STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1950-1952

Volume

6

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from December 1, 1950,
to November 30, 1952.

By

W. H. PERRY

Clerk

VOLUME VI

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

WM. W. GAUNT & SONS, INC.

Reprint Edition

Wm. W. GAUNT & SONS, INC.

3011 Gulf Drive, Holmes Beach, Florida 33510

Printed in the United States of America

by

Jones Offset, Inc., Bradenton Beach, Florida 33510

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HONORABLE PHILIP ANGEL ..... Alternate Judge

W. H. PERRY ..... Court Clerk

LENORE THOMPSON ..... Law Clerk

JOHN G. FOX ..... Attorney General

Letter of Transmittal

To His Excellency

The Honorable Okey L. Patteson

Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March sixth, one thousand nine hundred forty-one, I have the honor to transmit herewith the report of the State Court of Claims for the period from December first, one thousand nine hundred fifty to November thirtieth, one thousand nine hundred fifty-two.

Respectfully submitted,

W. H. PERRY

Clerk.

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

Passed March 6, 1941; amended March 8, 1945

CHAPTER 14, CODE

Article 2. Claims Against the State.

Section

Section 1. *Purpose.*—The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and statutory restrictions, inhibitions or limitations cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest.

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

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

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

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

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

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

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

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

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

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

Sec. 4. *Court of Claims.*—There is hereby created a "State Court of Claims" which shall be a special instrumentality of the Legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be heard in a court of law or equity, and recommending the disposition thereof to the Legislature. The court shall not be invested with or exercise the judicial power of the state in the sense of article eight of the constitution of the state. A determination made by the court shall not be subjected to appeal to or review by a court of law or equity created by or pursuant to article eight of the constitution.

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

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

Sec. 5. *Court Clerk.*—The court shall have authority to appoint a clerk, and shall fix his salary at not to exceed the sum of three thousand six hundred dollars per annum to be paid out of the regular appropriation for the court. The clerk shall have

custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations and shall issue all official summonses, orders, statements and awards.

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

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

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

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

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

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

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

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

Sec. 12. *General Powers of the Court.*—The court shall in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or of some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. But no liability shall be imposed upon the state or any of its agencies by a determination of the court of claims approving a claim and recommending an award, unless the Legislature has previously made an appropriation for the payment of a claim subject only to the determination of the court. The court shall consider claims in accordance with sections sixteen to twenty, inclusive, of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by three judges. If, after consideration, the

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

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

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

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

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

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

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

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

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

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

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

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

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

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

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

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh in accordance with its evidential value any information that will assist the court in determining the factual basis of the claim.

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

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in

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

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

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

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

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

Sec. 17. *Shortened Procedure.*—The shortened procedure authorized by this section shall apply only to claim possessing all the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court. The record shall be filed with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

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

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

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

3. When the claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance

of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

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

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

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

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

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

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

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the state agency, the state auditor, and the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and verified by the court.

Sec. 20. *Claims Under Special Appropriations.*—Whenever the Legislature makes an appropriation for the payment of claims

against the state, then accrued or arising during the ensuing biennium, determination of claims and the payment thereof may be made in accordance with this section. But this section shall apply only if the Legislature in making its appropriation specifically so provides.

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

Sec. 21. *Limitations of Time.*—The court shall not take jurisdiction over a claim unless the claim is filed within five years after the claim might have been presented to such court. If, however, the claimant was for any reason disabled from maintaining the claim, the jurisdiction of the court shall continue for two years after the removal of the disability. With respect to a claim arising prior to the adoption of this article, the limitation of this section shall run from the effective date of this article: *Provided, however,* That no such claim as shall have arisen prior to the effective date of this article shall be barred by any limitation of time imposed by any other statutory provision if the claimant shall prove to the satisfaction of the court that he has been prevented or restricted from presenting or prosecuting such claim for good cause, or by any other statutory restriction or limitation.

Sec. 22. *Compulsory Process.*—In all hearings and proceedings before the court, the evidence of witnesses and the production of documentary evidence may be required. Summons may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a summons or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers, and documents. Upon proper showing, the circuit

court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

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

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

Sec. 25. *Reports of the Court.*—The clerk shall be official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of a biennial report.

Claims and awards shall be separately classified as follows:

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

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

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

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

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

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

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

Sec. 26. *Fraudulent Claims.*—A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer who knowingly and wilfully participates or assists in the preparation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted preson is a state officer he shall, in addition, forfeit his office.

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

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

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

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

TABLE OF RULES

Rules of Practice and Procedure

RULE

Rules of Practice and Procedure

OF THE

State Court of Claims

RULE 1. CLERK'S OFFICE LOCATION AND HOURS.

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

RULE 2. CLERK, CUSTODIAN OF PAPERS, ETC.

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

RULE 3. FILING PAPERS.

(a) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents received or filed in the office kept by the Clerk of

this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

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

RULE 4. RECORDS.

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

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

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

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

RULE 5. FORM OF CLAIMS.

Notices of all claims and demands must be filed with the Clerk of the Court and may be by a written statement, petition, declaration, or any writing without regard to form, which sufficiently sets forth the nature of the claim or demand, the

facts upon which it is based, the time, and place of its origin, the amount thereof, and the State Agency, if any, that is involved. Technical pleadings shall not be required. The Court however, reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notices of claims be furnished in triplicate.

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

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

RULE 7. JURISDICTION, PRIMA FACIE.

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

RULE 8. PREPARATION OF HEARING DOCKET.

The Clerk shall prepare fifteen days previous to the regular terms of Court a printed docket listing all claims and demands that are ready for hearing and consideration by the Court, and

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

RULE 9. PROOF, AND RULES GOVERING TESTIMONY.

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

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

(c) Under its rules, the Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weigh, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim.

RULE 10. CLAIMS, ISSUES ON.

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

RULE 11. STIPULATIONS OF FACT, INTERROGATORIES TO DETERMINE.

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

The control and jurisdiction over, location, grade, width, type of surface and condition of particular roads, right of ways and bridges; exact or approximate dates; identities of persons; identity, description and ownership of property; and any and all other evidential facts directly involved or connected with the claim, without regard to the foregoing enumeration of data, and which the parties may be able properly and definitely to agree upon and stipulate, for the purpose of expediting the hearing, simplifying and shortening the transcript or record of the claim and to facilitate the labour of the Court in arriving at and resolving the controverted questions and issues involved; and to the further end, where the claim is small, to avoid, if possible, the necessity for the introduction of evidence.

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

RULE 12. CLAIMANTS, APPEARANCES.

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

RULE 13. BRIEFS, NUMBER OF COPIES.

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

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

RULE 14. AMENDMENTS TO NOTICES, PETITIONS, ETC.

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

RULE 15. CONTINUANCES; DISMISSAL FOR FAILURE TO PROSECUTE.

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

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

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

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

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

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

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

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

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

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

RULE 18. WITNESSES.

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

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

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

RULE 19. DEPOSITIONS.

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

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

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

RULE 20. REHEARINGS AND REOPENINGS OF CLAIMS AFTER DETERMINATION.

(a) Rehearings may not be allowed except where good cause is shown why the case should be reconsidered. Motions for

rehearings may be entertained and considered *ex parte,* unless the Court otherwise directs upon the petition and brief filed by the party seeking the rehearing. Such petition and brief shall be filed within 30 days after notice of the Court's determination of the claim, and the filing of the Court's opinion therein, unless good cause be shown why the time should be extended.

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

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

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

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

(2) The department, by or through neglect, default or failure to use reasonable care under the circumstances caused the dam-

age to claimant, so that the State in justice and equity should be held liable.

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

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

REPORT OF THE COURT OF CLAIMS

For Period December 1, 1950, to November 30, 1952

(1-a) Approved claims and awards referred to the Legislature, 1951, for the period from December 1, 1950, to January 26, 1951, after Report No. 5 had gone to press; allowed by the Legislature, 1951; opinions therein included in this report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
727	Byard, Carter O. (Mrs.)	State Road Commission	$ 197.27	$ 197.27	January 19, 1951
731	Chambers, Thurman, Sheriff	State Auditor	14.60	14.60	January 19, 1951
721	Clark, C. H.	State Road Commission	42.08	42.08	January 16, 1951
707	Cohen, Dina	State Department of Employment Security	825.00	825.00	January 23, 1951
729	Cramer, H. E.	State Road Commission	36.11	36.11	January 25, 1951
725	Daniels, Claire	State Road Commission	57.34	57.34	January 19, 1951
716	Gant, A. L.	State Road Commission	25.00	25.00	January 10, 1951
718	Garrison, Charles	State Road Commission	35.60	35.60	January 12, 1951
710	Hannas, Clearsin	Department of Public Safety	700.00	700.00	January 15, 1951
720	Linkinogger, H. H.	State Road Commission	56.80	56.80	January 15, 1951
722	Mullins, Flem L.	State Road Commission	6,209.44	3,000	January 25, 1951
719	McBride, W. L.	State Road Commission	109.14	109.14	January 12, 1951
730	Resides, John B. and Service Fire Insurance Company	State Road Commission	60.46	60.46	January 23, 1951
728	Roberts, Orban, Father of Gary Roberts	State Road Commission	200.00	200.00	January 22, 1951
726	Smith, Kenneth G. and Calvert Fire Insurance Company	State Road Commission	164.63	164.63	January 25, 1951
717	Tabor, Woodrow	State Road Commission	150.00	150.00	January 12, 1951
715	Taylor, L. C.	State Road Commission	60.69	60.69	January 10, 1951
724	Town of Romney	W. Va. Board of Education	872.38	872.38	January 16, 1951
			$ 9,816.54	$ 6,607.10	

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1953 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
760	Andrews, Doyle	State Road Commission	$ 121.50	$ 121.50	January 16, 1952
735	Bumgarner, Wallace	State Board of Control	3,079.30	2,000.00	July 17, 1951
763	Cleaver, Tressie V. admx. estate of Lemuel A. Cleaver, Jr., deceased	State Conservation Commission	256.80	256.80	April 30, 1952
745	Copley, Jennie Bell	State Road Commission	84.50	350.00	January 18, 1952
745	Copley, Stanley	State Road Commission		50.25	January 18, 1952
772	Crighton, H. N. (Mrs.)	State Adjutant General		30.00	October 23, 1952
758	DelSignore, Jacquelyn R. and American Farmers Mutual Insurance Company	State Road Commission	50.00	50.00	January 17, 1952
743	Esso Standard Oil Company	State Adjutant General	58.00	58.00	July 12, 1951
764	Gill, Stanley B. and Florence L.	State Road Commission	1,514.01	1,100.00	April 30, 1952
771	Herbaugh, Sylvia	State Conservation Commission	75.00	75.00	October 20, 1952
761	Higginbotham, P. O.	State Road Commission	2,000.00	600.00	April 30, 1952
767	Hogsett, Paul C.	State Road Commission	127.50	127.50	October 17, 1952
769	Holliday, J. Kelvin and Kathleen Holliday, d/b/a The FayetteTribune	State Auditor	76.55	76.55	October 16, 1952
772	Johnson, Cora	State Adjutant General		30.00	October 23, 1952
756	Massi, Ugo J. and American Farmers Mutual Insurance Company	State Road Commission	50.00	50.00	January 17, 1952
757	Milkint, Louis and Virginia and American Farmers Mutual Insurance Company	State Road Commission	50.00	50.00	January 17, 1952

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1953 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
755	Milkint, Robert and Emogene and American Farmers Mutual Insurance Company	State Road Commission	50.00	50.00	January 17, 1952
742	Motors Insurance Corporation	State Adjutant General	176.31	176.31	October 24, 1951
766	Norris, Fred W.	Department of Archives and History	150.00	150.00	October 16, 1952
759	Parks, Gerald H. and American Farmers Mutual Insurance Company	State Road Commission	40.00	40.00	January 17, 1952
736	Rich Valley Dairy Company	State Adjutant General	416.47	416.47	July 19, 1951
737	Stewart, Clifford S.	State Adjutant General	196.97	79.41	October 24, 1951
772	Weekley, Margaret E.	State Adjutant General	725.82	57.00	October 23, 1952
772	Weekley, J. C.	State Adjutant General		608.82	October 23, 1952
752	Young, Hazen D.	State Adjutant General	202.90	202.90	January 16, 1952
			$ 9,501.63	$ 6,806.51	

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payment out of regular appropriation for the biennium.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
738	Withrow, Bertram L.	State Road Commission	$ 30.60	$ 30.60	October 19, 1951

