate said machinery and equipment over, on and across said lands at points deemed convenient to the road commission, for the purpose of quarrying, blasting, crushing, stocking, handling, loading and removing of stone from quarry.

The agreement further specifies that the sum of one dollar ($1.00) therein designated, shall constitute full, final and complete payment for the stone quarried from said quarry and used for construction purposes, as well as full, final and complete payment for all damages of every nature whatsoever and all damages to residue of property which may result to the said claimant, by reason of the operation of said stone quarry and removal of stone to point or points of application where needed.

The claimant asserts that he has suffered damages to his said farm, beyond the special and peculiar benefits received, by reason of the manner of the work done, namely: First, that the state road commission, by its agents, changed the quarry site, without any additional agreement; second, that approximately

500 cubic yards of stone was quarried, of which amount about 250 cubic yards were used in the construction of the Gilmer bridge, after which no further stone was used out of said quarry in the construction of said bridge, the remaining abutments of said bridge being constructed out of concrete, and that claimant notified the agents of said state road commission, in charge of said project, not to remove the stone remaining in said quarry which had been quarried but not used, but that said stone was removed from his lands to a place on the Copen Run road at or near the mouth of Copen Run, and that claimant was the owner of said stone so removed; third, that the amount of waste material deposited at the junction of Long Shoal Run and state road route No. 35 was insufficient for the purpose of a barn site; fourth, that most of said waste stone and material was trucked out to the mouth of Copen Run and used on state road route No. 35 at several places for side ditches; fifth, that the fence along quarry site near and on the upper side of Long Shoal Run was not reset by the state road commission; sixth, that a sufficient wall around the spring near quarry site was not made, but on the contrary the state road commission laid up a loose rock wall which did not preserve the spring; seventh, that the fence around the barn lot was torn out by the state road commission and never replaced; and eighth, that the right-of-way of the Long Shoal Run road was changed so as to place it higher above the run, thereby using a strip of land owned by claimant 200 feet long and 20 feet wide, under a verbal agreement that said new road would be filled in level with state road route No. 35, running at right angles thereto, which roadway was changed but not filled level with said state road route No. 35, nor substantially so, and that the fence above said road was not replaced.

As to the first assertion of damages pertaining to change of quarry site it appears from the evidence that all of the 500 cubic yards of stone were quarried near the mouth of Long Shoal Run in accordance with said agreement with an intervening space of about 200 feet (record p. 36). Claimant says that he saved some of the stone on the point from the mouth of

Long Shoal Run for his individual use (record p. 10) but there is no reservation in the agreement to sustain this contention. It further appears from the evidence that the claimant agreed to this change or extension of the quarry in consideration of receiving some of the stone squared up for him, which he received. (Record pp. 10, 37 and 60).

As to the second assertion of damages that claimant was the owner of the stone which had been quarried and which was removed from his farm and not used in the construction of the Gilmer bridge, it appears from the evidence, and the agreement which claimant entered into with the road commission, that claimant was vitally interested in the construction of said Gilmer bridge, for if this bridge had not been constructed by the state road commission he would not have had any outlet to two-thirds or more of his farm across the river from the state road except to ford the river, which was impossible (record pp. 5 and 29). It further appears from the evidence that the price of stone in the quarry to be made into cut stone would be from 25 cents to 50 cents per cubic yard, varying as to quality and proximity to project (record pp. 112, 113, 127), and that the price of man stone in the quarry or on the surface would be from three to ten cents per yard (record p. 127). These prices are mentioned to show the actual value of the stone quarried and taken from claimant's land. No stone had been quarried on this land prior to the quarrying done by the state road commission and the stone proved to be of poor quality with a large amount of waste and man stone to handle. (Record pp. 112, 113, 124 and 139).

Claimant was also interested in having a fill made on his land at the junction of Long Shoal Run road and state road route No. 35 to furnish him with a foundation for a barn site above the high water level since the old barn which he had on that side of the river was flooded when there was a rise in the river. These were the major factors involved as a consideration for the state road commission to quarry the stone (record pp. 17 and 29). The contract provided that the surplus waste material

from quarry was to be deposited on this barn site. It appears from the evidence that the state road commission did make a fill from six to seven feet high on said barn site level with or higher than the road (record pp. 138 and 187) and claimant has since constructed a barn on this fill 34 feet by 50 feet foundation dimensions (record p. 18) with the fill extending 24 feet from the barn to the edge of state route No. 35 (record p. 68). There was an old culvert extending 40 feet from the junction of the Long Shoal Run road and state road route No. 35 which was placed below the drain level (record p. 53) and the state road commission installed 100 feet of culvert through the fill with the drain level. The agreement had specified that 40 feet of culvert requested by the claimant was to be installed, but this 40 feet would have extended up to the barn site and the additional 60 feet of culvert pipe was furnished and laid by the state road commission at claimant's request in order to have same extended beyond his barn site (record p. 159). There was more waste material dumped for the fill and the fill extended further than was expected when the contract was drawn, which required the culvert to be extended to the end of the fill. (Record pp. 52, 139 and 159). This additional 60 feet of culvert pipe cost $1.00 per foot.

It appears from the contract that there was no specific requirement as to how high the fill should be made, except that surplus waste material was to be deposited at the site designated. Ordinarily waste material from a quarry would not be considered as cut stone or man stone, and especially so since it appears from the evidence that the man stone quarried and placed at the highway was worth $4.10 per cubic yard (record p. 63).

It further appears from the evidence that after the state road commission had completed the Gilmer bridge the claimant requested the commission officials to clean up the quarry site including the removal of cut stone and man stone from the quarry site (record pp. 11 and 12). It does not appear from the evidence that claimant at that time as much as proposed to

take the stone quarried for the costs and expenses of the cleanup. The road commission expended a total sum of $501.60 in this cleanup and haul, dredging and straightening the channel of Long Shoal Run through claimant's property and constructing a wall around the spring. (State's exhibit No. 9).

It further appears from the evidence that in addition to the surplus waste material piled in said fill at said barn site at the junction of said roads, the state road commission, at the request of the claimant, hauled from said quarry site and placed on said fill from 175 to 225 cubic yards of man stone in February 1941; that from this fill made by the road commission, claimant took therefrom and sold approximately 175 cubic yards of man stone at a net profit of $4.10 per cubic yard or $717.50 (record pp. 46 and 63). There was considerable evidence introduced to show that 56 cubic yards of man stone was hauled to the opposite side of the Gilmer bridge and stacked there, but it appears from the evidence that this stone was used in making fills for the approaches to the bridge (record pp. 27 and 201). Hence, the question, under all the evidence and circumstances in the case, is the claimant entitled to recover damages for the cut stone hauled from his premises which was not used in the construction of the Gilmer bridge? It is to be borne in mind that the state road commission had the right to quarry and remove 1000 cubic yards of stone in consideration of the premises mentioned in the contract, while it only quarried about 500 cubic yards. Out of that amount it placed on top of the fill of surplus waste material from 175 to 225 cubic yards of man stone which was sold as such by the claimant. The cut stone was quarried at considerable expense by W. P. A. labor and claimant received the benefit of surplus waste material and man stone, both of which were of a special and peculiar benefit to him. It would be unfair to the Federal Government furnishing the W. P. A. labor to quarry and cut this stone at great expense, for the state to abandon or give away same. It cannot be seen how such stone could be considered surplus waste material, and since claimant sold man stone from the fill made, it would appear that the fill was made sufficiently high for his purpose.

Furthermore, the contract provided for "the removal of stone to point or points of application where needed." The special and peculiar benefits which the claimant received far exceeded any damages which he may have sustained.

From the evidence we fail to find any basis of claim for damages pertaining to the fill being made insufficient for the purposes contemplated.

The evidence fails to establish any claim for damages under claimant's fourth assertion pertaining to waste material being trucked away and used on state road route No. 35. From the evidence it would appear that if the state had quarried its full quota of 1000 cubic yards of stone, there would have been so much surplus waste material that, if anything, claimant would have been justified in objecting to the surplus quantity placed upon his land at the place designated in the contract. From the quantity of stone sold from the fill it would appear that the fill had been made sufficiently high to meet his purpose.

Claimant failed to establish any claim for damages for failure of the road commission to reset fence along quarry site. From the evidence it appears that the fence was reset where removed. It was not contemplated that the agreement to reset the fence along quarry site would require the commission to build a fence where it had not been torn down, nor at other points not contemplated by the contract in the changes made.

The claimant failed to establish any damage by reason of the failure of the road commission to build a sufficient wall around the spring specified in the contract, or to establish the fact that its usefulness had been lessened or destroyed. From all the evidence and circumstances in the case it would seem that the well drilled at the barn site was the most feasible solution of the lack of water facilities on the premises, and were contemplated when the barn site was planned. There was considerable evidence introduced relative to a verbal agreement that the road commission agreed to remove a large rock near the

spring. However, if this rock had been blasted and moved, it would have by all probability diverted the course of the spring.

The claimant failed to establish by the evidence any claim for damages under his seventh and eighth assertions since it appears from the contract and the circumstances surrounding the making of the fill and the construction of the barn that it was not contemplated between the parties that the fence around the barn lot was to be rebuilt. It further appears from the evidence that claimant consented to the road change made along the quarry. The road was placed on a better grade than the old road running by the quarry (record p. 145).

From all the evidence in the case we conclude that the special and peculiar benefits to the claimant's farm and quarry, as well as revenues which he derived from the sale of stone from the fill made by the road commission, exceeded all claims for damages that could have been sustained upon any assertion made pertaining thereto, and are therefore of the opinion to deny an award, and an order will be entered accordingly.

(No. 113—J. R. Gibson awarded $100.00; No. 114—Roma Gibson awarded $1000.00.)

J. R. GIBSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.
ROMA GIBSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

Where a liability is admitted on the part of the state department concerned and the amounts of the awards for damages for personal injuries on the two claims filed are left for determination the court from all the evidence on the claims heard together finds for each claimant such

damages as is deemed just and proper, commensurate with each claimant's injuries, that is, damages proportionate or equal in measure or extent of their injuries sustained.

Appearances:

G. C. Belknap, Esq. and *E. C. Pierson*, Esq., for the claimants;

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

WLTER M. ELSWICK, Judge.

These two claimants, J. R. Gibson and Roma Gibson, were injured while walking across a suspended bridge spanning Elk river, at Glendon, in Braxton county, West Virginia, known as Glendon bridge. It was stipulated and agreed by and between claimants. by counsel, and the state road commission, by Eston B. Stephenson, a special assistant to the attorney general for the state, that the evidence on the two claims should be heard together; that the bridge known as Glendon bridge which collapsed and fell injuring claimants is, and was, maintained by the state road commission at the time claimants were injured, to-wit, on the 2nd day of May 1941; that the state road commission was negligent in not keeping said bridge in a safe condition; that the said injuries were sustained by the falling of said bridge; that said bridge was maintained for use by the public and that claimants had a right to assume said bridge was safe for travel; and it was further admitted by counsel for the state that claimants were not negligent by traveling thereon to cross Elk river in the ordinary course of their business; and it was further so stipulated and agreed that claimants were told by employees of the state road commission, who were then working on and repairing said bridge, that it was safe, before claimants entered thereon. Mr. George I. Simons, a special investigator for the state road commission, from his investigation of the facts pertaining to the cause of the injuries, concurred in said stipulations.

Claimants then upon the date fixed for hearing of the two claims produced evidence by witnesses to show the extent of injuries sustained by each claimant and other evidence to assist the court in arriving at the amount of damages recoverable in each case, and the state road commission produced evidence by witnesses to likewise assist the court in arriving at the amount of damages recoverable in each case. Evidence adduced on the part of the claimants further corroborated the facts set forth in the stipulations.

From the evidence adduced it appears that J. R. Gibson is now seventy-six years of age; that he and Roma Gibson fell with the bridge a distance of from 17½ feet to 25 feet landing on the river bank (record pp. 9, 53, 91); that by said fall he sustained a sprained ankle by reason of which he lost, at the most, about two months work on the farm; that the injury was painful and had to be treated by rest and hot foments, and elevation of the injured member; that he also suffered some discomfort in his back by reason of his fall. It further appears that he resumed his usual work on his farm, as a man of his age would customarily do, after said two month period; that he did not sustain any permanent injury; that he incurred a bill for medical and x-ray treatment amounting to $10.00. We are of the opinion and do award to J. R. Gibson the sum of one hundred dollars ($100.00), as a fair and just compensation for his injuries from all the circumstances in the case.

From the evidence it appears that Roma Gibson is a married man forty-one years of age, and is the father of three children, the eldest child being eleven years of age; that he sustained a puncture wound of the right thigh on the posterior aspect of the thigh and on the upper one-third of the thigh; that it was a wound about six to eight inches in length and about two to three inches in diameter, more oblong in appearance externally, but ragged, and extended upward under the skin penetrating the subcutaneous tissue, the fat, and the edge of the gluteus maximus muscle (record p. 42); that his wound was caused by falling on a small stump or snag where a bush about two inches in diameter had been cut (record p. 84); that he was pinned to

this snag and had to be pushed up off of the same (record pp. 53 to 55); that he was confined in a hospital at Sutton, West Virginia, from May 2, 1941 until May 13, 1941 and incurred medical and hospital bills aggregating $59.50; that antiseptic solutions were applied, drain tubes inserted and tetanus antitoxin given, as well as sedative drugs administered for pain while he was confined in the hospital; that he was treated at intervals of about ten days after leaving the hospital until the 15th of June 1941, and had to travel a distance of about thirty-two miles each way to go to the hospital; that he was not able to do work until August 8, 1941 and did begin work on that day at Akron, Ohio, but quit work on September 15, 1941 for the reason that his leg tired from standing at his work, his statement being corroborated by a state's witness that he was complaining of pain after he returned home (record pp. 61, 78 and 103); that he still complains of his leg becoming tired during work hours which is caused as stated by Dr. Eckle, his attending physician: "Probably some scar tissue formation as a result of the injury and the contracture of the scar pulling against some other neighboring structure" (record p. 48), the permanent effect, as further stated by Dr. Eckle would be some atrophy in the particular location of the injury; that while the defense undertook to base the earning power of Roma Gibson solely on that of a farm laborer, by reason of the fact he had resided and worked on his farm during the two years next preceding the injury, it appeared from the evidence that he had earned as much as ninety cents per hour at the Goodrich Rubber Company, at Akron, Ohio, in 1939.

It further appears from the evidence that Roma Gibson sustained a painful injury and that the same has caused him a loss of time of from four to eight months and that the effects of said injury such as atrophy of the affected parts will by all probability tend to reduce his earning power in the future.

From all the evidence in the case we are of the opinion that a fair and just compensation to him for his injuries would be the sum of one thousand dollars ($1000.00) and an order will be entered making an award accordingly.

(No. 117—Claim denied.)

L. C. CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

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

Appearances:

D. Grove Moler, Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

This claim is prosecuted for injuries to claimant's automobile, occasioned while he was traveling on a certain state highway between Pineville and Welch, on December 14, 1936, and caused by a rock or stone sliding off the mountainside and into the path of his automobile, causing it to be wrecked and entailing a loss to the claimant in the amount of four hundred or five hundred dollars. The road was in good condition (record p. 5) but claimant maintained that the banks along the road were thawing and that the stone or rock broke loose from the mountain side, rolled down the bank at swift speed, and before he could stop his automobile, the stone or rock

struck the machine, causing it to swerve from the road and turn over down an embankment (record p. 7).

The evidence fails to show in any manner how the state road commission was negligent or that the stone in question that caused the accident was known to be or had been dangerous to travel on the highway in question, or that the state road commission or its agents or employees could have known of the condition and situation with reference to the sliding of the stone. Not a word is shown in the record that the state road commission or its employees ever knew of the position of the stone in question or that it might become dangerous to travel on the said highway; nor is there any evidence to show that the state road commission or any of its employees or agents had ever been informed of the possibility or probability of the stone in question falling to the highway, and thus becoming dangerous to travel and traffic. Considering the topography of the place where the accident happened, that it is hilly and mountainous, it is apparent that stones or rocks on the sides of the embankments are liable to fall or slip on to the highway, and that, therefore, the state road commission must take the necessary precaution, so far as humanly possible, to prevent injuries to traffic or to travel. So far as the evidence reveals such precautions were taken. The state is not a guarantor of safety to the traveling public, since if it had such burden placed upon it the state as a whole might soon be bankrupt and unable to function as a commonwealth or as a *body politic.* We repeat that there is no evidence, as shown by the record, that indicates any negligence whatever on the part of the state road commission, its agents, or employees, or that they had notice of the possibility of the stone in question falling to the highway, or that they could have known of the possibility of the said stone slipping or falling by an examination of the embankment at the place of the accident. Under all these conditions and circumstances, we deny an award.

(No. 115—Claim dismissed.)

JAMES CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

A case in which upon the facts disclosed by the record the claim will be heard and disposed of upon its merits.

No appearances by claimant;

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

ROBERT L. BLAND, Judge.

Contending that his six year old bay mare, well broken to work, perfectly sound and weighing about 1350 pounds, broke through the state owned bridge which spans the middle fork of Lee creek, on the public road leading to Bellville, in Wood county, West Virginia, on the 18th day of March 1942, and injured her stomach and left front leg so badly that she never recovered, and died nine days later, claimant seeks an award of $200.00 which sum he alleges to have been the value of said animal. He says that the state road commission had twice been notified within the last six months that the bridge was dangerous, but that no repairs had been made prior to the accident.

The petition setting forth the claim is duly verified, and a copy of an affidavit made by claimant and filed with the state road commission is filed with said petition and made a part thereof. It is alleged in the petition that after the accident claimant had two veterinarians to attend said horse.

The claim was placed on the docket of the regular July 1942 term of the court of claims for investigation and hearing on July

14, 1942, and due notice of such action was given to the claimant by the clerk on the 17th day of June 1942. Claimant did not appear in person or by attorney or other representative to prosecute his claim on the date on which it appeared on the trial calendar of the court. The state, which had incurred expense in its investigation of the claim, had witnesses subpoenaed and present for the purpose of resisting claimant's demand on said trial date. The state's proof was permitted to be offered, and at the conclusion of the introduction of this evidence the clerk was directed to notify the claimant of the defense interposed by the state to his claim, and that the state had offered its evidence in support of such defense, and that the case would be considered by the court upon such evidence unless he should appear within ten days from said 14th day of July 1942, to offer evidence in support of his claim or show cause why he should be allowed to have the case reopened for further hearing. Such notice was accordingly given to claimant by letter bearing date on the 14th day of July 1942. There was no further appearance on the part of claimant, and the case was heard upon claimant's verified petition and affidavit exhibited therewith and the evidence introduced by the state in opposition to the claim.

All claims asserted against the state or any of its agencies must be established by satisfactory proof before awards may properly be made for the payment of them. A claim asserted but not proved can have no meritorious status in the court of claims. All claims filed in the court may be contested by the attorney general. The statute provides that the attorney general shall represent the interests of the state in all claims coming before the court. When the Legislature created the court of claims it provided a forum to which persons may come who have what they conceive to be meritorious claims against the state, and have such claims promptly and carefully investigated and acted upon. For such purpose four regular terms of the court are held annually. Diligence on the part of claimants against the state thus favored by the Legislature should be observed. We do not believe that it was the intention or policy of the Legislature to subject the state to useless

or unnecessary costs incident to delay in prosecuting claims filed in the court of claims. When the state investigates a claim and concludes upon such investigation it is without merit it is the duty of the attorney general to resist an award therefor. To do this it frequently becomes necessary to subpoena and have witnesses from remote sections to come to the state capital where the regular terms of the court are held. Continuances without cause are not regarded with favor by the court.

We have carefully considered the record of this claim as presented by the claimant's verified petition and affidavit and the evidence offered on behalf of the state. From this evidence we cannot see that the death of claimant's horse was in any manner attributable to the negligence of the state road commission.

David Harrison Woodyard, a veterinarian of forty years experience, testified that he was called on behalf of claimant to attend the horse on the day of its death. It does not appear from the record that the horse had the attention of any veterinarian at the time of the alleged bridge accident. Dr. Woodyard was called by Ira Bennett who was in charge of the horse. Nothing was said about the horse having been injured on the bridge. Mr. Bennett told him that the horse had been sick the preceding day and had been left in the stable at night and "gast itself and got bound up and couldn't get up, and the next morning they brought the horse up and got it to the stable door and as it went out it fell and it hadn't been up since." The veterinarian testified: "After I had made my examination of the horse I decided it was suffering from inflamation of the bowels." He called it "Fuller's colic." He stated that the inflammation of the bowels showed indigestion and impaction. He observed no sign of injury to the stomach or the leg and stated that the only outward sign that he observed was where the horse had beaten its head on the ground or on the stall in the barn. He expressed the opinion that the horse could not have died from injuries alleged to have been sustained on the bridge. When claimant talked with the veterinarian he did not inform him that the horse had been injured

on the bridge. The veterinarian was positive in his conviction that the condition of the horse could not have been caused by a fall through a bridge.

It is revealed by the record that after the horse had been extricated from its cramped position in the barn it was hitched to an automobile and pulled out of the barn and around in front of the barn door. Pulley blocks were used in raising the animal to its feet.

It was shown that a day or two before the animal became ill, and several days subsequent to the alleged bridge accident, Ira Bennett used it in moving claimant and his family to the place where claimant lived at the time of the horse's death.

Photographs of the bridge were used for illustration, and it was shown that in the condition of the bridge it would have been impossible for a horse to fall through it.

Under the facts disclosed by the record the claim will be disposed of upon its merits. Under such facts the claimant would be entitled to no relief against the state.

The claim is dismissed.

(No. 95—Wayne Damron and Calvert Fire Insurance Company awarded $343.82; No. 120—Zillie Damron awarded $100.00; No. 121—Rebecca Damron awarded $50.00.)

WAYNE DAMRON, and CALVERT FIRE INSURANCE COMPANY, a Corporation, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

ZILLIE DAMRON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

REBECCA DAMRON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

When, pending the hearing and investigation of claims against the state, duly filed in the court of claims and placed upon its trial calendar, all growing out of the same facts, such claimants and the state agency concerned effect a compromise adjustment and settlement of such claims, subject to the approval and ratification of the court of claims, and evidence offered in support of such claims and compromise settlement thereof shows the advisability and propriety of such compromise settlement, awards will be made for the payment of such claims in accordance with and pursuant to such agreed terms of settlement.

J. Walter Copley, for claimants;

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

ROBERT L. BLAND, Judge.

After attending the funeral of his mother at ten o'clock on the morning of October 2, 1941, claimant Wayne Damron, of McVeigh, Kentucky, was driving his Chrysler automobile east between Huntington and Williamson, West Virginia, on U. S. route No. 52. Other occupants of the automobile were claimant Zillie Damron, wife, and Rebecca Damron, sister, of said

Wayne Damron. At a point known as "Sam Adam's Curve" on said highway, about twenty miles east of Wayne Court House and a mile above Genoe, in Wayne county, state road truck No. 238-27, driven by Earl Tabor, of East Lynn, ran into and collided with the Wayne Damron automobile. As a result of the accident the Wayne Damron vehicle was badly damaged and claimants Zillie Damron and Rebecca Damron suffered personal injuries. Wayne Damron filed his claim in the court of claims for an award on the 22nd of May 1942, and Zillie Damron and Rebecca Damron filed their claims, respectively, in said court on July 18, 1942. Claimant Wayne Damron seeks an award of $383.48; claimant Zillie Damron asks damages in the sum of $500.00, and claimant Rebecca Damron asks for reimbursement for money expended by her in the amount of $13.25, and $200.00 to compensate her for pain and suffering, making a total of $213.25.

Since all three of the claims grow out of the same accident and involve the same facts with respect to the question of liability for damages they were placed upon the trial calendar of the court for investigation and hearing on the 22nd of July 1942, a day of the regular July term of said court. After the three claims had been duly docketed as aforesaid the state road commission caused a careful and thorough examination to be made of the facts attending the accident and determined that the responsibility for said accident was due to the negligence of the driver of the state road truck. Thereupon, and prior to the date appointed for the hearing of said claims, said three claimants and the state road commission entered into an agreement whereby a compromise adjustment and settlement was made of said claims subject to the approval and ratification of the court of claims.

On the day appointed for the investigation and hearing of said claims, by leave of the court, the petition of claimant Wayne Damron was amended by making Calvert Fire Insurance Company, a corporation, a co-claimant thereto.

When said three claims were called for hearing on said 22nd day of July 1942, counsel for said claimants and the assistant

to the attorney general made the following stipulations a part of the record of said claims, respectively:

> "It is stipulated and agreed by and between J. W. Copley, counsel for each of the claimants, and the state road commission by E. B. Stephenson, assistant to the attorney general, that the evidence to be submitted in case of Nos. 95, 120 and 121 may be submitted on all three claims at the same time and by the same witness and upon the same examination.
>
> "Furthermore, that a compromise of these claims has been agreed upon, subject to the approval and ratification of the court of claims, whereby Wayne Damron, case No. 95, is to receive $343.82 for the damages to his automobile; that Zillie Damron, case No. 120, is to receive $100 for her personal injuries; and that Rebecca Damron, case No. 121, is to receive $50 for her personal injuries.
>
> "It is further stipulated and agreed that since the filing of this petition the Calvert Fire Insurance Company, a corporation, has paid to Wayne Damron $253.82 and that they are subrogated to that extent upon this claim, and that when claim No. 95 is paid that the draft claim should be drawn jointly to Wayne Damron and the Calvert Fire Insurance Company. It is further understood and agreed that J. W. Copley, who appears today for the claimants in the three claims, is also counsel for the Fire Insurance Company and that the claim when paid should be mailed to him.
>
> "It is further stipulated, understood and agreed that the settlement of these claims as hereinbefore set forth will be in full and complete settlement for any and all damages claimed or sustained by the three claimants as well as the claim by the Fire Insurance Company against the state road commission, its agents and employees."

The evidence adduced before the court in support of the claims and the compromise adjustment and settlement thereof show that the accident was caused by the negligence of the driver of the state road commission truck. As claimant Wayne Damron approached the Adams Curve he was successfully

passed by four or five trucks, but the state road commission truck driven by Earl Tabor was approaching him on his side of the road. When he saw it coming toward him and that it was likely to hit his car he cut his vehicle to the curb and stopped it. When he stopped his vehicle it was struck by the approaching truck. Damron was driving on the extreme right of his side of the highway—as he expressed it, "hugging the extreme right." The driver of the road truck admitted to claimant Zillie Damron that he was responsible for the accident. He said, "I couldn't help it. I seen I was going to hit you and reached for my emergency brake and stopped." The only reason assigned by him was that there was something wrong with the steering wheel of his truck. In a very few minutes after the accident it was investigated by Oscar Allen, an employee of the road commission. A member of the state police force also arrived at the scene of the accident. Mr. Allen made measurements on the highway. The state policeman also made measurements and an investigation of the accident. It was found that the left hind wheel of the Damron automobile was four feet on the extreme right of the double line, there being a double line going around the curve on the highway. The state road truck was at least four or five feet over on the wrong side of the road. Mr. Allen had the Damron car conveyed to the State Garage at Wayne. Mr. Allen testified that as a result of his investigation he found that Earl Tabor, the driver of the state truck, was at fault and that his negligence was responsible for the accident. It is also shown that Tabor was charged and convicted of reckless driving and relieved from further employment with the state road commission on account of the accident.

The Wayne Damron automobile was badly damaged. To repair it would require the expenditure of $303.82. Other costs shown by the evidence to have been incurred by claimant Wayne Damron would amount to $40.00. These two sums would aggregate the amount proposed to be paid to him in settlement of his damages by the compromise adjustment.

Claimant Zillie Damron had been undergoing medical treatment at Dr. Hatfield's hospital in Huntington for gall bladder trouble. At the time of the accident she was in her menstrual period and the shock of the accident seriously impaired her nervous system. She sustained bruises and injuries. The proposed compromise settlement with her is a very reasonable one.

Claimant Rebecca Damron is shown to have sustained shock and slight personal injuries. She was practically unable to do any housework for some time and had to employ a maid to assist about the housework and the award of $50.00 proposed to be made to her in the compromise adjustment appeals to the court as a very reasonable sum.

Upon consideration of all of the evidence offered in support of the claims and the proposed compromise settlement and adjustment thereof, we are of opinion that the settlement proposed to be made and agreed upon by and between claimants and the state road commission is fair, reasonable and just .

We therefore make the following awards in favor of the claimants, that is to say:

1. To Wayne Damron and Calvert Fire Insurance Company, a corporation, jointly, three hundred forty-three dollars and eighty-two cents ($343.82), ninety dollars ($90.00) thereof to claimant Wayne Damron, and the residue of two hundred fifty-three dollars and eighty-two cents ($253.82) to Calvert Fire Insurance Company, a corporation; but we do not see that we have jurisdiction to provide for the manner of the delivery to said claimants or their attorney and submit all matters relating to the appropriation and delivery of said awards to said Damron and the Insurance Company to the Legislature.

2. To Zillie Damron, one hundred dollars ($100.00).

3. To Rebecca Damron, fifty dollars ($50.00).

(No. 133—Claim denied.)

ADA HARLESS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 21, 1942.

Where the evidence seems to indicate and tends to show that the state road commission was not negligent in maintaining a certain bridge and wire guardrails attached thereto, and that the said state road commission exercised reasonable care in maintaining and controlling said bridge, then, in that case, an award will be refused accordingly to one who alleges that she fell from the said bridge by reason of improper or defective guardrails or protection thereon.

Appearances:

Messrs. *Watts & Poffenbarger (L. F. Poffenbarger,* Esq., and *Martin C. Bowles,* Esq.), for the claimant;

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

CHARLES J. SCHUCK, Judge.

The claimant, Ada Harless, alleges that on or about Sunday, the 9th day of November 1941, she fell from a certain suspension bridge spanning the Coal river at and near Racine, in Boone county, West Virginia. She further alleges that her fall from the said bridge was caused by insufficient and improperly constructed wiring running lengthwise with the bridge, and which was supposed to be a protection to pedestrians or persons being obliged to cross the said bridge. She testified (record p. 29) that it was about eleven o'clock on Saturday night, the night before her accident, that she crossed the bridge from the town of Racine, going in the direction of her daughter's home; that her daughter and the daughter's two children (record p. 29) were with her at the time; that she was on her way to her

daughter's home, where she had been living since some time in October previous, and that the next day at about eight o'clock in the moning she suffered the fall from the bridge as hereinbefore stated. Evidence offered by the state distinctly contradicts her as to the time she crossed the bridge the night before the accident, and also the persons with whom she was accompanied at the time. One of the state's witnesses, Belcher by name, testifies positively that he accompanied the claimant over the said bridge some time about midnight, and that he sat with her on the railroad tracks, after passing over the bridge, for some fifteen or twenty minutes before she started from that point to her daughter's home. There is also evidence of another witness that he saw her cross the bridge unaccompanied at midnight, and the evidence of the witness, Ramsey, who says that he took her home from the Glenview end of the bridge about one-thirty o'clock on Sunday morning, November 9, and that the claimant, at the time that the witness was accompanying her to her home, made the statement (record p. 127) "I been drunker than hell all night." It is surprisingly strange that neither the daughter of the claimant nor her son-in-law were brought before the court as witnesses to corroborate her statements with reference to her movements on the night previous to the accident; and as no reasons or excuses were given for the absence of these persons, it may well be assumed that their testimony would likewise have been contradictory to the sworn statement of the claimant herself; at least not favorable to her. Testimony was also introduced that claimant had been intoxicated at previous times while living near Racine, and that on one occasion she was ejected from a beer establishment at Racine by reason of her condition.

We are convinced, from all the evidence, that she was in an intoxicated condition at least five or six hours before she was found sitting in the Coal river, as testified to by the witness Rowland, who also testified (record p. 90) that while he paid no attention to her breath at the time he attempted to remove her from the river, yet it was foul. The claimant is not corroborated by any direct testimony as to falling from the bridge, as

no witness was presented to give any such testimony; and while several witnesses were offered by the claimant who testified as to the unsafe condition of the bridge, we are of the opinion that the reliability of the witnesses presented by the state far outweighs that of those presented by the claimant, and that the bridge at the time of the alleged accident was in reasonably safe condition for pedestrians to cross and travel over. We repeat what we have heretofore held, that the state cannot absolutely guarantee the safety of travelers and pedestrians on highways and bridges under its control and can only be held liable when it or the state road commission, its agency, fails to use reasonable care in maintaining roads and bridges used by the general traveling public.

As already indicated, we are not inclined to accept claimant's story of the accident, and without taking into consideration her condition, which at least was known a few hours before the accident, we feel that the evidence fully sustains our view that the bridge was in reasonably good condition and repair, and that any adult in his or her normal senses could have crossed the bridge without any difficulty whatever. The witness Rowland, who was the first to learn of claimant's position in the river below the bridge on the morning of the alleged accident, and who assisted her back to the bank of the river, testified that he crossed the bridge many times—four times on the day of the accident—and that it was in good condition. In this respect he was supported by several other witnesses. An attempt was made to show that just a short time ago a child's leg had gone through some break in the bridge, but no attempt is shown to have been made to locate the child or its parents, who were supposed to have been with the child at the time. Under all the circumstances and conditions, as presented by the record in this case, we are of the opinion that no negligence was shown on the part of the state road commission with reference to maintaining and keeping the bridge in repair, and we are therefore constrained to refuse an award.

(No. 75—Claimants awarded $600.00.)

W. W. CHAPMAN and MAE CHAPMAN, Claimants,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed August 21, 1942.

Where it appears from the evidence that claimants have suffered loss and damages to their property by the same being actually invaded by the creation of a dam on the state's property by a state department caused by abandonment of the project or undertaking in changing the channel of a stream, which dam permanently floods a part of claimant's land, and causes intermittent but inevitably recurring overflows and seepage of water on other lands of claimants, when the abandonment of the project or undertaking is done without any intention of completing same in such manner that claimants are not afforded a remedy in the courts of the state, the court of claims will recommend an award to such claimants for what is considered a fair and just compensation for the loss and damages sustained.

Appearances:

Lynn Mapel Brannon, Esq., for the claimants;

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

WALTER M. ELSWICK, Judge.

The claimants, W. W. Chapman and Mae Chapman, are, and have been since the year 1928 the owners in fee simple of a tract of land containing approximately twenty-two acres, situate in Freeman's creek district Lewis county, West Virginia, lying on the west side of West Fork river. The West Virginia board of control is the owner of certain real estate situate in said district of said county, about one-fourth mile to the north of the Chapman property on the West Fork river, which is known as

the state 4-H camp, at Jackson's Mill in said county. A portion of the 4-H camp property lying on West Fork river on the then east side thereof about one-half mile from the Chapman property was converted into an air field. This airport lay within a bend of West Fork river. It was to be used by the West Virginia university extension as a training field for students. Sometime prior to the year 1934 said board of control in an effort to straighten the channel of West Fork river and to improve its said property for an airfield and airport, by extending its runways, undertook and did change the course of said river by cutting a new channel over a different course and abandoning and filling in the original course and channel of said river. The work was done by the federal emergency relief administration, which work was authorized and sponsored by said West Virginia board of control.

The work on the cut for the new channel was begun on the upper end of the bend in the river and the cutting and dredging continued down from the upper end of said bend to a distance of about 2000 feet from the lower end of the bend of the river. At this point in the construction of the new channel for the river they encountered a hard ledge of rock or limestone at about seven feet above what was originally intended to be the bottom of the cut where the channel enters the cut, the top of said limestone ledge being about seven feet above what had been the level of the river bottom. Due to the heavy cost of removing the limestone ledge and continuing the cut to the level of the river bottom at the intake of the cut, the board of control on December 5, 1934 determined to abandon further excavation in said channel and to allow the river to pass over the new channel as then constructed down to the limestone ledge, which work was then accordingly discontinued by the federal emergency relief administration. (Claimant's exhibit board of control certificate).

During the course of this work the original course of the river had been filled in around the bend or curve in the river, and the water of West Fork river dammed against said ledge of

stone at the end of the construction, and has since backed up on the Chapman property. The water level of the river for a distance of about 1627 feet along the Chapman property has been raised about eight feet or more higher than the water level of the river along these lands prior to the filling of the old channel bed of the river.

From the evidence it appears that as a consequence of this filling in of the old channel of the river and the abandonment of the excavation of the new channel contemplated at the beginning of the work, approximately .82 of an acre of the Chapman property has been inundated by the raising of the water level of the stream; that .5 or one-half acre of said land is now a ravel, wasting area that is being undermined by the water, and that other portions of said property are becoming swampy and water sogged areas due to the seepage and inflow of the river's waters. It appears that the Chapman property is mostly all level river bottom land, and, due to its location, and adaptability to agricultural purposes was valuable agricultural land. The soil along the river was about fifteen feet deep. (Record p. 13). Due to its location in the vicinity it could also have been partitioned and sold into lots at an advantage. (Record p. 78).

Prior to the change of the river's original channel trees and other vegetation grew along the river bank on the Chapman property which protected the bank from erosion. (Record p. 44). Since the water was dammed and a portion of the bank inundated the trees and vegetation have died and left the Chapman lands exposed to erosion of water. The water from the dam seeps through the deep soil causing the river's bank to fall in, and the seepage of the water makes the adjoining lands "water sogged" or "swampy" (record p. 105). Due to the raise of the water level along these lands it would be impractical to drain them, since ditches or drains would necessarily be down to the water level of the river as raised. (Record pp. 6, 8, 9 and 43). From the evidence it appears that this land along the river will by all probability continue to erode and waste

away (record p. 46). As this is done more land will by all probability become water sogged and swampy.

The West Virginia board of control, by the attorney general, filed a special plea to claimant's petition alleging that a mandamus proceeding in the proper circuit court of this state would lie against the state board of control, and that for that reason this claim is excluded from the jurisdiction of the court of claims by virtue of subsection 7, section 14, chapter 20, acts of the Legislature 1941. The question therefore is, does this court have jurisdiction? If a remedy is afforded in the circuit courts this court would not have jurisdiction. But if the claimants' property has been taken or damaged without just compensation and no remedy is afforded in any of the courts of this state, this court has jurisdiction to entertain the claim against the state board of control.

The agencies of the state are clothed with wide discretion in determining purposes for which condemnation proceedings may be invoked, and the amount of property needful and reasonably necessary for a particular project. *State* v. *Horner,* 1 S. E. 2nd 486, 121 W. Va. 75. Even where condemnation proceedings have been instituted and the proposed project determined as to its particular location, it has been held by our Supreme Court that a county court proceeding under chapter 43, section 138 of the 1923 code may in its discretion abandon the undertaking proposed in the condemnation proceedings. It had the right to consider the state of the funds at its disposal and the probable cost of the land and construction of the project. *County Court* v. *Hall,* 41 S. E. 119, 51 W. Va. 269. Chapter 54, article 2, section 14 of the code of West Virginia, Michie's code section 5385 supersedes the portion of chapter 43, section 138 which gave to the county court the option to pay the award of such proceeding or to abandon the proposed undertaking. The said provision no longer appears under the narrow and limited title of "public highways" to be acquired by county courts as found in the 1923 code, but appears under the broad title of *Eminent Domain* applicable to the state or any subdivision thereof.

Said chapter 54, article 2, section 14 of the code provides that the court or judge, at the request of the applicant, may make an order permitting the applicant at once to enter upon, take possession, appropriate and use the land sought to be condemned for the purpose stated in the petition. This section of the code before the amendment of acts of 1937 further provided that:

> "If the applicant shall enter upon or take possession of property under the authority of this section, and shall do any work thereon and injure such land or property, it shall not be entitled, without the consent of the defendant, to abandon the proceeding for the condemnation thereof, but the same shall proceed with reasonable dispatch to a finality, and the applicant shall pay to the owner of the land the amount of compensation and damages as finally determined in such proceeding."

The amendment by acts of 1937 substituted for the words "the same shall proceed with reasonable dispatch to a finality" formerly appearing, and used the words "such proceedings shall proceed to final award or judgment after a reasonable time has elapsed for completion of the work upon the particular property so entered upon and taken possession of, . . ."

In the instant case the state board of control did not enter upon or take possession of any lands owned by claimants. At the time of the undertaking we can justly conclude that the board did not deem it necessary or proper to negotiate with the claimants for a release of the damages later inflicted upon their property or to file a petition for an entry upon their lands, for the reasoon that the work being done was upon the lands owned by the state, and if it had been feasible to have completed the work undertaken, the claimants' property would not have been damaged. It was such an undertaking that all parties in interest had the right to assume that the work would be completed.

The cases of *Hardy* v. *Simpson*, 118 W. Va. 440, 190 S. E. 680, 191 S. E. 47 and *Riggs* v. *State Road Commission*, 120 W. Va. 298, 197 S. E. 813, had to deal with the rights of landowners

whose properties had been damaged after completion of the work being done by the state road commission. The court in the majority opinion in the *Hardy* case, *supra,* referring to the act of the Legislature (code 54-2-14) said:

> ". . . this provision contemplates a proceeding to condemn, because it provides that such proceeding may not be dismissed without the consent of the landowner. A recent act of the Legislature, Senate Bill 188, 1937 session, and now effective, provides for the ascertainment of damages for property actually taken 'after a reasonable time has elapsed for the completion of the work upon the particular property so entered upon and taken possession of.' This act is mentioned as showing the legislative policy . . . probably a more equitable ascertainment can be made after the completion of the project for which the property is taken, and the legislative policy seems to be to delay compensation until there is a final and complete picture of the damage done, both in the actual taking and otherwise; or on the other hand, the damage done to property, where there is no actual taking, arises solely from the maintenance and use of the project (in this case a highway) after its completion."

In the *Hardy* case, *supra,* a writ of mandamus was refused for the reason that the project involved therein had not been completed at the time the writ was sought and the court held that the road commissioner had a reasonable discretion, after completion of the work to take the necessary steps to ascertain of the damages, if any, to which petitioners were entitled. Likewise the record in the *Riggs* case, *supra,* shows that the work had been completed sometime prior to the time the petition for mandamus was filed.

Since it appears from the decisions of the courts of our state that the only remedy which has been afforded landowners by way of mandamus has been in cases where the work has been completed and after the commission or board has had a reasonable time to exercise its discretion in taking steps to ascertain the damages, if any, it appears that the Chapmans, the claimants in this case, have never been, and are not now, afforded a remedy in the courts of this state for the damages sustained by

them. Furthermore, since the board of control in its discretion had not seen cause to file its petition for right of entry or assessment of damages to claimants' property, the board could abandon the undertaking without the statute (code 54-2-14) affording the claimants a remedy in the courts of this state.

When the board of control found it impractical to continue with the cutting of the 2000 foot ledge of rock, it had the work of cutting the new channel of the river discontinued. It was not the cutting of the channel or the completion or use of the work which caused claimants' damages, but the failure of the board of control to complete the cutting of the channel which caused the damage to claimants' property. By leaving the ledge or rock in the new channel, the water dammed against it, and a part of claimant's property has been inundated by the water backing up on same. This constituted a taking as well as damages to claimants' property.

> "When a public agency acting under authority of statutes uses land which it has lawfully acquired for public purposes in such a way that neighboring real estate, belonging to a private owner, is actually invaded by superinduced additions of water, earth, sand, or other material so as effectually to destroy or impair its usefulness, there is a taking within the meaning of the constitution. Applying this rule it is universally the law that the permanent flooding of private land by the erection of a dam constitutes a taking of the land so flooded. Similarly, a permanent liability to intermittent, but inevitably recurring, overflows constitutes a taking." 18 Am. Jur. 759, see also cases therein cited.

Having concluded that the claimants have not been afforded a remedy in the courts of the state, and that this court has jurisdiction to hear and determine the merits of said claim of claimants, from all the evidence in the case, we are of the opinion that claimants are entitled to an award for the tortious and permanent injuries sustained to their property, and that the sum of six hundred dollars ($600.00) is a fair and just compensation to them, and an order will be entered recomemnding an award accordingly.

(No. 103—Claim dismissed.)

HERBERT DODRILL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed September 19, 1942.

Where a claimant alleges that state prisoners who have escaped from a state road camp stole and carried away his automobile, and there is no evidence of any kind to sustain the said claim against the state or the state agency involved, as in the instant case, an award will be refused and the claim dismissed.

Appearances:

No appearance for the claimant;

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

CHARLES J. SCHUCK, Judge.

This claim was presented to recover the value of a 1929 Model A Ford coach alleged to have been stolen from the claimant while parked on the road near his home in Webster county, West Virginia, by state prisoners who had escaped from a road camp located some seven miles from claimant's home.

The hearing to determine the merits of the claim was set for July 14 of the present year, and claimant duly notified in ample time to appear and present his case. However, at the appointed time, the claimant failed to appear before the court, and the state insisting that the case should be heard, the court proceeded to hear and examine the state's witnesses; and after such examination and hearing held the whole matter in abeyance until the claimant could have further notice of the proceedings that had taken place, and accordingly claimant was given a ten day notice to appear and offer evidence in support

of his claim, or to show cause why he would be entitled to have the case reopened for a rehearing. Notice was duly and accordingly sent to the claimant, who, at the end of the period of time allowed, failed to appear. The court therefore makes its finding and bases its opinion upon the evidence as submitted by the state.

The automobile in question, as already stated, was evidently stolen while parked near claimant's premises on or about the 26th day of February of the present year. On the same day several prisoners escaped from a state road camp located approximately seven miles from claimant's residence and home, and some time later the escaped prisoners were apprehended in Clay county in possession of an automobile which, however, was not the one in question in this case, nor did the automobile so apprehended belong to the claimant. There is not a scintilla of evidence presented anywhere in the record to show that the claimant's automobile was stolen by the escaped prisoners, or any one of them; and in conversation with claimant (record p. 16) the witness Robinette, a state guard, testifies that claimant admitted that he could not testify or swear that the prisoners in question had stolen his car, and that because of the fact that the prisoners in question had escaped at and about the time his car was stolen, he simply assumed that they were the culprits who had committed the theft (record p. 17).

Under these circumstances no liability is shown on the part of the state or the agency involved and we therefore refuse an award and dismiss the claim.

(No. 137—Claim denied.)

THOMAS L. JOHNSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed September 19, 1942.

The state or its agency, the state road commission, is not an absolute guarantor of the safety of its employees, nor was it such guarantor at the time of the accident from which the instant case arose; and when claimant with full knowledge of the danger incident to the work that he was about to perform had at his command and disposal the means of protecting himself by the use of available equipment, and the use of which would in all probability have prevented the accident to him, and failed to do so, then he was guilty of such negligence as must necessarily preclude him from an award.

Appearances:

Henry S. Cato, Esq., for the claimant;

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

CHARLES J. SCHUCK, Judge.

Thomas L. Johnson, at present fifty-three years of age, brings this claim against the state road commission for injuries suffered by him on or about March 11, 1937, while engaged in spreading cinders mixed with calcium chloride on the Kanawha City bridge at about one o'clock A. M. on the day in question.

The facts, as adduced by the evidence, show that claimant had been employed since 1934 by the state road commission, and at the time of the accident in which he was injured, was known as a maintenance foreman. On March 10, 1937, claimant was called by one Joe L. Stern, the assistant superintendent of county roads for Kanawha county, to take charge of a crew to spread cinders on the various bridges located at and near

Charleston, on which bridges there was a collection of frost, thereby making them dangerous to traffic, and requiring the spreading of cinders as a matter of safety. It seems that but three men, including the claimant, could be obtained for the work, it being midnight on the day in question, and claimant was placed in charge and was assisting a fellow workman in spreading the cinders, while a third, who was a son-in-law of claimant, drove the truck which was carrying the material to be used on the bridges. The evidence shows that claimant had done work of this nature before, and, consequently, knew of any hazard that might be connected with its operation. Two of the three bridges had already been given attention, and about midnight or shortly thereafter, claimant and the other two men of the crew repaired to the garage of the state road commission located on Wilson street, in the city of Charleston, for more material, and then started for what is known as the Kanawha City bridge, where the work was seemingly to be completed. While the operation of spreading the cinders was being carried on on the last mentioned bridge; and while claimant and his fellow workmen were walking behind the truck carrying the material, shoveling it from the truck, to be spread on the bridge; and while the truck was moving at a speed about as fast as a man could walk; and when the crew in question had reached a slight incline in the bridge toward the Kanawha City side of the bridge, an automobile speeding in the direction of said Kanawha City, and driven by one Brierly, ran into the claimant, throwing him violently to the bridge, passing over part of his body. Before he could be extricated from his perilous situation another automobile being driven in the same direction as the Brierly car ran into the Brierly car and into and upon and over the claimant, causing very serious injuries and placing the claimant in such a critical condition that for a long time his life was despaired of. He sustained compound fractures of both legs and of the left arm. His nose was broken and he suffered skull injuries, and was unable, by reason of said injuries, to return to his work for nearly a year thereafter. He had been earning approximately from $120.00 to $130.00 per month at the time of his injuries. While he was confined in the hospital he was paid approximate-

ly for two months salary by the road commission. He returned to his work in the month of February 1938, receiving approximately $110.00 to $120.00 per month for some time, but was gradually given increases of pay; and since October 1941, he has been paid at the rate of $200.00 per month and given work that requires his attention at the shop or building where the equipment of the state road commission is kept and maintained. He is known now as a shop foreman. After he had been dismissed from the hospital, suits were commenced in the circuit court of Kanawha county in his behalf against the owners of the automobiles that had run into and injured him; and after the payment of his attorney fees he received approximately $8,-250.00. His hospital and doctors' bills amounted to approximately $2,500.00, which bills were paid out of the amount that he had received by reason of the actions at law that had been commenced by him. In 1939 the Legislature of the state of West Virginia made an appropriation to him to cover the said hospital and doctor bills amounting to $2,459.05, which amount was ultimately paid to the claimant's attorney, but from which amount it seems that claimant's attorney deducted the sum of $250.00 for services rendered in having the said appropriation made by the Legislature aforesaid. Claimant also maintains that he has been obliged to pay approximately $1,000.00, since returning to his work, for doctor and medicine bills, although no evidence is introduced in the slightest degree to sustain this item. Claimant now asks that the state make him a further payment in compensation for the injuries received.

That the work in question involved danger and risk on the part of claimant on the night in question is a settled fact. This, claimant well knew. In fact he had done similar work under similar circumstances and could readily realize that it was fraught with a certain degree of danger to those who were called upon to carry on the operation of spreading the cinders on the bridge in question. After completing the work on the second bridge the three men carrying on the work, of whom the claimant was one, and who was in charge, repaired to the state garage to load material on the truck for the purpose of using it on the third or Kanawha City bridge. In this garage

were flares, lights, lanterns, signs and other equipment that would be necessary to warn not only the traveling public, but to protect the crew that was working on the bridge as well; and all this equipment was at the disposal of the claimant without let or hindrance so far as its use for the work in question was concerned. He could have taken flares, lights, lanterns, signs, and placed them in the truck previous to going to the Kanawha City bridge, and would have been entirely within his rights, not only in protecting himself and the other members of his crew, but the traveling public as well, by the use of these lights and flares.

However, it is maintained by the claimant that under the circumstances it would not have been expedient to use any signs, lanterns or flares, since it required one man to drive the truck, two others to unload and spread the cinders, and for the use of the signs, lanterns, flares or lights another man or employee would have been needed. We do not agree with this proposition. We feel that in view of the dangerous and hazardous work that the crew was called upon to perform, that it was midnight or thereafter, and necessarily quite dark at that season of the year, and that claimant knew or should have known that automobiles would be passing over the said bridge while the work was being carried on, that flares or lanterns could have been used under the circumstances, even although the work of spreading the cinders would have been from time to time halted till the flares or lanterns could have been moved in closer proximity to the truck that was hauling the material. What was there to prevent the claimant or crew, as the spreading progressed, from placing the flares or lanterns every fifty or seventy-five feet back of the truck, which was only moving, as shown by the evidence, as fast as a man could walk, and then moving the flares or lanterns up closer to the work that was being carried on after the distance of fifty or seventy-five feet had been covered by the spreading of the cinders? Surely this would have been a precaution that would perhaps have entirely avoided the accident in question, and, consequently, the injuries to the claimant; and we fail to understand why such measures were not employed under the existing circumstances.

The claimant was even charged with a higher degree of care, perhaps, than the other two men of the crew, since he was in charge of the work. The witness Bratton, the man who was working with claimant in unloading the cinders, says that several days after the accident they were instructed by their superiors, employed by the road commission, to use flags, lights and flares in the future on all curves and bridges when work of this kind was carried on. Did the lack of these instructions make the state road commission liable to the claimant? We think not. His experience in similar work under similar circumstances had undoubtedly taught him that necessary precautions must be taken when such work is carried on; and his failure to do so under all the circumstances was, in our judgment, a very grave degree of negligence. The witness Cavendish, the district engineer of the road commission at that time, testified (record p. 124) that crews were instructed to use lights whenever necessary. This instruction would seem to be reasonable, and we have no doubt that in the course of his several years of employment previous to the time of the accident, claimant knew the importance of such instructions and their beneficial effect when followed by those carrying on work such as claimant did at the time of his injuries.

The state or its agency, the state road commission, is not an absolute guarantor of the safety of its employees, nor was it such guarantor at the time of the accident; and when claimant, with full knowledge of the danger incident to the work that he was about to perform, had at his command and disposal the means of protecting himself by the use of available equipment, and the use of which would in all probability have prevented the accident to him, and failed to do so, then he was guilty of such negligence as must necessarily preclude him from an award on any legal basis.

We feel further that in view of the fact that he received approximately $8,000.00 after the payment of his doctors' and hospital bills, from those immediately responsible for his injuries, and that he has been given steady employment since 1938 by the road commission, and since October 1941 has been

receiving a salary at an increase of fifty per cent over and above the highest he had received previous to the time of his injury, that the state of West Virginia and the state road commission have fully discharged their obligations, which in good conscience they may have owed to the claimant as an employee.

In view of all of these facts, taken into consideration with what we believe to have been an extreme degree of negligence on the part of the claimant himself, we are unable to sustain the claimant's theory for compensation advanced by him, and, therefore, refuse an award.

(Nos. 118-119—Claims denied.)

MARGUERITE M. SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

and

HERMAN SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed September 19, 1942.

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

2. Where upon the hearing of a claim filed by a husband for an award for property damages under the above facts it is shown by the evidence that his automobile was maintained for convenience and family purposes and that the loss occasioned to his car was the result of the contributory negligence of his wife in the use of the same, his claim for damages will be denied.

Appearances:

Hedges & Hedges, for claimants,

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

ROBERT L. BLAND, Judge.

These two claims grow out of the same automobile accident. By agreement of counsel they were heard and considered together. One seeks an award for personal injuries, the other for property damage.

Driving the 1935 Plymouth automobile owned by her husband, claimant Herman Smith, claimant Marguerite M. Smith left her home at Kester, in Roane county, West Virginia, on the morning of May 6, 1941, for Charleston, in Kanawha county. The purpose of her trip was to take treatment from a Charleston physician for sinus trouble from which she had been suffering for more than a year. On the occasion under consideration she was accompanied by her neighbor and friend, Mrs. Eva Parker.

The route traveled by Mrs. Smith was over the Little Left-hand road leading from Vineyard Gap to Amma, in Roane county, known as state route 58. This road had been rock-based for four or five years, witnesses not being in agreement as to the actual length of time. It is fourteen feet in width. At a point on the right hand side of the road as Mrs. Smith traveled toward Charleston, and probably about two hundred yards from the residence of George Pettit, it had broken away

leaving a large depression or hole. When this break occurred is not made clear by the evidence, but seemingly it had existed something like a year without being repaired. This break or depression was of circular shape or form and the hole was approximately two and a half feet deep at the point where the break occurred. It was considerably deeper at the lower edge of the road, probably as deep as four feet. After allowing for this break about six feet of the stone base remained for one-way travel.

It appears from the evidence that warnings of this dangerous condition of the road had been placed from time to time at nearby points. Press Snodgrass, a former assistant county maintenance supervisor, testified that he had placed "bats" around the break or depression several times. It is shown that "paddles" had been placed in the vicinity of the depression in the road. A "paddle" is an iron post placed in the ground on which a board eight or ten inches wide, with alternate black and yellow stripes, is fastened. This seems to be, under the evidence, a standard warning of danger adopted by the state. J. H. Smith, father of claimant Herman Smith, testified that he had seen warning signs in this slip. Doubtless some of these warnings had been removed from time to time and replaced from time to time, but it is made clear by the evidence that signs indicating the dangerous condition of the road at the point of the break therein had been displayed by road authorities. No one traveling on the road could fail to see the dangerous condition of the road at the point of the break or slip.

On her way to Charleston on the morning of May 6th, Mrs. Smith was obliged to pass this dangerous point in the road. She had an unobstructed view of the point of danger as she approached the place of the break or depression in the road. She passed this dangerous point successfully by driving the car on the rock base portion of the road which was used for one-way travel.

On her way back home from Charleston Mrs. Smith drove the automobile into this break or depression in the road. The automobile turned over three times down an embankment. Mrs. Smith sustained a severe shock to her nervous system. She was taken to a hospital at Spencer for treatment. As a result of the accident she was incapacitated for some time for the performance of her customary household duties. It is shown that she incurred expense in receiving medical treatment. She seeks an award for personal injuries, and rests her claim upon the failure of the state road commission to keep the road where the accident occurred in proper condition for public travel. She maintains that the road was out of repair and that the accident which she sustained was due to the negligence of the state in failing to keep the road in proper repair. She testified that she had never been over the road since it had been rock-based and was not aware of the hole or depression in the road. She claims that as she ascended the embankment or small hill approaching the break in the road she had no view of it, and could not and did not see the dangerous condition of the road. In this view she is supported by the testimony of a number of witnesses. A mass of testimony was taken in the case. The transcript of evidence covers 242 pages.

For purposes of illustration two photographs were offered in evidence by respondent. One showed a view of the break in the road as Mrs. Smith approached the point on her way to Charleston. The other showed the point in the road as Mrs. Smith was on her way home from Charleston. Claimants maintain that these pictures did not describe or delineate the true condition of the road. As a result of the introduction and use of these photographs considerable confusion was created. Several days after the taking of the testimony at the bar of the court all three members of the court visited the scene of the accident and inspected the road. They did this for the purpose of satisfying themselves as to the true and actual condition of the road. The road had been repaired after the accident.

When the automobile owned by claimant Herman Smith ran into the depression or hole in the road it was precipitated over the embankment on the left side of the road and was practically demolished. As shown by the evidence it was not fit for more than junk and a value of $50.00 was placed upon the vehicle as such junk.

Mrs. Parker, the companion of Mrs. Smith in the automobile, testified that as the automobile ascended the rather abrupt bank or small hill before reaching the break in the road, that she for some inexplicable reason raised up suddenly in the vehicle and exclaimed that there was a broken place in the road. Almost immediately the car fell into the slip or break in the road and turned over three times down the embankment. She further testified that about the time that the automobile landed on the ground Mrs. Smith ejaculated: "Oh! I have fainted and torn this car all to pieces."

There can be no question as to the fact that the road at the point of the accident was out of repair, nor is there any doubt as to the further fact that warning signs of the danger caused by the slip had been placed around the hole as above stated. Mrs. Smith had ample opportunity when she passed this break in the road in the morning on her way to Charleston to see the dangerous condition of the road. If she did not see it she should have done so. The danger was too apparent to pass unnoticed. She was charged by law with the exercise of ordinary care to avoid driving the car into the slip. She could not have helped knowing that on her return home from Charleston she would be obliged to again pass this dangerous place in the road. She had ample notice and warning of its existence. If she failed to exercise such prudence and ordinary care and drove into the slip or break in the road without going around it as she should have done she is chargeable with and guilty of contributory negligence. The law required her to exercise care. Her failure to do so will bar her right to an award. It appears from the evidence that she is a woman of mature years and good intelligence. Her action in driving the automobile

into the slip was in our opinion the proximate cause of the accident. Since she passed the dangerous point in the morning she was charged with notice of the danger that existed. Her failure to remember the point in the road where the break occurred will not make the state liable for damages to her.

In Berry on Automobiles, second edition, section 653, the rule is stated that one who keeps an automobile for the pleasure and convenience of himself and his family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family. Since it appears from the evidence that claimant Herman Smith permitted his wife to use his automobile on the day of the accident and that her negligence in driving the vehicle into the slip in the road was the direct and proximate cause of the accident that resulted in loss sustained by the destruction of said car, an award will not be made in his favor for such damage.

We are of opinion, from all the facts disclosed by the evidence and after personal inspection of the road at the scene of the accident by all of the members of this court, that neither claimant Marguerite M. Smith nor claimant Herman Smith is entitled to an award as claimed by them respectively.

The claims of both of said claimants are therefore denied.

(No. 141—Claimant awarded $180.00.)

ELKINS BUILDERS SUPPLY COMPANY, a corporation, Claimant,

v.

BOARD OF CONTROL, Respondent.

Opinion filed September 19, 1942.