(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
713	Bettina, Sergio	State Commissioner of Forfeited and Delinquent Lands	$ 60.00	Dismissed	January 9, 1951
709	Bowers, C. H. d/b/a Huff Creek Coal Company	W. Va. Department of Employment Security	788.11	Dismissed	July 11, 1951
754	Cassady, Kermit R.	State Conservation Commission	50.00	Dismissed	January 15, 1952
740	Coleman Electric Service	State Road Commission	25.00	Dismissed	January 14, 1952
711	Daniels, Raymond	State Commissioner of Forfeited and Delinquent Lands	168.16	Dismissed	January 9, 1951
733	Dauenheimer, C. V.	State Road Commission	100.88	Dismissed	October 22, 1951
765	Farnsworth, Carlyle D.	State Road Commission	1,600.00	Denied	October 23, 1952
770	Flynn, William	State Road Commission	2,500.00	Denied	October 21, 1952
744	Friend, Harvey	State Department of Mines	150,000.00	Dismissed	December 17, 1951
712	Graham, Homer	Workmen's Compensation Commissioner	709.72	Dismissed	January 9, 1951
723	Greene, H. F.	State Road Commission	18.16	Dismissed	October 12, 1951
762	Hale Electric Company	W. Va. Board of Education	9,659.02	Denied	June 27, 1952
753	Lemon, Argel D.	State Road Commission	15,000.00	Dismissed	December 17, 1951
714	Lopez, Aurora and Dositeo	State Commissioner of Forfeited and Delinquent Lands	235.00	Dismissed	January 9, 1951
734	Martin, Mary J., admx. of the estate of James F. Martin, deceased	State Road Commission	10,000.00	Denied	October 23, 1952

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
751	Mills, W. L.	State Road Commission	315.00	Denied	October 12, 1952
768	McKinley, Henry J.	State Road Commission	1,500.00	Denied	October 20, 1952
747	McPeake, Alice	State Conservation Commission	.....	Dismissed	September 22, 1951
741	Peters, L. R.	State Road Commission	53.98	Dismissed	July 13, 1951
749	Raynes, Brooks G.	West Virginia University	131.62	Dismissed	October 25, 1951
750	Runyan, Sylvia and Bennie	State Road Commission	1,000.00	Dismissed	December 17, 1951
746	Rutherford, Spence	State Road Commission	346.92	Denied	October 25, 1951
739	Tsutras Brothers	State Road Commission	55.64	Denied	October 17, 1951
689	Vanata, Paul E.	State Road Commission	1,400.00	Dismissed	January 9, 1951
748	Webb, Emmett Wayne	State Road Commission	662.53	Denied	October 25, 1951
732	West Virginia Insurance Company	State Road Commission	2,000.00	Denied	October 17, 1951
			$198,379.74		

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

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

OPINIONS

TABLE OF CASES REPORTED

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

(No. 715-S—Claimant awarded $60.69.)

L. C. TAYLOR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 10, 1951

JAMES CANN, JUDGE.

On or about the 20th day of July, 1949, the agents and servants of the respondent were engaged in painting, by means of a spray gun, a bridge spanning Elk river, at or near Big Chimney, Kanawha county, West Virginia; they were using red lead paint commonly used in the painting of bridges. On the above mentioned date, some of the paint that was being used was sprayed on the claimant's automobile while being operated over said bridge, resulting in damages to claimant in the sum of $60.69.

It is evident that claimant's automobile while traveling over said bridge was not observed by the employes of respondent. The record discloses that no flagman was present, or other means of warning used, to warn persons using said bridge that it was being sprayed with paint. Further, the record fails to disclose any negligence or contributory negligence on the part of the claimant; but that the damage suffered by claimant was caused solely by the negligence of the employes of the respondent.

Recommendation of payment of this claim is made by respondent and concurred in by the attorney general. Under all the facts and circumstances as shown by the record, we are of the opinion, and so hold, that the state should compensate claimant for the damages suffered; therefore an award is made in favor of claimant, L. C. Taylor, in the sum of sixty dollars and sixty-nine cents ($60.69).

(No. 716-S—Claimant awarded $25.00.)

A. L. GANT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 10, 1951

JAMES CANN, JUDGE.

On or about the 20th day of July, 1949, the agents and servants of the respondent were engaged in painting, by means of a spray gun, a bridge spanning Elk river, at or near Big Chimney, Kanawha county, West Virginia; they were using red lead paint, commonly used in the painting of bridges. On the above mentioned date, some of the paint that was being used was sprayed on the claimant's automobile while being operated over said bridge, resulting in damages to claimant in the sum of $25.00.

It is evident that claimant's automobile while traveling over said bridge was not observed by the employes of respondent. The record discloses that no flagman was present, or other means of warning used, to warn persons using said bridge that it was being sprayed with paint. Further, the record fails to disclose any negligence or contributory negligence on the part of the claimant; but that the damage suffered by claimant was caused solely by the negligence of the employes of the respondent.

Recommendation of payment of this claim is made by respondent and concurred in by the attorney general. Under all the facts and circumstances as shown by the record, we are of the opinion, and so hold, that the state should compensate claimant for the damages suffered; therefore an award is made in favor of claimant, A. L. Gant, in the sum of twenty-five dollars ($25.00).

(No. 719-S—Claimant awarded $109.14.)

W. L. McBRIDE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1951

JAMES CANN, JUDGE.

On or about the 20th day of July, 1949, the agents and servants of the respondent were engaged in painting, by means of a spray gun, a bridge spanning Elk river, at or near Big Chimney, Kanawha county, West Virginia; they were using red lead paint commonly used in the painting of bridges. On the above mentioned date, some of the paint that was being used was sprayed on the claimant's automobile while being operated over said bridge, resulting in damages to claimant in the sum of $109.14.

It is evident that claimant's automobile while traveling over said bridge was not observed by the employes of respondent. The record discloses that no flagman was present, or other means of warning used, to warn persons using said bridge that it was being sprayed with paint. Further, the record fails to disclose any negligence or contributory negligence on the part of the claimant; but that the damage suffered by claimant was caused solely by the negligence of the employes of the respondent.

Recommendation of payment of this claim is made by respondent and concurred in by the attorney general. Under all the

facts and circumstances as shown by the record, we are of the opinion, and so hold, that the state should compensate claimant for the damages suffered; therefore, an award is made in favor of claimant, W. L. McBride, in the sum of one hundred nine dollars and fourteen cents ($109.14).

(No. 717-S—Claimant awarded $150.00.)

WOODROW TABOR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1951

ROBERT L. BLAND, JUDGE.

This proceeding was submitted to the court of claims for determination upon a record made by the state road commission in pursuance of section 17 of the acts of the Legislature creating the court of claims. The claim involved is in the sum of $150.00. The head of the agency concurred in the claim and an assistant attorney general has approved the said claim as one that in view of the purposes of the court of claims statute should be paid. The determination must necessarily therefore be made upon the basis of the record thereof submitted to the court as aforesaid. It is made the duty of the attorney general by the court act to represent the interest of the state in respect to all claims filed. This court must conclude that neither the attorney general himself nor one of his assistants would approve a claim asserted against the state without having carefully examined such claim and making himself fully familiar with the facts out of which it grew and with the knowledge that it is a claim for which the Legislature may lawfully make an appropriation of the public revenues.

The facts in this case are substantially as follows. Employes of the state road commission were, on the 28th day of March,

1950, engaged in blasting on secondary route No. 52/2 in Mercer county, West Virginia. Naturally, in performing work of this character precautionary measures should be employed to prevent the possibility of accidents to persons lawfully using the public highways of the state and their property. In the instant case no flagman was present to warn persons traveling on the highway that blasting operations were in progress. This fact alone would indicate a dereliction of duty on the part of the road commission, and seemingly establish its negligence in the performance of the work in which its employes were engaged. The claimant had no knowledge of the work that was being done upon the road and so far as it can be discerned from the record was guilty of no negligence himself. However, as a result of the negligence of respondent certain debris emanating from the blasting struck claimant's car causing damage thereto in the amount of $150.00.

Under all the circumstances and upon the clear showing of respondent's negligence, we are of opinion to approve the claim.

An award is therefore made in favor of the claimant Woodrow Tabor in the sum of one hundred and fifty dollars ($150.00).

(No. 718-S—Claimant awarded $35.60.)

CHARLES GARRISON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1951

JAMES CANN, JUDGE.

On the tenth day of April, 1950, at approximately two-thirty o'clock P. M., claimant, while crossing the River Bridge at Monongah, Marion county, West Virginia, in his automobile, was compelled to drive close to the guardrailing on his right in

order to avoid a large coal truck proceeding in the opposite direction. At this point a piece of said guardrail, which was broken and sticking out from the bridge railing, caught the right front fender of claimant's car causing damage thereto in the amount of $35.60.

The record discloses that shortly after this accident the broken guardrail was welded and repaired.

This court has held in numerous cases that the statute requiring inspection and proper maintenance of bridges controlled by the road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident if caused by such negligence. No negligence is shown on the part of claimant.

The respondent has recommended payment of this claim and the same is approved by the attorney general. In view of the facts and circumstances as disclosed by the record presented to this court, we make an award in favor of claimant, Charles Garrison, for the sum of thirty-five dollars and sixty cents ($35.60).

(No. 710-S—Claimant awarded $700.00.)

CLEARSIE HANNAS, Claimant,

v.

DEPARTMENT OF PUBLIC SAFETY, Respondent.

Opinion filed January 15, 1951

A. D. KENAMOND, JUDGE.

Claimant, Clearsie Hannas, of Romney, West Virginia, seeks reimbursement in the sum of $700.00 as damages for the loss of

certain livestock occasioned by their eating poisonous lead paint and red lead which had been spilled and left in open buckets upon unfenced property adjacent to or encircled by the pasture field of the claimant through the negligence of employees of the state department of public safety on April 24, 1950.

In October 1946 respondent had leased for ninety-nine years, for the construction and maintenance of a remote radio control tower and station, a one-acre parcel of ground surrounded by land owned by the plaintiff who used the same for the pasture of livestock. According to the terms of the lease, a copy of which was filed as exhibit A, respondent was to erect and maintain a permanent fence to enclose the said one-acre parcel of ground. No fence was erected, and thus the cattle belonging to claimant had access to the poisonous paint left on the ground at the base of the tower and to open used buckets of paint strewn about near the tower.

The deposition of T. E. Haines, a Hampshire county stock raiser experienced in treating sick cattle, states that he was present with veterinarians from Romney, West Virginia, and Winchester, Virginia, when they examined the sick cattle and came to the conclusion that they had symptoms of poisoning. Shortly thereafter four of the cattle died and said T. E. Haines was present when Sgt. K. V. Shanholtzer, chemist for the state department of public safety, examined contents of the dead cattle's stomachs and after appropriate chemical analysis, decided that the cattle died as the result of poisoning.

Depositions of T. E. Haines, Daniel T. Williams and R. L. Baker, competent appraisers, stated that they concurred in the following values for the cattle which died as the result of eating the poisonous paint:

One bull, about thirteen months old	$250.00
One heifer, about seventeen months old	175.00
One heifer, about thirteen months old	125.00
One heifer, about twelve months old	150.00
Total	$700.00

This claim was originally filed on September 25, 1950, for consideration under the regular procedure, but, after a thorough investigation by the state department of public safety, it was submitted by respondent, with a record of all the facts and circumstances in the case, as a shortened procedure claim under the provisions of the state court of claims act.

The state department of public safety having concurred in this claim and recommended an award of $700.00, and the attorney general having approved the claim as one that should be paid, this court hereby makes an award and recommends the payment of seven hundred dollars ($700.00) to the claimant, Clearsie Hannas.

(No. 720-S—Claimant awarded $56.80.)

H. H. LINKINOGGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1951

JAMES CANN, JUDGE.

On the 6th day of October, 1950, claimant was driving cattle over and along Route No. 36, near Tariff in Roane county, West Virginia, when a steer stepped into a broken corrugated metal pipe culvert along said highway and almost severed its foot.

It appears from the record submitted to this court that this pipe culvert had been separated and broken by a grader in putting the ditch line along this highway; that an investigation by B. D. Shattoo, district safety director for respondent, revealed that the pipe culvert had become separated from the collar clamp leaving the pipe separated some four or five inches, the separa-

tion being along the berm about two feet from the paved surface and about four feet from the ditch line.

The record further reveals that because of the injuries to the steer it had to be slaughtered and sold to a butcher for $193.20; that at the time of the accident the fair market value of the steer was $250.00, thus representing a sacrifice loss to claimant in the sum of $56.80 for which claim is made. Mr. Shatto's report of his investigation of this claim contains the statement that claimant's claim of damages is just and that he should be reimbursed for the loss he has sustained.

The respondent has recommended payment of this claim and said recommendation has been concurred in by the attorney general.

Under all existing facts and circumstances as submitted to this court we are of the opinion that this claim should be paid.

Therefore, an award is made to claimant, H. A. Linkinogger, in the sum of fifty-six dollars and eighty cents ($56.80).

(No. 724-S—Claimant awarded $872.38.)

TOWN OF ROMNEY, Claimant,

v.

STATE BOARD OF EDUCATION, Respondent.

Opinion filed January 16, 1951

A. D. KENAMOND, JUDGE.

Claimant in this case seeks an award in the sum of $872.38, representing pro rata share for the biennium 1947-1949 of the West Virginia school for deaf and blind, in maintenance of the sewage disposal plant operated by the Town of Romney and

jointly used and maintained by said school and the Town of Romney. The claim includes $444.60 for 1947-1948 and $427.78 for 1948-1949, making up the total of $872.38.

The state board of education would have authorized payment of the two items of the claim if they had been brought to the attention of the board before expiration of appropriation funds. The written agreement, under date of October 1, 1940, between the Town of Romney and the West Virginia board of control, then and until July 1, 1947 in charge of the fiscal affairs of the school, set 35 per cent of cost as the school's proportionate share of maintaining and operating the sewage disposal plant. The superintendent of the school contended that the proportion 35 per cent was too high and it was not until August 4, 1949 that the town council agreed to cut it from 35 to 20 per cent until the census of 1950 should be taken, and a proper ordinance was adopted by council to that effect. Thus the claims made after expiration of appropriated funds were based on a lower rate than that which prevailed in the years 1947-1948 and 1948-1949 under the original contract.

The West Virginia board of education concurs in this claim and recommends an award therefor under the shortened procedure provision of the state court of claims act, and the claim is approved by the attorney general as one that should be paid.

Accordingly, this court makes an award of eight hundred seventy-two dollars and thirty-eight cents ($872.38) to the Town of Romney.

(No. 721-S—Claimant awarded $42.08.)

C. H. CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1951

JAMES CANN, JUDGE.

On the 4th day of October, 1950, claimant was operating his Ford truck over and along the left fork of Sams Creek road in Wood county, West Virginia, when one of his tires was cut by a sharp portion of a corrugated metal pipe culvert which extended up alongside and into said road. From the record submitted to this court it appears that a grader used in maintaining said road had struck the pipe culvert splitting it in two near the end of the culvert and leaving a sharp edge of said pipe sticking up inside of the road.

Respondent has approved this claim and has recommended payment and the said payment is concurred in by the attorney general.

We are of opinion that upon the showing made by the record that claimant is entitled to an award in the case; therefore, an award is made in favor of claimant, C. H. Clark, for the sum of forty-two dollars and eight cents ($42.08).

(No. 725-S—Claimant awarded $57.34.)

CLAIRE DANIELS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 19, 1951

ROBERT L. BLAND, JUDGE.

The claim involved in this case comes to the court of claims under the shortened procedure provision of the court act. It is a claim concurred in by the head of the agency concerned and approved by an assistant attorney general as one which within the meaning of the court act should be paid by the state. The record prepared by the state road commission and filed in the court discloses the following factst: On October 21, 1950, claimant was driving her automobile in the town of Benwood, where respondent had been engaged in grading and widening the road, taking out crossties, *et cetera*, when, at a point known as Kentucky Heights, her automobile came in contact with a spike, damaging the tire and tube to the extent of $57.34.

The court having informally considered the said claim is of opinion that under the circumstances it would appear to be a claim possessed of merit. An award is therefore made in favor of claimant Claire Daniels in the amount of fifty-seven dollars and thirty-four cents ($57.34).

(No. 727-S—Claimant awarded $197.27.)

MRS. CARTER O. BYARD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 19, 1951

JAMES CANN, JUDGE.

Claimant, Mrs. Carter O. Byard, seeks reimbursement in the amount of $197.27, which sum she was obliged to pay for repair to her automobile damaged by rocks and debris thrown by blasting operations on Hubbard's Branch road, a secondary route of the state road commission, in Wayne county, West Virginia.

The record submitted to this court reveals that the claimant, on the 19th day of September, 1950, was operating her 1949 Ford sedan over and along said road and as she approached the place where the employes of respondent were reconstructing certain sections of said road, and were using dynamite to make a new cut, she was halted by a flagman stationed for the purpose of halting traffic while the blasting was occurring. After a blast had been shot claimant was signaled and advised by the flagman to proceed and when she had traveled a short distance a second blast was shot which threw rock and debris over her automobile, damaging the top to the hood and side thereof which necessitated the expenditure of $197.27, for repairs.

From the accident report form prepared and filed by the respondent it appears that this accident was caused by improper flagging. From the report made by E. C. Fields, foreman for the Wayne county maintenance department of respondent, it appears that either the flagman or the employe in charge of blasting made the mistake which caused the damages to claimant's automobile, otherwise this accident would not have happened.

From the whole record we conclude that the employes of the respondent working on the project above mentioned were at

fault and were solely responsible for the damages claimed in this case.

The respondent concurs in claimant's claim for damages and the same is approved by the attorney general. We therefore make an award in favor of claimant, Mrs. Carter O. Byard, for the sum of one hundred ninety-seven dollars and twenty-seven cents ($197.27).

(No. 731-S—Claimant awarded $14.60.)

THURMAN CHAMBERS, *Sheriff Mingo County,* Claimant,

v.

EDGAR B. SIMS, *State Auditor,* Respondent.

Opinion filed January 19, 1951

ROBERT L. BLAND, JUDGE.

Claimant Thurman Chambers, sheriff of Mingo county, West Virginia, has filed a claim against Edgar B. Sims, auditor of West Virginia, to obtain reimbursement in the sum of $14.60 on account of witness certificates in felony cases which were paid by him. The auditor has concurred in the claim and prepared and filed in the court of claims, under section 17 of the court act, a record setting forth in detail the facts and circumstances supporting said claim. These facts and circumstances are detailed as follows:

> "These are witness certificates from felony cases which were held at various times ranging from the October 1945 term to the May 1949 term. Mr. Thurman Chambers, Sheriff of Mingo County paid the witnesses for their expenses itemized on the certificates, and in December 1950, submitted them to the State for reimbursement from the Criminal Claims appropriation set up from General Revenue Funds to pay certain expenses of felony cases, including witness fees such as these. The State Auditor

refused to reimburse the Sheriff out of the Criminal Claims appropriation for the *current* biennium on the ground that these were for expenses incurred *prior* to the current biennium. Recommendation of an award is urged so that these delinquently submitted certificates can be paid."

An assistant attorney general has approved the claim for payment. The court has informally considered the claim upon the basis of the facts above stated and is of opinion to make an award in favor of the claimant.

An award is, therefore, made in favor of claimant Thurman Chambers, sheriff of Mingo county, in the sum of fourteen dollars and sixty cents ($14.60).

(No. 728-S—Claimant awarded $200.00.)

ORBAN ROBERTS, father of GARY ROBERTS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 22, 1951

A. D. KENNAMOND, JUDGE.

The record of the claim involved in this case was prepared by the state road commission and filed with the clerk of the court of claims on January 8, 1951, to be considered upon the record submitted, under the shortened procedure provision of the court act.

This claim is for injuries received on August 24, 1949, by Gary Roberts, then seven years old, the son of Orban Roberts, of Hamlin, West Virginia. The facts in the case were fully investigated by John L. Moore, safety director for district one, Putnam

county, and by Harry R. Bell, claims agent for the state road commission, and their statements of fact are found in the record submitted and may now be briefly recited by the court.

While working on the Big Creek Road in Putnam county, state workmen left a dynamite cap lying by the side of the road when they quit work, and this cap (exploder) was found by the child and exploded by him causing painful injury. The child has several pieces of this exploder imbedded in various parts of his body, which his physician, Dr. C. W. Thompson, of Hamlin, says will eventually work out. The father, Orban Roberts, was delayed for several days in his work of caring for a large tobacco crop in order to take the boy to the doctor at Hamlin, a distance of several miles, and had doctor bills including treatment of wounds, anti-tetanus shots and administering penicillin.

On January 5, 1951, Orban Roberts and Lena Roberts, father and mother of Gary Roberts, executed a release, witnessed by Locie Johnson, releasing the state road commission from any and all liability for damages, doctor bills, compensation for lost time, *etc.*, accruing from the accident wherein the said Gary Roberts was injured, upon an award being made and payment being made to them in the sum of two hundred dollars, said amount to be in full settlement of any claim they now have or may have in the future against the state road commission by reason of this accident.

Taking into consideration the immaturity of the child Gary Roberts, the negligence of employes of the state road commission, the absence of any intervening third cause, and also time lost by the child's father as a result of the accident, we are impressed with the merit of this claim.

The head of the agency concerned concurs in the claim and the attorney general's office approves it as a claim which in view of the act creating the court of claims should be paid.

An award is therefore made in favor of the claimant Orban Roberts for the sum of two hundred dollars ($200.00).

(No. 707—Claimant awarded $825.00.)

DENA COHEN, Claimant,

v.

STATE DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.

Opinion filed January 23, 1951

Pursuant to the purpose and spirit of the act of the Legislature creating the state court of claims, an award may be made for claims against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state received distinct value and benefit; and by virtue of the same act an award may be made to a claimant for losses arising from such benefit having been afforded the state.

Appearances:

John S. Stump, Jr., for claimant.

Eston B. Stephenson, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

Claimant in this case seeks damages in the sum of $825.00, representing loss in rent for property occasioned by the failure of respondent to vacate certain premises on West Main street in Clarksburg, West Virginia, on the expiration date of a written lease.

By writing dated July 1, 1944, claimant leased these premises to the state department of unemployment compensation (so titled until changed by the Legislature of 1949 to the department of employment security) for a period of one year with renewal option for an additional year, which option was exercised, thereby extending the lease period to and including June 30, 1946. On January 21, 1946, claimant notified respondent that the lease would not be renewed, the said premises having been demised

to other and different tenants, and demanded possession of the premises on expiration date of June 30, 1946, and further offering to waive the thirty-day notice stipulation in the lease if the respondent found it convenient to move to other suitable quarters before expiration date of lease and agreeing to accept rent only to such earlier date.

Respondent failed and refused to vacate as demanded, on the ground that other suitable quarters could not be found. Finally respondent did vacate the premises on November 15, 1946, and paid claimant rental in the amount of $1,125.00, or $250.00 per month, for the four and a half months of extended occupancy beyond expiration of lease. During this extended period Arlene Shops, *Inc.* would have been paying claimant a rental of $300.00 per month, or a total of $1,350.00, under a lease dated January 14, 1946, with the right of occupancy on July 1, 1946. There was no disposition on the part of respondent to contest the claim for $225.00, the amount of rental claimant lost by reason of respondent's occupying the premises from July 1 to November 15, 1946.

Accordingly, this court unanimously favors and does hereby make an award of two hundred twenty-five dollars ($225.00) to Dena Cohen, as a claim for which the state received distinct value and benefit.

Consideration of an additional claim of $600.00 for loss to claimant arising from respondent's failure to vacate on June 30, 1946, and a determination thereof, is more difficult, and Judge Bland will dissent from the majority opinion.

Having been deprived of occupancy of the premises on July 1, 1946, through the failure of respondent to vacate, until November 15, 1946, and having been unable to make necessary preparations for the Christmas trade, Arlene Shops, *Inc.*, entered into a controversy with the claimant in this case, asserting both the right to reject the lease and to hold the claimant for heavy damages. The controversy was settled by the claimant's releasing Arlene Shops from the payment of $600.00 rent for two months, from November 15, 1946 to January 15, 1947, during which time Arlene Shops could secure materials, no longer hav-

ing the priorities obtained for the previous July 1, and make necessary alterations and prepare for the Easter trade. By this compromise settlement Arlene Shops waived the right to, and released claimant from, any and all damages to which they may have been entitled.

Counsel for state, on learning during the hearing of this case that, by this settlement, Arlene Shops, *Inc.*, is precluded from proceeding in the court of claims or having a claim against the state of West Virginia said "I think we got off swell." However, said counsel felt he would be derelict if he did not raise a constitutional question in connection with the compromise settlement between Dena Cohen and Arlene Shops. In a brief filed by the assistant attorney general, Eston B. Stephenson, he says that "It follows, therefore," (from reference to the case of *State ex rel. Baltimore & Ohio Railroad Co.* v. *Sims, Auditor,* 132 W. Va. 13; 53 S. E. 2d 505) "that we cannot under the guise of a moral obligation, regardless of how equitable and just this claim may appear, accomplish indirectly that which cannot be accomplished directly, within the prohibition of section 6, article X of the constitution."

Counsel for claimant responds to respondent's contention that allowance of the $600.00 portion of this total claim rests entirely upon the holding in the *B. & O.* case, cited in Mr. Stephenson's brief, by pointing out that "That case rested its decision upon the inability of the state, either directly, that is by express contact, or impliedly, that is by recognition of a covenant running with the land, to assume an obligation resting upon the Parkersburg Bridge Company, a private corporation, as the result of a contract made many years before by that corporation with the Baltimore and Ohio Railroad. That case is as though we were here asking the state to assume a liability resting upon a former tenant for whom it had taken over for an unexpired term, such as a covenant to deliver up the premises in good repair where the damages had been done by a former tenant."

In the consideration and determination of this case we have weighed the following statement from the case of *State ex rel. Davis Trust Co.* v. *Sims,* 130 W. Va. 638:

> "The doctrine which gives rise to a moral obligation of the State, in any particular instance, is not rendered inoperative by, and it is not incompatible with, the principle which recognizes the immunity of the State from suit, * * *. It rests upon considerations of an entirely different and independent character. * * * if there were a legal liability upon the State, or any legally recognized remedy for such against it, there would be no occasion for one aggrieved or injured to seek from the State, upon the basis of a moral obligation, the relief which he is denied by positive law but to which he would be entitled if, in the identical situation, an obligation or duty would be judicially recognized in cases between private persons."