Where the state department of purchases requests bids for furnishing to a state institution 2,000 feet of black walnut lumber, without specification as to quality, and a dealer agrees to furnish same at the price of $90.00 per thousand feet, and thereafter said department of purchases makes its requisition for such lumber, in pursuance of such bid, and said lumber is furnished and delivered to the state institution for whose benefit it was purchased, in accordance with such bid and requisition, and it is shown to be fifty per cent clear black walnut lumber and the balance of lower grade, but suitable for use in making furniture and for other wood-working purposes, such order cannot be cancelled for the reason that said lumber was of inferior quality, and the lumber so furnished and delivered will be required to be paid for at the contract price.

B. M. Hoover, for claimant,

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

ROBERT L. BLAND, Judge.

Claimant is engaged in the sale of lumber and builders' supplies, at wholesale and retail, in the city of Elkins, Randolph county, West Virginia. By requisition in writing bearing date on the 16th day of September 1941, after quotation as to price and bid duly submitted, Honorable J. Buhl Shahan, state director of purchases, authorized and directed said Elkins Builders Supply Company to deliver to the West Virginia schools for the deaf and the blind, at Romney, West Virginia, 2,000 feet of black walnut lumber, without mention of grade or specification, at the price of $90.00 per thousand feet, the total purchase price being $180.00. In pursuance of said requisition claimant delivered said lumber, by truck, to said West Virginia schools for the deaf and the blind, at Romney, West Virginia, a distance of one hundred miles from Elkins, on the 23rd day of September 1941. The delivery was made by H. T. Beal,

an employee of and truck driver for claimant, who had with him at the time of delivery the original purchase order for said lumber. The delivery and receipt of said lumber was evidenced by this endorsement made on said order: "W. Va. School for the Deaf, by Evan Ellis."

The superintendent of the West Virginia schools for the deaf and the blind was not at the institution at the time of the delivery of the lumber, but it was unloaded by Evan Ellis and James R. Thompson, both employees of the institution, and H. T. Beal, the truck driver, and placed in the basement of the Mechanical Arts building. Mr. Ellis is a deaf teacher and cabinet maker, who has been with the institution for twenty-three years. Mr. Thompson became connected with the schools in July, 1941, and is employed as a carpenter and teacher in the wood shop. Both men work with lumber there. After the superintendent's return to the institution he was informed by either Mr. Ellis or Mr. Thompson that the lumber was of inferior quality. He thereupon directed said Ellis and Thompson to measure the lumber to determine what part of it could be used. The lumber was graded by Ellis and Thompson, who reported that 385 feet of the 2,000 feet was unusable. Mr. Harris, the superintendent, inspected the lumber and determined that in its entirety it was not suitable for the use to which it was intended to be devoted, and that certain portions of it were crooked, split and rotten. He thereupon notified the department of purchases of the condition of the lumber and the disposition he would like to have made of it. He wanted a "stop order" and was informed that such order had been issued. His first communication with the department of purchases was by telephone, and later by letter.

On October 3, 1941, the department of purchases addressed a letter to claimant whereby it attempted to rescind and cancel the purchase which it had made of the lumber in question and requested that the said lumber be removed from the institution. Claimant, taking the position that it did not know when or where a re-sale of said lumber could be made if compelled to comply with the request of the department of purchases and remove the same, declined to reclaim said lumber

from said West Virginia schools for the deaf and the blind and filed its claim in this court for the purpose of obtaining an award for the contract purchase price of said 2,000 feet of black walnut lumber.

Upon the investigation and hearing of said claim it was shown that the lumber delivered was of standard lengths and widths. Standard lengths in hardwood run from eight to sixteen feet. It was, we think, satisfactorily shown by the evidence that at least fifty per cent of the lumber in question was clear black walnut. The balance of the shipment was of a lower grade, but suitable for use in general furniture making. The lumber was what is generally known or termed "log run." This lower grade could be cut into small pieces and used by gluing them together, as is customary in the making of tables, chairs and other furniture.

It appears from the record that prior to the appointment in July 1941, of Stanley R. Harris as superintendent of the West Virginia schools for the deaf and the blind, and under the former administration of former superintendent, Dr. Krause, a man named Ed Doman, who conducted a sawmill and dealt in lumber at Romney, proposed to sell to the institution 2000 feet of black walnut lumber, and guarantee the grade thereof, at $30.00 per thousand feet. Dr. Krause caused requisition to be made for this Doman lumber and forwarded to the department of purchases. On this requisition a notation was endorsed as follows: "It may be secured from Ed Doman, of Romney, West Virginia, for use in the cabinet making shop." The department of purchases sent to Mr. Doman a request to bid on this lumber, but received no reply from him. The department then "went shopping around" and finally got a bid from the Elkins Builders Supply Company, which bid was accepted and a requisition made for the lumber as above stated. The purchase order given to claimant did not contain the notation "for use in the cabinet making shop."

When claimant delivered 2000 feet of black walnut lumber to the schools for the deaf and the blind, Evan Ellis evidently thought it was what he supposed had been purchased from Ed Doman. Superintendent Harris labored under the impression

that the Doman lumber had been purchased as requisitioned for by his predecessor, former President Krause. He did not understand that the purchase made for the institution by the department of purchases was an entirely different transaction. In the one instance the use for which the lumber was intended was indicated, in the other it was not. Out of these different transactions misapprehension and confusion resulted. In the former case the quality of the lumber was to be guaranteed. In the latter there was no mention of quality or grade.

But in view of all the evidence, the probative value of which we have carefully considered, we are of opinion that claimant furnished 2000 feet of black walnut lumber suitable for use in furniture making and for general hard wood-working purposes. Our conviction in this respect is confirmed by a conversation between claimant's truck driver and the institution's cabinet maker, Evan Ellis, at the time of the delivery of the lumber. Ellis asked the truck driver if claimant had "the order for a thousand feet of choice walnut." The truck driver replied that his company had been requested to bid on it, but did not think its walnut was good enough. Ellis then said, referring to the 2000 feet of black walnut delivered to the institution by Claimant, "You could have picked that, graded that out of this that you got." That statement was made at the time that Mr. Ellis was assisting in unloading the lumber and had opportunity to see and discern its quality.

We appreciate the circumstances under which superintendent Harris called the state department of purchases and requested a cancellation of the order made for the purchase of the lumber. He was a new man at the institution and conscious of the responsibilities of his position. He believed that lumber had been delivered to the institution that was not the lumber that had been ordered and intended to be purchased by his predecessor in office. He acted as a careful, prudent and conscientious official would be supposed to act under the circumstances, but it is manifest that he labored under a misapprehension as to the actual facts in the premises.

The evidence shows that the claimant made a bid of $90.00 per thousand feet as the price for which it would sell 2000

feet of black walnut lumber to the state for the West Virginia schools for the deaf and the blind, and that the state department of purchases accepted said bid and issued its purchase order for said 2000 feet of black walnut lumber at the price of $90.00 per thousand feet. A binding contract was created between the claimant and the state. Claimant complied with its contract, and has not been paid the contract price for the lumber so furnished and delivered by it.

Where the state department of purchases requests bids for furnishing to a state institution 2000 feet of black walnut lumber, without specification as to quality, and a dealer agrees to furnish same at the price of $90.00 per thousand feet, and thereafter said department of purchases makes its requisition for such lumber, in pursuance of such bid, and said lumber is furnished and delivered to the state institution for whose benefit it was purchased, in accordance with such bid and requisition, and it is shown to be fifty per cent clear black walnut lumber and the balance of lower grade but suitable for use in making furniture and for other wood-working purposes, such order cannot be canceled for the reason that said lumber was of inferior quality, and the lumber so furnished and delivered will be required to be paid for at the contract price.

It appears from the record that the West Virginia schools for the deaf and the blind had at the time that the state department of purchases issued its order for the purchase from claimant of said 2000 feet of black walnut lumber for the benefit of said institution, and now has, funds to its credit, out of the appropriation made for said institution for the current biennium, sufficient to pay the contract price, to-wit, $180.00 for said 2000 feet of black walnut lumber, and that there has been no lapse of said appropriation. The claim in question arises under such appropriation, and we ascertain and find that the award made by the court for the payment thereof should be paid out of said appropriation.

An award is now made in favor of claimant, Elkins Builders Supply Company, for the sum of one hundred and eighty dollars ($180.00), payable out of the appropriation made for the West Virginia schools for the deaf and the blind for the current biennium period.

(No. 131—Claimant awarded $318.00.)

FLORENCE DOYLE, Claimant,

v.

STAT EAUDITOR and STATE CONSERVATION COMMISSION, Respondents.

Opinion filed September 19, 1942.

Where it appears that the director of the state conservation commission has established and is operating a restaurant for the convenience of the public at one of the state park areas as provided by the acts of 1939, and it appears that claimant has furnished meals at said restaurant to a convention group of persons under a special arrangement made by the officials of the commission in charge of the park and restaurant whereby they on behalf of the commission contracted with claimant to collect for meals served, and to pay her for same, an award will be made directing payment for such services rendered from funds available for the purpose.

Appearances:

Richard Currence, Esq., for claimant;

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

WALTER M. ELSWICK, Judge.

During the summer of 1941, the claimant, Mrs. Florence Doyle, was awarded the concession of the dining room at Watoga state park in Pocahontas county, West Virginia, by the director of the state conservation commission pursuant to the authority vested in him by chapter 20, article 8a, section 9 of the West Virginia revised code, as enacted by chapter 64 of the 1939 acts of the Legislature. By this statute, authority is granted the director of the state conservation commission in connection with the state parks and state forests to operate commissaries, restaurants and other establishments for the convenience of the public, and for these purposes the director

may purchase equipment, foodstuffs, supplies and commodities as provided and contemplated therein.

On August 11, 1941, the then chief of the division of state parks received a letter from a representative of a convention group making inquiry as to whether or not accommodations could be provided for a group of about 55 persons from September 7, 1941 to September 13, 1941, in one of the state parks. Inquiry was also made as to rates for rooms, meals, etc. On August 13, 1941 a letter was written by the division of state parks in reply to the letter received which advised that they could accommodate the group of people at Watoga state park for the period at a cost of approximately $5.00 per person for cabin rental for the week, and that meals would be breakfast 40c, lunch 60c and dinner 75c. Copies of this letter were sent to Mrs. Doyle, the claimant, and to the then custodian of Watoga state park. But on August 14, 1941, the then chief of the division of state parks by letter advised the then custodian of Watoga state park that the representative of the group had just called at his office making reservations and arrangements for the conference to be held at the Watoga state park. He further advised that the conference would consist of 55 people, both ladies and gentlemen, and that they were holding cabins numbers 1, 2, 3, 12, 13, 16, 4 and 5 for this group. He further advised that this group was to pay the custodian at the rate of $1.50 per day. Out of this sum the custodian was instructed that $1.00 per day was to be paid to Mrs. Doyle in payment of three daily meals. The letter goes on to state that for the six days 55 persons at $1.50 per day should pay the custodian $495.00, and that out of this sum $330.00 would be paid by the custodian to Mrs. Doyle, the claimant, and that the balance of $165.00 should be submitted with the custodian's weekly report to the division of state parks. Mrs. Doyle, the claimant, was notified of the contents of this letter by the said park custodian. The then custodian of the park also advised her at the time that he would collect for the meals along with the cabin rental charge pursuant to the arrangements made by the chief of the division of state parks. There is nothing appearang from this

letter from the chief of the division of parks addressed to the park custodian, or from the record, that it was in any way to be implied that either the park custodian or Mrs. Doyle was to look to the treasury of the United States Government for pay for either meals or cabin rental.

It appears that the claimant relying upon these representations made to her by these park officials furnished the meals to the group as contracted. The meals furnished by her to this group of persons in accordance with the contract made by the park officials amounted to the sum of $333.00. It appears that she relied upon the representations made at the time by the then officials of said park that the then custodian of said park would collect for the meals from each individual of the group and by reason of said representations so made to her, she made no effort to collect from the group of persons served, or from individuals of said group. It further appears that said representations were made by said park officials while in the scope of their employment. The park custodian was instructed by the chief of the division of parks to collect $1.50 per person per day making a total of $495.00 to be collected from the group for the week. Of this sum he was directed to pay $330.00 to Mrs. Doyle "and the balance of $165.00 will be submitted with your weekly report to this office."

After the group arrived, for some reason unknown, it appears that the then custodian of the park, without the knowledge of claimant, failed to collect the said sum of money for claimant. It also appears that the then custodian failed to collect the rental for cabins from this group of persons.

It further appears that the group of persons being served by claimant happened to be a conference of supervisors of the division of education of the works projects administration. After the group had received the accommodations contracted for at the park, and for which the then custodian had failed to collect for either cabin rental or meals, it appears that the conservation commission filed a claim with the treasury department of the United States Government for cabin rental in

which claim it included the account of claimant for meals served by her to these persons. The claim was denied by the treasury department and claimant has not been paid for her services. It does appear that one Arel B. Cook, the representative of the conference group gave a check for $15.00 payable to the then park custodian who endorsed same over to claimant, but that said check was worthless and has not been paid. It doesn't appear from the evidence that the claimant had any negotiations with any official of the Federal Government. All of her negotiations prior to and at the time she rendered the service were with state officials whose duty it was to provide for these accommodations. All arrangements for the care of the convention group while at the park were made by the officials in charge of the park, namely, that the services were to be paid for at the rate of $1.50 per day per person to the park custodian who was to pay over to Mrs. Doyle the sum of $1.00 per day per person, and that the custodian was to account for the proceeds collected in his weekly report. Hence, the claimant did not render credit to the Federal Government or to any employee or official thereof and would not have any claim against its treasury department. She had a right to rely upon the representations made by the officials of the park while in the scope of their duty and employment. From the letter written by the chief of the division of state parks to the park custodian one could not imply that the state was lending its credit to the group or to the treasury department, since it instructs the park custodian that this group was to pay him at the rate of $1.50 per day each. The letter of August 13, 1941, copies of which were sent to the park custodian and to Mrs. Doyle, the claimant, specified that there was to be a $5.00 deposit for each cabin, which was to be credited when the balance was paid to the park custodian. Hence, it cannot be said that the claimant was chargeable with notice that the credit of the state was being given to anyone under the arrangements made by the state officials in charge of this park.

It appears from the evidence that the state conservation commission approved the claim of Mrs. Doyle in the sum of

$318.00 and submitted same to the auditor for payment on or about February 13, 1942 as a claim which should be paid by the state conservation commission, and the claimant was then advised by the chief of the division of state parks that check should be received by her on the then following Monday or Tuesday. The requisition as submitted by the commission to the auditor did not give a detailed explanation as to the nature of the claim, neither did it set forth the nature of the contract made by the state officials in charge of the park with Mrs. Doyle at the time the services were rendered by her for the state in furnishing accommodations at the park to the public as it had undertaken to do. The requisition just stated "pay to Mrs. Florence Doyle $318.00" without any detailed information (record p. 22). The state auditor, therefore, returned the requisition and refused payment. In returning same the auditor requested a correct explanation and it appears that a sufficient and satisfactory explanation was not furnished him to justify payment on the statement made to him.

When the claim came on for hearing herein the state auditor was made a party to the proceeding. The claim was heard as an appeal from rejection by the state auditor under an existing appropriation, the auditor, and Mr. Mills, his assistant being present at the hearing on the claim.

The points of defense to the claim raised at the hearing and in the attorney general's brief were as follows:

1. That the claim is one against the Federal Government rather than the state of West Virginia.

The facts in the case do not show that the claimant had any dealings or negotiations with the Federal Government or any of its employees, but that her contract was made direct with state officials in charge of the park whose duties were to furnish accommodations to the public, and to collect payment for services rendered under the arrangements which they themselves negotiated and agreed to carry out so far as claimant was concerned.

2. That no benefit or value adhered to the state since all parties served were federal employees, their wives, husbands and children, in attendance at a federal W. P. A. educational convention held at Watoga state park.

So far as the claimant's services were concerned her services were rendered to the public, that being the intent and purpose of the state in establishing a public park. A distinction cannot be seen under the arrangements made by the park officials for claimant's pay, as to whether or not it was a ministerial association convention, a state bar association meeting, a state educational meeting, a federal W. P. A. educational convention, or a horse traders' association convention. All would have to eat and would require accommodations when reservations were secured, but the state conservation commission would not be authorized to furnish either of them meals free of charge under the statute. It did have authority to collect for rental and for other accommodations such as meals served which its officials agreed with claimant to do at the rate of $1.50 per day under the arrangements which they made as stipulated in the said letter addressed to the custodian under date of August 14, 1941.

3. That the state conservation commission had no statutory authority to pay out of the general maintenance or other funds of the conservation commission for the services rendered by Mrs. Doyle on credit to the W. P. A. convention group.

The facts in the case do not show that Mrs. Doyle rendered her services on credit to the convention group, but on the contrary, that she relied upon the representations made by the officials in charge of the park while acting in the scope of their employment as officials that the custodian as such official would collect and pay to her for the services rendered. It is, no doubt, true that the state conservation commission had no statutory authority to pay the claimant out of general maintenance funds of the commission, but if it had no "other funds" such as restaurant or commissaries fund provided for under chapter 64, acts of the Legislature 1939, Michie's code section 2290 (9), or gen-

eral maintenance funds for such purposes in its appropriation, it should not take an inconsistent position to mislead the claimant in the procedure taken herein. In such case claimant should have been properly advised, and a hearing had as to the validity of the claim justifying an award to be included in future appropriations. Said chapter 64, acts of 1939, Michie's code section 2290 (9) provides:

> "Restaurants and Other Facilities at Recreational Areas.—The director may, in connection with recreational areas in state parks and state forests, operate commissaries, restaurants and other establishments for the convenience of the public. For these purposes the director may purchase equipment, foodstuffs, supplies and commodities, according to law."

Under this act the officials in charge of the park where a restaurant had been established and was being operated in connection with the recreational areas provided *for the convenience of the public* by the director, had the authority to negotiate with the claimant for the services rendered. If the commission should not have the money available for the purpose of paying for such services rendered under contracts made by authority given it by said statute, this fact should be disclosed so that proper appropriations may be made for the purpose of paying such commitments. By necessity commitments and special arrangements would have to be made from time to time to enable it to operate a restaurant or dining room for the convenience of the public as contemplated by the statute.

4. That the conservation commission could not guarantee to the claimant the meals served gratuitously or on credit to the said convention.

It does not appear from the evidence and record in this case that Mrs. Doyle ever contemplated, or had any reason to do so, to serve meals gratuitously or on credit to the said convention group. On the contrary, she was advised of the special arrangements made by the park officials, that while she was serving meals to the group at a reduced rate, the said official in charge

would collect for the meals. By this arrangement made by the said officials she was not given an opportunity to collect for the meals served. No member of the convention group contacted her with reference to charges, but the park officials reduced her rates for meals by their negotiations with representatives of the convention group from $1.45 per day for each person, which she would have been entitled to collect without the special negotiations made, to the sum of $1.00 per day for each person, which the custodian was to collect under the said special negotiations. The claimant was rendering a daily service while the convention group attended the park and had no information that payment was not being collected in accordance with the arrangements made by the park officials with the said convention group, and as represented to her by the park custodian, whose duty it was to provide such accommodations and collect and pay for same pursuant to instructions received by him from the chief of the division of state parks. Otherwise, the claimant was entitled to notice of any change of arrangements made from those represented to her to have been made by such official before she rendered such services.

We are of the opinion that an award should be made to claimant for the sum of three hundred and eighteen dollars ($318.00) and that the auditor would be authorized to pay the same under all the circumstances of the case from existing appropriations available for the purpose, and an order will be entered by a majority of the court accordingly.

Judge Bland dissents.

ROBERT L. BLAND, Judge, dissenting

An award in this case was made by majority members of the court. The court act provides: "If the determination of the court is not unanimous, the reasons of the dissenting judge shall be separately stated." In obedience to this mandate I respectfully submit the following reasons for not concurring in said award.

I see no justifiable ground for recommending to the Legislature an appropriation for the payment by the state of West Virginia of the claim in question. No liability to pay, on the part of the state, is disclosed by the record. It is a claim against the Federal Government rather than one aganst the state of West Virginia.

I grant that the claim makes a strong appeal to the sympathy of the members of the court, but an award may not properly be made on the ground of sympathy. There should be some legal or equitable basis to support an award in favor of the claimant against the state of West Virginia, and no such basis exists.

A careful reading of the record discloses the following state of facts out of which the claim arises:

One Arel B. Cook, a federal employee and at the time state supervisor of education for the works progress administration, was desirous of arranging for holding a meeting or convention of the state educational supervisors of the works progress administration at one of the state parks in West Virginia. He went to the office of Linn Wilson, then chief of the division of parks of the state of West Virginia, and arranged with him for carrying out his plans for the holding of such meeting. Thereafter said Wilson corresponded with one S. E. Nease, at that time park custodian of the Watoga state park, in Pocahontas county, West Virginia, who arranged on behalf of said Arel B. Cook, state supervisor of education for the works progress administration, to have a group of works progress administration officials entertained at said Watoga park for one week, beginning on Sunday, September 7, 1941, and ending on Saturday, September 13, 1941. Said Nease concluded arrangements with Florence Doyle, the claimant, to furnish these meals for a group of fifty-five of these works progress administration officials, including their wives and children, during that week.

As I interpret the record, Nease, in making this arrangement, was acting at the behest and for and on behalf of Cook. The

meeting or convention was not a state affair. It was distinctly a federal project of the works progress administration. Under the terms of the arrangement made by Nease one dollar a day was to be paid to claimant for furnishing meals and fifty cents per day was to be transmitted by Nease, with his weekly report, to the office of Wilson. It nowhere appears in the record that this balance of fifty cents per day for each member of the group was not to be accounted for to the federal works progress administration, or that it was paid to the state conservation commission. Claimant furnished these meals to fifty-five persons for six days. She was not paid by any person for such meals. It is true that Cook, state educational supervisor for the works progress administration, who made the arrangement for the holding of the convention in question did deliver to her a check for fifteen dollars on account of the meals furnished by her, but said check was never paid.

Mrs. Doyle's claim of $318.00 was presented to the state fiscal officers of the works progress administration for payment, but payment was refused on the ground that there had been no prior authorization for the educational meeting held at Watoga park, and advice was given that her claim would have to be submitted to the general accounting office in Washington.

Thereafter the claim was presented to the state conservation commission for payment. This commissi6n made requisition upon the auditor for the sum of $318.00 in settlement of said claim, after the same had been approved by the state department of purchases. The auditor, however, with characteristic alertness in safeguarding the public funds of the state, declined to pay the claim on the ground that it did not constitute a proper or lawful claim against the state of West Virginia.

The chief clerk of the auditor's office discussed the claim with the secretary of the state conservation commission. The latter agreed that the claim was not a proper claim against the state. In a letter written by the chief clerk of the auditor's office to the clerk of the state conservation commission, under

date of February 24, 1942, this statement was made: "It appears from the explanation you have made that this is a charge against the United States Treasury and the State of West Virginia is advancing the money." The secretary of the state conservation commission thereupon informed the chief clerk of the auditor's office that it was a claim against the United States treasury, but that claimant needed her money and that the state was going to advance the amount of her claim to her and then seek reimbursement from the Federal Government.

The payment of the claim was rejected by the auditor and not again heard from by him until it was filed in the court of claims, where the state continued to resist its payment as a proper demand against the state.

I have the profoundest sympathy for Mrs. Doyle, a worthy and deserving lady, who has been made the unfortunate victim of circumstances that should be further investigated, but I am unable to see how, under the showing made by the record, that she would be entitled to an award against the state of West Virginia. I do not think that the court of claims has power to make such award.

I would sustain the motion of the assisatnt to the attorney general, and dismiss the claim.

As a concluding observation I make this inquiry: Who got the money that should have been paid to Mrs. Doyle?

(No. 107—Dewey Adkins awarded $411.95; No. 108—Joel H. Adkins awarded $798.56; No. 109—G. B. Adkins awarded $681.35; No. 110—Walter Adkins and D. B. Wilson awarded $756.89.)

DEWEY ADKINS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

JOEL H. ADKINS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

G. B. ADKINS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

WALTER ADKINS AND D. B. WILSON, Partners, Trading as ADKINS AND WILSON, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed September 19, 1942.

Where it appears from the evidence that the state road commission has made a commitment of sponsorship with the works progress administration agreeing to contribute a certain percentage of the total costs of construction of a road project, and fails to contribute the agreed percentage of the total costs of construction, and it appears that claimants' services by use of their trucks and operators have supplied the deficiency of the state road commission's commitment to furnish trucks and operators and the state road commission has received and applied said services of claimants as credits upon its contribution under its commitment as sponsor of the project, without withdrawing its sponsorship by continuing to retain its equipment and supplies on the project and accepts the road after completion, when such services of claimants as appears from the evidence were not donated and claimants have not been paid for same, awards will be made for the reasonable value of such services commensurate with the value of credits for such services received by the state road commission on its commitment to pay the costs of such services under its said sponsorship.

Appearances:

A. A. Lilly, Esq., (*Lilly and Lilly*), for the claimants;

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

WALTER M. ELSWICK, Judge.

These four claims, heard together by agreement, are made upon a *quantum meruit* basis for work and services performed by the claimants, and for use of their four trucks in and about the construction of about five miles of road extending from the main state highway between Hamlin and West Hamlin in Lincoln county up Mud river toward the Logan county line. The work consisted of hauling stone from two to three miles for laying a rock base on this stretch of road. The work was being carried on under a commitment by the state road commission to sponsor for the works progress administration of the Federal Government a project commonly known in that vicinity as project No. 76 upper Mud river road, Lincoln county, West Virginia.

It appears from the evidence that each federal project must have a sponsor, which in all cases was the state, or a political subdivision such as a city, county or another federal agency. The state road commission on all state road projects was obligated to contribute from 20% to 25% of the total costs of the construction. The sponsor's contribution in such instances was made by the use of equipment furnished by the state road commission, with operators, such as trucks, road graders, rollers, power shovels, etc. All labor on the project except the operators of the state road commission's equipment, was furnished by the Federal Government. So long as the state road commission furnished sufficient equipment to equal the 20% to 25% as the case may be, of the total costs of the project for which it was obligated under its commitment, the Federal Government could then issue purchase orders for use of other or additional equipment such as trucks and operators from its

fund known as "other funds." But whenever the sponsor failed to keep a sufficient amount of equipment in use on the project to equal the proportion it was to supply it appears that the Federal Government could not issue purchase orders out of its "other funds" to supply the deficiency on the part of the sponsor. (Record pp. 45, 135, 164, 170, 175; Lunsford's depositions pp. 18, 19).

It further appears from the evidence that the Federal Government regularly furnished the labor of about seventy-five men on this particular project (record pp. 168, 169). The costs of labor and equipment supplied by the Federal Government was compared with the sponsor's contribution under its commitment from forms made out and signed by the sponsor's agent, the project superintendent, the area engineer, and the timekeeper, the first mentioned being an employee of the state road commission, and the last three being employees of the Federal Government. These report forms were known as form 710, one copy of which was furnished to the sponsor, the state road commission, and another copy to the Federal Government. (Record p. 171).

It further appears from the evidence that the road being constructed was an important one running through the center of Lincoln county, from near its county seat to the Logan county line; that this part of the road was accepted when the rock base was laid and that the state road commission continued to sponsor other projects on the same road further on up the river and into Logan county, and surface treated all of the same. However, on or about the 27th day of August 1937, while the construction of the first five miles was in progress, certain officials of the works progress administration discovered that there was a marked shortage of equipment contributed by the road commission on the project, and an investigation was ordered. It was found that the Federal Government was spending more money for equipment than required, and that while the state road commission still operated certain equipment on the project, it was not sufficient to match the amount of contribution under its commitment as sponsor of the road

work. The state road commission had taken the state trucks off the project in an emergency to take care of their regular maintenance of other roads (record p. 174) and the particular equipment needed at the time to make up the deficiency in its contribution was found to be trucks for hauling the base stone. The state road commission had only one truck on the project at the time of the investigation. The acting branch engineer of the works progress administration had received instructions that if it were impossible for the state road commission to furnish the additional trucks required, the work on this road should be discontinued until such time as proper equipment could be furnished. Under the commitment of the state road commission, if the work was closed down as much as three days, for lack of sufficient equipment, the project would be closed, and it would then be necessary to go through a lengthy procedure of making a new commitment as sponsor, which procedure usually required from three to four months to get such renewed sponsorship in operation. (Record p. 175).

The acting district engineer for the works progress administration, on August 29, 1937 went to the project in Lincoln county and advised the superintendent of the project, and other officials in Lincoln county of the necessity of closing down the project unless additional trucks were supplied to comply with the sponsor's commitment. The claimants, prior to this, had received purchase orders for the use of their trucks, from time to time, from the Federal Government. On certain occasions they had been instructed to proceed with their work prior to the time that they had received purchase orders, although it appears that the Federal Government had a rule not to pay for work on which a purchase order had not been issued prior to the time that it was performed (record pp. 28, 44, 66 and 147). While said engineer was in Lincoln county on this visit, it appears that Caudle Adkins, the county supervisor for the works progress administration, and Elza B. Adkins, its superintendent, contacted the claimants and secured their promises to use their trucks on the project a few days in order to hold the project intact, which they did, some beginning work during the last days in August 1937 and others beginning work in

September 1937. It appears that claimants received assurances from time to time by the works progress administration engineer and other members of its officials connected with the work that they would receive pay for their services. They continued on with their work with the use of their trucks until the 8th day of March 1938.

The road work progressed satisfactorily to all concerned, except the claimants, on the project until it was completed. It is not denied that each of the claimants performed the work for which they have filed claims, and that they have not been paid. In addition thereto these facts were fully established by the evidence. It also appears that the state road commission received credit on its commitment as sponsor of the project for the greater portion of these services performed by claimants. It also accepted the road and all benefits derived from the completion of the project. It appears from the reports made on form 710 showing contributions made by the sponsor as its proportionate part of its commitment that the claimants were contributing the work. It further appears from the evidence that they did not sign these reports or authorize them to be signed on their behalf, and that they were not aware of the fact that the state road commission was receiving credit for their services on its sponsorship of the project. Since the works progress administration allowed the state road commission credit for the use of claimants' trucks and operators as having been donated by them to the state road commission from the reports submitted by its agent as a part of its commitment as sponsor of the project, the Federal Government could not pay claimants for their services without in effect twice paying for the same.