We have also weighted the applicability to the instant case of the opinion rendered by our Supreme Court of Appeals in the case of *Price* v. *Sims,* 58 S. E. 2d 657, in which Judge Haymond stated:

> "Generally, moral obligation which will support appropriation of public funds must be based on obligation or duty created by prior statute, or created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable between private persons."

A majority of this court is of the opinion that claimant in the instant case took reasonable measures to reduce damage inflicted upon her by a state agency, that her claim is such a claim as between private persons would be enforced by a court of law, and that the nature of the claim brings it within the definition of a moral obligation. We think there is merit in the contention of claimant's counsel that "It cannot be disputed that the damage grew out of a breach by the state of its contract to surrender the leased premises at the expiration of its term."

Accordingly, a majority of this court makes an award of six hundred dollars ($600.00) to Dena Cohen, in addition to the award of $225.00 made by unanimous opinion of the court, making a total award of eight hundred and twenty-five dollars ($825.00) to claimant.

ROBERT L. BLAND, JUDGE, *dissenting in part.*

Upon its face the total claim involved in this case would seem to be possessed of merit. In its consideration I have been greatly perplexed. I have concurred in so much of the whole claim as would recommend to the Legislature an appropriation in favor of claimant of the unpaid balance of rental due to her for the occupation of the demised premises at Clarksburg, that is to say, the sum of two hundred and twenty-five dollars ($225.00).

I would be pleased if I could see my duty in a way that would enable me to vote for the residue of the claim amounting to $600.00. I have no hesitancy in saying that if the case were an action between private persons in a court of law of the state a judgment in favor of the plaintiff against the defendant would be upheld. I am constrained to think, however, that the award made by majority members of the court in favor of the claimant for the further sum of $600.00 is in contravention of section 6 of article X of our state constitution. That section reads as follows:

> "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; nor shall the state ever hereafter become a joint owner, or stockholder in any company or association in this state or elsewhere, formed for any purpose whatever."

It seems to me that the said award for the said sum of $600.00 is in effect a grant of the credit of the state in favor of claimant. It amounts to an indemnity. It circumvents the constitutional inhibitions and nullifies the organic law of the state. It is urged that there is a moral obligation of the state to pay such sum of $600.00. May a moral obligation take precedence over an express constitutional inhibition? I think not.

For the reasons hereinbefore set forth I respectfully note this dissent to the award in the sum of $600.00.

(No. 730-S—Claimant awarded $60.46.)

JOHN B. RESIDES and SERVICE FIRE INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 23, 1951

A. D. KENAMOND, JUDGE.

This claim is for damages sustained by John B. Resides by reason of cinders being thrown on his automobile by a state road commission employee while cindering U. S. route 60 at Cedar Grove, West Virginia, on the morning of February 25, 1950. The record supporting the claim includes a statement by Gary Thompson, who threw the cinders, that he was at fault, an itemized estimate of repairs in the amount of $60.46 made by N. &. W. Motors, Inc., of Oak Hill, and the subrogation agreement with Service Fire Insurance Company covering the payment of same. It appears from the record that John B. Resides carried insurance against loss or damage to his car with the Service Fire Insurance Company of New York.

The state road commission concurs in this claim and recommends that an award be made therefor under the shortened procedure of the state court of claims act, and the claim is approved by the attorney general's office as one that should be paid.

Accordingly, an award is hereby made in favor of the claimants, John B. Resides and Service Fire Insurance Company, in the sum of sixty dollars and forty-six cents ($60.46).

(No. 726-S—Kenneth G. Smith awarded $63.90; Calvert Fire Insurance Company awarded $100.73.)

KENNETH G. SMITH, and CALVERT FIRE INSURANCE COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 25, 1951

A. D. KENAMOND, JUDGE.

On April 10, 1950, at one-thirty o'clock A. M., claimant Kenneth G. Smith was driving his 1949 Plymouth station wagon over and upon the Bridge Street bridge, entering U. S. 40 in Wheeling, West Virginia, when he collided with a protruding rail, damaging his car to the extent that the sum of $164.63 was required to repair it. Of this repair cost coclaimant Calvert Fire Insurance Company paid $100.73 by reason of a policy which it had theretofore underwritten; the remaining portion of $63.90 is due the Sonderman Motors, *Inc.*, from Kenneth G. Smith.

The record in this case shows that the Bridge Street bridge had been abandoned by the state road commission on September 6, 1949, said road commission hoping that the city of Wheeling would assume its maintenance. The city of Wheeling was unable to do this because of financial difficulties, and no notices or barricades were placed by the road commission forbidding traffic to enter the bridge. It appears that the accident was unavoidable on the part of the claimant and the state road commission feels that the accident made claim for is its liability. A copy of the Sonderman Motors bill for repairs to Kenneth G. Smith's automobile is included in the record.

The state road commission concurs in this claim and recommends that an award be made therefor under the shortened procedure provision of the state court of claims act, and the claim is approved by the attorney general's office as one that should be paid.

Accordingly, an award is made by a majority of the court in the amount of sixty-three dollars and ninety cents ($63.90) to Kenneth G. Smith, and in the amount of one hundred dollars and seventy-three cents ($100.73) to Calvert Fire Insurance Company.

ROBERT L. BLAND, JUDGE, *dissenting.*

The claim involved in this case is in the sum of $164.63. It is concurred in by the state road commission and submitted to the court of claims under section 17 of the court act. An award for the full amount sought has been made by a majority of the court. I cannot concur in such award.

It will be observed that an insurance company is interested in the claim. As a matter of fact it is a subrogation claim. It is prosecuted in the name of Kenneth G. Smith, for the benefit of the insurance company.

The claim, for which the award is made, has been informally considered upon the limited showing made by respondent's record. No other or independent investigation has been made as to the merits of the claim. The court has merely placed its "rubber stamp" upon the above mentioned concurrence and approval. The record does not satisfy me that the claim is one which a sovereign commonwealth should discharge and pay. I do not look with favor upon claims by way of subrogation against the state. Where does a moral obligation exist to pay such a claim? The only way that the Legislature may make a valid appropriation of the public revenues in satisfaction of such claim is upon the theory of a state's moral obligation to do so, and after it has ascertained and declared the existence of such moral obligation. The doctrine of subrogation is the creature of equity. It was unknown to the common law. The rule of subrogation might be invoked in a proceeding between private persons, when it could not properly be invoked against the state.

The Legislative interim committee which worked out the court scheme in its report to the Legislature that enacted the court act stressed the fact that the "shortened procedure" of the court act

should only be used in cases involving no issues and where it is plainly manifest that the claim should be paid. Is it plainly manifest that the claim in question should be paid? The fact that a claim is referred to the court of claims under section 17 of the court act does not make it obligatory to make an award.

After approximately ten years on the court of claims I do not hesitate to express the opinion that the shortened procedure provision of the court act should be repealed. It is not sound or practical in its operation.

At the present term of the court of claims we have had sixteen shortened procedure cases and three cases under the rgular procedure. If laymen of the road commission may make investigations and determine for what claims awards should be made I do not see any reason for three members of the court—however honest, conscientious and upright they may be—to exercise no duty other than to use a "rubber stamp" by way of approval.

I hold my colleagues in the higest esteem but I cannot be too outspoken in my condemnation of the "shortened procedure" of the court act.

I most earnestly and respectfully note this my dissent to the award made in the instant case.

(No. 729-S—Claimant awarded $36.11.)

H. E. CRAMER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 25, 1951

JAMES CANN, JUDGE.

The claim involved in this case is submitted to this court under the shortened procedure provision of the state court of claims act.

After an investigation by the respondent, or its agent, of the circumstances which are the basis for the instant claim, a record was made and submitted to this court and it revealed the following state of facts.

On the afternoon of the twenty-ninth day of November, 1950, while claimant was operating his automobile over and across a small wooden bridge located on Figgett road in Kanawha county, West Virginia, a part of the undercarriage of the bridge gave away causing the front end of his automobile to drop into a large hole thereby causing damages to it in the amount of $36.11.

It appears that this bridge was a small wooden structure approximately two feet in depth and approximately sixteen feet in width; that on the day previous to the day of the accident the employes of the respondent had attempted to move a large piece of equipment—a bulldozer—over the bridge, and because of its weight it broke through; the said employes then filled the break with rock, gravel and dirt to road level, as a temporary foundation, to make it passable. No doubt the bridge was in a very poor and weakened condition due to the above incident, and no attempts were made by the respondent to advise the general public of it being unsafe. The record discloses that after this accident a "Road under construction, travel at own risk" sign was erected at the scene of this accident.

No negligence is shown on the part of the claimant. The respondent recommends the payment of this claim and the same is concurred in by the attorney general.

In view of all the facts and circumstances as submitted an award, by majority members of the court, is made in favor of claimant H. E. Cramer, for the sum of thirty-six dollars and eleven cents ($36.11).

ROBERT L. BLAND, JUDGE, *dissenting.*

The facts, constituting the basis of this claim for which an award has been made, as certified to the court of claims by the head of the agency concerned, are as follows:

"This accident was caused by the automobile belonging to this claimant wrecking on a wooden bridge located on Figgett Road, which road was under construction at the time. The bridge had been broken by heavy equipment passing over it and had been filled with dirt and gravel. It seems that when claimant attempted to cross bridge it collapsed and the automobile dropped into a hole causing damage to it."

It occurred to me at the time the claim was being informally considered that the record submitted to the court was inadequate. I was of opinion that it should have been returned to the department for supplementary information.

It will be observed that the bridge on which the accident occurred was under construction. Could not the claimant have observed that fact? Why did he attempt to cross the bridge when it must have been apparent that the road was under construction? In doing so was he guilty of such contributory negligence as would defeat his claim for an award? The court is necessarily bound by the limited informatnon contained in the record.

Not being satisfied that the claimant has a meritorious claim against the state I cannot concur in the award made, and make this brief note setting forth my dissent to such award.

(No. 722—Claimant awarded $3000.00.)

FLEM L. MULLINS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 25, 1951

1. **Hours of labor on state public works; penalty.** The service and employment of all laborers and mechanics who now are or hereafter may be employed by or on behalf of this state, or by any contractor or subcontractor, upon any of the public works of the state, is hereby limited and restricted to eight hours in any one calendar day, except in cases of extraordinary emergency; and it shall be unlawful for any officer of the state, or any countractor, or subcontractor whose duty it shall be to employ, direct or control the service of such laborers or mechanics, to require or permit any such laborers or mechanics to work more than eight hours in any calendar day, except as hereinbefore provided.

Any officer or agent of the state, or any contractor or subcontractor, whose duty it shall be to employ, direct or control any laborer or mechanic emplyed upon any of the public works of the state, who shall intentionally violate any provision of this section, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be fined not to exceed one thousand dollars or imprisoned for not more than six months, or both fined and imprisoned, in the discretion of the court having jurisdiction thereof. Code, chapter 21, article 4, section 2349 (2).

2. Where a former employe of the state road commission who had been required and allowed to discharge the duties of night watchman for a period of time in excess of eight hours per calendar day seeks an award in the state court of claims for remuneration for such overtime work, an award will be made in his favor for such sum as the evidence adduced upon the hearing and investigation of his claim shows him to be reasonably and justly entitled to.

J. Paul Clark, for claimant.

W. Bryan Spillers, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding Flem L. Mullins, sixty-two years of age and a resident of Logan county, West Virginia, seeks an award of

$6,209.44. He represents to the court that he has been in the employment of the state road commission of West Virginia for twelve years. Prior to January 10, 1946, he was employed as a laborer, working on the state highway system in Logan county. He maintains that said employment was on the basis of an eight-hour day and an hourly rate of pay. He further maintains that on January 10, 1946, he was transferred by the county road supervisor from his job as a laborer on the state highway system to the position of night watchman at the road commission garage located at Stollings, Logan county, and that the rate of pay was on an hourly basis and at the same hourly rate as that of laborer working out on the state highway system, and that the hourly rate of pay at that time and at the time he entered upon his duties as night watchman were the same. He says that he entered upon his duties as night watchman the 10th day of January, 1946, and worked sixteen hours a day in that capacity on through December 31, 1948, but only received remuneration for eight hours a day, and that said contract of employment was on the basis of fifty-eight cents per hour from January 10, 1946 through the 31st day of March, 1946; and sixty-five cents per hour from the 1st day of April, 1946, through the 30th day of April, 1947; and seventy-five cents per hour from the 1st day of May, 1947, through the 15th day of April, 1948, and eighty-two cents per hour from the 16th day of April, 1948 through the 31st day of December, 1948.

Claimant further maintains that in July of 1949, no action having been taken by the county road supervisor, he employed an auditor to audit the number of hours he had worked and the different hourly rates of pay that were in effect during the period from January 10, 1946 through December 31, 1948; that said audit of time and the amount due and payable to him under said audit was presented to the state road commission, but payment was refused; that said audit shows that he worked a total of 17,296 hours but that he only received remuneration for 8,648 hours, and that by computing the number of hours for which he did not receive remuneration by the different hourly rates of pay that were in effect during this period, there is due and payable to him the sum of $6,209.44.

Upon the investigation and hearing of the claim the claimant testified at some length on his own behalf. We were not favorably impressed by the method employed by him in keeping his time. According to his statement, for the period that he discharged the duties of night watchman—being approximately three years—he kept his time on calendars, using three of such calendars. He would mark each day that he worked on these calendars. He did not produce the calendars before the court or satisfactorily account for their absence. He did, however, file what purported to be a copy of the calendar showings as an exhibit with his testimony. As before stated, prior to the filing of his claim he had employed an auditor to audit his time but the auditor in question did not testify upon the hearing. It developed that in the course of his examination that although by his petition he claimed to work sixteen hours a day from the time of his employment as night watchman until a period when the duties discharged by him were divided into two shifts and the employes worked every other day, that there was confusion in his testimony, and that on certain occasions he had not worked on Saturdays, thus making it manifest to the court that his testimony was inconsistent with the allegations of his petition. From the testimony of other witnesses introduced on claimant's behalf it is made quite clear that he had in fact worked many hours in excess of eight hours a calendar day. His contention of overtime work was well established by numerous witnesses, including a former county supervisor.

At the conclusion of claimant's testimony, W. Bryan Spillers, an assistant attorney general, who represented the interests of the state at the hearing, moved the court to dismiss the claim for reasons assigned at the time, but the court, being of opinion that the claimant having invoked relief through the state court of claims, as he had a lawful right to do, was entitled to be given full opportunity to present his claim, therefore the said motion was overruled.

The further testimony introduced in support of the claim in question gave the court additional enlightenment and assistance, and claimant's counsel offered to stipulate with the assistant attorney general that no claim would be made for overtime remunera-

tion for those days on which the claimant was at any time absent from duty. It was apparent to the court, however, although the question was not presented for its consideration, that claimant was, during the approximate period of three years in which he discharged the duties of night watchman, entitled to annual leave with pay. The stipulation was not agreed to, and after the claimant rested his case the state introduced its several witnesses who respectively testified according to their personal knowledge of claimant's overtime work. We deem it unnecessary in this statement to detail in any length the testimony of these witnesses. Suffice it to say that there was unanimity of statement by both the claimant's witnesses and the state's witnesses with respect to the overtime work performed by claimant. On the whole claimant's contention that he was required and allowed to work many hours in excess of eight hours per calendar day was supported by the witnesses offered in opposition to the allowance of the claim. In the judgment of majority members of the court the plaintiff's claim that he did work over a period of approximately three years far in excess of eight hours per calendar day was satisfactorily established. It would be difficult to determine the actual time of the over work, but in view of the determination hereinafter made by majority members that fact is unimportant.

Majority members of the court are not unmindful of chapter 21, article 4, section 2349 (2) of the official code of West Virginia, used as point 1 of the *syllabi* in this statement, which is a general law and certainly means what it says. It should be our guide in disposing of the claim, "Let the chips fall where they may." As we perceive our duty under the law of the state and the evidence deduced before the court upon its investigation of the claim, we can do nothing less than make an award in favor of claimant. Majority members feel that under all the circumstances an award of $3000.00 would be reasonable in the premises. It is possible that a greater award could have been made if claimant had been able to show more satisfactorily than he did the exact number of days he was employed.

Accordingly, majority members of the court make an award in

favor of claimant Flem L. Mullins in the sum of three thousand dollars ($3000.00).

JAMES CANN, JUDGE, *dissenting.*

The arbitrary award of $3000.00 made to claimant in this case by a majority of the court, in the light of the evidence introduced, compels me to file this dissent. So many matters were set out in the majority opinion, justifying the instant award which, to my opinion, were not part of the record or part of any one's testimony. But without going into any of that, I shall confine my dissent to the lack of proof, as required by law, on the part of claimant. Mr. Mullens testified at great length with respect to his employment as night watchman for respondent. He presented a sheet of paper which purported to show the number of hours he had worked each day as night watchman from the tenth day of January, 1946 to the thirty-first day of December, 1948; this sheet of paper attempted to indicate that he had worked sixteen hours each day, during the above period, and as he stated, was paid for only eight hours at the prevailing hourly rate. He was asked from where he had obtained the information shown on the above mentioned sheet of paper, and his reply was "From three calendars" on which he had marked the hours he had worked as a night watchman; he was further asked about the whereabouts of such calendars and was unable to explain their absence from this hearing; he was also further asked as to who had made up the purported record of his time and he stated that an auditor, one James A. Hogg, had made up such record. The auditor was not presented as a witness. He admitted that the sheet of paper introduced in evidence, which set out the hours worked, was only a copy of the original record. (R. pps. 29-30-42-43-44-45-46). No explanation was ever made or attempted to be made, of the whereabouts of the purported calendars or original record. The majority opinion states that the above proof was unsatisfactory; that his itemized statement attempting to show that he had worked sixteen hours each day during the disputed period, when he testified that during such period he was off a number of days, made it manifest that the testimony and proof were inconsistent with the allegations of his

petition. I was particularly impressed with claimant's testimony with respect to his complaint made to Charles Sattler, commissioner of labor of the state of West Virginia. When claimant complained to Mr. Sattler about the hours he had worked for respondent, for which he had not been paid, Mr. Sattler advised claimant to prepare and furnish him with a statement, setting forth the days he had worked for respondent and the number of hours worked over eight hours (the legal limit provided by statute). This, claimant failed or refused to do and Mr. Sattler gave the matter no further attention. Why was not the same information requested or required of the claimant at the hearing of this case? It is true that from the evidence one can conclude that claimant had at sometime worked sixteen hours during his employment as a night watchman, but on what, and for how many, days did he work that number of hours?

It is elementary law that the burden of proof rests upon the party asserting the affirmative of an issue.

> "In an action for tort, the plaintiff bearing the burden of proof, a verdict for him cannot be found on evidence which affords mere conjecture that the liability exists, and leaves the minds of jurors in equipoise and reasonable doubt. The evidence must generate an actual rational belief in the existence of the disputed fact." *Moore* v. *West Va. Heat & Light Co.*, 65 W. Va. 552; 64 S. E. 721. *Antonovich* v. *Home Life Ins. Co.*, 116 W. Va. 159. *Wiles* v. *Walker*, 88 W. Va. 147; 106 S. E. 423. *Legg* v. *Junior Mercantile Co.*, 105 W. Va. 287; 142 S. E. 259.

Our own court has held on numerous occasions that when a claimant fails to establish liability on the part of a respondent by the production of proper evidence as proof in support of his claim an award will be denied.

> "All claims asserted against the state or any of its agencies must be established by satisfactory proof before awards may be made for the payment of them. A claim asserted but not proved can have no meritorious status in the court of claims." *Clark* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 232.

"Claimant must prove his claim by a preponderance or greater weight of the evidence, and no award can be made in the absence of such proof." *Hartigan* v. *Board of Control,* 2 Ct. Claims (W. Va.) 275.

"A claim is denied when claimant fails to establish liability on the part of the department concerned by the production of proper evidence as proof in support of his claim." *Swartzwelder* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 96.

"Where the evidence offered in support of a claim against the State fails to establish by a preponderance of proof its merit as a claim for which an appropriation should be made by the Legislature, an award will be denied." *Smith* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 1.

"An award will be denied upon failure to prove by a preponderance of the evidence the justness and merit of a claim against the state or any of its governmental agencies." *Loveless* v. *State Road Commission,* 4 Ct. Claims (W. Va.) 19.

"A claim for damages not sustained by the evidence and an award refused." *Thompson* v. *State Road Commission,* 4 Ct. Claims (W. Va.) 74.

As another ground for dissenting, it is my firm belief that the purported itemized statement, filed in this case, attempting to show the hours worked as a night watchman, should have been rejected for two reasons: (1) It was not the original record and (2) it did not correctly state on what actual days sixteen hours were worked by claimant.

Our Supreme Court has held:

"The record offered is secondary evidence; the book in which the original entries were recorded, so far as a record is concerned, being the best evidence. The authorities are uniform to the effect that the best evidence must be produced." *Thompson* v. *Turkey Gap Coal Co.,* 139 S. E. 642; 104 W. Va. 134. Also *Art Co.* v. *Thacker,* 65 W. Va. 143. *State* v. *Gillaspie,* 47 W. Va. 336. *Fox* v. *Railroad Co.,* 34 W. Va. 466.

> "Courts should be cautious in admitting the introduction of secondary evidence. Without an effort to procure and offer the original contract or a showing entitling a party to offer secondary evidence, secondary evidence should not be admitted. Sec. 120, *Evidence,* Michie's Jurisprudence. Also *Cobb* v. *Dunlevie,* 63 W. Va. 398; 60 S. E. 384.

For the reasons set out I respectfully dissent from the majority opinion in this case.

(No. 743-S—Claimant awarded $58.00.)

ESSO STANDARD OIL COMPANY, Claimant,

v.

STATE ADJUTANT GENERAL, Respondent.

Opinion filed July 12, 1951

JAMES CANN, JUDGE.

Claimant seeks an award in the amount of $58.00 representing damages done to one of its gasoline pumps located at service station 83, St. Albans, West Virginia. The facts out of which this claim arose are as follows: On the 15th day of March, 1951, private first class Tom Cogan, of the St. Albans, West Virginia, detachment of the West Virginia national guard, while operating a national guard 6 x 6 2½ ton truck, enroute to the national guard center, Charleston, West Virginia, attempted to turn left at Pennsylvania avenue, in said city of St. Albans, and enter the service station of claimant. In doing so he was unable to straighten the wheels of said truck before its left bumper caught against a gasoline pump, knocking it loose from its foudiation and causing damages thereto in the sum of $58.00.

The record discloses that respondent has made a careful investigation of this accident and as a result thereof has concurred

in this claim and recommends an award, and, further, that the claim is approved by the attorney general.

From the record submitted, the court is of the opinion that respondent, or its agents, was solely at fault, and therefore makes an award in favor of claimant, Esso Standard Oil Company, in the sum of fifty-eight dollars ($58.00).

(No. 735—Claimant awarded $2000.00.)

WALLACE BUMGARNER, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 17, 1951

An award may be made by the court of claims in favor of a claimant who, while walking on a public highway in the nighttime from one county to his home in another county, was attacked, shot and seriously and painfully wounded by a guard at the state penitentiary at Moundsville, acting at the time as captain of the guard of a road camp while searching for an escapee from said camp, upon the theory of the moral obligation of the state to make reparation for the reckless and negligent conduct of its agent.

Wm. S. Ryan, for claimant.

W. Bryan Spillers, assistant attorney general, and *L. Steele Trotter,* treasurer of the board of control, for respondent.

ROBERT L. BLAND, JUDGE.

On the 20th day of May, 1950 and for some time prior to that date the state road commission of West Virginia maintained a prison camp at Kyger in Roane county, West Virginia, where a number of convicts from the state penitentiary at Moundsville were kept working on the public roads of said county.

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

A large number of convicts were, upon the recommendation of the state road commissioner, sent by the warden of the penitentiary to this camp and were under the control of one I. M. Coiner, a guard at the penitentiary and captain of the guard at the camp. One of these convicts had made his escape and was running at large. The captain of the guard was in pursuit of him, armed with a revolver which he was authorized to carry by the warden of the penitentiary.

One Wallace Bumgarner, a farm laborer residing in Wirt county, West Virginia, who had gone on an errand from his home to Reedy in the county of Roane, was returning to his home. He was walking on a public highway of the state of West Virginia, being route 14 extending between the town of Reedy and the city of Parkersburg. At a certain point on the thoroughfare he was approached by guard Coiner and informed that he was under arrest. Bumgarner, the claimant, then twenty-six years of age, was at once frightened and started to run. The captain of the guard, without knowledge of the identity of the man and without the exercise of ordinary prudence or judgment, shot him in the leg. According to Dr. A. T. Gordon, who examined the patient after he had been transferred to a hospital at Spencer, the point of entrance of the bullet was external, the exit being on the inside some place about the middle or upper third of the thigh and on through. Dr. J. M. DePue testified as follows: "Well, he (Bumgarner) was brought in on May 21st, 1950, with a gunshot wound of the upper right thigh, the bullet entering in the back and coming out in front, completely through

the thigh. The examination did not show any injury to any nerve, blood vessels or bones. It was entirely a muscular injury."

The captain of the guard, after shooting the man, reentered his automobile and drove away. He subsequently returned to the scene of the shooting and found his victim lying prostrate upon the ground, bleeding profusely, and wrapped in blankets which considerate and sympathetic folks in the vicinity had furnished. It was then that he was removed to the hospital.

Bumgarner later instituted an action of trespass on the case against the captain of the guard, Coiner, in the circuit court of Roane county. A jury upon his trial returned a verdict for $3000.00 in favor of the plaintiff. A motion to overrule this verdict and grant defendant a new trial was denied and a judgment entered upon the verdict. An application to the Supreme Court of Appeals for a *writ of error* from and *supersedeas* to said verdict was denied.