It further appears from the evidence that the then maintenance superintendent of the state road commission in Lincoln county, who had charge of the works progress administration's projects for the state in Lincoln county, knew of this shortage of trucks and knew that these claimants were performing the services for which they claim pay, without being paid by the Federal Government. (Record pp. 173, 174). He delegated the charge and supervision of the work on this project for the

state to one J. A. Coffman, who was the assistant county engineer for the state, and who acted as inspector and as sponsor's agent. (Record p. 173, state's exhibits 1 to 12, Lunsford's depositions p. 27). Furthermore the state road commission furnished the right of way for the road, surveyed it, and operated other trucks, a grader, tractor, scarifier and air compressor on the project during the time claimants performed the services now considered. The said J. A. Coffman, as agent of the sponsor, the state road commission, certified the reports on said form 710 to the state road commission and works progress administration as having been contributed by claimants. He was not produced as a witness.

There is not any evidence emanating from claimants to support the contention of the state that these claimants authorized these reports to be signed by Coffman or by anyone for them, or that they otherwise donated their services. Such contention is emphatically denied by each of the claimants that they agreed to donate their services. It would seem, however, that claimants did contemplate a risk or gamble on the first few days work performed by assuming that they would soon thereafter receive purchase orders from the works progress administration. But there is no evidence in the record to show that they knew the state was receiving credit for their work, by the reports made on contributions by the state road commission's agent, thus preventing the possibility of claimants receiving purchase orders from the Federal Government.

From all the evidence in the case it seems only just, fair and proper that the state, under all the circumstances in the case, should pay to the claimants a just portion of the sums of money as credit which it received under its commitment as sponsor of the road project. It appears from the evidence that all of the claiments are men of little or no financial worth, and that only one of them, namely, Dewey Adkins, actually resided on the road being constructed.

The record further shows that Dewey Adkins, the only claimant who resided on this road at the said time, did not perform any services with his truck from December 16, 1937 to March 8, 1938, while Joel H. Adkins, who did not own any property in

Lincoln county and resided at the time in Logan county, performed the largest amount of services with his truck and operator during said time. It further appears that the work performed by all of claimants as claimed aggregated approximately the sum of $4,284.00. Fair minded men could not conclude from the evidence presented that they intended to donate to the state the full value of all of these services. Some of the claimants, at the time, were even hard pressed financially. We think it only proper that claimants be reimbursed by a reasonable sum for the amounts for which the state received credit from the works progress administration for their services.

From the evidence it appears that prior to this particular time during which claimants were not paid, that they received $1.75 per hour, or more, for the use of their trucks when they furnished the gas, oil and grease. It appears, however, that either the state (state's exhibits 1 to 12) or the works progress administration furnished the gas, oil and grease to the claimants during the time claimants rendered the services for which they have not been paid. Neither they, nor anyone else apparently kept an account of how much gas, oil or grease was used by them and, hence, the court is not placed in position to calculate the same. However, it appears that the state received credit on its commitment by the use of these trucks on some reports made on form 710 for as much as $1.75 per hour, while on others it received credit for only $1.25 per hour. It appears that when the rate of $1.75 per hour was allowed as credit, that the state was also receiving credit for use of rather large quantities of gas, oil, and grease while only small quantities, if any, of the same were taken credit for when it received credit for only $1.25 per hour on the same trucks. This would certainly indicate that during the first months when the state received the credit for $1.75 per hour for each truck and operator that the state then furnished the gas, oil and grease and when the unit price per hour credited was reduced to $1.25 per hour on each truck and operator the Federal Government furnished gas, oil and grease. Therefore under all the circumstances, in justice and fairness, we are of the opinion that the claimants should be paid only on the services for which the state received credit under its sponsorship of the

project. After making a deduction for gas, oil and grease furnished them we are of the opinion from all the evidence and circumstances in the case that the sum of $1.25 per hour for truck and operator should be paid for said services for which the state received credit in its accounting with the Federal Government. All time for services performed by claimants for which the state did not obtain credit as shown by the record, should not be paid, and claims for such services are denied.

From the first report filed September 23, 1937 on said form 710 it appears that the state received credit by the use of claimants' trucks for a total of 166 hours without segregating the hours performed by each claimant, and that from the record it appears that all the claimants' trucks up to and including September 23, 1937, had been worked a total of 455 hours, distributed as follows: Adkins and Wilson 122 hours, Dewey Adkins 92 hours, G. B. Adkins 140 hours and Joel H. Adkins 101 hours. The credit received for which the state should be chargeable at the rate of $1.25 per hour for truck and operator for 166 hours amounted to $207.50 which should be distributed to each claimant on the proportion that the hours performed by each compared with the total of 455 hours performed by all during said time. Such percentage would amount to approximately .365%, which percentage calculated as aforesaid upon the number of hours allowed to each as aforesaid to September 23, 1937, based upon the number of hours performed by each would entitle each of the claimants to receive the following sums on said amount of $207.50, to-wit: To Adkins and Wilson, $55.64; to Dewey Adkins, $41.95; to G. B. Adkins, $63.85 and to Joel H. Adkins $46.06.

The total credit of hours for services performed by claimants received by the state road commission on its sponsorship for the period from September 24, 1937 to and including October 23, 1937, as shown by two reports filed on form 710 October 23, 1937, was practically the same as the total number of hours worked, a credit being taken for a total of 423 hours while claimants' trucks were used a total of 416 hours. During this period of time each of the claimants should receive pay on credit received by the state based upon the hours worked by each

truck at the rate of $1.25 per hour for truck and operator, as follows: To Adkins and Wilson 155 hours, or $193.75; to Dewey Adkins, 39 hours or $48.75; to G. B. Adkins, 91 hours or $113.75, and to Joel H. Adkins, 131 hours or $163.75.

The total credit of hours for services performed by claimants received by the state road commission on its said sponsorship for the period from October 24, 1937 to and including November 23, 1937, as shown by two reports filed on form 710 on November 8, 1937 and on November 23, 1937 respectively, for which claimants should receive pay at the rate of $1.25 per hour for truck and operator, is, as follows: To Adkins and Wilson, 143 hours or $178.75; to Dewey Adkins, 153 hours or $191.25; to G. B. Adkins, 175 hours or $218.75; to Joel H. Adkins, 150 hours or $187.50.

The total credit of hours for services performed by claimants received by the state road commission on its said sponsorship for the period from November 24, 1937 to and including December 8, 1937, as shown by accounting report filed on form 710 December 8, 1937, aggregated 333 hour. The report does not segregate the number of hours of services performed by each claimant, but from the record it appears that each of the claimants rendered services aggregating said number of hours for which the state received credit and are entitled to be paid, at the rate of $1.25 per hour, as follows: Adkins and Wilson, 91 hours or $113.75; Dewey Adkins, 76 hours or $95.00; G. B. Adkins, 87 hours or $108.75; Joel H. Adkins, 79 hours or $98.75.

It appears from a report filed December 23, 1937 that the state received credit on its sponsorship for 56 hours of services performed by Joel H. Adkins and that he is entitled to be paid for same at the rate of $1.25 per hour for truck and operator which amounts to $70.00. Said report, without segregating the number of hours of services performed by each shows that the state received credit for 43 hours of services performed by Dewey and G. B. Adkins and from the record it appears that from December 9, 1937 to and including December 23, 1937 said Dewey Adkins and G. B. Adkins performed said services and are entitled to pay for same at the rate of $1.25 per hour

for truck and operator, as follows: To Dewey Adkins, 28 hours or $35.00; to G. B. Adkins, 15 hours or $18.75.

It appears from a report filed January 8, 1938 that the state received credit on its sponsorship for 51 hours of services performed by Joel H. Adkins and that he is entitled to be paid for same at the rate of $1.25 per hour for truck and operator or the sum of $63.75. Said report without segregating the number of hours of services performed by each claimant shows that the state received credit for 64 hours of services performed by "G. B. and Adkins" and from the record it appears that from December 23, 1937 to and including January 8, 1938, Dewey Adkins did not perform any services, but that Adkins and Wilson and G. B. Adkins did perform such services and are entitled to pay for same at the rate of $1.25 per hour for truck and operator, as follows: Adkins and Wilson, 61 hours or $76.25; G. B. Adkins, 3 hours or $3.75.

It appears from four reports filed on January 23, 1938, February 8, 1938, February 23, 1938 and March 8, 1938, respectively, that the state received credits on its contributions as sponsor of the project for a total of 369 hours of services performed by Adkins and Wilson, G. B. Adkins and Joel H. Adkins from January 9, 1938 to and including March 8, 1938, and it appears from the record that they performed said services and are entitled to receive pay for same at the rate of $1.25 per hour for truck and operator for said services, as follows: Adkins and Wilson, a total of 111 hours or $138.75; G. B. Adkins, a total of 123 hours or $153.75, and Joel H. Adkins, 135 hours or $168.75.

A majority of the court are therefore of the opinion to make awards to said claimants, as follows: To Adkins and Wilson, an award of seven hundred fifty-six dollars eighty-nine cents ($756.89); to Dewey Adkins, an award of four hundred eleven dollars ninety-five cents ($411.95); to G. B. Adkins, an award of six hundred eighty-one dollars thirty-five cents ($681.35); to Joel H. Adkins, an award of seven hundred ninety-eight dollars fifty-six cents ($798.56), and orders are entered thereon accordingly.

Judge Bland dissents.

ROBERT L. BLAND, Judge, dissenting.

I cannot agree with the determination made of these claims. The claims are not, as I view them, claims for which awards may properly be made under the provisions of the act creating the court of claims. They are not, according to my interpretation, claims which the state of West Virginia as a sovereign commonwealth should, in equity and good conscience, discharge and pay.

Since the court of claims is in its formative period it is especially important to guard carefully against the creation of dangerous precedents in the matter of making awards. We have no power or authority to make an award that is not authorized by the court act.

It is impossible, I think, to reconcile the awards made in these cases with the cause of action set forth in the petitions filed by claimants. These petitions do not state facts sufficient to show that the state of West Virginia is liable to pay the claims. Each petition on its face fails to disclose a cause of action against the state. The petitions are identical in form in the four cases except as to hours of labor performed and amounts of claims. I quote from the petition of claimant Dewey Adkins:

> "Your petitioner, Dewey Adkins, of Sias, West Virginia, respectfully represents that he was duly and legally employed by the works progress administration to furnish and operate a truck in connection with and in furtherance of certain road work on Upper Mud River Road known and designated as W. P. A. Project No. 76, in Lincoln County, West Virginia, which said road work primarily consisted of laying a rock base road about five (5) miles in length; that in line with and in furtherance of said employment your petitioner between August 24, 1937, to September 8, 1937, furnished and operated a truck for 26 hours at $1.75 per hour, making a total of Forty-five Dollars and Fifty cents ($45.50); that your petitioner between September 9, 1937 to September 23, 1937, furnished and operated a truck for 66 hours at

$1.75 per hour, making a total of One Hundred and Fifteen Dollars and Fifty Cents ($115.50); that your petitioner between September 24, 1937 to October 8, 1937, furnished and operated a truck for 39 hours at $1.75 per hour, making a total of Sixty-Eight Dollars and Twenty-five Cents ($68.25); that your petitioner between October 24, 1937 to November 8, 1937, furnished and operated a truck for 66 hours at $1.75 per hour, making a total of One Hundred and Fifteen Dollars and Fifty Cents ($115.50); that your petitioner between November 9, 1937 to November 23, 1937, furnished and operated a truck for 87 hours at $1.75 per hour, making a total of One Hundred Fifty-Two Dollars and Twenty-five Cents ($152.25); that your petitioner between November 24, 1937 to December 8, 1937, furnished and operated a truck for 77 hours at $1.75 per hour, making a total of One Hundred and Thirty-four Dollars and Seventy-five Cents ($134.75); that your petitioner between December 9, 1937 to December 23, 1937, furnished and operated a truck for 28 hours at $1.75 per hour, making a total of Forty-Nine Dollars ($49.00); that the total amount due your petitioner for labor and services as above detailed is Six Hundred Eighty Dollars and Seventy-five Cents ($680.75).

"Your petitioner further represents that he was not paid for said work, or any part thereof, and that the same is due and unpaid and has been due your petitioner from the respective dates above set forth, and your petitioner is entitled to the respective amounts above set forth, with legal interest thereon from the respective dates aforesaid.

"Your petitioner further represents that at the time he was doing said work he was informed and believed that there was available money to pay for the same, but after said work was done he was informed by the W. P. A. authorities that there were not sufficient funds and in fact no fund to pay the amount due your petitioner and that all the available money had been expended in the meantime.

"Your petitioner further represents that the detailed account of your petitioner was duly, legally and accurately kept on forms furnished by the State Road Commission of West Virginia; that said accounts were duly approved on said blanks by Elza B. Adkins,

Superintendent of W. P. A. Project No. 76, and by Wilburn Mullins, Timekeeper, and that said accounts were duly sworn to by your petitioner; and your petitioner therefore prays that his petition may be duly filed, that the proper State Department concerned in this petition be duly notified, and that the claim of your petitioner may be properly docketed for a hearing and that final hearing thereon may be had, and that the claim of your petitioner may be duly and legally adjudged him, together with a legal rate of interest thereon, and that your petitioner be granted full and adequate relief in the premises, and thus in duty bound he will ever pray, etc."

It is obvious that the petition on its face fails to disclose a cause of action against the state. On the contrary it specifically alleges a cause of action against the Federal Government. Under the averments of the petition the claim presented thereby is not *prima facia* within the jurisdiction of the court of claims. The court's power to make an award is limited to the jurisdiction conferred upon it by the Legislature. An award, in the absence of jurisdiction to make it, is, I think, abortive and of no legal effect.

But notwithstanding the failure of the petitions to state causes of action against the state the claims were investigated and heard on their merits under the regular procedure of the court act. I do not think that the evidence offered upon the investigation and hearing of the claims warrants the findings of fact set forth in the majority opinion or establishes the right of the claimants to the awards which have been made in their favor. It is quite as essential to do justice to the state as it is to do justice to claimants. As pointed out in the opinion the claims are for work and services performed by the claimants and for use of their four trucks on works progress administration project No. 76, upper Mud river road, in Lincoln county, West Virginia. This project is shown to have been sponsored by the state road commission of West Virginia. Under the terms of the sponsorship the road commissioner was obligated to furnish from twenty per cent to twenty-five per cent of the total cost of the project. This contribution on the part of the

road commission was not to be paid in cash, but by the use of state road equipment with operators, such as trucks, road graders, rollers, power shovels, etc. In order for persons to qualify for employment on the project it was necessary for them to first obtain "purchase orders." Truck hire was in all cases paid for from the works progress administration fund known as "other funds." Purchase orders were not granted by the state. The issuance of purchase orders was a Federal Government commitment, not a state commitment.

It appears from the evidence that in the vicinity of the Mud river road project there is a settlement of Adkins. They do not live far apart but reside along the road. The Mud river road is the road that is traveled by them in order to go from the creek to any other part of the country. Seemingly this family is of importance and influence in that section of Lincoln county. It is shown that Caudle Adkins was the works progress administration supervisor for Lincoln county. He had general supervision of works progress administration projects throughout the county. Elza B. Adkins was the works progress administration project superintendent. He had the closest contact with the project because his work was confined entirely to that project. Elza B. Adkins is a brother of the Adkins claimants. It is not strange, therefore, that after the beginning of work on the project Dewey Adkins, Joel H. Adkins, G. B. Adkins, and Walter Adkins and D. B. Wilson, partners, obtained "purchase orders" for the use of their trucks on the Mud river road project. The evidence would indicate that they had regular and lucrative employment. There came a time, however, in the fall of 1937 when equipment on this project became "top heavy." At that time there were perhaps seventy-five persons employed as laborers on the project. At times the number employed would reach one hundred and twenty-five. The project was in good shape and running along satisfactorily except that it was "top heavy" with works progress administration equipment. Works progress administration truck rental expired August 16, 1937. Roller rental expired July 20, 1937. There was, therefore, no money available for the hire of this character of equipment. F. A. Wyant,

W. P. A. director of division of operations, addressed a letter from Charleston under date of August 27, 1937, to Abe Forsythe, works progress administration branch manager, at Huntington, advising him that labor would soon be at a standstill until additional equipment should be provided. Forsythe addressed a communication under date of August 28, 1937, to W. Frank Harrison, acting works progress engineer, at Huntington, directing him to investigate the equipment shortage on the Mud river road project, and instructed him that if his findings should indicate that more equipment was needed and it would be impossible for the state road commission to supply it, that work on this project should be discontinued until such time as proper equipment should be furnished.

It may be observed at this point that the works progress administration was responsible for the top heavy condition of equipment on the project, not the failure of the state road commission to furnish equipment for which it was obligated. The Federal Government was paying more money for equipment than it should expend for that purpose. So long as the resources known as "other funds" were exhausted no purchase orders could be issued for truck hire. Unless the state road commission should come to the relief of the works progress administration and supply other and additional trucks, than those for which it was obligated, to take the place of the trucks that the works progress administration could not employ because it was without funds to pay for them, the work on the project would have to be suspended.

W. Frank Harrison, district engineer in charge of five counties for the works progress administration, testified that after the receipt of the Wyant letter he, in company with one John McGee, who was connected with the program in Lincoln county, went to the project site and discussed the situation with Elza Adkins, W. P. A. superintendent of the project. It was at this time that Adkins informed Harrison that claimants would use their trucks which they had been using under their employment by the works progress administration and for which use up to that time they had received purchase orders. There was

an agreement between Harrison and Adkins, both W. P. A. employees, that under this arrangement the works progress administration would furnish claimants with oil and gas. Neither the state nor the state road commission was a party to this arrangement between Harrison and Adkins, nor shown by the evidence to have had any knowledge of it, and would not be bound by it.

It is disclosed by the evidence that after the arrangement concluded between W. Frank Harrison, District Engineer, and Elza B. Adkins, W. P. A. County Supervisor, claimants did work on the project with their trucks and that oil and gas were furnished to them by the works progress administration. Reports of their trucks and labor were regularly made to the works progress administration on form No. 710. This is a form used for the purpose of showing contributions to the project by the sponsor of the project or other persons. It is a form used by the accounting division of the works progress administration in order to keep its records straight. On these reports the time of claimants was shown as "Contributions by other than sponsor."

After this form 710 showing contributions by claimants had been received at the Huntington office of the works progress administration, inquiry was made of J. Scott Lunsford, area engineer, for an explanation of the reason for claimants' time being reported as a contribution to the project. Under date of October 11, 1937, Mr. Lunsford addressed a letter to W. T. Farrell, supervisory clerk of the works progress administration, at Huntington, saying:

> "These are 'Other than Sponsor' contributions. It happens in this case that a number of truck owners not only are unselfishly public spirited but wish to show their appreciation for past favors extended to the degree where they will contribute their personal time and the use of their equipment toward the success of our program. In this instance SRC, having failed to provide equipment on the project, and 'Other Cost' funds having been exhausted, these private truck owners volunteered their services gratis to bring the job to completion."

On the hearing Mr. Lunsford testified that he visited the project and asked Caudle Adkins, W. P. A. county superintendent, what interest claimants had in the project that would induce them to offer the services of their trucks to the project or just what their motive in doing so was; and that Mr. Adkins replied that claimants lived up the river from or on the project site and were therefore interested in the continuation or construction of the road for several reasons; that they wanted an outlet and the paving finished from their homes; that they were public spirited and wanted to see the work continued to prevent unemployment, and realized that by their demonstration of their willingness to furnish their trucks gratis they would be probably more readily favored by future purchase orders. Mr. Lunsford further testified: "I do recall that due to the unusual nature of their offer I explained to these men at some length that there could be no misunderstanding about the matter of pay for the trucks as there was no money on the project to pay for the truck use. In other words, I wanted to avoid any possible misunderstanding and these men acknowledged or rather expressed their understanding of the conditions on which their trucks would work and they said that they were so anxious to see the project work continued without shutdown or delay they would volunteer the use of their trucks, hoping that some day some arrangement would be made whereby funds could be procured for truck purposes."

The work on the project for which the claims are made ended in March 1938. The evidence does not show that from that time until April 2, 1942, when they were filed in the court of claims, that these claims were regarded as claims against the state of West Virginia.

I do not see wherein the evidence shows that the state or the state road commission failed to furnish the full complement of equipment for which it was obligated under the terms of its sponsorship of the project. It is not shown what the total cost of the project was, and there is nothing in the record to show that the state did not furnish from twenty to twenty-five per cent of the equipment used. The testimony of W. Frank

Harrison, works progress administration district engineer, very definitely shows that the project was "top heavy" on account of works progress administration equipment. The actual reason for the failure of claimants to receive further purchase orders for the use of their trucks on the project was that the money applicable to the payment of truck hire was exhausted.

It does appear from the evidence that after the completion of the project claimants obtained purchase orders for employment on other projects in Lincoln county. This is what they bargained for and gambled upon obtaining.

Elza B. Adkins, the project superintendent, who seems from the evidence to have been the spokesman for the claimants in the matter of furnishing their trucks, and who evidently made arrangements with them to do so, was not produced by claimants to testify on their behalf and in support of their claims.

If the state road commission furnished from twenty to twenty-five per cent of the equipment used on the project, and the evidence does not show that it failed to do so, there would be no reason why the state should pay the awards made in favor of these claimants in addition to its agreed contribution to the project.

The claims are distinctly claims against the Federal Government and not against the state of West Virginia.

(No. 46-S—Claimant awarded $31.20.)

LOUIS TOMICH, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed October 13, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, Louis Tomich, of Slovan, Pennsylvania, asks that he be paid damages for injuries to a certain neon sign belonging to the claimant and attached to a certain lunch stand located near Burgettstown, Pennsylvania. The accident happened on August 21, 1940. It seems, from the record as submitted, that Raymond Brown, in charge of a truck belonging to the state conservation commission, a state agency, and while hauling a concreate mixer, struck and demolished the sign in question, causing damages in the amount of $31.20. No negligence is imputed to the owner of the sign as to its place or location, and it seems to have been purely a case of lack of attention in driving away from the property to which the sign aforesaid was attached, on the part of the operator of the state truck.

The state conservation commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of thirty-one dollars and twenty cents (31.20).

(No. 47-S—Claimant awarded $85.00)

N. H. SOVINE, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed October 13, 1942.

WALTER M. ELSWICK, Judge.

On July 29, 1940, a truck owned by the state conservation commission was being operated by one of its employees in the course of his employment on the road leading to Malden, West Virginia, where the railroad crosses route 60. On approaching the railroad crossing, the driver came over a slight hill at approximately twenty miles per hour. It was raining at the time. On topping the hill, he observed several cars parked in line waiting for a train to clear the crossing. He immediately applied his brakes and skidded into the rear end of a Buick four-door sedan being operated by Rufus Carter and owned by the claimant, N. H. Sovine.

It appears that this collision caused damage to the trunk compartment and fender of claimant's car. An itemized statement furnished by Hugh Stewart Motors, Inc. of Charleston, West Virginia was filed with the claim showing that the costs of parts and labor in repairing claimant's automobile as a result of this collision amounted to the sum of $89.44.

It appears that claimant's car was not in motion and that the collision could have been avoided by respondent's driver.

The conservation commission made investigation of the collision and finds that the claim is one which should be paid. The claim was submitted by the state conservation commission with its papers and files on September 10, 1942, recommending that the sum of $85.00 should be paid. The attorney general approves the claim in this amount as one which should be paid and concurs in the recommendation.

From the record submitted we are of the opinion that an award should be made to claimant in the sum of eighty-five dollars ($85.00) and will enter an order recommending an award for said amount to be paid to claimant in full settlement of his claim.

(No. 142-S—Claimant awarded $15.91.)

ORA SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed October 13, 1942.

ROBERT L. BLAND, Judge.

On the evening of March 5, 1942, claimant, Ora Smith, of East Liverpool, Ohio, was driving his Ford automobile on state route No. 23, in Tyler county, West Virginia. There was a heavy snowfall on the highway. Roy L. Ullom, an employee of the state road commission, was engaged in removing this snow from the road. For the purpose of doing this work he was operating state road commission grader No. 634-20. Claimant's automobile was following this grader. From time to time it was necessary for the grader to back a few feet to get a better start in order to remove the snow. On one of these occasions the rear wheel of the grader hit the front end of claimant's car. It appears from the record, however, that claimant's car had stopped and was in a stationary position at the time it was hit by the grader. As a result of the accident claimant's vehicle was damaged to such extent that he was obliged to expend the sum of $15.91 for new parts and expense of repairs. He made claim upon the state road commission for this amount. The state road commission prepared a record of his claim and the same was referred to and filed in the court of claims on June 17, 1942. The payment of this amount is recommended by the state agency concerned and approved by the attorney general. Since it appears from this record that the driver of the grader was responsible for the accident, the claim is a proper one for an award.

An award is, therefore, made in favor of claimant Ora Smith for the sum of fifteen dollars and ninety-one cents (15.91).

(No. 143-S—Claimant awarded $50.00.)

ARZANA M. WARD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

CHARLES J. SCHUCK, Judge.

Claimant Arzana M. Ward asks reimbursement for damages occasioned to a water well located on her premises near Reedsville, West Virginia, and caused by a certain state road commission maintenance crew turning or diverting surface water from a roadside ditch on to the property of claimant, which water so turned or diverted, polluted the water well of claimant, located on her property as aforesaid, and she was unable to use the said well for a period of six months. The record seems to clearly indicate that it was the negligence of the said maintenance crew in turning the surface water from the road in and onto the property and well of the claimant that caused the said well to become polluted and the water unfit for use.

The state road commission does not contest the claimant's right to an award in the sum of $50.00, in full for the damages aforesaid, and concurs in the claim for that amount; the claim is approved in the amount of $50.00 by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim; and an award is hereby made in the sum of fifty dollars ($50.00).

(No. 144-S—Claimant awarded $8.16.)

KETTERING BAKING COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

WALTER M. ELSWICK, Judge.

On or about September 8, 1941, a state road commission truck operated by one of its employees in the city of Fairmont, West Virginia, skidded into a parked truck owned by claimant, Kettering Baking Company. The left fender and left quarter panel of claimant's truck were damaged by reason thereof and it appears from a statement filed that it cost the claimant $8.16 to have its truck repaired.

From the investigation made by the state road commission it was found that the claim was one which should be paid, and payment is recommended by the commission, which recommendation is approved by the attorney general. The claim was filed and submitted by the state road commission with the clerk, on June 29, 1942.

From the record submitted we are of the opinion that an award should be made to claimant and an order will be entered recommending an award of eight dollars and sixteen cents ($8.16.)

(No. 145-S—Claimant awarded $9.18.)

SYLVIA B. FRANKEL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

ROBERT L. BLAND, Judge.

The record of this claim, with the concurrence therein of the state agency concerned and the approval of the payment thereof by the attorney general, having been prepared by the state road commission, was filed with the clerk on the 29th day of June 1942.

It appears from this record that on the 17th day of February 1942, about 8:00 o'clock in the evening, state road truck No. 430-122 with snowplow attached, operated by A. J. Richardson, an employee of the state road commission, while being used on a state highway in the city of Morgantown, in Monongalia county, West Virginia, was negligently run into the Chevrolet automobile owned and operated by claimant. The road truck was being driven at twice the rate of speed of claimant's vehicle on a wet road. In consequence of the accident the fender of claimant's car was damaged to the extent of $9.18, which amount she was obliged to and did pay for having it repaired. After full investigation of the circumstances attending the accident the district engineer of Monongalia county reached the conclusion that responsibility for the occurrence rested upon the driver of the state road truck.

An award is made in favor of claimant, Sylvia B. Frankel, for the sum of nine dollars and eighteen cents ($9.18).

(No. 151-S—Claimant awarded $45.14.)

AUBREY HART, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

CHARLES J. SCHUCK, Judge.

The claimant, Aubrey Hart, asks reimbursement for damages occasioned by state road commission truck No. 430-24 backing into the parked, privately owned automobile of the claimant on the second day of July 1942. From the record as submitted, it would appear that the driver of the state road truck was negligent while in the act of turning his truck, for it was at this time that said truck collided with the parked car of the claimant. It further appears that there was no negligence on the part of the claimant in having his automobile parked at the place it was at the time of the accident in question.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for the amount of $45.14; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of forty-five dollars fourteen cents ($45.14.)

(No. 160-S—Claimant awarded $32.75.)

VALVOLINE OIL COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

WALTER M. ELSWICK, Judge.

On June 3, 1942, the state road commission, by its employees, was operating a road plow on a road leading through the F. M. Britton farm in Central district of Doddridge county, West Virginia. The road plow struck the oil pipe line owned by claimant and broke its line out of collar. As a result, the claimant lost 5 barrels of crude oil valued at $14.70, and was required to expend $18.05 on labor and materials in repairing its oil pipe line.

From the investigation made by the state road commission it appears that the claim is one which should be paid. The state road commission submitted the claim to the clerk on July 15, 1942 with its recommendation that the claim be paid. Said recommendation is approved by the attorney general.

We are of the opinion after reviewing the record, that an award should be made and an order will be entered recommending an award of thirty-two dollars and seventy-five cents ($32.75) to be paid to the claimant, Valvoline Oil Company.

(Claim No. 161-S—Claimant awarded $1.53.)

D. C. IRWIN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

ROBERT L. BLAND, Judge.

Claimant's 1941 model Plymouth sedan automobile broke through a defective wooden floor of a state bridge, located on secondary road No. 42 at junction with secondary road No. 33, in Cabell county, West Virginia, on June 18, 1942. He paid to Zora Perry's Garage, of Huntington, the sum of $1.53, as shown by statement filed, for the repair of damages sustained by said accident. The state road commission concurs in the payment of said claim in the said sum of $1.53. The special assistant to the attorney general approves this payment.

We are of opinion that said claim should be entered as an approved claim; and, therefore make an award in favor of claimant, D. C. Irwin, for one dollar and fifty-three cents ($1.53.)

(No. 162-S—Claimant awarded $127.23.)

GULF OIL CORPORATION, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, the Gulf Oil Corporation, asks reimbursement in the sum of $127.23, which amount is claimed as damages to a certain gasoline pump owned by the said claimant and leased to Pethtel Brothers at Hundred, West Virginia. It is alleged that the damages were caused by the negligence of the driver of state road truck No. 630-38 in not having his emergency brake properly set and locked, and said brake released, backing into the pump in question, causing the damages in the amount set forth in the petition of claimant. The accident seems to be attributed wholly to the negligence of this driver of the state road truck.

The state road commission does not contest claimant's right to an award for the above amount, but concurs in the claim for the said damages; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of one hundred twenty-seven dollars and twenty-three cents **($127.23.)**

(No. 169-S—Claimant awarded $13.52.)

SARVER GARAGE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

WALTER M. ELSWICK, Judge.

It appears from the record in this case that on April 7, 1942, one Ray Umburger was employed by the state road commission of West Virginia in moving a bulldozer loaded on a state road commission trailer from a quarry site near Pettry to East river project near Ada, West Virginia. Another truck was used to pull trailer. However, when he reached Laurel hill, the one truck would not pull the load up the grade and another state road truck was hooked in front. Due to the load, the two trucks could only make about two miles per hour. The road was narrow. A flagman was sent to top of grade to control traffic. Near the top a private car driven by Mrs. Charles McGuire and owned by her husband pulled to the right side of the road and stopped. The employee of the road commission in charge directed the drivers of the trucks to proceed. Before doing so, he realized that the clearance was very close, but undertook to pass the car without requiring its removal. The bulldozer blade struck the left rear fender on the private car and cut the fender in two pieces. It could not be repaired.

The claimant, Sarver Garage, at Bluefield, West Virginia, repaired the private car by installing a new fender and painting the scratched portions which, of course, was done by authority of the state road district engineer at Princeton, West Virginia. The costs of making these repairs amounted to the sum of $13.52.

From the investigation made by the state road commission it appears that the claim is one which should be paid. The claim was submitted by the state road commission with its recommendation for payment on August 25, 1942. This recommendation is approved by the attorney general. We are of the

opinion that an award should be made and an order will be entered recommending an award of thirteen dollars and fifty-two cents ($13.52) payable to Sarver Garage for making these repairs.

(No. 170-S—Claimant awarded $53.53.)

W. L. STROTHER, M. D., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

ROBERT L. BLAND, Judge.

The claim in this case grows out of an accident between state road commission truck No. 430-13 and a Plymouth coupe automobile owned by W. L. Strother, M. D. On August 10th, 1942, Dr. Strother's car was parked at curb on a state highway in the city of Salem, Harrison county, West Virginia. The state road commission truck, operated by Jasper Lough, was backing up in order to pull around the Strother automobile, and in doing so it back into claimant's car, breaking the left headlight lens and the left front parking light, and denting its left front fender. To repair the damaged condition of the car claimant paid to the Clarksburg Automobile Company, as shown by itemized receipted bill therefor, the sum of $53.53. Dr. Strother filed his claim with the state road commission for this amount. The state road commission prepared the record of the claim and referred it to and filed it in this court on the 26th day of August 1942. Respondent concurs in the payment of said sum of $53.53. The attorney general approves such payment. In view of this concurrence and recommendation and the facts disclosed by the record we are of opinion that the claim in question should be entered as an approved claim.

An award is accordingly made in favor of W. L. Strother, M. D., for the sum of fifty-three dollars and fifty-three cents ($53.53.)

(No. 171-S—Claimant awarded $18.00.)

GAIL NICHOLSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

CHARLES J. SCHUCK, Judge.

Claimant, Gail Nicholson, claims damages for injuries to his wagon, occasioned by the said wagon falling through defective flooring on a bridge located on a secondary road in Doddridge county, West Virginia, and damaging the vehicle to the extent of $18.00.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the special assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of eighteen dollars ($18.00.)

(No. 176-S—Claimant awarded $19.28.)

MARGARET B. POWELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

WALTER M. ELSWICK, Judge.

It appears from the record in this case which was submitted to the court by the state road commission with its recommendation that the claim be paid and the approval of the attorney general, that on April 3, 1942, a state road commission truck with trailer was traveling west on Pike street in the city of Clarksburg, West Virginia in heavy traffic when the trailer struck an automobile owned by claimant, Margaret B. Powell. The left rear fender of claimant's car was dented and rubber protector torn from fender. The truck also struck the rear left door of claimant's car.

It was necessary for the claimant to have the following repairs made by reason of this collision: Straightening and repair of left door $4.00; straightening and repair of fender $12.00 and material and repairs $3.28, making a total cost of $19.28.

From the record submitted by the commission with the approval of the attorney general, we are of the opinion that the claim should be paid and therefore, will enter an order recommending an award of nineteen dollars and twenty-eight cents ($19.28) payable to claimant, Margaret B. Powell.

(No. 190-S—Claimant awarded $20.00.)

J. H. SPENCER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 13, 1942.

ROBERT L. BLAND, Judge.

On the 10th day of June, 1942, Stanley Spencer was driving claimant's 1936 Buick sedan automobile, bearing West Virginia license number 172-648, on a state highway, in McDowell county, West Virginia. At the same time George Dickens, an employee of the state road commission, was driving in the opposite direction on said highway state road commission truck No. 1030-5, handling the road commission's trailer No. 1032-4 which was loaded with a roller. At a point on said highway, near Havaco, as the road truck moved down grade Dickens applied the brakes about the time that he was meeting claimant's approaching automobile, which was on the right side of the road. The brakes on the state road truck stuck, causing the trailer attached to the truck to skid to the left across the center of the highway and collide with claimant's vehicle, damaging its left rear fender and left rear wheel. It is shown that the defective condition of the brakes on state road commission truck 1030-5 was responsible for the damages sustained by claimant's car. The state road commission recommends the payment of twenty dollars in settlement of said claim. The special assistant to the attorney general approves the claim in said amount. And, having duly considered the record of said claim as prepared by the state road commission and filed with the Clerk on the 16th day of September 1942, we are of opinion that it should be entered as an approved claim and an award made therefor in said sum of $20.00.

It is therefore considered and ordered by the court of claims that an award be and is now made in favor of claimant, J. H. Spencer, in the sum of twenty dollars ($20.00.)

(No. 134—Claimant awarded $2750.00.)

CURTIS COTTLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 23, 1942

To allow road equipment being used in connection with highway improvements and repairs, to occupy any part of a used or traveled road or highway in the nighttime, without giving the traveling public proper, adequate and sufficient warning and notice of the presence of such equipment so placed or situate, is negligence on the part of the agents and employees of the road commission, for which the commission is liable.

Appearances:

Messrs. *Richardson & Kemper (George Richardson, Jr.),* for the claimant;

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

CHARLES J. SCHUCK, Judge.

Curtis Cottle, the claimant, and a miner employed in the mines at Havaco, McDowell county, while returning from his work late on the night of November 30, or early on the morning of December 1, 1941, and while proceeding by automobile along route 10 toward his home at Spanishburg, Mercer county, collided with certain road machinery and equipment theretofore placed on said route by the state road commission or its agents and employees, and by reason of said collision was seriously and severely injured.

The record reveals that on the night in question, the claimant left his work about midnight to proceed to his home in Spanishburg, Mercer county, by automobile. He had reached and passed the town of Matoaka and was traveling along route 10 when the accident in question occurred. Claimant maintains that the equipment in question occupied a great portion of the traveled road on the said route 10; that the equipment so placed was not properly lighted so as to inform an oncoming driver of its presence; and that the state road commission was negligent in carrying on the work without proper protection and signals or lights to the traveling public. The evidence also reveals that previous to the time of the accident in question, several other collisions had taken place at the same point and seemingly under the same circumstances and facts as presented in the instant case.

Claimant was very severely injured by the collision, sustaining a crushed pelvis, dislocated hip, fractured right knee, a broken nose, and his left wrist hurt, and other injuries. He maintains that he still suffers by reason of these injuries. He was confined in the hospital for nearly five weeks and to his bed at home about two weeks after his release from the hospital, and was disabled from doing any work for a period of some four or five months.

Claimant admits in his own testimony that he was driving approximately forty miles an hour at the time of the accident and that he experienced fog along the route after leaving the mine crossing the mountains into Matoaka and that there was some fog at the place of the collision as well as along route 10 between Matoaka and the place where the accident happened. Claimant maintains that there was but one red light displayed on the equipment placed on the said route, which equipment comprised a truck, shovel, several tractors, and other machinery, and this contention seems to be borne out by a preponderance of the evidence in the case. He maintains further that he concluded the red light in question appeared to be a tail light of an automobile ahead and that there was no other signal or warning of any kind that could inform him of the presence of

the equipment in question on the said route No. 10. The evidence further shows that no watchman was maintained at the place of the accident until after it had happened and that the usual warning signals, such as flares properly placed, had not been used. On the other hand, the evidence shows that on the afternoon of the day of the accident (Saturday) two lanterns were placed on the equipment, by two boys, one of whom was the son of the workman charged with placing the signals, but who had gone to Virginia on that afternoon and left the placing of the signals to the two boys in question; that the conditions, namely, the placing of the heavy equipment across or at nearly right angles on the road, allowing room or space for but one car or automobile going in either direction to pass, and the fact that the location in question was near a curve, made the situation dangerous and hazardous and required proper warning signals at least in the nighttime to be given or placed for the benefit of pedestrians and automobilists traveling on the highway in question at the time.

We are of the opinion that the proper precautions were not taken by the state road commission or those in charge of the work to give proper warning of the presence of the equipment and that the lanterns that were placed, one of which seems to have been knocked off the equipment previous to the time of the accident, were wholly inadequate to give the proper warning to anyone using the highway at the time. We are also of the opinion that this was negligence on the part of the state road commission and that such negligence was the proximate cause of the accident in question, although it may be well said that the claimant himself may have contributed to the severity of his injuries by reason of the speed at which he was traveling at the time of the accident, which would have been a legal speed under ordinary circumstances, but which speed was perhaps excessive in view of the weather conditions presented at the time. Claimant had experienced pockets of fog from the time he left his work until the accident happened and admits, as shown by the record, that there was fog at the very place of the collision and that there was visibility but for fifty or

sixty feet ahead. This element, of course, must be taken into consideration in fixing an award.

The testimony shows that the car driven by the claimant at the time of the accident was worth approximately six to six hundred and fifty dollars and that he was offered $125.00 for the automobile shortly after the wreck, which would make his loss approximately $500.00. Claimant was making approximately $240.00 a month at the time of the accident and since his recovery has been making from one hundred and fifty to one hundred and sixty dollars per month. His doctor and hospital bills amounted to $265.00.

We are of the opinion, considering all the circumstances in the case and the fact that claimant may have contributed to the severity of his injuries by his failure to use the proper degree of care under the then existing circumstances, that the sum of twenty-seven hundred and fifty dollars ($2750.00) would be a fair award for the injuries sustained, loss of time, and the injuries to his automobile, and an award is made accordingly.

(No. 24—Claimant awarded $257.00; No. 30—claim denied)

ROY C. BABB, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

J. J. RADER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 26, 1942.

1. Where it appears from the evidence that there is a sharp curve on a state secondary dirt road, which is overgrown with brush obscuring the vision of persons traveling thereon, and which road is narrow and otherwise defective and out of repair, and that a girl, thirteen years of age, while riding as a passenger in a mail truck on said road, sustains personal injuries and the loss of four upper front teeth as the result of the mail truck collision with a one and one-half ton truck loaded with shale or gravel while passing through said curve, an award will be recommended for hospitalization and dental bills.

2. An award will not be made in favor of an adult claimant traveling said road six days a week in carrying mail, whose negligence contributed to a motor vehicle collision which resulted in the demolishment of his truck.

K. C. Van Meter, Jr., Esq., and *Isaac D. Smith*, Esq., for claimants;

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

ROBERT L. BLAND, Judge.

By agreement of counsel these two cases were heard together on the 31st of July 1942. The claim of Roy C. Babb was originally filed September 13, 1941. The claim of J. J. Rader was originally filed September 22, 1941. Both claims were dismissed from the docket of this court, for failure of prosecution, on the 26th of February 1942, at a special term of the court held in the city of Wheeling, but with the right on

the part of claimants to have them reinstated on the docket of the court upon showing satisfactory cause for such reinstatement. An opinion has heretofore been filed in each case.

Both claims were subsequently reinstated on the court docket after the claimants, respectively, had shown satisfactory reasons for their failure to appear and prosecute their said claims.

Both claims grow out of a collision which occurred about noon, on the 27th day of July 1938, in a sharp curve or bend, approximately three hundred feet east of Greenland Gap store, on a state secondary road in Grant county, West Virginia, between a 1934 model Chevrolet one and one-half ton truck driven by Ernest Rotruck, and a light pickup Chevrolet truck owned and driven by claimant J. J. Rader.

D. A. Burt of Wheeling, West Virginia, owns a large estate and maintains a summer home in that section of Grant county, which section is noted for its scenic beauty and attractiveness.

Rotruck was hauling shale or gravel in his truck from Horace Cassel's place to the Burt estate to be used in road work there. As he drove his truck toward a sharp curve or bend in the road claimant J. J. Rader, driving his mail truck, was approaching the curve or bend from the opposite direction. Barbara Babb, thirteen year old daughter of claimant Roy C. Babb, was a passenger in the Rader mail truck.

At the place of the curve or bend the road was narrow, not more than twelve feet in width. Inside of the curve or bend on the lower or creek side of the road, a stone wall had been constructed from six to twelve feet in height. From this wall there was a gradual slope down to the creek for a distance, according to the evidence, of from forty to seventy-five feet. On the other side of the curve the road abutted on a mountain bank. A culvert used for draining the water from the mountainside had become clogged or stopped up, causing a ditch of from one to two feet deep alongside of the road on the upper

or mountain side. Small trees were growing on either side of the road and the branches of these trees extended over the road obscuring vision in the curve. Most of the overhanging brush was on the lower side next to the steep embankment. Some of it was growing in the right of way.

When Rotruck observed the approach of the car driven by the claimant Rader, the distance between the two cars was not more than eighteen to twenty feet. Rotruck stopped his car. Claimant Rader's car ran into and collided with the Rotruck vehicle. As a result of the collision the Rader truck was practically demolished. Barbara Babb, daughter of claimant Roy C. Babb, was thrown forward and her face struck the front of the cab. Four of her upper front teeth were knocked out, her mouth badly lacerated and her knee slightly cut. She was removed to the Potomac Valley hospital at Keyser where she was given tetanus serum and her lip was sewed while she was under the influence of ether.

On account of the injuries sustained by the Babb child by reason of the accident it is shown by the evidence that her father, Roy C. Babb, has paid and incurred the following sums of money:

Expenses paid:	
Hospital	$49.00
Nurse at hospital	10.00
Dentist, for services and temporary plate	103.00
Expenses to be paid:	
Dentist, for permanent plate	95.00
Total	$257.00

Said claimant Roy C. Babb seeks an award of $257.00. No other or further claim is made on behalf of his daughter.

The mail pickup truck of claimant J. J. Rader was practically demolished. He seeks an award in the sum of $118.91, which sum is shown by the evidence to have been paid by him to Ludrick's garage, at Keyser, West Virginia.

Trooper E. R. Turner made an investigation of the circumstances attending the accident and submitted his report to the department of public safety, which report was introduced as a part of the evidence upon the hearing of the claims. He also testified before the court. He described very clearly the defective condition of the road at the place of the accident. He said that vision was obscured in the curve by trees overhanging the road. According to measurement made by him the road in the curve was only twelve feet in width. He emphasized the fact that on the embankment side of the curve the branches from small growing trees overhung the road about three or four feet and obscured vision, so that cars approaching would not have a view of each other until they were within approximately eight or ten feet. Other testimony showed that brush was actually growing on the right-of-way of the road. The evidence makes it very clear that the road was undoubtedly out of repair at the point of the curve and dangerous to the safety of persons using it.

Adult persons familiar with the road at the point of the curve would be charged with the exercise of precaution and care for personal safety in traveling thereon. According to her own admission the Babb child had traveled occasionally with claimant Rader in his mail truck to Keyser, passed the curve in the road and knew of the overhanging brush at that point. She cannot, however, be chargeable with contributory negligence. She is shown to have been thirteen years of age at the time of the accident. An infant over the age of fourteen years is presumed to have sufficient discretion and understanding to be sensible of danger and to have power to avoid it. *Hairston* v. *United States Coal & Coke Company,* 66 W. Va. 324. The rule is otherwise where the infant is under fourteen years of age. *Ewing* v. *Lanark Fuel Company,* 65 W. Va. 726.

It is obvious to the court from the evidence in these two cases that the road was out of repair at the sharp curve or bend where the accident occurred. It was clearly the duty of the road commission to have made the road safe for travel around this dangerous curve, and its failure to do so was an omission

of that duty. Under the particular facts disclosed by the record in these cases it was negligence on the part of the road commission not to have caused the overhanging brush over the road in the curve to be removed. The existence of growing trees with their branches extending four or five feet on either side of the road at this particularly dangerous point was a menace to the safety of persons traveling on the road. The explanation for the failure of the road commission to remove this menace to the safety of travel on the road may perhaps be found in the evidence given upon the investigation of the claim by A. N. Clower, supervisor of roads for Grant county at the time of the accident. When asked if complaint had been made to him about the condition of the road at the point of the curve he said he might have told claimant Roy C. Babb that Mr. Burt objected to anything being done that would mar the scenery.

We think that upon the showing made by the record claimant Roy C. Babb is entitled to the award which he seeks.

In the case of claimant J. J. Rader, however, a different situation is presented. It is shown by the evidence that for six days a week he traveled through the curve in the road in carrying United States mail in his pickup truck. He was bound under the circumstances to have known of the danger incident to travel through the curve on account of the narrow width of the road and the overhanging brush which obstructed vision at that point. He was chargeable with the exercise of ordinary care and prudence for his own safety. The evidence shows that he was traveling down grade as he approached the curve. The Babb child says he was traveling at from ten to fifteen miles an hour. Ernest Rotruck states that Mr. Rader's speed was from fifteen to eighteen miles per hour. He must have known that two vehicles could not pass each other in the curve, yet the evidence does not show that he sounded his horn or gave any other indication that he was approaching a place of danger. Mr. Rader is chargeable with contributory negligence that will preclude an award in his favor.

It may be observed at this point that claimant Rader did not appear in person to testify in support of his claim. He did not

appear in response to a summons served upon him to testify on behalf of claimant Roy C. Babb.

An order will be entered making an award in favor of claimant Roy C. Babb in the sum of two hundred and fifty-seven dollars ($257.00).

An order will be entered denying an award to claimant J. J. Rader and dismissing his claim.

(No. 45-S—Claim denied.)

JENNINGS C. BOLEY, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed October 28, 1942.

Where it appears from the record submitted that the negligence of claimant in the operation of a truck owned by the state agency concerned was the approximate cause of a collision by the truck with a privately owned car, inflicting damage to same, an award will be denied to claimant for contribution of the amount of damages paid by claimant to the owner of the damaged car.

WALTER M. ELSWICK, Judge.

On February 10, 1940, the claimant, Jennings C. Boley, was driving an International 2-ton truck owned by the state conservation commission on the highway from Petersburg to Franklin, West Virginia, when the said truck collided with an automobile driven by one Charles H. Pike of Martinsburg, West Virginia, causing damages to the automobile driven by Pike for which the claimant paid $200.00 as settlement in full for all claims for damages against him.

From the record submitted it appears that he was driving at a speed of from 20 to 25 miles per hour. As he entered a left hand curve in the highway, it appears that he was driving

on his left side of the highway across the point where white lines would have been if the center line of the road had been so marked, and saw coming from the opposite direction on the highway the said automobile driven by Pike. It was raining and the road was wet. The Pike car was driven to the operator's extreme right side of the roadside and brakes applied. Upon seeing the approach of the Pike car, the claimant cut the truck sharply to the right, when the rear end of the truck slid over past the center of the road until the truck body apparently passed over the left front fender of the Pike car, breaking off the parking light and continuing along the car body, striking the hinges of the left front door and removing the handle of the car door. The truck continued up the road for some distance before the body broke loose from the chassis and turned on its side, dumping a part of its load into the road. During this time the drive-shaft of the truck had broken and the right rear outside dual wheel had been thrown off.

After the said collision, state trooper Smith, of Franklin, was summoned to the scene and took the statements of the parties. His report was not filed with the record, but after the trooper made his investigation the claimant was charged with reckless driving, that is to say, driving on his left side of the highway in the face of oncoming traffic, before a justice of the peace at Franklin. The claimant plead guilty to the charge and was fined $14.60 including costs. He later made a settlement with the owner of the Pike automobile for the sum of $200.00 in full satisfaction of his claim, and asks the state to reimburse him for this sum.

There is a copy of a letter, dated June 15, 1940, from the then director of conservation, addressed to the attorney for Mr. Pike, stating that: "It is apparent to me from evidence submitted by Mr. Boley that the collision was caused by the breakage of a drive-shaft on a truck belonging to the conservation commission, thereby taking control of the truck from Mr. Boley." But it appears from Mr. Boley's statement that the road was wet, that he was rounding a left hand curve on his left side of the road when he cut the truck sharply to his right

and the rear end slid over past the center of the road and struck the Pike car. We think it was negligence on his part to be driving a loaded truck on a wet road around a curve on his left side of the road, and that such negligence was the cause of the accident.

The case was submitted for determination by the Conservation Commission under the shortened procedure, with its recommendation for payment, which recommendation is concurred in by the attorney general. We cannot approve the claim for the reasons herein set forth, and therefore an award is denied upon the record submitted.

(No. 182-S—Claimant awarded $565.64.)

C. W. LEGGETT COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 29, 1942

CHARLES J. SCHUCK, Judge.

The claimant, the C. W. Leggett Company, located at Clarksburg, West Virginia, seeks reimbursement in the sum of $565.64, which amount had heretofore been paid in various sums, beginning with the year 1924 and including the year 1936, in excess of its legal business and occupation tax, known as the gross sales tax, due and payable to the state for the period designated. A demand for refund of such excessive payments has heretofore been duly and legally made to the tax commissioner of the state of West Virginia, and this official, upon being petitioned to requisition the auditor of the state for a warrant refunding the said amounts, refused the said petition on the grounds that there were no available funds out of which the said excessive payments could be paid.

The state tax commissioner recommends the refund of the excessive payments in the amount aforesaid and does not contest claimant's right to the said refund, but concurs in the claim for the aforesaid amount; and the claim is likewise approved for payment by the attorney general's office as one that should be submitted to the Legislature for proper appropriation and future payment. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of five hundred sixty-five dollars and sixty-four cents ($565.64).

ROBERT L. BLAND, Judge, dissenting.

The above case came to the court of claims from the state tax commissioner under the "shortened procedure" provision of the court act. The record was prepared by the tax commissioner and filed with the clerk September 15, 1942. It was placed upon the special docket of the court for its regular October 1942 term and is considered informally upon the record submitted. It appears from this record that pursuant to article 13, chapter 11, of the official code of West Virginia, relating to business and occupation, formerly known as the gross sales tax law, claimant C. W. Leggett Company paid taxes to the state of West Virginia as follows:

Year	Amount
1924	$ 12.50
1925	17.91
1926	22.79
1927	18.64
1928	22.82
1929	23.40
1930	31.00
1931	31.69
1932	5.51
1933	2.79
1933	54.04
1934	96.18
1935	103.36
1936	122.01
Total	565.64

It is also shown by the record that a demand for a refund of said payments has heretofore been made to the tax commissioner and that he has been petitioned to requisition the auditor of West Virginia for a state warrant refunding said aggregate amount so paid, and that such demand and petition have been refused upon the ground that there exists no funds out of which such refund might be made, the funds out of which refunds might be made for said years having reverted to and become a part of the general revenue and reappropriated for succeeding years.

During the period that Honorable Fred L. Fox and Honorable Ernest K. James, respectively, served as state tax commissioner one of the rules and regulations of the tax commissioner's office provided that persons maintaining a place of business in West Virginia for the purpose of representing out-of-state suppliers of merchandise on a commission basis and obtaining orders for the shipment from such out-of-state suppliers to customers in West Virginia were not liable for payment of the West Virginia business and occupation (formerly gross sales) tax on their gross commissions because such transactions were considered exempt from the payment of state taxes under the interstate commerce clause of the Federal Constitution.

By reason, however, of a decision of the Supreme Court of Alabama, in the case of *State* v. *Stein*, reported in 199 Southern, page 13, the above mentioned rule and regulation was abrogated and annulled for the reason that said case held that commissions earned by reason of transactions above mentioned were not exempt under the commerce clause of the Federal Constitution.

In advising all such commission merchants in West Virginia of this fact it was ascertained by the tax commissioner that those claiming refund, including the above claimant and others, did pay business and occupation tax on commissions received from interstate shipments when at the time said tax payment was made said taxpayers were exempt from the payment of

the tax. In view of the fact that all other commission merchants did not pay taxes on commissions earned from interstate transactions, the tax commissioner was of the opinion that claimant and other taxpayers claiming refund have paid more taxes than were required by them under the law, and that the taxes so paid by them were in excess of the amounts due from said taxpayers, and it is the view of the tax commissioner that such taxpayers are entitled to a refund for what he regards as overpayments made by them.

For the reason that what the tax commissioner conceives to have been an erroneous tax payment made by claimant more than two years prior to the application for refund he is barred from making said refund by reason of section 655 (1) (2a) of article 1 chapter 11 of the 1941 supplement to the West Virginia code, which reads 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."

However, beginning with the year 1942 and for all subsequent years the tax commissioner will collect business and

occupation tax on the gross commissions of merchant brokers who represent out-of-state suppliers and obtain orders for the shipment of such out-of-state supplies to customers in West Virginia. It appears that all such commission brokers have been notified to this effect and are reporting their gross income received from this source of business on their regular tax returns. But in view of the fact that tax commissioners Fox and James had both ruled otherwise prior to the Alabama decision of *State* v. *Stein, supra,* the tax commissioner has taken the position that it would not be fair to backtax any of such taxpayers for years prior to 1942 for such taxes, and it is his opinion that the taxpayers who did make such payments when not required to do so by reason of the above mentioned rule and regulation are entitled to refund in order to place them on an equal basis with the taxpayers who did not pay on the commissions earned from interstate transactions carried on by them. The tax commissioner's department, however, is prohibited from making the refund sought by claimant by reason of the prohibition contained in section 655 (1) (2a) of Michie's supplement of 1941 to the code of West Virginia. The tax commissioner is of opinion that the matter may be presented to the court of claims for its consideration, and if an award shall be made by this court the Legislature might make the necessary appropriation sought by claimant. The tax commissioner, therefore, concurs in the payment to claimant of the sum of $565.64. The assistant to the attorney general approved the claim as one that should be paid. An award for the said sum of $565.64 has been made in favor of claimant C. W. Liggett Company in the said sum of $565.64 by majority members of the court. However fair and just such award may appear to be under the facts disclosed by the record, I cannot concur therein.

I do not think that the case as presented by the record authorizes an award for reimbursement of the taxes paid by claimant. It is, I think, the law that where a tax is illegal the aid of a court of equity may be invoked to prevent the collection of said tax. The taxes which claimant seeks to have reimbursed were voluntarily paid. Such payments were not

compulsory. They were not made under duress. It is fundamental law that a tax paid voluntarily cannot be recovered back. There is no statute authorizing a refund of the taxes paid by claimant under the showing made by the record.

If claimant felt aggrieved on account of paying the taxes in question it had the right under the statute above set forth, within two years from the date of such payments, and not after that time, to apply to the official or department through which such taxes were paid for redress and relief authorized by such statute. It did not see fit to pursue such remedy. It is now barred by the statute of limitation from doing so. For such reason the tax commissioner could make no refund. For the same reason the court of claims is without jurisdiction to make an award in its favor.

(No. 183-S Claimant awarded $14.29.)

UNITED BROKERAGE COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent

Opinion filed October 29, 1942

CHARLES J. SCHUCK, Judge

The claimant, the United Brokerage Company, located at Clarksburg, West Virginia, seeks reimbursement in the sum of $14.29, which amount had heretofore been paid in various sums, beginning with the year 1922 and including the year 1925, in excess of its legal business and occupation tax, known as the gross sales tax, due and payable to the state for the period designated. A demand for refund of such excessive payments has heretofore been duly and legally made to the tax commissioner of the state of West Virginia, and this official, upon being

petitioned to requisition the auditor of the state for a warrant refunding the said amounts, refused the said petition on the grounds that there were no available funds out of which the said excessive payments could be paid.

The state tax commissioner recommends the refund of the excessive payments in the amount aforesaid and does not contest claimant's right to the said refund, but concurs in the claim for the aforesaid amount; and the claim is likewise approved for payment by the attorney general's office as one that should be submitted to the Legislature for proper appropriation and future payment. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of fourteen dollars twenty-nine cents ($14.29).

ROBERT L. BLAND, Judge, dissenting.

I respectfully dissent to the award made by majority members of the court in the above case for the reasons and upon the grounds set forth in my dissenting opinion filed *in re* claim No. 182-S, *C. W. Leggett Company* v. *State Tax Commissioner.*

(No. 184-S—Claimant awarded $570.91;
No. 185-S—Claimant awarded $603.79)

BLAIR WILLISON COMPANY, Inc., Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 29, 1942

CHARLES J. SCHUCK, Judge.

The claimant, the Blair Willison Company, Inc., located at Clarksburg, West Virginia, seeks reimbursement in the amounts of $570.91 and $603.79, which amounts had heretofore

been paid in various sums, beginning with the year 1934 and including the year 1936 for the first amount, and beginning with the year 1937 and including the year 1940 for the second amount, in excess of its legal business and occupation tax, known as the gross sales tax, due and payable to the state for the periods designated. A demand for refund of such excessive payments has heretofore been duly and legally made to the tax commissioner of the state of West Virginia, and this official, upon being petitioned to requisition the auditor of the state for a warrant refunding the said amounts, refused the said petition on the grounds that there were no available funds out of which the said excessive payments could be paid.

The state tax commissioner recommends the refund of the excessive payments in the amounts aforesaid and does not contest claimant's right to the said refund, but concurs in the claim for the aforesaid amounts; and the claim is likewise approved for payment by the attorney general's office as one that should be submitted to the Legislature for proper appropriation and future payment. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the amounts of five hundred and seventy dollars ninety-one cents ($570.91) and six hundred and three dollars seventy-nine cents ($603.79).

ROBERT L. BLAND, Judge, dissenting.

I respectfully dissent to the award made by majority members of the court in the above cases for the reasons and upon the grounds set forth in my dissenting opinion filed *in re* claim No. 182-S, *C. W. Leggett Company* v. *State Tax Commissioner.*

(No. 186-S—Claimant awarded $243.28.)

B. D. BAILEY & SONS, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 29, 1942.

CHARLES J. SCHUCK, Judge.

The claimant, B. D. Bailey & Sons, located at Clarksburg, West Virginia, seeks reimbursement in the sum of $243.28, which amount had heretofore been paid in various sums, beginning with the year 1926 and including the year 1936, in excess of its legal business and occupation tax, known as the gross sales tax, due and payable to the state for the period designated. A demand for refund of such excessive payments has heretofore been duly and legally made to the tax commissioner of the state of West Virginia, and this official, upon being petitioned to requisition the auditor of the state for a warrant refunding the said amounts, refused the said petition on the grounds that there were no available funds out of which the said excessive payments could be paid.

The state tax commissioner recommends the refund of the excessive payments in the amount aforesaid and does not contest claimant's right to the said refund, but concurs in the claim for the aforesaid amount; and the claim is likewise approved for payment by the attorney general's office as one that should be submitted to the Legislature for proper appropriation and future payment. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of two hundred and forty-three dollars twenty-eight cents ($243.28).