After having exhausted his remedy at law to enforce payment of the circuit court judgment Bumgarner filed a claim in the court of claims. By stipulation between counsel for claimant and counsel for the state a transcript of the evidence heard upon the trial in the circuit court of Roane county was considered by the court of claims. The only plea interposed by the state was that of the general issue "not guilty." It was maintained by the attorney general that the court of claims is without jurisdiction to hear and determine the claim in question since the court act provides that the jurisdiction of the court shall not extend to any claim "* * * 7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."; and that claimant had a remedy against defendant in a court of law of the state. However, we are of opinion that the only remedy afforded by the statute was exhausted by claimant and that under the circumstances he has a clear right to come into the court of claims and prosecute his claim against the state of West Virginia upon the theory that the state should make reparation for the injuries inflicted and suffering caused by the ruthless and unwarranted conduct of the state's duly authorized

agent. It is further maintained by the attorney general that the doctrine of *res judicata* would preclude the prosecution of the claim in this court. Suffice it to say that the claimant did not assert his claim against the state until he had exhausted his remedy against Bumgarner in the courts of the state.

Considering the evidence before the court and giving full effect to the probative proof offered in support of the claim, we are of opinion that it would be unconscionable to say that no moral obligation of the state exists to compensate the claimant for the injuries suffered by him at the hands of the state's duly accredited agent.

An award is therefore made in favor of claimant Wallace Bumgarner against the state board of control in the sum of two thousand dollars ($2,000.00).

(No. 736—Claimant awarded $416.47.)

RICH VALLEY DAIRY COMPANY, Claimant,

v.

STATE ADJUTANT GENERAL, Respondent.

Opinion filed July 19, 1951

1. Failure of motorist to stop at stop sign constitutes *prima facie* negligence and makes him responsible for all damage resulting proximately from his failure to stop. *Somerville* v. *Delbosa,* 56 S. E. (2d) 756.

2. Violation of a statute [W. Va. Code, chapter 17, article 8, section 10 (1537)] alone is sufficient to make the violator *prima facie* guilty of negligence, but to justify recovery it must be shown by a preponderance of the evidence that the violation was the proximate cause of the damage. *Id.*

Appearances:

Rummel, Blagg & Stone (Paul N. Bowles) for claimant.

W. Bryan Spillers, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

About the middle of the afternoon of March 15, 1951, Fred F. Willett, the driver of one of Rich Valley Dairy Company's trucks, a 1948 model 2-ton Chevrolet, was driving out Fifth street, Point Pleasant, West Virginia, when at the intersection of Fifth and Viand streets, the truck was struck by West Virginia national guard truck 480-69-43. Claimant seeks to recover $376.47, the amount required to repair damage to the Rich Valley Dairy Company truck caused by the collision, and $40.00, the amount necessary to replace service of same during the four days it was out of commission.

Respondent in the case resisted the claim with no testimony, only asking that claimant present evidence to the court of claims that the driver of the national guard truck was negligent and at fault and that the damages claimed were reasonable and just.

Evidence presented by claimant showed that driver Willett had stopped his truck on Fifth street when the traffic light was red, and when the light turned green pulled into Viand street. The testimony showed that the national guard truck driver had speeded up along Viand street hoping to cross Fifth street before the light turned red. Too late to pass over Fifth street before the light turned red, the national guard truck driver put on his brakes, but too late to prevent crashing into the claimant's truck, after skidding a considerable distance.

Claimant secured three estimates of cost of repairs, which repairs were made by Mason Motor Company, of Point Pleasant, at a cost of $376.47, the lowest of three estimates secured.

Testimony showed that it was necessary for claimant to hire a truck for four days to make his usual milk deliveries. Secur-

ing on short notice only a small truck necessitated claimant's making two trips of approximately 100 miles each day instead of the accustomed single trip each day. Cost of use of the smaller truck to Rich Valley Dairy Company was $10.00 per day or a total of $40.00.

With the testimony of the claimant before us and in the lack of counter testimony of respondent, it is the unanimous opinion of the court of claims that the driver of the national guard truck was negligent and solely at fault, that his violation of the stop sign at point of collision was the proximate cause of damages done to claimant's truck, making the state agency involved liable to claimant for said damages.

Accordingly we make an award to Rich Valley Dairy Company in the sum of four hundred sixteen dollars and forty-seven cents ($416.47).

(No. 732—Claim denied.)

WEST VIRGINIA INSURANCE COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 17, 1951

A case in which the state court of claims declines to make an award for reason that it feels bound by the refusal of the Supreme Court of Appeals of West Virginia to issue a rule in *mandamus* proceeding to compel the state auditor to pay an award made by the said court of claims in a companion case, and ratified by the Legislature.

Appearances:

Robert A. Holland and *Floyd A. Ross* for claimant.

W. Bryan Spillers, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

Claimant asserts this claim of subrogation in the amount of $2000.00, which amount was paid by it to Albert and Odesie Brown by reason of a fire loss suffered by them on the 21st day of April, 1948, and which loss was occasioned by a fire originating from a building occupied and used by respondent, located at Huttonsville, in Randolph county, West Virginia.

As to the facts relied upon in support of this claim reference is made to the case of *J. A. Cox et al* v. *State Road Commission,* 5 Ct. Claims (W. Va.) 123, and *Albert Brown et ux* v. *State Road Commission,* 5 Ct. Claims (W. Va.) 133, heard on the 25th and 26th day of April, 1950, in the city of Elkins, Randolph county, West Virginia, and to the awards made in both cases.

The awards made by this court in the *Cox, et al* and *Brown* cases *supra* were included in and made a part of the budget bill (Sec. 4 of title 2 of chap. 8, acts of the Legislature of West Virginia, fiftieth regular session, 1951, at pages 66-67), which budget bill was passed by both houses of the Legislature on March 10, 1951, and became effective from passage. On July 11, 1951, the state road commissioner of West Virginia, acting for the state road commission of said state, and acting upon such legislative *fiat,* issued his requisition upon the auditor of the state of West Virginia for a warrant for the payment of said appropriation of the Legislature made in behalf of said *Cox, et al, and Brown,* in satisfaction of the approved awards for their claims. The auditor refused to honor said requisition insofar as the same covered and related to the approved awards for the claims of said *Cox, et al, and Brown,* on the grounds that the payment of said awards is in violation of the constitution of this state, and further, in effect, that no negligence on the part of the state was shown.

Following this action on the part of the auditor, one of the claimants, *J. A. Cox, et al,* sought in the Supreme Court of the state a writ of *mandamus* against Edgar B. Sims, auditor to compel the issuance by him of a warrant on the state treasurer for payment of their claim, so recommended by the court of

claims, and appropriated for by the Legislature. The petition for said writ was filed on the 31st day of July, 1951, and on the 3rd day of August, 1951, a rule in *mandamus* was refused by a majority of the Supreme Court. On the 31st day of August, 1951, the petition for said writ of *mandamus* was refiled and on the 24th day of September, 1951, the rule in *mandamus* was again refused by the same majority of the Supreme Court. To date nothing further has been done, either in the *Cox, et al,* case or the *Brown* case, with reference to compelling the state auditor to issue his warrant for the payment of the *Cox, et al,* and *Brown* claims.

From the action of our Supreme Court in the *Cox, et al,* matter we can only conclude that they have in effect given affirmance to the reasons or part of the reasons, set forth by the auditor in refusing to honor the *Cox, et al* and *Brown* claims, and therefore to make any further awards for claims arising out of the fire mentioned in this opinion, which occurred in Huttonsville, would be a useless gesture.

Regarding ourselves bound by the refusal of the Supreme Court to award a rule to show cause in the *Cox, et al,* claim, an award in this case is now denied.

(No. 739—Claim denied.)

TSUTRAS BROTHERS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 17, 1951

1. In an action to recover damages based upon negligence, negligence will not be presumed from the mere proof of injury, but it must be proved as alleged.

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

Appearances:

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

Claimants prosecute this claim against the state road commission for the breaking of a plate glass window in their store situate at 105 West Fourth avenue, Williamson, Mingo county, West Virginia, and facing U. S. route 52. They claim that because of the neglect of the state road commission to repair a break in said route 52, facing their store building, on the fifteenth day of February, 1951, a passing truck "skidded" a rock or stone from the break in the road through their plate glass window causing damage in the amount of $55.64.

Gus Tsutras, one of the claimants, testified that U. S. route 52 was in bad condition; that breaks or holes existed over a great portion of said highway, particularly in front of claimant's store building, where much water, mud and stone had accumulated; that passing cars and trucks splattered much of the water and mud against the window of his store, and it was presumed that one of these passing cars or trucks had precipitated one of the accumulated stones through their window.

The evidence disclosed that the portion of U. S. route 52 in question was originally a brick road and later covered with a black top mixture; that breaks in said road did exist but nothing could be done by respondent, by way of repairs to said road, because of the inclement weather existing at that time of the year; that the mud and water which accumulated in front of claimants' store was caused by the thawing of snow which had fallen several days before.

Without giving further consideration to the evidence concerning the condition of U. S. route 52, the question before the court is, was the respondent, or any of its agents, responsible in any way for the damages done to claimants' window? No one knows how said window was broken. One of the witnesses testified that a large round hole appeared in the window and that a stone or rock measuring three to four inches in diameter and resembling the brick which covered the bed of route 52, was found on the floor inside of claimants' store next to the broken window, which rock or stone was not exhibited to the court. How the stone or rock was propelled or precipitated through claimants' window, or from where it came, no one seems to know. It may have been thrown through the window. The record in this case is devoid of any evidence from which the court could reasonably have inferred that claimants' window was damaged as the result of the negligence of the respondent in failing to keep route 52 in a reasonable state of repairs, or that respondent was in any way responsible for the rock or stone being thrown, precipitated or propelled through said window.

Negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made.

In this jurisdiction, in an action to recover damages based upon negligence, "negligence will not be presumed from mere proof of the injury," but it must be proved as alleged. Point 3, *syllabi, Keyser Canning Company* v. *Klots Throwing Co.*, 94 W. Va. 346.

In this case the only thing before the court is evidence of a broken window, none as to negligence on the part of anyone. Therefore an award will be denied and the claim dismissed.

(No. 738—Claimant awarded $30.60.)

BERTRAM L. WITHROW, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1951

An award will be made when it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of an agent of the state road commission and such damages were in no way brought about by any fault on the part of claimant.

Appearances:

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, for the state road commission.

A. D. KENAMOND, JUDGE.

Claimant Bertram L. Withrow, owner of a 1950 model Pontiac sedan coupe, who lives on route 35, eight miles west of Charleston, was traveling along route 35, about a mile east of Lock 6, on the afternoon of April 18, 1951.

At that time the state road commission had a power shovel working at that point on the highway. The state road foreman in charge had a flagman stationed near the shovel to direct one-way traffic, part time to the east and part time to the west, through a lane provided for the traveling public. The claimant's car was the last in a line of four or five cars that had been signaled to pass along the lane. The other cars passed through in safety, but claimant's car was struck by a part of the body of the power shovel, which caused the top of his car to be dented in and the windshield to be broken.

Claimant's insurance company took care of the bill for windshield "on the comprehensive coverage," but claimant had to pay the remainder of the damage, said remainder amounting to $30.60, for which he presented in evidence a receipted bill from the West Virginia Body Works, Incorporated, Charleston, West Virginia. This amount he seeks to recover, claiming the damage was due to negligence on the part of the state road commission.

Respondent presented testimony of two employees on the job at the time—one, the foreman, Lawrence Roberts, who was about 30 feet from the power shovel and did not see the shovel hit claimant's car, being engaged in flagging his trucks in so the shovel could load them; the other, a laborer, Samuel Hill, who was working at the slide behind the shovel, yet in view of the claimant's car, since he testified that he saw the shovel hit the claimant's car and that claimant was then following in the line of traffic.

Neither the flagman who directed the traffic nor the operator of the shovel appeared to offer testimony.

Foreman Roberts and laborer Hill both said claimant got "too close to the shovel." Since the testimony showed claimant was traveling in the line of traffic, that the shovel got too close to the claimant's car would be an equivalent explanation.

The shovel was continually in operation while the traffic passed, according to the testimony, and when the shovel in its outward swing from the slide was about to strike claimant's car, the flagman jumped out of the way. Foreman Roberts stated that said flagman had his back toward the truck carrying the power shovel and faced the traffic he was directing.

It is the opinion of the members of this court that the flagman directing the traffic was responsible and to blame for permitting and directing claimant's car to be in the line of traffic at a time when the power shovel was in its outward swing from the slide, and that no fault on the part of claimant was shown. We therefore make an award in favor of claimant, Bertram L. Withrow, for the sum of thirty dollars and sixty cents ($30.60).

(No. 733—Claim Dismissed.)

C. V. DAUENHEIMER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 22, 1951

Claims with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state are expressly excluded from the jurisdiction of the state court of claims by subsection 7 of section 14 of the court act.

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, on behalf of respondent.

ROBERT L. BLAND, JUDGE.

Claimant C. V. Dauenheimer, a resident of Harrison county, West Virginia, seeks an award against the state road commission in the sum of $100.88 to compensate him for the damage done to his automobile, a 1947 Dodge convertible coupe, which was parked at the far edge of a wide berm on U. S. route No. 19, near the entrance to a county road leading to the farm of Moore M. Reynolds, one mile north of the city of Clarksburg, Harrison county, West Virginia, and while so parked was backed into by a road commission truck operated by a road commission employe. The road commission denies all responsibility for the damage done to claimant's said car. The material facts developed upon the hearing and investigation of said claim are hereinafter set out.