ROBERT L. BLAND, Judge, dissenting.

I respectfully dissent to the award made by majority members of the court in the above case for the reasons and upon the grounds set forth in my dissenting opinion filed *in re* claim No. 182-S, *C. W. Leggett Company* v. *State Tax Commissioner.*

(No. 187-S—Claimant awarded $692.32.)

ELLIOT BROKERAGE COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed October 29, 1942.

CHARLES J. SCHUCK, Judge.

The claimant, the Elliot Brokerage Company, located at Bluefield, West Virginia, seeks reimbursement in the sum of $692.32, which amount had heretofore been paid in various sums, beginning with the year 1937 and including the year 1940, in excess of its legal business and occupation tax, known as the gross sales tax, due and payable to the state for the period designated. A demand for refund of such excessive payments has heretofore been duly and legally made to the tax commissioner of the state of West Virginia, and this official, upon being petitioned to requisition the auditor of the state for a warrant refunding the said amounts, refused the said petition on the grounds that there were no available funds out of which the said excessive payments could be paid.

The state tax commissioner recommends the refund of the excessive payments in the amount aforesaid and does not contest claimant's right to the said refund, but concurs in the claim for the aforesaid amount; and the claim is likewise approved for payment by the attorney general's office as one that should be submitted to the Legislature for proper appropriation and future payment. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim and an award is made accordingly in the sum of six hundred and ninety-two dollars thirty-two cents ($692.32).

ROBERT L. BLAND, Judge, dissenting.

I respectfully dissent to the award made by majority members of the court in the above case for the reasons and upon the grounds set forth in my dissenting opinion filed *in re* claim No. 182-S, *C. W. Leggett Company* v. *State Tax Commissioner*.

(No. 148—Walter Lee Kincaid, infant, awarded $150.00; No. 149—Betty Jane Kincaid, infant, awarded $500.00; No. 149-a—E. W. Kincaid awarded $50.00.)

WALTER LEE KINCAID, Infant, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

BETTY JANE KINCAID, Infant, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

E. W. KINCAID, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

The State Road Commission is charged with the duty of making all bridges under its control and authority reasonably safe for travel thereon by day or by night, and when it fails in this respect, the state will be held liable.

Appearances:

Messrs. *Lilly & Lilly,* (*A. A. Lilly,* Esq.) for the claimants;

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

CHARLES J. SCHUCK, Judge.

The two infant claimants herein maintain that on or about the 25th day of July 1941, while crossing a bridge over Cabin creek, in a Ford roadster, at about 10:00 at night on the day in question, they were injured by reason of the said bridge being out of repair, the floor boards thereon loose, part of the railings torn off, and the bridge generally in such a bad condition as to make it dangerous for travel. The claimants in question had been over the bridge previously that evening,

but the evidence does not reveal as to whether or not either or both of them had occasion to notice the dilapidated and dangerous condition of the bridge at the time of the first crossing. The bridge was part of the main county or state road leading from the town of Decota to Miami, and from Miami down to Cabin creek junction, and was the only outlet for persons obliged to travel the highway in question and going to the places or towns mentioned. That the bridge was in a highly dangerous condition at the time of the accident is plainly shown and revealed by the exhibits in question, and those charged with the duty of keeping the bridge in reasonable condition for use by pedestrians and autoists were negligent in this respect, and the bridge dangerous for general use. The fact is that there was a hole in part of the traveled portion of the bridge and travelers in vehicles or automobiles over and upon the said bridge, if aware of this condition, were obliged to keep to the left side thereof in order to avoid an accident. Since the claimants in question had only crossed the bridge once before, and that on the same day that the accident happened, they cannot, under the evidence, be charged with negligence in attempting to cross the bridge at the time in question when the accident to them happened. From the evidence, it seems that one of the loose boards on the bridge turned up, catching the running board of the automobile and being lodged against the wheel thereof, by reason of which the car was stopped suddenly, and the occupants thereof thrown against and through the windshield, receiving severe cuts to the head of both, and to the face of the said Betty Kincaid. They were shortly after taken to the hospital, where their wounds were treated, and then were returned home, and so far as the evidence reveals, required very little further medical attention. It is true that the said Betty Kincaid still bears a scar on her cheek caused by the injuries inflicted when she was undoubtedly cut by the ragged ends of the windshield. The claimant, Walter Lee Kincaid, suffered a cut of approximately one and one-half inches on his head, but the wound was of such a nature that it required only to be taped, so far as the treatment at the hospital was concerned. The claim is made that the said claimant, Walter Lee Kincaid, suffers an eye affliction by

reason of the accident, but substantial testimony is not offered to sustain this contention. We feel that the injuries to the said claimant, Walter Lee Kincaid, were comparatively minor, and of no lasting effect, and we make an award of $150.00 to him.

In the case of Betty Jane Kincaid, we feel that an award of $500.00 is proper for the injuries sustained, and in view of the fact that no permanent injuries were sustained by her, and that we feel that the scar in question on her cheek will eventually disappear or become unnoticeable, that the award made to her is proper and ample. Under the circumstances, the awards in the amounts of one hundred and fifty dollars ($150.00) for the claimant, Walter Lee Kincaid, and five hundred dollars ($500.00) for Betty Jane Kincaid, respectively, will be recommended to the Legislature for payment.

The infants, Walter Lee Kincaid and Betty Jane Kincaid, were driving and riding in an automobile owned by E. W. Kincaid, and the damage to the said automobile by reason of the accident in question amounted to $93.50. Of this amount the said claimant, E. W. Kincaid, has been paid $43.59 by the Insurance Company that carried the insurance on said automobile, and is entitled to the remainder of the said estimated damages, for which said amount, to-wit fifty dollars ($50.00), an award is made to him.

(No. 199-S—claimant awarded $3.00.)

R. L. HALSEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

CHARLES J. SCHUCK, Judge.

The claimant, R. L. Halsey, seeks reimbursement in the sum of $3.00, which is claimed as damages for injuries to his car, caused by state road truck 1030-16, on or about the 24th day of September 1942. It appears that the said state road truck, while being driven at and near an intersection of certain streets in Welch, McDowell county, collided with respondent's car, and causing the damages in question.

So far as the investigation shows, there was no negligence on the part of the claimant.

The state road commission does not contest the claimant's right to an award for the said amount, but concurs in the claim for that amount; and the claim is approved by the assistant attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of three dollars ($3.00).

(No. 200-S—Claimant awarded $90.43.)

EVAN KOLAR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

CHARLES J. SCHUCK, Judge.

Claimant Evan Kolar seeks reimbursement in the sum of $90.43, which amount he was obliged to pay for damages to his car, caused by the tail gate of a truck operated by the state road commission swinging over and against the car of claimant, and causing considerable damage to the various parts of claimant's car. It appears that the said tail gate on the state road truck dropped off or became loose from the hooks to which it was fastened, and thereby swung into the path of the claimant's car, causing the damage in question. No negligence is found on the part of the claimant.

The state road commission does not contest the claimant's right to an award in the said amount, but concurs in the award for that amount; and the claim is approved by the assistant attorney general as one that should be paid. We have carefully considered the case upon the record submitted and are of the opinion that it should be entered as an approved claim, and an award is made accordingly in the sum of ninety dollars, forty-three cents ($90.43).

(No. 202-S—Claimant awarded $25.28.)

MRS. E. C. KLAGES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

WALTER M. ELSWICK, Judge.

In the summer of 1942 state road commission employees were engaged in blasting on project 3544-A in Marshall county, West Virginia, near the home of claimant. As a result of evercharging the loads, the claimant suffered the following losses to her property; 8 broken windows $16.78; 1 window blind $1.50; 5 broken glasses in chicken house $5.00; 1 door to coal house $2.00; or a total loss of $25.28 on which claim is based.

The claim was submitted to the court by the state road commission under the shortened procedure and considered informally by the court. The attorney general concurs and approves payment of the claim.

We, therefore, recommend payment and make an award to claimant, Mrs. E. C. Klages, for the sum of twenty-five dollars and twenty-eight cents ($25.28.)

(No. 204-S—Claimant awarded $50.00.)

MINNIE BROYLES, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed November 17, 1942

WALTER M. ELSWICK, Judge.

A right-of-way for a state road was obtained from claimant by the state road commission through her lands in Monroe county, West Virginia,, with the agreement that the state road commission would construct a fence between her pasture and the new state road commission bridge across Hands creek in Monroe county. The fence was not constructed in accordance with the agreement and claimant's yearling calf ran astray from its pasture to the bridge and ate red lead paint off the bridge. The yearling was fatally poisoned from the lead paint and claimant's loss amounted to the sum of $50.00, for which claim was submitted.

The state road commission submitted the claim to the court under the shortened procedure, and the claim was considered informally by the court. The attorney general concurs in and approves payment of the claim.

We, therefore, recommend that the claimant, Mrs. Minnie Broyles, be paid the sum of fifty dollars ($50.00), and make an award to her for said sum.

(No. 206-S—Claimant awarded $5.00.)

DAVID COX, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

ROBERT L. BLAND, Judge.

On the morning of October 1, 1942, a 1934 Dodge motor vehicle, bearing West Virginia license No. 60-050, owned by claimant David Cox of Anmoore, West Virginia, was parked on the state controlled road at Anmoore. State road commission truck No. 430-15, operated by Clarence Edwards, was driven into a private driveway and then backed across the road to a spreader and negligently collided with claimant's car damaging the left rear corner of its body. The road commission admits that the driver of the state truck was at fault and recommends an award of $5.00 in settlement of the damage done to claimant's vehicle, which amount claimant agrees to accept in full settlement of his claim, and which amount is approved for payment by the special assistant to the attorney general.

An award is therefore made in favor of claimant David Cox for the said sum of five dollars ($5.00).

(No. 207-S—Claimant awarded $449.60.)

A. C. RIGGS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 17, 1942

ROBERT L. BLAND, Judge.

On the afternoon of July 14, 1942, claimant A. C. Riggs, of Bearsville, Tyler county, West Virginia, was riding horseback,

traveling south on the Bearsville secondary road in Tyler county, West Virginia, accompanied by his son, O. H. Riggs, who, was walking alongside of him. While crossing a 10′ x 16′ by 2″ wooden bridge one and one-eighth miles south of Bearsville which spans a small ravine which empties into Sancho creek, claimant's horse broke through the floor, throwing him and breaking his right leg just above the ankle. Claimant was removed to the Sistersville general hospital at Sistersville, West Virginia, where he received treatment for eighty-two days for the injury sustained by him in consequence of the accident. Upon investigation of the accident made by Joe C. Yoho, safety director for Tyler county, it was found that the boards of the bridge where the accident occurred were rotten and unsafe to hold the traffic crossing the bridge. The floor was covered by three inches of clay, which prevented travelers over the bridge from discovering the unsafe condition of its floor. As a result of the accident claimant incurred the following expenses: 82 days in Sistersville general hospital at $3.00 per day, $246.00; operating room, $10.00; dressing, $3.00; ultra violet ray treatment, $5.00; x-ray treatments at $7.50 per treatment, $45.00; plaster cast, $5.00; amount of bill of E. L. Thrasher, M. D., $135.00, aggregating $449.00, which said several amounts were paid by claimant. The state road commission recommends an award to claimant for this amount and assigns as a reason for such recommendation the unsafe condition of the bridge decking, due to negligence on the part of state road commission employees. The assistant to the attorney general approves the payment of the claim. Photographs of the defective bridge made a part of the record fully justify the concurrence of the road commission in the claim filed and the approval of payment thereof by the assistant to the attorney general.

An award is made in favor of claimant A. C. Riggs for the sum of four hundred forty-nine dollars ($449.00).

(No. 179—Claim denied.)

R. L. JAMES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 21, 1942.

The court of claims will not make an award in a case where the evidence shows that the state road commission has used reasonable care and diligence in the maintenance of a state controlled highway on which claimant wrecked his motor vehicle by colliding with a large stone or boulder that had become dislodged from a cliff or hillside and fallen on said highway the night preceding or early morning of such accident, and in which it further appears from the evidence that the employees of the state road commission had no knowledge of the likelihood of such happening.

Claimant, in his own behalf;

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

ROBERT L. BLAND, Judge.

In this case claimant, R. L. James, seeks to obtain an award to reimburse himself for money paid for the repair of a 1941 Ford pickup truck after it had collided with a large stone or boulder which had fallen from a cliff or hillside on state route No. 21 in Wirt county, West Virginia, about seven-tenths of a mile from the Wood - Wirt county line. The accident occurred on Limestone hill on said road on Monday, June 21, 1942, at about 5:30 o'clock A. M. Mr. James, who is a welder by occupation and employed by the Carbon Carbide Chemicals Corporation in the city of Charleston, was returning to work after having spent the weekend at his home at Slate, a small village in Wood county.

It had rained throughout Sunday night and on Monday morning the road was wet and it was still drizzling rain and very foggy. He was driving at the rate of forty miles per hour and just after rounding a curve on Limestone hill and approximately from one hundred to one hundred and fifty yards from said curve a large stone or boulder had become dislodged from

a ledge of rock on a cliff on one side of the road. It appears from the evidence that claimant observed this obstruction in the road but thought that he would be able to go around it successfully and attempted to do so, but collided with the stone or boulder and wrecked his car, although the evidence shows that there was sufficient clearance on the right of the obstruction to pass around it in safety and avoid the collision. He is of opinion that the road commission was negligent in not removing the obstruction from the road and for that reason that he is entitled to an award for $120.50, which amount he was obliged to pay in order to have his vehicle repaired. It appears from the evidence that claimant was quite familiar with the road having been in the habit of traveling it every weekend for eighteen months past. It also appears that the state road commission had used reasonable care and diligence in maintaining the road at the point of the accident. It is shown that about two weeks previous to the accident a crew of road commission employees had made a thorough investigation of the conditions of the ledge from which the stone had apparently fallen and had removed all loose rock from the hillside, and that everything had been done at that time, that it was possible to do, to prevent the falling of rocks from the embankment side of the road. It further appears from the evidence that on Friday preceding the occurrence of the accident on Monday, a further investigation of the condition of the hillside had been made and that there was at that time nothing to indicate the likelihood of rocks falling onto the roadside. We are impressed by the fact that the road commission had been diligent in its efforts to make the road safe for the traveling public and that the accident which occurred to claimant's truck was in no respect attributable to any negligence on its part.

We deem it unnecessary to further detail the evidence heard upon the hearing of the claim, all of which has been carefully examined and considered, and under all of the circumstances disclosed by the record we are of opinion that there is no liability on the part of the state to pay the claim contended for by Mr. James.

The claim is denied and an order will be entered accordingly.

(No. 188 and No. 189—Claims denied.)

FRED HARVEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

ROSA HARVEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 21, 1942.

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

Appearances:

Claimants, *Fred Harvey* and *Rosa Harvey* in their own behalf;

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

WALTER M. ELSWICK, Judge.

The Claimants, Fred Harvey and Rosa Harvey, were traveling in a truck on route No. 80 leading from their home in Mingo county, West Virginia, in the direction of Gilbert, West Virginia, on Sunday, December 14, 1941, at about seven o'clock P. M., when said truck struck a large stone or boulder lying on their right side of the said highway. It appears from the evidence that this boulder had fallen from the mountainside sometime about midnight on the previous night. No report

was made to any of the state road commission authorities by anyone until the day following the mishap. The boulder was about five feet long and forty inches thick (record p. 78). It had broken off the mountainside above a twelve inch seam of coal. The rock had laid above this seam of coal about 15 to 25 feet above the road surface and had broken out lengthwise with the highway. There had not been any appreciable falling of rocks in this particular vicinity prior to this time. (record pp. 62 and 77). There was a clearance of about eight feet on claimant's left side of the highway including the berm (record p. 71); of such width as to enable vehicles to pass (record p. 79). The mishap occurred on a misty, foggy night at a point where claimants were approaching near another vehicle coming from the opposite direction on the highway. The driver of the other vehicle had come to a stop at the time of the mishap, waiting, as he stated, for claimants' vehicle to pass. The driver of the other vehicle testified that he had not seen the rock or slide until claimants' vehicle had struck same. Fred Harvey, the owner and operator of the vehicle in which claimants were riding testified that he did not see the rock until he was "thirty or forty feet" from the rock, that he was traveling up grade at from 15 to 20 miles per hour, that he had traveled the same road almost daily, that ordinarily he would have had a vision on the highway at the scene of the mishap "a few hundred feet" back from this rock, "one hundred feet" on a clear night. From the first curve down the road from which claimants had traveled to the "slide" where the rock was lying one witness stated that it measured a distance of 800 feet. (Record p. 80).

Fred Harvey's truck was damaged considerably from the collision and Rosa Harvey, his mother, received painful injuries on the face and head. This injury to Rosa Harvey has left the nasal bone on the left side distorted and the septum seems to be out of line also. She still has tenderness in the left nasal bone and over the left frontal sinus, and complains of bad vision in both eyes since injury. She is now past 72 years of age.

From the evidence, it appears that the state road employees made routine examinations of the highway and had not received any warning of the likelihood of this rock falling, from such examinations or otherwise, and had no knowledge of the rock being in the highway until the day after the mishap. There was a conflict in the testimony of witnesses as to whether the slide and stone was removed on Monday or Tuesday after the mishap but we fail to see that this in anyway pertained to the cause of the collision. We fail to find any evidence of negligence on the part of the state road commission employees, in the record, or that they had notice of the possibility of the stone in question falling to the highway, or that they could have known of the possibility of the said stone slipping or falling by an examination of the embankment at the scene of the mishap. The state is not a guarantor of safety to the traveling public, since, if it had such burden placed upon it, the state as a whole, might soon be bankrupt and unable to function as a *commonwealth* or as a *body politic*. (See holding in Claim of *L. C. Clark* No. 117). Considering all facts and circumstances in the case, we deny an award.

(No. 159—Claim denied.)

FOREST RIDDLE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 21, 1942.

Where it appears from the evidence that there was some question as to whether the state road commission was negligent when a guard on one of its prison camps was struck by a passing motorist, but the Legislature and the state road commission has resolved all doubt in favor of the employee injured by reason of the state workmen's compensation not being in force at the time and has heretofore made generous awards to claimant in such manner and under such circumstances at the time as would appear to have been full and adequate compensation, an award will be denied.

Appearances:

Bruce Ferrell, attorney for claimant;

S. B. Chilton, as counsel for the state road commission, and *Eston B. Stephenson*, special assistant to the Attorney General for the state.

WALTER M. ELSWICK, Judge.

On April 17, 1936, Forrest Riddle, the claimant was employed by the state road commission as a guard for prisoners who were working on a state road near Harmon in Randolph county, West Virginia. About one o'clock in the afternoon of that day, the claimant and two other guards were marching about 65 prisoners along the highway back from their camp to their work when he was struck and knocked down by a pickup truck owned and operated by a Mrs. E. H. Cooper. The truck struck the claimant from behind and ran over his body across his stomach. The claimant testified that he and the prisoners were walking on the left side of the road

facing traffic, that the prisoners were walking two abreast on their left side of the road, that he was at the head of the line, that he "must have been ten or twelve feet from the center line of the road," that is to say of the left center o fthe road. The witness Mrs. E. H. Cooper testified that the prisoners were walking on the left of the highway and that claimant and the other guard were on the right. She testified that when she came to the first line of prisoners that she blew her horn and that when she came near to Riddle she blew her horn again, and just as she blew it the last time Mr. Riddle, the claimant, stepped in front of her truck. Her testimony conflicts with that of the claimant in that she states that Riddle was on the right side of the road while he states that he was on the left side of the road. The claimant testified that just as the truck hit him, the horn blew but that he had no warning prior to that time. Mrs. Cooper had made one trip each day on this road prior to the time of claimant's injury and knew of the construction work being done. She had a vision of from 150 to 200 yards ahead before approaching claimant.

The claimant received the following injuries; namely, fracture of the right tibia, fracture and dislocation of the right ankle, fracture of the left tibia, fracture of the left fibula and internal injuries. He was taken by an ambulance to the city hospital at Elkins, West Virginia, and remained at the hospital for treatment for 42 days and returned home on June 9, 1936. His hospital bill for this period amounted to $395.00. He recovered so that he was able to drive an automobile sometime after he had returned home from the hospital and during the fall of that year. Claimant is now unable to walk and is confined to a wheel chair. His legs are cramped and cannot be straightened. He uses morphine daily but there was no medical testimony produced to show its connection with the injuries sustained when the truck struck him. Claimant employed counsel and instituted a suit for damages against the said Mrs. E. H. Cooper for the said injuries sustained by reason of being struck by her truck, which suit was compromised and settled for the sum of $3,750.00. By chapter one, page 62 of the general appropriations act of the 1937 Legislature the

sum of $899.01 was appropriated by the Legislature to Forrest Riddle for payment of hospital bills, nursing, etc., which sum was paid by the state of West Virginia, and by acts of the Legislature, 1939, chapter 6 of the general appropriations act the sum of $720.00 was appropriated to pay to him for injujries received while guarding prisoners, which was paid in 24 monthly installments of $30.00 each. It also appears that the claimant was carried on the pay roll from the 25th day of April 1936 through the 28th day of April 1937 and paid wages amounting to the sum of $734.66. All these payments make a total of $2,353.67 paid to and on his behalf by the state of West Virginia by reason of said injuries.

The claimant contends that the state road commission was negligent by failing to have a flagman behind and in front of the column of prisoners and by not having the roadway properly posted. With the three guards present on the usual march to and from work we would be constrained to have doubt on this contention if compensation had not been awarded owing to all the circumstances of the case. It was apparently a clear day with good vision, on a gravel based, comparatively level, roadway. It seems clear that the claimant had a clear cut cause of action against Mrs. E. H. Cooper the operator of the truck which struck him. The same was compromised by claimant. It seems that the state road commission, owing to the fact that at the time claimant was injured the state workmen's compensation was not in force, endeavored to resolve all doubt in favor of claimant, and paid him one year's salary and the Legislature did not intend these appropriations to be in full settlement of claimant's claim, especially in view of his right of action against Mrs. Cooper, since claimant had recovered sufficiently to drive an automobile in the fall of 1936. We are of the opinion from all the evidence and circumstances in the record in the case that the claimant, too, consented to and intended same to be in full settlement, in any event. We are not in position to say that the state road commission or prison authorities were negligent, from the evidence. We therefore deny an award.

(No. 177—Alfred D. Roberts, II, awarded $400.00; No. 178—Alfred D. Roberts, III, infant, awarded $1000.00.)

ALFRED D. ROBERTS, II., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

ALFRED D. ROBERTS, III., Infant, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 23, 1942

Where it appears from the evidence that a boy 15 years of age while riding a bicycle, is injured in a collision with a state road commission truck running on his side of the street and blocking his pathway which was clear when he entered the street while said truck is in the act of passing another truck and it is found from all the facts and circumstances in evidence in the case that the truck driver was negligent in undertaking to pass another vehicle at the scene of the collision, awards will be made to the boy to compensate him for the injuries sustained, and to the father for expenses incurred and loss of his son's services during minority.

Appearances:

A. Garnett Thompson, Esq., for the claimants;

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

WALTER M. ELSWICK, Judge.

On July 27, 1942, Alfred D. Roberts, III, who was approximately 15 years of age, received the personal injuries hereinafter enumerated while riding on a bicycle on Virginia street west, in the city of Charleston, West Virginia, when his bicycle collided with a state road commission truck. It appears from the evidence that he was returning home from work and had proceeded west on Virginia street until he came to a children's

playground east of Park avenue where he drove up on to the sidewalk for the purpose, as he testified, of seeing who was playing. When he did not find anything of interest to him going on at the playground site, he again started on his journey home in a westwardly direction. Near the southwest corner of the playground is a 13 foot driveway entering the north side of Virginia street, and 29 feet west of said driveway is a 41 foot driveway. A pickup truck was parked facing east along the north side of Virginia street in between the two driveways with its rear near to the 41 foot driveway. A Packard car was parked, facing west, along the north side of Virginia street about 20 feet west of the pickup truck with its rear end extending with a slight angle out into Virginia street. Another car, owned by Ralph Waybright, was parked facing east on the south side of Virginia street about opposite the Packard car.

The claimant, Alfred D. Roberts, III., testified that when he left the view of the said playground he proceeded on his bicycle on the sidewalk until he came to the said 13 foot driveway and looked back of him to see if any cars were coming the way he was going, and then looked back in front to make sure that there wasn't anything in front of him. (Record p. 32). He did see a truck coming east on his left of Virginia street (record p. 29). He then turned off the sidewalk on the 13 foot driveway, as he stated, and proceeded down Virginia street until he was by the side of the pickup truck, when his memory fails to recall anything that happened afterward at the scene of the collision. It appears from the evidence, that he had proceeded on down Virginia street to a point opposite the rear end of the Packard car when his bicycle collided with the state road truck at a point on its side near the rear end of its body. The boy was knocked about 15 to 20 feet and fell with his legs extending under the rear bumper of the parked pickup truck. His bicycle landed on the sidewalk east of the Packard car. At the time of the collision, Alfred D. Roberts, III., was a boy lacking approximately 12 days of being 15 years of age, he having been born August 8, 1927.

The witness, Ralph Waybright, testified that he started to get into his car which was parked across the street from the Packard car; that as he started to open the door to his car he saw two trucks coming east up Virginia street, one passing the other, thus making four cars "side by side" on the street, that is to say, the Packard car on the opposite side of the street from him, the two trucks, one passing the other, and his car. The truck on his side was a state road truck on which was loaded an air compressor, and was coming, within about 12 inches, close to him; so close that he practically jumped on his running board. As he turned he saw the boy on the sidewalk on the bicycle, but had to look out for his own safety. This truck nearest to him was "driving pretty fast" (record p. 55), and the other truck "had picked up pretty good speed to get past" the one nearest to him. He didn't see the boy hit, for he had his head turned, but heard the truck hit him and could see him where the boy fell. The truck which hit the boy was on the boy's right side of the street farthest from Waybright, the one which was in the act of passing the other state truck. Virginia street has an approximate width of 39 feet at the point where the collision took place. The bicycle had made a mark on the street about 12 inches out in the street from the rear end or side of the parked Packard car. Another witness, E. H. Irwin, was standing in the middle of the street about 150 feet west, watching a driver back a truck into a driveway and heard a tin can fall off of a truck and turned around and saw this state truck passing another truck, which truck passing the other "was making pretty good speed . . . wasn't losing any time" (record p. 71). There was a distance of about 6 feet in between the two moving trucks. The two trucks had already passed Park avenue and when the falling of the tin can attracted his attention, the two trucks were then side by side to the other. The eastern intersection of Park avenue is about 76 feet from the point of collision. The state contends that the boy drove off of the sidewalk on the 41 foot driveway behind the Packard car. One of the witnesses, Mr. E. L. Hart, was sitting in his office facing Virginia street directly in front of the space on this driveway left vacant between the parked pickup truck and the Packard car.

The first thing that he heard was the impact of the bicycle and truck. He could see the boy where he landed after being struck, through his doorway. The boy would have had to pass his doorway on the sidewalk if he had turned in the street at this point, and if such had been the case, it is highly probable that the witness, Hart, would have seen or heard the boy pass his door.

Mr. Moles, the driver of the truck which hit the boy, testified that he did not see him until he came around the back end of the Packard car, when he, Moles, turned to the right and the boy struck the truck bed. Moles said he was looking at the truck he was passing to keep from hitting it. An occupant in the driver's seat of the Moles truck did see the boy come off the sidewalk and couldn't say positively whether he came off the 13 foot sidewalk or the 41 foot sidewalk, but that he thought the boy came off of the 13 foot sidewalk (record p. 150). Moles could not remember sounding his horn when passing the truck and none of the witnesses heard a horn. Moles had followed the other truck all the way from their work on the Sissonville road, following the Sissonville road to Washington street, then up Washington street and turned out to Virginia street. From the evidence, it appears that this road had been a narrow one until they got to Virginia street. The employees were always in a hurry to get home (record p. 126). They had quit work about 5 minutes early on that day (record p. 121). The driver and the accupant of his truck testified that he was traveling about 25 miles per hour.

From the evidence, it appears that Alfred D. Roberts, III., received the following injuries from the collision, namely:

He received a very severe flesh wound over biceps area of the left upper arm and a rather more severe wound across the left clavicle area, (that is to say the left collar bone) extending vertically, with the collar bone severed and either pulled apart or a piece of the bone missing. He also received a laceration on his forehead, over his left eye, which leaves a scar which according to medical testimony will remain for

the rest of his life. When taken to the hospital the boy was also suffering from shock. He was in a semi-conscious condition, quite pale with pulse rapid, and suffering from what is technically termed traumatic shock, from severe traumatic injuries (record p. 104). He was admitted to the Staats hospital on July 27, 1942 and discharged on August 7, 1942. Since then, he has regularly visited Dr. Anderson for observation and treatment. The x-rays showed a fracture of the left clavicle or left collar bone, and that there was apparently some part of that clavicle missing, that is to say, there was a compound fracture of the left clavicle. There was also an extensive wound of the left arm.

From an x-ray examination made on October 20, 1942, it showed that there is an excessive scar tissue over the fractured clavicle, which is called keloid type, that is, a heavy, dense, red scar, a scar which is an overgrowth of skin. This scar is about 3½ inches long and went from front to back, right over the middle of the left collar bone. There is another scare on the left upper arm which is "L" shaped, one branch of the "L" is about one-half inch long and the other running straight down the arm is two inches long. That is also a deep, dense, red, overgrown scar. Examination of the shoulder at the time showed some limitation of what is called abduction, that is, bringing the arm up from the side, and also some limitation of what is called internal rotation, that is, he cannot bring the arm up the back as far as he can the other one. And there was, at said last examination, definite tenderness and pain in the place of the fracture, in the line of the fracture, in the point of the fracture when pressure was placed on the collar bone. At that time the bone had not entirely grown across the line of the fracture, in other words, the bone union is not entirely firm, either by x-ray or by examination, as indicated by the pain when the physician pressed on the outer end of the collar bone. While he is still under the care of his physician, reliance is made upon nature to perfect a firm union. It is problematical as to whether the growth of the callus formation will take care of the situation. If it does not proceed sufficiently to give a strong union at the point of fracture, then the

procedure will be to operate on the arm and put in a bone graft across the line of fracture. Such an operation would have about a seventy-five per cent chance of being successful. If the bone grows firmly together, his physician is of the opinion that the boy will have a very good arm. If the operation is not successful, he would continue to have a definite weakness of that extremity, if he didn't have a firm bony union. The boy has about three chances out of five of escaping an operation today.