On the evening of November 28, 1950, claimant, (then a student at West Virginia university) drove his automobile from Morgantown to Harrison county. It was snowing heavy that night. Claimant proceeded as far as the road leading to the Reynold's property. When he arrived at that point on the road

he encountered a high wall shoveled up by snowplows coming up and down route 19. He was able to break through this snow wall but got only as far as the mail box. His automobile was then parked, facing south on route 19. The following morning it was still snowing. Claimant's car was "snowed under" and could not be seen. There was no traffic on the road, no buses, no automobiles or anything moving. A heavy snowstorm prevailed. The road commission sent a grader to the point near where claimant's car was parked to clear the "county road" and "it hung up in a snowdrift." The commission then sent a state road truck to "pull the grader out." On the way out this truck "backed in" and damaged the right side of claimant's car. The amount claimed by claimant as compensation for the damage done to his car is reasonable. Some days subsequent to the accident W. A. Drummond, an employe of the road commission and a helper on the road truck, which truck was driven and operated by one Robert Windon, informed Mr. Moore Reynolds that claimant's car was entirely covered by snow and that it was supposed by this road crew to be a pile of cinders. No one on the road truck knew that the claimant's car was parked or that it had been struck by the road commission crew. No person in the employ of the road commission reported the accident to the commission. Claimant himself did not inform or give notice to the commission that his car had been damaged as herein shown. In fact the only step taken by him was to file his claim against the road commission in the court of claims.

Under authority of law the state road commission is authorized to purchase and carry insurance for the benefit and protection of its motor vehicle drivers. Chapter 6, article 12, section 1, Michie's code, reads as follows:

> "Officers, boards, commissions or agencies of the state or of any county, municipality or any other unit of local or state government, authorized to spend public funds, or to direct the expenditure of public funds, may provide at public expense for bodily injury liability and property damage liability insurance against the negligence of the drivers of motor vehicles operated by or for such officers, boards, commissions and agencies in such amount as such officers, boards, commissions and agen-

> cies may specify, and any such officer, board, commission or agency having the authority to contract for the use in the service of such officer, board, commission or agency, of any motor vehicle, may require the contractor to provide like insurance at his own expense in such amount and as such officer, boards, commissions or agency may specify."

The state road commission carries insurance as above authorized. The insurance policy, issued in favor of Ray Cavendish, state road commissioner, provides indemnity under the following coverage.

> "It is hereby understood and agreed that such insurance as is afforded by this policy covers PASSENGER OPERATORS of PASSENGER AUTOMOBILES, STATION WAGONS, all types of TRUCKS, MOTOR GRADERS, TRUCK SHOVELS, HIGHWAY MOWING MACHINES, ENDLOADERS, JEEPS, BLOWERS AND SWEEPERS, while such equipment is being operated under its own power by an employee of the Unit of Government named in this policy.

During the past year the road commission paid out in premiums for such insurance $78,000.00.

Claims with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state are expressly excluded from the jurisdiction of the state court of claims by subsection 7 of section 14 of the court act.

Claimant has a remedy in the courts of the state against Robert Windon, the operator of the road commission truck which backed into his car and caused the damage of which he complains. Robert Windon is suable. If he shall elect to proceed against him in a court of law of the state he should do so before the 28th day of November, 1951. If he should reduce his claim against Windon to judgment it would be paid by the insurance company.

Since it is made clearly to appear that the court of claims is without jurisdiction in the instant case, the claim is dismissed.

(No. 734—Claim denied.)

MARY J. MARTIN, *admx.* of the estate of JAMES F. MARTIN, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 23, 1951

No award will be made in favor of a claimant, as administratrix of her deceased husband's estate, when said husband has contributed directly to the accident causing his death, notwithstanding that respondent is not free from blame.

Appearances:

David Williams and *Sam B. Kyle, Jr.*, for claimant.

W. Bryan Spillers, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

Claimant Mary J. Martin, duly qualified administratrix of her deceased husband's estate, represented that on January 12, 1951, at about nine o'clock in the morning, said husband, James F. Martin, was driving a 1946 model Chevrolet 1½ ton truck, owned by Lowry Moser, then a passenger in said truck, along old U. S. 50, about ½ mile east of the city limits of Clarksburg, and that on a decided downgrade the vehicle struck a badly broken portion of the highway, causing it to swerve to the left into a deep slide at the left edge of the paved portion of the highway, thence over an embankment to the the bottom thereof, whereupon the said James F. Martin was instantly crushed to death.

Claimant seeks $10,000. for the wrongful death of her husband, charging negligence on the part of the state road commission for knowingly permitting this hazardous condition to exist for a long period of time, and failing to maintain any guardrails or warning signs.

When this case was called up for hearing on October 10 in the Harrison county courthouse in Clarksburg, and before any evidence was heard, the court and counsel for claimant and for respondent adjourned to the scene of the accident, approaching the scene from the upper side and taking the same route that the deceased took.

Turning off New-U. S. 50, a three-lane highway comparatively new and of superior construction, and sharply to the left into Old. U. S. 50, a two-lane macadam or blacktop road approximately sixteen feet in width in its wider and normal stretches, and proceeding along its curves and changing grades, we felt that a driver of a motor vehicle would normally be alerted to keep his eyes on the road and open to any possible danger that might be ahead.

From the viewing it was possible to determine, from the repair and new surfacing of the broken portion of the highway, both the surface area and shape of the break, but not the depth of the break at the time of the accident. The deep slide or breakoff extending straight downward to a depth of three or more feet, at the very edge of the left lane of hard surface was still there, and no guardrail had been erected for the protection of any driver who might under certain conditions of traffic be pressed over to the berm normally maintained along the course of that lane.

The hearing of the case resulted in a feeling on the part of the court that everything was conspiring to take the life of James F. Martin, leaving a widow and two children who are deserving of the deepest sympathy.

The state road commission was under no mandate of law, in view of the Supreme Court decision in the *Adkins* case, 130 W. Va. 646, to maintain guardrails and warning signs, but in the matter of proper maintenance of the two-lane highway appears to have shown indifference, if not actionable negligence.

On the other hand, James F. Martin seems to have concurred and cooperated with the state road commission in bringing on the accident by choosing the more dangerous of two alternate routes,

by giving little attention to the road over which he was passing, and by driving when his physical state was not at its best.

Let us examine the facts in the case, insofar as they are revealed by the testimony, first considering the conduct of the state road commission with respect to the requirement "That the highways be kept and maintained in a reasonably safe condition for travel with ordinary care and in the ordinary mode by night and by day." (See note, Code 1597 (9), citing *Corbin* v. *Huntington* 74 W. Va. 479, and *Reynolds* v. *Milton* 93 W. Va. 108). Testimony showed that the broken portion of the highway was in the shape of a triangle extending across both lanes, but wider and deeper (variously estimated at 7, 8, 10, 12 or 14 inches) on the left going down, and that, because of the break in the left lane, the traffic was using the right-hand side of the road, getting onto the berm wholly or with the left wheels on the shallow-break in the outer portion of the right lane.

The road maintenance superintendent for Harrison county had experienced trouble with this break or dip over the entire four years of his service in that capacity. The roadway would go down at least once a year and possibly two or three times in a given year. At first he used cinders to fill up the dip, but finally got to using crushed rock, which repair he regarded as more or less temporary. The repair made after the accident, in the judgment of the court viewing same, was of a more or less permanent nature and such repair could reasonably have been made with some saving of the expense required under the plan of repeated temporary repairs.

Trooper W. A. Wood, who visited the scene of the accident within a few days thereafter, stated that "the break was a hazardous condition," but the maintenance superintendent testified that he "wouldn't say it would be particularly hazardous." Between the street commissioner of Clarksburg and the maintenance superintendent for the road commission they managed to keep the break in such condition that the city garbage trucks and other vehicles would not find it impossible to use the road by keeping well to the right going down. It was not a pretty situation at best,

but fortunately no serious accident had occurred there before that in which James F. Martin lost his life. On numerous occasions a driver going down the hill from the Wonder Bar, a night club at the top of the hill, would get a wheel off the road and blow a tire, but, according to John Folio, Wonder Bar proprietor, many of his patrons went down over Old U. S. 50. Sometimes a garbage truck would be thrown down over the road, but the street commissioner would then take the driver off, because "the road was bad" and "because he had to be very careful with that big equipment on that road." W. Howard Drummond, maintenance superintendent, evidently put great dependence on everyone exercising extreme caution because of knowledge of the bad condition of the road. There was, however, testimony to the effect that some indication of a break, and rutted arc of traffic to the right, could be observed 75 feet away, though the depth of the break could not be seen until a driver was "right up on it."

As previously stated, James F. Martin seemed to concur and cooperate in bringing on the accident causing his death. Let us examine the testimony. The deceased had been employed as a truck driver hauling coal in the county for more than five years, without a wreck. He lived in Bridgeport, about three or four miles from the scene of the accident. Presumably, after driving a coal truck in the vicinity for more than five years and going about in his own Ford V-8 car, he would have known something of the bad condition on Old U. S. 50, but there was no testimony to the effect that he did. The fairest statement with reference thereto was that of his widow, who stated that she didn't think he ever traveled Old U. S. 50, that he never did go over it when she was with him.

From about five-thirty o'clock of the evening before this accident until one-thirty o'clock in the morning Lowry Moser and another boy and girl were with James F. and Mary J. Martin at the Martin home, during which time all but Mrs. Martin indulged in beer and highballs, the whiskey being furnished by the visiting boy, but according to testimony, James F. Martin and Lowry Moser had only one highball or drink of whiskey each. Shortly after one-thirty o'clock the party broke up and James F. Martin

was in bed till four o'clock or four-thirty o'clock when Moser returned with a ham. By eight minutes before five o'clock, James F. Martin and Lowry Moser had partaken of fried ham and coffee and set out for "Bob's place" over in Glen Elk, about six miles from the Martin home, for the purpose of delivering a ham. They stayed at Bob's place till about eight o'clock, during which time Moser had a highball.

A sequel to this social period of some fourteen hours, during which the deceased had been in bed not more than three hours, was a report, dated January 13, 1951, from W. R. Bennett, chemist, criminal identification bureau, Charleston, showing .15 of one percent of alcohol in the blood and stomach content of the deceased. Dr. Kenna Jackson, county coroner, who examined James F. Martin after he was killed, had the test made at the request of the Department of Public Safety, and stated that the report indicated a little more than a slight degree of intoxication, giving Dr. Lemoine Snyder, director of the police department of the State of Michigan, as authority for his statement.

While Moser and James F. Martin were out on U. S. 50, they decided to go to the P-K mine to see about coal. Testimony shows that Martin turned off onto Old U. S. 50 of his own volition, without request or suggestion from Moser, and no one could more than conjetcure why he chose a route generally known in that area to be in poor condition when he might have traveled the improved New U. S. 50.

As Martin and Moser proceeded down Old U. S. 50, they were engaged in conversation, according to Moser, whose testimony as to whether they were watching the road was evasive, though he did say "He (referring to Martin) knew about where we were."

Trooper W. M. Simon, called to investigate the accident resulting in the death of James F. Martin, made at least three statements that have a very material bearing upon the merits of the claim under consideration. Moser told him that the deceased had been drinking; his report showed "exceeding lawful speed," but he explained that there was no other heading he could mark to show

"exceeding speed due to highway conditions," and describing "the way and the direction the truck traveled from the time" in his opinion "it came into the rough spot on the highway," and "it went some little distance there with two wheels over the berm on the left-hand side where the truck started skidding over the bank."

Weighing all the facts from the testimony adduced in this case, the court is of the opinion that the deceased James F. Martin made such a contribution to the accident causing his death as could not be regarded as so indirect as to permit an award to the claimant in this case (*Willhide* v. *Biggs,* 118 W. Va. 160.)

In the case of *Overby* v. *Chesapeake & Ohio Ry. Co.,* 37 W. Va. 524, we note:

> "The general rule in regard to contributory negligence is that, if the negligence be mutual on the part of the plaintiff and defendant, there can be no recovery."

Also, *Otte* v. *Miller,* 125 W. Va. 324, which quotes *Carrico* v. *W. Va. C. & P. Railway,* 39 W. Va. 86:

> " 'To debar a plaintiff from recovery of damages for an injury from negligence, his negligence must be the proximate cause of the injury. When both parties are charageable with negligence, the plaintiff cannot recover if his negligence contributed in any degree to his injury; * * *
>
> " '* * * we do not apply the rule of comparative negligence in this state, by apportioning between the plaintiff and defendant the effect of the negligence of each one in producing the injury and finding in favor of the less negligent.' "

Dale G. Casto v. *Charleston Transit Co.,* 120 W. Va. 676, quotes *Keller* v. *N. & W. Ry Co.,* 109 W. Va., 522:

> " 'When a plaintiff is negligent and his negligence concurs and cooperates with that of the defendant, as a proximate cause of the injury complained of, he cannot recover.' "

And in the *Casto* opinion, *supra,*

> "Whatever the surroundings, whether urban or rural, if the situation is such that a traveler, in the exercise of reasonable care, should look for impending danger, he must look efficiently, and not carelessly or perfunctorily."