From all the facts and circumstances in the record in the case, we are of the opinion that the truck driver was negligent in undertaking to pass the other truck at the congested point where the collision took place. It is contended by the state that the boy was negligent in turning into the street off of the sidewalk, but from all of the evidence, in the record, as well as a view of the premises by the court, we are of the opinion that when the boy entered Virginia street, that his side of the street was clear, that he had the right to assume that it would remain free and unobstructed, but that when the truck undertook to, and did pass the other truck at the intersection of Park avenue along these driveways where cars were parked on either side he, in effect, completely obstructed the boy's side of the street and that the boy was not left in position to avoid the collision. Then, too, the driver knew the street, drove over it almost daily, and knew that the playground was in front of him.

However, none of the witnesses present or in the vicinity of the collision could give a clear version of how the collision took place, as to where the boy was when the one truck passed the other, or as to whether the boy could have seen this truck coming on his side of the street, which was passing the other truck, in time to have stopped to avoid the collision. He was not certain that he could not have seen it when riding into the street before he passed the parked truck. We therefore feel that he should be chargeable with some negligence such as to induce us to reduce the amount of the award that we might have otherwise found.

From all the facts and mitigating circumstances in the record in the case we are of the opinion that awards should be made to each of the claimants. The father's claim is based upon loss of bicycle $20.00; Dr. Anderson's bill $125.00; Dr. Bailey $10.00; ambulance $5.00; x-rays $7.50; Staats hospital $138.50, as well as loss of the boy's services and medical attention that may be required. We are of an opinion from the evidence that an award of $400.00 to the father, Alfred D. Roberts II, would be fair and reasonable, and that an award to the boy, Alfred D. Roberts III, in the sum of $1000.00 would be fair and reasonable for his injuries, suffering, and handicaps for the present and future.

We therefore recommend an award to Alfred D. Roberts II, in the sum of four hundred dollars ($400.00), and to Alfred D. Roberts III, the sum of one thousand dollars ($1000.00), and an order will be entered accordingly.

(No. 106—Claimant awarded $9,750.00.)

CONSOLIDATED ENGINEERING COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 23, 1942

Where it appears from the evidence that by reason of the lack of available data it is impossible to take actual measurements of excavation of material in its original position under a contract as is the usual and customary practice when such data is available, the court will consider evidence of estimates taken from measurements of fills made from the excavation and allow a percentage for shrinkage based upon the nature of the material in the fill, the manner of rolling or filling same, the time elapsed before final survey and all surrounding facts and circumstances in an effort to obtain the actual measurements of excavations made, and base an award thereon accordingly.

Appearances:

Austin V. Wood, Esq., *T. C. Townsend,* Esq., and *Joseph Thomas,* Esq., for the Claimant;

Eston B. Stephenson, Esq., special assistant to the Attorney General, and *Arden Trickett,* Esq., for the state.

WALTER M. ELSWICK, Judge.

On the 23rd day of September 1932, the state road commission entered into a contract with claimant, Consolidated Engineering Company, a corporation, for certain excavation, hauling and filling in the construction of what is now known as route No. 2 immediately south of Moundsville in Marshall county, West Virginia, and more particularly designated as Round Bottom hill, Moundsville road, project No. E-184-C. Claimant started work on the project on October 10, 1932 and completed same on November 28, 1934.

The work consisted of excavation, hauling and filling through a rugged, mountainous locality. The surface of the mountainside was irregular and the slope varied. This excavation was made of the mountainside above the Baltimore and Ohio Railroad tracks, which tracks and roadway run parallel with the mountain.

It appears from the evidence that the right-of-way for this road was surveyed in April 1928. At this time the engineers for the state road commission took cross-sections or laid down a base line with stakes approximately fifty feet apart along the ditch line of the railway track. No additional surveys of the topography of the mountainside or slope were made until after the excavations were completed.

The terms of payment for excavation and hauling under the contract were: Unclassified excavation was to be paid for at the rate of 34 cents per cubic yard dug. Overhaul consisting of a measure for each cubic yard per 100 feet hauled a greater distance than 1000 feet was to be paid at a price of one-fourth cent per station yard. Paragraph 12, page 6 of the contract provided that the certificate of estimates of the engineer shall state, from actual measurements, the whole amount of work done by the contractor. Section 74 subsection "a" of the specifications, entitled "basis to pay" provides that the work shall be paid for at the contract unit price per cubic yard of excavation measured in its original position, excavated and deposited in accordance with the specifications.

After the excavations were made the state road commission by its engineers in 1935 undertook to ascertain the amount of excavation by running cross-sections in the cut in accordance with the purported original base line run by the survey in 1928. From the evidence it appears that the usual and customary method to obtain the amount of excavation made is from measurement in the cut based upon the preliminary survey, but from good engineering practice in order to do so in a practical manner in a rugged and irregular country like the one in question it is necessary to survey the topography of the surface within a reasonable time before the excavation and to survey the cut within a reasonable time after the excavation is made.

From all the facts and circumstances in evidence in this case, it appears that the surveying was not done in that way in this case.

It further appears from the evidence in this case that the original survey made in 1928, nearly five years before the excavation, was inaccurate and insufficient to enable the engineers to use same as a basis of obtaining actual measurements of the whole amount of the work done. For it appears that at the request of the claimant's representatives the engineers undertook to take cross-sections of the cut at intervals of less than 50 feet on the original base line and it was impossible to make the majority of those taken to close. Some of these cross-sections failed to close with living monuments (record pp. 45-47). For a distance of approximately 8800 lineal feet along the project running from the south to the north between station 437 plus 50 to station 525 plus 50, it appears that at least a total of 478 separate cross-sections were run, and that of this number 312 were so defective in closing with the original surface as taken from the old survey that they were not used in making calculations of the measurement of the excavation. Of the remaining 156 cross-sections used in making calculations 105 or approximately two-thirds of them had errors or discrepancies shown on them. (Record p. 87). It appears that the engineers in calculating the measurements from these 156 cross-sections used undertook to resolve in favor of claimant certain measurements in some of the 105 cross-sections used which had errors and discrepancies. But even then it does not appear that they could arrive at actual measurements of the excavations made, for after they went back for re-checks on these cross-sections it was found that they could not be made to close with the purported survey of 1928 made of the original ground surface. Therefore, not having accurate measurements of the original ground surface immediately prior to the time of the excavations they could not arrive at an actual measurement of the excavation made even though these 156 cross-sections used had been taken at sufficient intervals to calculate measurement of a slope with a regular surface.

Although the excavation was completed on November 28, 1934, final cross-sections were not completed until about April

1935. The engineers in making said final survey after the work was completed had to use the old survey made in 1928 with stations fifty feet apart. They then endeavored to take cross-sections at closer intervals, at the request of claimant, as close as ten feet or less. Forced to use their old survey with stations 50 feet apart they interpolated in between to get the original ground surface to be taken in the calculation from the cut surface on the excavated section. This could have been done more or less successfully if the original survey and final survey had been accurate. They were then in position to re-check the final survey of the cut which they did and which was verified. They could not however re-check the original survey for the material had been removed. The interpolated cross-sections were so inaccurate and out of proportion with the survey of the cut as compared with the old survey that they could not be used. They were of no benefit in arriving at actual measurements of the work done. We can come to no other conclusion than that either the original survey was inaccurate or that there had been a material change in the contour of the hillside by slipping or slides between the time of the original survey and that of the excavation.

The question confronting us upon this inquiry is whether or not the claimant has been paid for the work done under its contract. The contract provides that this shall be arrived at by actual measurements. We are of the opinion that the claimant has shown by a preponderance of the evidence that the amount of actual excavation done, by measurement of the cut, would not be an actual measurement, since this cannot be done with any degree of certainty due to the failure of cross-sections of the cut taken from the final survey to close with the original survey within the bounds of tolerance by averages under all engineering practice. And of course it would seem that when 478 cross-sections are first reduced by 312 cross-sections discarded, and, out of the remaining 156 used, 105 cross-sections had errors or discrepancies, leaving only approximately 11% of those taken to be accurate, the law of averages would become more and more disrupted and out of proportion as a guide for actual measurements. It appears that there must have been a fundamental error in the original

survey of 1928 throughout this area excavated and that same could serve no purpose in the measurements of the cut.

While it is customary (and section 74, subsection "a" of the specifications support the customary practice) to use the actual measurement of the excavation in its original position, in arriving at estimates from these surveys, we do not have data available from which to obtain actual measurements of excavation in its original position. We find from the evidence that cross-section after cross-section on the 8800 lineal feet of excavation, where the bulk of the work was performed, failed to close. There must have been a fundamental error in the original survey or a material change in the topography or contour of the mountainside. The engineer who made the survey in 1928 stated that he took cross-sections at practically every fifty feet and didn't remember of taking any intermediate sections; that he took such sections every fifty feet "irregardless." Hence, his testimony doesn't enlighten us on the question of arriving at actual measurements of excavations dug. However, it is to be borne in mind this was an immense project, probably the largest one of its kind that the state ever considered at the time of the original survey.

Some of the heights of the cut in this excavation ran from a depth of 180 feet. The survey lines ran back in some instances at angles three or four hundred feet from the lower base line to the top of the excavation (record p. 206). In order to make the original survey it was necessary to use rope ladders which were anchored in some way to the steep hillside. The rodman would climb up on these ropes and clinging thereto take measurements. This original survey was completed in thirty days, while it took three months to complete the final survey, which was made after final excavations were completed. From the evidence it appears that this territory involved was steep, rugged with projections, indentations and ravines. It doesn't appear from the evidence that the original survey was made with the view of using the cross-sections at regular fifty foot intervals as a basis of taking final estimates or measurements on such an immense undertaking as contemplated at that time. It further appears from the evidence that

this mountainside from which excavations were made consisted chiefly of a formation of shale; that this formation when exposed to air and weathering conditions is subjejct to softening, and in due time crumbles and breaks causing slips and slides on the mountainside. Prior to the time of this excavation the B. & O Railway Company often had to remove large slides from its tracks coming down from this mountainside. These slides would sometimes overrun its tracks. (Record p. 117). This mountainside continues to have slides and sloughage falling into this cut. There being an interval of from four to eight years from the time that the original survey was made until surveys were made after excavation, we must necessarily conclude from the evidence, considering the nature of this mountainside before and after the excavation that there was a considerable change in the contour or topography of this area excavated so as to affect to a material extent the area through which claimant excavated.

It therefore appears that since we are not in position to say that actual measurements could be taken of the excavations of the material in its original position, it is necessary to look to and consider such other method as may enable us to ascertain as near as possible an estimate of the excavations from actual measurements of other data available. As justification for this procedure we find that the claimant did not know of the inaccuracies of the original survey, and that intermediate cross-sections had not been taken so as to enable the engineers to run cross-sections at closer intervals than regular fifty foot intervals, until after final survey was made and the excavation had been completed. (Record p. 73). Claimant does contend that after it started to work on the excavation, due to the regular slips and slides and change of the contour of the mountainside since the original survey, upon learning that the state road commission was not taking cross-sections in advance of its excavations, requested the inspector of the project and the then state road district engineer to take preliminary cross-sections prior to the excavation. It contends that these state road officials refused to do this and stated that the commission had no appropriation allotted for the purpose. The inspector and district engineer deny that this request was made, but we are of

the opinion that since the commission was relying upon the original survey made in 1928 it failed to maintain by a preponderance of the evidence that the old survey was accurate or otherwise furnished accurate and sufficient data upon which to base a final survey to enable them to estimate the actual measurements of excavation removed, and that an accurate survey furnishing data within the bounds of tolerance in making cross-sections close under engineering practice, should have been made available under its contract.

From the evidence it appears that at the request of claimant the engineers of the state road commission took cross-sections of the fill and disposal dump where the material excavated had been hauled and dumped. A survey of all disposal dumps had been made immediately prior to the filling. The final survey was taken after the project was completed, which was in some cases a year or more after the filling had been completed. (Record pp. 49 and 50). The disposal dumps were large in size, covered a lot of territory, and had to be kept in shape for the trucks to haul over them. To do this, a heavy bulldozer was used to pack the fill as the material was dumped. It further appears that after the fills were made there had been two floods in the Ohio river which completely inundated all of the fills. These floods washed out a part of the materials down the river. They also by the very nature of the shale content of the materials caused settlement of the fills before the final survey was made. A shrinkage factor in measuring such fills after a lapse of time and under the conditions involved must necessarily be considered in arriving at an estimate by measurements taken from fills. This particular material deposited in the fills contained what is known as colloids which make for a great deal of aeration in volume, depending upon the extent of moisture and how it is deposited. When it dries out it contracts and shrinks like a mud puddle. Similar material has been known to have had a greater shrinkage than 20 per cent under pressure. (Record p. 121).

The total quantity of excavation as determined from measurements from fill and disposal dump sections as found and submitted to claimant by the engineers of the state road com-

mission amounted to the sum of 518,890 cubic yards, of which sum 28,285 cubic yards were cast into the Ohio river (and settlement thereon has been adjusted and paid to claimant) leaving 490,605 cubic yards. From all the evidence in the case considering a general shrinkage factor of such material after being rolled and exposed to moisture and air, inundation by two floods and the lapse of time after deposited and before the survey, and all the facts and circumstances of the case, we are of the opinion that a shrinkage factor of approximately 10% should be considered and added to these measurements in order to arrive at a reasonable and just conclusion of what the actual measurements would have been of the materials measured in their original position before the excavation.

It appears from the evidence that certain adjustments have heretofore been made in favor of claimant by the state road commission in a partial effort to accomplish this purpose. It appears that numerous calculations made on the cross-sections at the 50 foot intervals which failed to close with the purported original survey, were resolved in favor of the contractor by the road commission engineers in attempting to arrive at their measurement in the cut upon which basis claimant has been paid. Credits for all such adjustments are considered, but we are of the opinion that these adjustments were not adequate or sufficient to compensate claimant for the work done. They no doubt tended to compensate for yardage at the point of the original 50 foot cross-section when found in error, but would not reveal the amount of actual excavations between such cross-sections on the very rugged and irregular slope in question. The state road commission has paid to claimant the unit price on unclassified excavation and overhaul of 494,999 cubic yards. From the evidence it appears that overhaul would naturally follow by calculation upon the amount of shrinkage found to exist by taking measurements from the fills. After considering all adjustments heretofore made by the commission in making estimates on the basis of measurements taken and crediting the commission with such adjustments made in favor of the claimant, from all the evidence we are of the opinion that claimant is entitled to an award of

nine thousand, seven hundred fifty dollars ($9,750.00) for unclassified excavation and overhaul for which it [the commission] was not paid under the contract. An order will be entered accordingly.

(No. 150—Claim dismissed.)

MARY DILLON, an infant, who prosecutes her claim by MACIE WILEY, her mother and next friend, Claimant,

v.

BOARD OF EDUCATION of Summers County, West Virginia, a corporation, Respondent.

Opinion filed November 23, 1942

1. A county board of education is not a state agency as contemplated by the act creating the court of claims.

2. Insofar as the opinion *in re* claim No. 48, *J. C. Richards,* against the board of education of Calhoun county, and the opinion *in re* claim No. 55, *Benjamin Johnson, Jr.,* against the board of education of Logan county, recognize the jurisdiction of the court of claims to entertain, investigate and make determination in claims against a county board of education is concerned, such holding is now disapproved by a majority of the court.

Lilly & Lilly, for claimant;

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

ROBERT L. BLAND, Judge.

The petition in this case, which was duly filed with the clerk on the 30th of June 1942, alleges that on the 22nd day of March 1938, Mary Dillon, then fifteen years of age, was a student in the Hinton high school, one of the public schools of

Summers county, West Virginia; was transported to and from said school to her home, near Lilly, West Virginia, by one of the school buses owned and operated by the board of education of Summers county, West Virginia; that on said 22nd day of March 1938, and for some time prior thereto said bus was driven and operated by one C. A. Clinebell, who was employed by said board of education of Summers county, West Virginia, to drive and operate said bus in the transportation of students to and from said school; that on the afternoon of March 28, 1938, while transporting the said Mary Dillon and other students from said school to their homes, and while driving said bus over West Virginia route No. 3, at a point near Jumping Branch, West Virginia, said driver operated said bus in such a careless, negligent and improper manner that said bus ran off the road and upsided in a deep drain; that as a result of said accident the said Mary Dillon was thrown through the windshield of said bus and was seriously, painfully and permanently injured in and about her entire body, and was especially injured in and about her head, neck and right arm, which said injuries to the right arm resulted in almost total loss of the use of said arm; that by reason of said injuries the said Mary Dillon was permanently scarred, disfigured and disabled and has been and will continue through life to be highly nervous; that by reason of said injuries the said Mary Dillon was confined in a hospital for a long period of time, for which large expenses were incurred and she suffers great physical pain and mental anguish, and yet so suffers.

The petition also alleges that no public liability insurance was carried on said bus by said board of education, and that the driver of said bus is not financially responsible.

The claimant seeks an award of $15,000.00.

In the opinion of Judge Schuck and myself the claim presented by the petition is not *prima facie* within the jurisdiction of the court of claims and for that reason it was not placed upon the docket for investigation and hearing. Judge Elswick takes the opposite view and will file a dissenting opinion.

Chapter 18, article 5, section 5 of the official code provides that a county board of education shall be a corporation and may sue and be sued, plead and be impleaded, contract and be contracted with. The local or county administration of the state system of free schools, authorized by the constitution, has been delegated by the state to the county boards of education of the state.

Upon the showing made by the petition it is obvious that the claim asserted is against a subdivision of the state.

In *Ralston* v. *Weston*, 46 W. Va. 549, Judge Dent said: "The word 'State' is generally understood to denote three different things, and often without discrimination. First, the territory within its jurisdicton; second, the government or governmental agences appointed to carry out the will of the people; and third, the people in their sovereign capacity." The purpose of the Legislature in creating the court of claims, as expressed in the act, was to provide a simple and expeditious method for the consideration of claims against the state. It was not, we think, contemplated by the Legislature that the court act should be so construed as to extend to the consideration of claims against the subdivisions of the state.

A claim against a board of education is a claim against a unit or subdivision of the state. It is not a claim against the state as a sovereign commonwealth. It is not a claim against the state at large or the general public. It is not a claim against a state agency as defined by the court of claims act. State agencies are those whose duties concern the state at large. A state agency as defined in the court act was not intended to include a political subdivision, but only to apply to administrative agencies of state government as such. They are agencies to which are delegated the exercise of a portion of the sovereign power of the state. A board of education is not a department of the state government. Such boards are not created for governmental purposes. The duties of a county board of education do not concern the state at large. Such a board is not engaged in the exercise of any part of the

sovereign power of the state. Its duties and power are not coextensive with the state.

In the case of claim No. 48, *J. C. Richards* v. *The Board of Education of Calhoun County, West Virginia,* and claim No. 55, *Benjamin Johnson, Jr.,* v. *The Board of Education of Logan County, West Virginia,* both of which were claims for personal injuries sustained by pupils attending public schools, this court made awards. The members of the court, however, were not in agreement upon the question of the court's jurisdiction to do so. The opinion in the Richards case was written by Judge Elswick. I wrote the opinion in the Johnson case, basing the award upon the principles enunciated in the opinion in the Richards case. Judge Schuck took the position at that time that a county board of education was not a state agency as defined by the court act. At the time of the determination of said two claims I reasoned that if the purpose of chapter 20 of the acts of the legislature of 1941, creating a court of claims, was to provide for the hearing of claims against the state which are barred from adjudication in the courts of the state by reason of section 35, article 6 of the constitution, the claims under consideration fell within that category. It seemed to me that the profound reasoning of Judge Elswick's opinion was unanswerable, and for that reason I adopted his views and joined with him in making said two awards. From the beginning of the consideration of the claims, however, Judge Schuck contended that the jurisdiction of the court of claims could not be extended to embrace subdivisions or units of government, and filed a dissenting opinion. All three members of the court were in agreement that *if* the court of claims did not have jurisdiction to make awards in cases such as those presented by the Richards and Johnson claims, *supra,* that the court act should be so amended as to give the court power to make such awards, and Judge Schuck, in his dissenting opinion, made recommendations accordingly.

Since the determination made in said two cases, and as the result of further earnest study and reflection, I have reached

the conclusion that the jurisdiction conferred by the Legislature upon the court of claims to make awards does not include political subdivisions. I want, so far as it is possible for me to do so, to be right in the determination of claims in which I concur. If I am persuaded that I have been wrong I shall not hesitate to endeavor to correct the error. I know that the three members of the court of claims have been earnest, conscientious and diligent in their investigation, study and consideration of all claims that have been presented to the commission, and each one has tried very faithfully to discharge his duty to the best of his ability and understanding. The state court of claims of West Virginia is an experiment. There are only four courts of claims in the United States, namely, New York, Illinois, Michigan, and West Virginia. We have little precedent for our guidance. We must of necessity blaze our own trail. If, therefore, under such circumstances, error is made, the most that can reasonably be hoped is a correction of such error. I am, in view of my further, more mature, investigation, study and reflection constrained to reach the conclusion that the dissenting opinion filed by Judge Schuck in the Richards case, above cited, announces the correct view that should be adopted by the court in determining the question of its jurisdiction to maintain claims against subdivisions or units of government.

A county board of education is not a state agency as defined by the act creating the state court of claims.

Insofar as the opinion *in re* claim No. 48, *J. C. Richards* v. *The Board of Education of Calhoun County,* and the opinion *in re* claim No. 55, *Benjamin Johnson, Jr.* v. *The Board of Education of Logan County,* recognize the jurisdiction of the court of claims to entertain, investigate and make determinations in claims against a county board of education is concerned, such holding is now disapproved by a majority of the court.

Until such time as the Legislature shall clarify the question of the jurisdiction of the court of claims to entertain, investi-

gate and make determinations in claims filed against a county board of education, and so amend the statute as to make certain its intention to confer upon the court such jurisdiction, the court of claims, as now constituted, will hold that it is without *prima facie* jurisdiction to entertain such claims.

Judge Elswick dissents.

WALTER M. ELSWICK, Judge, dissenting.

It never occurred to me, when the cases of *J. C. Richards*, Claim No. 48, and *Benjamin Johnson, Jr.*, Claim No. 55, were filed against the state before the state court of claims for hearing and determination as claims against the *state* that we had in mind making awards against county or district boards of education. In those cases no request was made to render judgment against or to direct authority to district boards of education to provide for compensation to pupils injured by negligence of the school authorities. No such action was undertaken for the reason that no remedy has been prescribed by general laws to enable county or district boards to raise funds for such compensation for injuries. See *Jarrett* v. *Goodall*, 168 S. E. 763, 113 W. Va. 478 and *Krutili* v. *Board of Education*, 129 S. E. 486, 99 W. Va. 466, cited in the majority opinion (when written) in the *J. C. Richards* case *supra*. It appears from article XII, section 5 of the constitution that such authority shall be "as shall be prescribed by general laws."

The claim in question was not filed against a local board of education but against the *state*. Under the constitution, article 12, section 1, the Legislature is made the agency of the state to provide by general law for a thorough and efficient system of free schools throughout the state. Under section 5, article 12, ample provision is given to the Legislature to provide for the support of free schools by general taxation of persons and property or otherwise in addition to the special funds set aside solely for that purpose.

Weighed in the light of compensation being awarded for personal injuries or damages to property on the state highways through lack of due care on the part of the department, if compensation be denied and no remedy afforded to a pupil injured through negligence of school authorities, under the system provided for, in view of the broad terms of article 12, sections 1 and 5 of the constitution, can it be said that a thorough and efficient system has been provided for by the Legislature? A person travels the highways of his own volition but a pupil is required, by law, to attend school. This is an interest of the state as a whole.

This claim was filed in the same manner as the claims were filed in the *Richards* and *Johnson* claims, *supra*, not against the district board of education but against the *state*, for an injury sustained while attending a school directed by the constitution to be provided for by the Legislature with power and authority in the Legislature to provide for the support of such schools.

The question before the court is whether the Legislature has the power and duty to make an award for compensation to an injured pupil through negligence of officials of the school system of the state required by the constitution, when the Legislature has not provided for a remedy against the district boards of education in the courts of our state. No award is sought by claimant against the district board of education. The Legislature is the only agency having the power and authority to make an award. The courts of our state have held that there was no remedy against district boards of education for the reason the boards were performing a governmental function.

The last Legislature made the court of claims a special instrumentality of the Legislature. I have cited authorities in the then majority opinion in the *Richards* case showing that the Legislature has such power. Whatever the Legislature can do in the way of making just compensation to those injured under a system which the constitution directs to be

made thorough and efficient, the court of claims should perform its duty of making recommendations for just and proper action by the Legislature when such claims are presented to it.

The case of *Berry* v. *Fox*, 172 S. E. 896, 116 W. Va. 503, was cited by the attorney general as authority to show that there would be a constitutional inhibition against the validity of an appropriation such as that sought by claimant, to be made by the Legislature under section 6, article 10 of the constitution. This case had to deal with the question of whether the state of West Virginia by act of the Legislature may undertake for a biennium to pay the sinking fund and interest of debts created by district school boards. These were debts which had been incurred by district boards of education pursuant to permissive legislation in the construction of valuable improvements for the special benefit of the respective communities themselves. At the time the debts were made the district boards had the right and duty to make levies and raise revenues in their respective communities to pay off such indebtedness. As stated in the opinion by the court in that case: "The schoolhouses, also, whether paid for from the proceeds of bonds or not, remain permanently for the use of the communities which brought them into being." That decision is sound. The district boards had the authority to contract the indebtedness, and upon them rested the entire burden of acquisition of school properties. Credit had been extended to the local district boards not the state, hence by contract, they were purely local debts.

But in the instant case as well as in the *Richards* and *Johnson* cases no risks had been assumed by claimants for the reason they were required to attend school, and no liability in the first instance ever rested upon the district boards such as would enable the boards to raise revenues to pay the claims under the *Krutili* and *Jarrett* cases cited herein. I sincerely adhere to the (then majority) opinion expressed on the claim of *J. C. Richards* No. 48, and to the dissent in the case of *Jess. E. Miller* No. 138. *Fiat justitia ruat coelum.*

REFERENCES

ACT OF GOD—See God, Act of

AGENCIES—See State Agencies

BLUE BOOK—See West Virginia Blue Book

BOARDS OF EDUCATION—See Schools

BRIDGES and CULVERTS—See also Negligence

Where it appears from the evidence that the state road commission kept a warning sign on a suspended bridge for a long period of time to the effect that the bridge was unsafe for over a three-ton gross load without making inspection of or repairs to the bridge, as provided by general law, to keep it safe for a three-ton gross load; and it appears that the persons who are injured or killed by the collapse of the bridge did not take particular care and caution as to the weight of the load carried thereon and such weight cannot be arrived at with definite certainty, such evidence should be weighed and considered in the light of all the circumstances to reduce the amount of the award to be made. *Wildman, Adm.* v. *State Road*........ **33**

When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Fry v. State Road*........ **48**

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

When the state road commission has charge of the maintenance of a national highway, as in the instant case, on which there is a culvert constructed across a stream, the failure of the commission to remove accumulations of dirt and debris in the stream bed to maintain the clearance or opening under the culvert as originally constructed and of sufficient size to permit the stream in times of ordinary flood or freshet, reasonably expected, to flow through the clearance as fast as the stream does, an award will be made for damages to property of another approximately caused by the negligent damming and the consequent overflow of the stream. *Valley Camp Stores* v. *State Road*........ **62**

During the course of repairing and reconstructing a bridge, which bridge is kept open to pedestrians and travelers while said repairs are being made, it is negligence on the part of state road commission employees to throw a hot rivet used in connection with the making of said repairs while a pedestrian is crossing the said bridge and in close proximity to where the said rivet is being thrown, and which, if improperly thrown, is likely to strike and injure such pedestrian. If injury results from such negligence, the state road commission is liable. *Ellis* v. *State Road* 88

When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Hershberger* v. *State Road* 52

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

Where a bridge controlled by the state road commission has been condemned as unsafe for public use or travel, and the uncontradicted evidence shows that the supports and girders on said bridge were very rotten and decayed, the commission must take all necessary means to effectually close and barricade the bridge as a protection to the public; and a failure to do so, by reason of which persons traveling on the bridge under the conditions mentioned are injured, is negligence on the part of the commission and must be considered as such in connection with determining the validity of a claim, even though the injured persons may have had a load slightly in excess of that allowed on the bridge. *Mealey, Admx., et als,* v. *State Road* 214

Where the evidence seems to indicate and tends to show that the state road commission was not negligent in maintaining a certain bridge and wire guardrails attached thereto, and that the said state road commission exercised reasonable care in maintaining and controlling said bridge, then, in that case, an award will be refused accordingly to one who alleges that she fell from the said bridge by reason of improper or defective guardrails or protection thereon. *Harless* v. *State Road* 241

The state road commission is charged with the duty of keeping the bridges on highways in reasonably good repair, and the failure to do so, by reason of which a child of tender years is injured, makes the road commission liable, even though the injured child may have had occasion to use the bridge in question a number of times while the bridge was out of repair. Such child of tender years cannot be charged with contributory negligence. *McMillion* v. *State Road* 162

Where it appears from the evidence that one using a state owned public bridge in a careful manner sustains personal property loss by reason of the defective condition of the bridge, an award will be made to such person and his assignee for compensation of such loss. *Ashworth, et al* v. *State Road* 172

The State Road Commission is charged with the duty of making all bridges under its control and authority reasonably safe for travel thereon by day or by night, and when it fails in this respect, the state will be held liable. *Kincaid* v. *State Road* 334

CAUSE OF ACTION—See also Jurisdiction,

Where the evidence makes it purely speculative or highly conjectural as to whether or not a state driven truck operated by and for the state road commission caused the injuries and damages complained of, an award will not be made. *Peterson* v. *State Road* 22

Where the evidence in the case shows the highway on which the accident happened was improved and eighteen feet wide, with no obstruction and no defect in the highway, and the claimant's decedent was killed by reason of the car in which he was riding leaving the said highway and striking a depression or hole in the berm, then there is no cause of action against the state road commission and the claim will be denied and dismissed. *Lambert* v. *State Road* 186

Where a claimant alleges that state prisoners who have escaped from a state road camp stole and carried away his automobile, and there is no evidence of any kind to sustain the said claim against the state or the state agency involved, as in the instant case, an award will be refused and the claim dismissed. *Dodrill* v. *State Road* 251

A case in which upon the facts disclosed by the record the claim will be heard and disposed of upon its merits. *Clark* v. *State Road* 232

Where it appears from the notice or petition of claimant filed that from the facts stated no liability exists on the part of the state, the court of claims does not have *prima facia* jurisdiction and will refuse to docket the claim for hearing upon such notice or petition. *Chapman* v. *Board Control* 183

CLAIMS, Failure to Prosecute

Where a claim is duly filed in the court of claims and twice placed upon its trial docket for hearing without appearance on the part of claimant to prosecute the same or show reason for his failure so to do, such claim will be dismissed, subject to the right of claimant to have the same reinstated upon showing to the court proper reason for such reinstatement. *Rader* v. *State Road* 109

Where a claim is duly filed in the court of claims and twice placed upon its trial docket for hearing, without appearance on the part of claimant to prosecute the same or show reason for his failure so to do, such claim will be dismissed, subject to the right of claimant to have the same reinstated, upon showing to the court proper reason for such reinstatement. *Babb v. State Road* 112

CLAIMS, Proof of

"All claims asserted against the state or any of its agencies must be established by satisfactory proof before awards may properly be made for the payment of them." *Clark* v. *State Road* 232

COMPROMISES

When, pending the hearing and investigation of claims against the state, duly filed in the court of claims and placed upon its trial calendar, all growing out of the same facts, such claimants and the state agency concerned effect a compromise adjustment and settlement of such claims, subject to the approval and ratification of the court of claims, and evidence offered in support of such claims and compromise settlement thereof shows the advisability and propriety of such compromise settlement, awards will be made for the payment of such claims in accordance with and pursuant to such agreed terms of settlement. *Damron, et al* v. *State Road* 236

Where it appears from the hearing that there was not a meeting of the minds between the claimant and the department concerned upon what appears from the evidence to have been nominal awards for compensation for personal injuries sustained by claimant, through negligence of employees of the department in the course of their employment, and it appears from the evidence that claimant is entitled to additional compensation for the injuries sustained, an award will be recommended to the claimant taking into consideration amounts heretofore paid as compensation. *Cecil* v. *State Road* 114

CONTINUANCES

"Continuances without cause are not regarded with favor by the Court." *Clark* v. *State Road* 232

CONTRACTS

Where it appears from the evidence that the state road commission has made a commitment of sponsorship with the works progress administration agreeing to contribute a certain percentage of the total costs of construction of a road project, and fails to contribute the agreed percentage of the total costs of construction, and it appears that claimants' services by use of their trucks and operators have supplied the deficiency of the state road commission's commitment to furnish trucks and operators and the state road commission has received and applied said services of claimants as credits upon its contribution under its commitment as sponsor of the project, without withdrawing its sponsorship by continuing to retain its equipment and supplies on the project and accepts the road after completion, when such services of claimants as appears from the evidence were not donated and claimants have not been paid for same, awards will be made for the reasonable value of such services commensurate with the value of credits for such services received by the state road commission on its commitment to pay the costs of such services under its said sponsorship. *Adkins, et al* v. *State Road* 280

Where the state road commission, by its contract may or may not furnish road metal (stone or other material) to keep lanes of traffic open to the traveling public, during the construction and improvement of a highway, and the testimony shows that it has been the custom of the said road commission to furnish such material or metal at its own cost or expense, on other road projects, then the contractor is entitled to a reasonable charge or claim for gathering and furnishing the said road metal or material so used on a highway during the improvement and construction thereof. *Keeley* v. *State Road* 165

Where the state road commission contracts for the making and building of a public road or highway and requires the work to be completed in a certain number of working days, and the contractor is subsequently prevented from carrying out his part of the contract through no fault of his, but by reason of the failure of the state road commission to consummate and complete a contract with a railroad company for the removal and relocation of the tracks of said railroad company, and which tracks, as located, prevent the carrying out of the said highway improvement and the contractor is thereby delayed for a long period of the best working days, considering the season of the year in which the said project is being carried on, the contractor is entitled to be reimbursed for any actual expenses and damages he has suffered by reason of the said delay. *Keeley* v. *State Road* 168

Where the state department of purchases requests bids for furnishing to a state institution 2,000 feet of black walnut lumber, without specification as to quality, and a dealer agrees to furnish same at the price of $90.00 per thousand feet, and thereafter said department of purchases makes its requisition for such lumber, in pursuance of such bid, and said lumber is furnished and delivered to the state institution for whose benefit it was purchased, in accordance with such bid and requisition, and it is shown to be fifty per cent clear black walnut lumber and the balance of lower grade, but suitable for use in making furniture and for other wood-working purposes, such order cannot be cancelled for the reason that said lumber was of inferior quality, and the lumber so furnished and delivered will be required to be paid for at the contract price. *Elkins Builders* v. *Board Control* 264

Where it appears that the director of the state conservation commission has established and is operating a restaurant for the convenience of the public at one of the state park areas as provided by the acts of 1939, and it appears that claimant has furnished meals at said restaurant to a convention group of persons under a special arrangement made by the officials of the commission in charge of the park and restaurant whereby they on behalf of the commission contracted with claimant to collect for meals served, and to pay her for same, an award will be made directing payment for such services rendered from funds available for the purpose. *Doyle* v. *Auditor, et al* 269

Where it appears from the evidence that by reason of the lack of available data it is impossible to take actual measurements of excavation of material in its original position under a contract as is the usual and customary practice when such data is available, the court will consider evidence of estimates taken from measurements of fills made from the excavation and allow a percentage for shrinkage based upon the nature of the material in the fill, the manner of rolling or filling same, the time elapsed before final survey and all surrounding facts and circumstances in an effort to obtain the actual measurements of excavations made, and base an award thereon accordingly. *Consolidated Engineering* v. *State Road* 358

CONTRIBUTORY NEGLIGENCE—See also Negligence.

When an adult woman of good intelligence, while driving her husband's automobile on a state highway passes a hole on one side of said highway caused by a break or slip on the rock base of said highway, which hole she could or should have seen by the use of ordinary care, and on the same day, in the daytime thereof, while driving said automobile in the opposite direction drives it into said hole and the said automobile is precipitated over an embankment and she sustains personal injuries in consequence of said accident, she will be held to be guilty of contributory negligence barring a claim for an award for damages occasioned by said accident. *Smith* v. *State Road* 258

Where upon the hearing of a claim filed by a husband for an award for property damages under the above facts it is shown by the evidence that his automobile was maintained for convenience and family purposes and that the loss occasioned to his car was the result of the contributory negligence of his wife in the use of the same, his claim for damages will be denied. *Id.*

The state or its agency, the state road commission, is not an absolute guarantor of the safety of its employees, nor was it such guarantor at the time of the accident from which the instant case arose; and when claimant with full knowledge of the danger incident to the work that he was about to perform had at his command and disposal the means of protecting himself by the use of available equipment, and the use of which would in all probability have prevented the accident to him, and failed to do so, then he was guilty of such negligence as must necessarily preclude him from an award. *Johnson* v. *State Road* 253

An award will not be recommended in a case where it appears from the evidence that the claimant has not heeded warnings and circumstances attendant to the hazards of travel on a highway being repaired by state road employees in the application of tar and slag, and has failed to exercise ordinary care and caution for the safety of himself and fellow travelers upon the highway, and where it is found from the evidence that the state road employees were exercising due care and caution in the performance of their work as well as to warn travelers of the hazards of travel attending the work being done. *Harper, et ux* v. *State Road* 12

Where it appears from the evidence that there are circumstances bearing upon the reasonableness of an award presenting a mixed question of law and fact, and on which reasonable minds may differ, and such circumstances are of a mitigating nature such as would justify a reasonable reduction of damages recoverable, then such circumstances will be considered in determining whether or not an award should be made, and if made the amount thereof. *Valley Camp Stores* v. *State Road* 62

Where it appears from the record submitted that the negligence of claimant in the operation of a truck owned by the state agency concerned was the approximate cause of a collision by the truck with a privately owned car, inflicting damage to same, an award will be denied to claimant for contribution of the amount of damages paid by claimant to the owner of the damaged car. *Boley* v. *State Conservation* 322

Where the claimant is charged with contributory negligence which from the evidence presents a mixed question of law and fact, and on which reasonable minds may differ, the question of such negligence will be considered in determining whether or not an award should be made, and, if made, the amount thereof. *Fry* v. *State Road* 48

An award will not be made in favor of an adult claimant traveling said road six days a week in carrying mail, whose negligence contributed to a motor vehicle collision which resulted in the demolishment of his truck. *Babb, et al,* v. *State Road* 317

In our opinion the evidence fails to reveal any contributory negligence on the part of the claimant and therefore, this defense is not sustained. *Atkinson* v. *State Road* 26

CONVICTS, Escaped

Miller v. *Board Control* 97
Dodrill v. *State Road* 251

DAMAGES

Where a liability is admitted on the part of the state department concerned and the amounts of the awards for damages for personal injuries on the two claims filed are left for determination the court from all the evidence on the claims heard together finds for each claimant such damages as is deemed just and proper, commensurate with each claimant's injuries, that is, damages proportionate or equal in measure or extent of their injuries sustained. *Gibson* v. *State Road* 226

Where it appears from the evidence that the special and peculiar benefits accruing to claimant by reason of a construction project performed by the state road commission on his land exceeds the amount of damages, if any, which claimant has sustained, an award will be denied. *Reed* v. *State Road* 219

DAMS—See Lands

FAILURE TO PROSECUTE CLAIMS—See Claims, Failure to Prosecute

FAMILY CAR DOCTRINE

Where upon the hearing of a claim filed by a husband for an award for property damages under the above facts it is shown by the evidence that his automobile was maintained for convenience and family purposes and that the loss occasioned to his car was the result of the contributory negligence of his wife in the use of the same, his claim for damages will be denied. *Smith* v. *State Road* 258

FELLOW-SERVANT RULE

Where the evidence shows that claimant, who was employed on a road project in Preston county, was paid for his services by the Federal Government, but was working under the control, supervision and direction of a foreman or supervisor of the state road commission, he is not a fellow servant of the said foreman or supervisor and cannot be treated as such in the instant case. *Atkinson* v. *State Road* 26

In view of the apparent reasons and purposes for the creation of this court as manifested by the Legislature in the act creating it, the court does not concede that the fellow-servant rule as formerly understood or construed by the courts will govern it in determining claims submitted to it for decision; and therefore holds that the decision in the case of *Corrigan* v. *The Board of Commissioners of Ohio County,* 74 W. Va. 89, and relied upon by the state in its motion to dismiss, cannot control in deciding the merits of this claim. *Id.*

GASOLINE TAXES

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* v. *State Tax* 15

GOD, Act of

ACT OF GOD. Testimony shows that the injuries complained of were caused by negligence and the lack of reasonable care in carrying on the road operations at the point or place where the accident occurred, and consequently could not be attributed to an act of God. *Brown* v. *State Road* 2

An act of God is a direct, violent, sudden or irresistible act of nature which could not by the exercise of reasonable care and diligence have been avoided or resisted. *Id.*

See also *Knicely* v. *State Road* 72

JURISDICTION—See also Cause of Action

JURISDICTION. The jurisdiction of the state court of claims does not extend to any claim for a disability or death benefit under chapter 23 of the code of West Virginia governed by the workmen's compensation commission. *Taylor, et als* v. *Workmen's Compensation* ... 1

Where upon motion of the attorney general to dismiss claim for want of jurisdiction, no answer is made by claimant to rule to show cause why his claim should not be dismissed, and it appears from a record that he is without right to maintain his claim, such claim will be dismissed. *Dragon* v. *State Road* ... 107

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Scaveriello* v. *State Road* ... 86

The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Cottle* v. *State Road* ... 84

An athletic board or department of a state controlled college is not a state agency as contemplated by the act creating the court of claims and a contract entered into with such board or department is not enforceable in said court, the court being without jurisdiction to hear and determine a claim based on the provisions or conditions of the contract in question. *Omaha University* v. *Board Control, et al* ... 185

LAND TAXES, Delinquent

Where the evidence establishes that a former commissioner of school lands obtained funds from the sale of property sold for delinquent taxes, and after deducting the costs of the sale, remitted the balance of the funds to the state auditor, and no disbursement or distribution was ever made of the said fund, as required by law, then an order will be entered by this court, making an award and ordering distribution accordingly. *Brooke County* v. *Auditor* ... 179

LANDS, Dams injuring

Where it appears from the evidence that claimants have suffered loss and damages to their property by the same being actually invaded by the creation of a dam on the state's property by a state department caused by abandonment of the project or undertaking in changing the channel of a stream, which dam permanently floods a part of claimants' land, and causes intermittent but inevitably recurring overflows and seepage of water on other lands of claimants, when the abandonment of the project or undertaking is done without any intention of completing same in such manner that claimants are not afforded a remedy in the courts of the state, the court of claims will recommend an award to such claimants for what is considered a fair and just compensation for the loss and damages sustained. *Chapman, et ux* v. *Board Control* ... 244

NEGLIGENCE

When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Fry* v. *State Road* 48

The state road commission is charged with the duty of making all bridges under its control and authority reasonably safe for travel thereon by day or by night, and when it fails in this respect, the state will be held liable. *Kincaid v. State road* 334

The fact that a stone or rock falls from the mountainside adjacent to a public road or highway, striking and wrecking a passing automobile, does not of itself constitute negligence on the part of the state road commission. The state or its agency, the state road commission, not being a guarantor of the safety of travelers on its roads and highways, must either have notice of the dangerous condition and position of such stone or rock on the banks along the highway or have known of it by the proper examination of the highway at the place where the accident happened and have failed to take the necessary steps to remove the rock and thus prevent any accident, before the state or its agency, the state road commission, becomes liable. *Clark* v. *State Road* 230

Where no remedy is provided by general statute, against the county boards of education for failure to provide safe equipment used in the public schools, an award will be recommended to the Legislature to appropriate funds for the medical care and treatment and compensation to a pupil permanently injured by burns received by reason of a defective and unsafe open-flame gas stove used in a public school where such pupil was attending, as a matter of justice and right and as contemplated in the thorough and efficient system of free schools directed to be provided for by the Legislature in article XII of the constitution. *Richards, et al,* v. *School Boards* 142

Where it appears from the evidence that one using a state owned public bridge in a careful manner sustains personal property loss by reason of the defective condition of the bridge an award will be made to such person and his assignee for compensation of such loss. *Ashworth, et al,* v. *State Road* 172

To allow road equipment being used in connection with highway improvements and repairs, to occupy any part of a used or traveled road or highway in the nighttime, without giving the traveling public proper, adequate and sufficient warning and notice of the presence of such equipment so placed or situate, is negligence on the part of the agents and employees of the road commission, for which the commission is liable. *Cottle* v. *State Road* 313

The state road commission is charged with the duty of keeping the bridges on highways in reasonably good repair, and the failure to do so, by reason of which a child of tender years is injured, makes the road commission liable, even though the injured child may have had occasion to use the bridge in question a number of times while the bridge was out of repair. Such child of tender years cannot be charged with contributory negligence. *McMillion* v. *State Road* 162

When the state road commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed upon it to guard all dangerous places on the public roads and bridges by suitable railings or barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night. *Hershberger* v. *State Road* 52

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

When the state road commission has charge of the maintenance of a national highway, as in the instant case, on which there is a culvert constructed across a stream, the failure of the commission to remove accumulations of dirt and debris in the stream bed to maintain the clearance or opening under the culvert as originally constructed and of sufficient size to permit the stream in times of ordinary flood or freshet, reasonably expected, to flow through the clearance as fast as the stream does, an award will be made for damages to property of another approximately caused by the negligent damming and the consesequent overflow of the stream. *Valley Camp Stores* v. *State Road* 62

Where it appears from the evidence that there are circumstances bearing upon the reasonableness of an award presenting a mixed question of law and fact, and on which reasonable minds may differ, and such circumstances are of a mitigating nature such as would justify a reasonable reduction of damages recoverable, then such circumstances will be considered in determining whether or not an award should be made, and if made the amount thereof. *Id.*

Award for the loss of a mule caused by the said animal falling into an unprotected pit previously used as a toilet, and under the control of the state road commission at the time of the accident, and located on a certain right-of-way owned and controlled by the said road commission at and near Lenore, Mingo county, West Virginia. *Fields* v. *State Road* 11

When, upon the hearing of a claim for an award for reimbursement for money paid for repairs to an automobile driven by claimant into a tree blown by storm upon a public highway, proof offered in support of such claim fails to show negligence on the part of the state road commission, or establish a right of action for such damages, a motion of the attorney general to dismiss the claim will be sustained, an award denied and the claim dismissed. *James* v. *State Road* 90

During the course of repairing and reconstructing a bridge which bridge is kept open to pedestrians and travelers while said repairs are being made, it is negligence on the part of state road commission employees to throw a hot rivet used in connection with the making of said repairs while a pedestrian is crossing the said bridge and in close proximity to where the said rivet is being thrown, and which, if improperly thrown, is likely to strike and injure such pedestrian. If injury results from such negligence, the state road commission is liable. *Ellis* v. *State Road* 88

Where it appears from the evidence that the employees of the state road commission had no knowledge of a large stone and slide falling from the mountainside into the highway due to its recent occurrence and had no previous warning of the likelihood of its falling from making their routine examinations of the highway, the state not being a guarantor of the safety of travelers on its roads and highways will not be held liable for personal injuries or property damages suffered by claimants when their motor vehicle runs into such stone. *Harvey* v. *State Road* 345

Where it appears from the evidence that there was some question as to whether the state road commission was negligent when a guard on one of its prison camps was struck by a passing motorist, but the Legislature and the state road commission has resolved all doubt in favor of the employee injured by reason of the state workmen's compensation not being in force at the time and has heretofore made generous awards to claimant in such manner and under such circumstances at the time as would appear to have been full and adequate compensation, an award will be denied. *Riddle* v. *State Road* 348

Where it appears from the evidence that the state road commission kept a warning sign on a suspended bridge for a long period of time to the effect that the bridge was unsafe for over a three-ton gross load without making inspection of or repairs to the bridge, as provided by general law, to keep it safe for a three-ton gross load; and it appears that the persons who are injured or killed by the collapse of the bridge did not take particular care and caution as to the weight of the load carried thereon and such weight cannot be arrived at with definite certainty, such evidence should be weighed and considered in the light of all the circumstances to reduce the amount of the award to be made. *Wildman, Adm.*, v. *State Road* 33

Where a common carrier delivers a car on a sidetrack or switch, in the usual and customary place for unloading, and has used the proper degree of care in placing the car for unloading purposes, and the car is equipped with brakes and appliances that are safe and sound when properly used, the carrier is relieved of further responsibility, unless there is a contract enlarging its duty in this respect; the consignee then becomes responsible for the skill and care of its employee in unloading the car or replacing it for unloading purposes; and if the car is damaged by reason of the lack of skill or care on the part of such employee of the consignee when so replacing it or unloading it, the consignee is liable for the damage caused. *Chesapeake and Ohio* v. *State Road* 55

Where it appears from the evidence that a boy 15 years of age while riding a bicycle, is injured in a collision with a state road commission track running on his side of the street and blocking his pathway which was clear when he entered the street while said truck is in the act of passing another truck and it is found from all the facts and circumstances in evidence in the case that the truck driver was negligent in undertaking to pass another vehicle at the scene of the collision, awards will be made to the boy to compensate him for the injuries sustained, and to the father for expenses incurred and loss of his son's service during minority. *Roberts* v. *State Road* 351

ACT OF GOD. Testimony shows that the injuries complained of were caused by negligence and the lack of reasonable care in carrying on the road operations at the point or place where the accident occurred, and consequently could not be attributed to an act of God. *Brown* v. *State Road* 2

An act of God is a direct, violent, sudden or irresistible act of nature which could not by the exercise of reasonable care and diligence have been avoided or resisted. *Id.*

Where the evidence shows that claimant, who was employed on a road project in Preston county, was paid for his services by the Federal Government, but was working under the control, supervision and direction of a foreman or supervisor of the state road commission, he is not a fellow servant of the said foreman or supervisor and cannot be treated as such in the instant case. *Atkinson* v. *State Road* 26

In view of the apparent reasons and purposes for the creation of this court as manifested by the Legislature in the act creating it, the court does not concede that the fellow-servant rule as formerly understood or construed by the courts will govern it in determining claims submitted to it for decision; and therefore holds that the decision in the case of *Corrigan* v. *The Board of Commissioners of Ohio County*, 74 W. Va. 89, and relied upon by the state in its motion to dismiss, cannot control in deciding the merits of this claim. *Id.*

In our opinion the evidence fails to reveal any contributory negligence on the part of the claimant and therefore, this defense is not sustained. *Id.*

Award for damages for injuries to an automobile driven and occupied by the claimant while driving on the highway from Lockbridge toward Elton, in Summers county, West Virginia, and near what is known as Elton Mountain, and caused by a slide rushing in and upon the said automobile and causing damages thereto. *Martin* v. *State Road* 9

Where a bridge controlled by the state road commission has been condemned as unsafe for public use or travel, and the uncontradicted evidence shows that the supports and girders on said bridge were very rotten and decayed, the commission must take all necessary means to effectually close and barricade the bridge as a protection to the public; and a failure to do so, by reason of which persons traveling on the bridge under the conditions mentioned are injured, is negligence on the part of the commission and must be considered as such in connection with determining the validity of a claim, even though the injured persons may have had a load slightly in excess of that allowed on the bridge. *Mealey, Admx., et als,* v. *State Road* 214

Where it appears from the evidence that there is a sharp curve on a state secondary dirt road, which is overgrown with brush obscuring the vision of persons traveling thereon, and which road is narrow and otherwise defective and out of repair, and that a girl, thirteen years of age, while riding as a passenger in a mail truck on said road, sustains personal injuries and the loss of four upper front teeth as the result of the mail truck collision with a one and one-half ton truck loaded with shale or gravel while passing through said curve, an award will be recommended for hospitalization and dental bills. *Babb, et al,* v. *State Road* .. 317

An award will not be made in favor of an adult claimant traveling said road six days a week in carrying mail, whose negligence contributed to a motor vehicle collision which resulted in the demolishment of his truck. *Id.*

Where it appears from the hearing that there was not a meeting of the minds between the claimant and the department concerned upon what appears from the evidence to have been nominal awards for compensation for personal injuries sustained by claimant, through negligence of employees of the department in the course of their employment, and it appears from the evidence that claimant is entitled to additional compensation for the injuries sustained, an award will be recommended to the claimant taking into consideration amounts heretofore paid as compensation. *Cecil* v. *State Road* 114

The court of claims will not make an award in a case where the evidence shows that the state road commission has used reasonable care and diligence in the maintenance of a state controlled highway on which claimant wrecked his motor vehicle by colliding with a large stone or boulder that had become dislodged from a cliff or hillside and fallen on said highway the night preceding or early morning of such accident, and in which it further appears from the evidence that the employees of the state road commission had no knowledge of the likelihood of such happening. *James* v. *State Road* 343

The state road commission will be held liable in damages for the negligent and wrongful acts of its agents and employees toward a W. P. A. employe while doing special services on a state project which services are distinguished from the services of other W. P. A. employees, where it appears from the evidence that the W. P. A. employee was receiving special orders from state road foreman and bosses and was no longer under the supervision of his W. P. A. foremen while engaged in such work with state road employees. *Canterbury, Admx.,* v. *State Road* 173

Under the act creating the court of claims, negligence on the part of the state agency involved must be fully shown before an award will be made. *Miller* v. *Board of Control* 97

Under the act creating the court of claims, negligence on the part of the state agency involved must be fully shown before an award will be made. *Moore* v. *State Road* 93

PRIMA FACIE JURISDICTION—See Cause of Action and Jurisdiction

RAILROADS—See also Negligence

Where a common carrier delivers a car on a sidetrack or switch, in the usual and customary place for unloading, and has used the proper degree of care in placing the car for unloading purposes, and the car is equipped with brakes and appliances that are safe and sound when properly used, the carrier is relieved of further responsibility, unless there is a contract enlarging its duty in this respect; the consignee then becomes responsible for the skill and care of its employee in unloading the car or replacing it for unloading purposes; and if the car is damaged by reason of the lack of skill or care on the part of such employee of the consignee when so replacing it or unloading it, the consignee is liable for the damage caused. *Chesapeake and Ohio* v. *State Road* 55

RIGHTS-OF-WAY

Award for the loss of a mule caused by the said animal falling into an unprotected pit previously used as a toilet, and under the control of the state road commission at the time of the accident, and located on a certain right-of-way owned and controlled by the said road commission at and near Lenore, Mingo county, West Virginia. *Fields* v. *State Road* 11

ROADS—See Bridges, Contributory Negligence and Rock Slides

ROCK SLIDES

The fact that a stone or rock falls from the mountainside adjacent to a public road or highway, striking and wrecking a passing automobile, does not of itself constitute negligence on the part of the state road commission. The state or its agency, the state road commission, not being a guarantor of the safety of travelers on its roads and highways, must either have notice of the dangerous condition and position of such stone or rock on the banks along the highway or have known of it by the proper examination of the highway at the place where the accident happened and have failed to take the necessary steps to remove the rock and thus prevent any accident, before the state or its agency, the state road commission, becomes liable. *Clark* v. *State Road* 230

The court of claims will not make an award in a case where the evidence shows that the state road commission has used reasonable care and diligence in the maintenance of a state controlled highway on which claimant wrecked his motor vehicle by colliding with a large stone or boulder that had become dislodged from a cliff or hillside and fallen on said highway the night preceding or early morning of such accident, and in which it further appears from the evidence that the employees of the state road commission had no knowledge of the likelihood of such happening. *James* v. *State Road* 343

Where it appears from the evidence that the employees of the state road commission had no knowledge of a large stone and slide falling from the mountainside into the highway due to its recent occurrence and had no previous warning of the likelihood of its falling from making their routine examinations of the highway, the state not being a guarantor of the safety of travelers on its roads and highways will not be held liable for personal injuries or property damages suffered by claimants when their motor vehicle runs into such stone. *Harvey* v. *State Road* 345

Award for damages for injuries to an automobile driven and occupied by the claimant while driving on the highway from Lockbridge toward Elton, in Summers county, West Virginia, and near what is known as Elton Mountain, and caused by a slide rushing in and upon the said automobile and causing damages thereto. *Martin* v. *State Road* 9

See also *Brown* v. *State Road* 2

SCHOOLS—Boards of Education

Where no remedy is provided by general statute, against the county boards of education for failure to provide safe equipment used in the public schools, an award will be recommended to the Legislature to appropriate funds for the medical care and treatment and compensation to a pupil permanently injured by burns received by reason of a defective and unsafe open-flame gas stove used in a public school where such pupil was attending, as a matter of justice and right and as contemplated in the thorough and efficient system of free schools directed to be provided for by the Legislature in article XII of the constitution. *Richards, et al* v. *School Board* 142

This claim is controlled by the opinion of a majority of the court of claims filed in the case of claim No. 48, *J. C. Richards* v. *Board of Education of Calhoun County and State Board of Education. Johnson* v. *School Boards* 158

A county board of education is not a state agency as contemplated by the act creating the court of claims. *Dillon* v. *School Board* 366

Insofar as the opinion *in re* claim No. 48, *J. C. Richards*, against the board of education of Calhoun county, and the opinion *in re* claim No. 55, *Benjamin Johnson, Jr.*, against the board of education of Logan county, recognize the jurisdiction of the court of claims to entertain, investigate and make determination in claims against a county board of education is concerned, such holding is now disapproved by a majority of the court. *Id.*

STATE AGENCY

An athletic board or department of a state controlled college is not a state agency as contemplated by the act creating the court of claims and a contract entered into with such board or department is not enforceable in said court, the court being without jurisdiction to hear and determine a claim based on the provisions or conditions of the contract in question. *Omaha University* v. *Board Control, et al* 185

A county board of education is not a "state agency" within the meaning of the act creating the state court of claims. *Miller* v. *School Board* 205

A county board of education is not a state agency as contemplated by the act creating the court of claims. *Dillon* v. *School Board* 366

STATE EMPLOYEES

The state or its agency, the state road commission, is not an absolute guarantor of the safety of its employees, nor was it such guarantor at the time of the accident from which the instant case arose; and when claimant with full knowledge of the danger incident to the work that he was about to perform had at his command and disposal the means of protecting himself by the use of available equipment, and the use of which would in all probability have prevented the accident to him, and failed to do so, then he was guilty of such negligence as must necessarily preclude him from an award. *Johnson* v. *State Road* 253

TAXES—See Gasoline Taxes and Land Taxes Delinquent

TREES—See also Negligence

Where it appears from the evidence that there is a sharp curve on a state secondary dirt road, which is overgrown with brush obscuring the vision of persons traveling thereon, and which road is narrow and otherwise defective and out of repair, and that a girl, thirteen years of age, while riding as a passenger in a mail truck on said road, sustains personal injuries and the loss of four upper front teeth as the result of the mail truck collision with a one and one-half ton truck loaded with shale or gravel while passing through said curve, an award will be recommended for hospitalization and dental bills. *Babb, et al* v. *State Road* 317

When, upon the hearing of a claim for an award for reimbursement for money paid for repairs to an automobile driven by claimant into a tree blown by storm upon a public highway, proof offered in support of such claim fails to show negligence on the part of the state road commission, or establish a right of action for such damages, a motion of the attorney general to dismiss the claim will be sustained, an award denied and the claim dismissed. *James* v. *State Road* 90

WEST VIRGINIA BLUE BOOK, Appropriation for

Where it appears from the record and evidence applicable to a claim, that the Legislature by successive appropriation acts makes reference in each instance to a former act of the Legislature which former act also refers to a concurrent resolution specifically directing that certain items in the costs of printing and binding, such as maps and half-tone illustrations and circular matter necessarily used in the completion of the work directed to be done, shall be paid out of the appropriations for printing, binding and stationery fund, known as the legislative printing fund appropriation, and said successive acts, by construction placed thereon by officers charged with their execution have been interpreted to include such costs, when such interpretation is the plain meaning of such acts, an award will be made to one who has been refused payment of such costs out of such appropriations, by the auditor, and has personally paid for same, when it is found that no part of said claim has been repaid to such claimant or to anyone for him. *Lively* v. *Auditor* 102

WORKMEN'S COMPENSATION

JURISDICTION. The jursidiction of the state court of claims does not extend to any claim for a disability or death benefit under chapter 23 of the code of West Virginia governed by the workmen's compensation commission. *Taylor, et als,* v. *Workmen's Compensation* 1

Where the evidence shows that one is fatally injured while in the course of his employment as an employee of a department of the state and such state department at the time of the injury is a subscriber to the state workmen's compensation fund, has paid the premiums and complied with all the provisions of chapter twenty-three of the code, the court of claims is without jurisdiction to make an award for the death of such employee although there were no dependents of the employee within the classification of dependents contained in the general law under said chapter twenty-three of the code which denies death benefits to all who are not dependents of the employee within the class therein specified. *Timms, Adm., v. Board Control* 41