The respondent's conduct in leaving a deep break or slide at the edge of hard surface portion of the road and failing to keep and maintain said portion in a reasonably safe condition for travel may have constituted negligence which, in other circumstances, would have afforded grounds for an award, but, for reasons of the deceased's conduct already set forth, we feel that such is not the condition in this case. We feel that the claimant's husband concurred and cooperated with the respondent in the accident which caused his death. Therefore, we deny an award and dismiss the claim.

(No. 737—Claimant awarded $79.41.)

CLIFFORD S. STEWART, Claimant,

v.

ADJUTANT GENERAL, Respondent.

Opinion filed October 24, 1951

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *H. A. Pelfrey* v. *Adjutant General,* 5 Ct. Claims (W. Va.) 106; *John Kipp* v. *Adjutant General,* 5 Ct. Claims (W. Va.) 108.

Appearances:

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

Claimant alleges that on Sunday, March 4, 1951, while operating his automobile over and upon U. S. route 60, in the city of Ceredo, Wayne county, West Virginia, he had stopped for a traffic signal, when a truck operated by private Robert Smith, a member of the West Virginia national guard, struck the rear of his automobile causing damages thereto in the sum of $79.41.

The evidence disclosed that on the afternoon of the above mentioned day, claimant, in company with his wife and three children, was operating his automobile over and upon U. S. route 60 enroute to Kenova, West Virginia. As he proceeded through the city of Ceredo, he and several others operating automobiles immediately ahead of him were compelled to stop at the intersection of U. S. route 60 and Main Street, in said city, by reason of a traffic light showing red, indicating a stop signal. As claimant came to a complete stop behind the other automobiles ahead of him, the rear of his automobile was suddenly struck by a truck carrying a "live load" of West Virginia national guardsmen, and operated by private Robert Smith of the West Virginia national guard.

Colonel Marble Zickefoos, representing the respondent, testified that the truck in question was one which was loaned by the U. S. government to the West Virginia national guard, under the supervision of the state adjutant general in the performance of his duty in maintaining national guard units in this state, and said truck, at the time of the accident, was being operated by a member of the West Virginia national guard, who, although paid by the federal government under its scheme of maintaining state national guard units in all of the states, was under the complete control, discipline and supervision of the respondent. Colonel Zickefoos exhibited to the court an investigation report which indicated that the operator of the truck at the time of the accident was not alert; that no fault was shown on the part of claimant and in his opinion this was a just and meritorious claim.

All of the testimony in this case indicates that the proximate cause of the damages done to claimant's automobile was the independent and negligent act of the agent of respondent, and which was in no way brought about by any fault on the part of claimant.

Under the circumstances and facts presented to us, we make an award in favor of claimant, Clifford S. Stewart, in the amount of seventy-nine dollars and forty-one cents ($79.41).

(No. 742-S—Claimant awarded $176.31.)

MOTORS INSURANCE CORPORATION, Claimant,

v.

ADJUTANT GENERAL'S DEPARTMENT, Respondent.

Opinion filed October 24, 1951

A. D. KENAMOND, JUDGE.

Motors Insurance Corporation, by a claim filed under shortened procedure on June 18, 1951, seeks an award for the sum of $176.31, which amount was expended to repair an automobile owned by Arthur Wingrove, of Powhatan, Ohio, and damaged to that extent when it was struck by a W. Va. national guard truck, while said automobile was parked on 32nd street, in Bellaire, Ohio, on December 9, 1950. Motors Insurance Corporation makes this claim as subrogee of the car owner by reason of an insurance policy theretofore entered into.

The circumstances surrounding the accident damaging the Wingrove automobile, and the facts out of which the claim arose, were fully determined by the adjutant general's department and reported to the court of claims.

M-24 tank belonging to Hq. Hq. & Sv. Co., 197th Tank Bn (Med), W. Va. national guard, at the time driven by Eugene

Day, member of the unit, was being pulled by another tank driven by Lt. James Summers. A ten-ton wrecker was out in front leading the convoy and was forced, by oncoming traffic, to stop after turning east off Guernsey street onto 32nd street, in Bellaire, Ohio. The tank Day was driving stopped at a slight angle when Lt. Summers' tank was forced to stop. When the latter tank was able to proceed again, the slight jerk in gaining forward momentum swung the rear end of the Day tank to the right and into the left rear bumper and fender of automobile driven by Mrs. Margaret Wingrove, wife of the owner. A thorough investigation of the accident was completed by Lt. Summers on December 11, 1950, when he interviewed the car owner and his wife, patrolman George Busch, of the Bellaire police department, and two other witnesses who were standing on 32nd street at the time the Day tank bumped the Wingrove car.

The car was repaired at Beam Motor Sales, Moundsville, West Virginia, whose estimate in the amount of $176.31, including tax, is attached to the adjutant general's report on claim.

The adjutant general's department having concurred in this claim and recommended an award therefor under the shortened procedure provision of the court act, and the attorney general having approved the claim, an award is hereby made in the amount of one hundred seventy-six dollars and thirty-one cents ($176.31) in favor of Motors Insurance Corporation.

ROBERT L. BLAND, JUDGE, dissenting.

The subrogee claimant in this case has a remedy at law. Subsection 7, of section 14 of the court act expressly excludes from the jurisdiction of this court claims for which a proceeding may be maintained by or on behalf of a claimant in the courts of the state. I do not think that the court of claims should assume to exercise jurisdiction when it is expressly excluded, as is the case in the instant claim, as I see it. Without any consideration of the claim upon its merits, I respectfully record this dissent.

(No. 749—Claim dismissed.)

BROOKS G. RAYNES, Claimant,

v.

WEST VIRGINIA UNIVERSITY, Respondent.

Opinion filed October 25, 1951

Claims with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state are expressly excluded from the jurisdiction of the state court of claims by subsection 7 of section 14 of the court act.

Appearances:

Kellum D. Pauley, for the claimant.

W. Bryan Spillers, assistant attorney general, for the respondent.

A. D. KENAMOND, JUDGE.

Claimant seeks an award in the amount of $131.62 to compensate him for damages to his automobile, a 1947 Chevrolet sedan, which he alleges were caused by the negligence of W. H. Roberts, district agent, agriculture extension service, West Virginia University, who was driving a university owned automobile, a 1949 Chevrolet sedan, at the time their cars and two other automobiles were involved in a collision on U. S. route 119 near Queen Shoals, West Virginia, on the morning of May 5, 1951.

Claimant Brooks G. Raynes testified that at the point above mentioned an automobile about 100 feet ahead of him suddenly came to a stop and that he then applied his brakes and stopped about 3 to 5 feet behind the car ahead. A third automobile, a Cadillac, driven by an army captain, was suddenly brought to a stop about the same distance behind the Raynes car, whereupon the car driven by W. H. Roberts and following in the procession of four cars, struck the rear of the third car, driven by the army

captain, causing said third vehicle to strike the rear of claimant's car and thus causing claimant's car to strike the car immediately ahead of him.

W. H. Roberts, appearing as a witness for the respondent, said he didn't think he was involved directly with the Raynes' car and that damages to the rear end of the Cadillac, the car owned and driven by the army captain, which had been struck by the university car, had been satisfied and cleared some two months after the accident.

At this point in the hearing it developed that the West Virginia University, the respondent state agency, under authorization of chapter 6, article 12, section 1 of the West Virginia code, carried insurance for the benefit and protection of its motor vehicle drivers. It appears that counsel for respondent did not set up insurance as a plea of denial and it was not until the case was heard before the court that it came to light that the Roberts car was covered by insurance.

Since claimant has an adequate remedy in the courts of the state against W. H. Roberts and his claim is thus excluded from the jurisdiction of the court of claims, as set forth in the *syllabus* of this opinion, the claim is dismissed.

(No. 748—Claim denied.)

EMMETT WAYNE WEBB, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed October 25, 1951

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. *Robison* v. *State Board of Control*, 3 Ct. Claims (W. Va.) 66.

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding claimant Emmett Wayne Webb, a resident of the state of West Virginia and the county of Fayette is of opinion that the court of claims should make an award of $662.53 in his favor against the state road commission because of an accident which he had on U. S. route 60 in said county of Fayette on the night of March 8, 1951. As a result of said accident his 1950 Chevrolet four-door sedan automobile was very considerably damaged, he sustained severe personal injuries, was hospitalized for four days in a medical center at Montgomery and lost about a month's time from his usual employment.

He represents to the court that the cause of said accident was due to the failure of the state road commission to prevent and sufficiently guard against a slide which occurred on said highway sometime during the night of March 8, and on the further ground of the failure of such state agency to provide warning signs, flares, and other notices of danger as he approached the site of the slide. In his petition he avers: "* * * that on the day and year aforesaid he was driving his said automobile as aforesaid he was on said highway using due care on the right or north side of the center of said highway at a lawful rate of speed, when suddenly and without warning of any kind there being no flares or signs or other warning he ran into a slide extending out over the paved surface of the highway approximately four or five feet; that said slide was on a curve and that he did not see it until he was too close to stop his automobile and trying to avoid it swerved to the left and in so doing struck a large rock on the highway breaking or tearing loose the tie rod on his car causing him to *loose* control of the vehicle and go over a large embankment * * *."

Said route 60 is one of the most extensively traveled and used highways in the state. In sections it frequently abuts on moun-

tainsides. Pictures exhibited upon the investigation of the claim show very clearly that the road at the point where the accident occurred was a beautiful stretch of highway. By reason of the topography of the state in the section traversed by the highway it infrequently happens that slides occur on the mountainsides. In such cases, however, before it could reasonably be contended that there would be responsibility on the part of the state to compensate a traveler on the road for injuries sustained or property damaged, it should be made to appear that the road commission had knowledge of the slide and an opportunity to remove it.

Since claimant is a resident of the county in which his accident occurred there is a reasonable inference, from the testimony offered by him in support of his claim, that he was familiar with the highway over which he traveled and had knowledge of the fact that slides frequently occurred on the mountain abutting the road, and that it was his duty at all times when using the highway with his automobile to exercise ordinary care and prudence.

The testimony adduced in support of the claim is reported in a transcript of more than eighty pages. However, the entire case was presented by claimant in these words: "Well, it was—I had left home around 11:00 o'clock at night, March 8. It was on a Thursday. I was driving westward on U. S. 60. I was driving along at the rate of 45 to 50 miles an hour and all of a sudden I came upon this slip in the road without any warning whatsoever, no signs of any slide, or any flares burning, or anything, so I applied my brakes and that way swerved the car and I hit a rock in the slide that caused me to lose control and go over an embankment, dropped right over on the New York Central Railroad tracks. The weather that night, it was drizzling-like, quite foggy and smoky. We have those coke ovens there at Harewood that holds the fog and smoke right on the road and the visibility was very bad at the time the accident happened."

The testimony as a whole was involved, obscure, vague and unsatisfactory to establish any negligence on the part of respondent, or responsibility for the sudden slide from the moun-

tainside. Being familiar with the road and the liability for slides to occur at any time it was all the more the duty of claimant to employ sufficient precautionary measures as he traveled on the highway to avoid accidents.

On the night of this particular accident it was drizzling rain; the weather condition was foggy and the smoke from adjacent coke ovens presented a situation sufficient to put claimant on notice of what might happen under the circumstances of prevailing conditions.

No good purpose would be subserved by reciting at length the testimony relied upon by claimant to establish his claim. It is sufficient to say that giving full consideration and weight to all of such testimony it fails signally to make out a case of negligence on the part of the road commission. It fully appears that the road commission was in the habit of giving proper attention to these slides when they would occur, which was frequently, and removing them from the highway. It is, in our judgment, reasonable to conclude that by reason of his lack of care and failure to employ reasonably precautionary measures he contributed to his unfortunate dilemma.

This court has frequently, in its determination of claims predicated upon the alleged negligence of the road commission, declared: "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."

> "No duty, express or implied rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways." *Hutchison* v. *State Road*, 3 Ct. Claims (W. Va.) 217.

The state has very generously provided an excellent system of highways in the state, which, as a general rule, are in reason-

ably safe condition for pedestrian and vehicular use. No award on the ground of the negligence of the road commission could be made or responsibility attributed to it for the sudden slide. A person who rides in an automobile on the very best highway of the state is liable to have an accident at any time.

We cannot agree, upon a full hearing of this case, that the road commission was in any way responsible for the accident. Absolutely no negligence on its part can be inferred from the evidence offered by claimant in support of his claim. In view of this conclusion by the court an award in the instant case is denied and the claim dismissed.

(No. 746—Claim denied.)

SPENCE RUTHERFORD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 25, 1951

1. A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries notwithstanding the respondent is not free from blame. *Hamilton* v. *State Road Commission*, 5 Ct. Claims (W. Va.) 119.

2. If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion. *Williams* v. *Main Island Creek Coal Co.*, 98 S. E. 511.

Appearances:

Claimant, pro se.

W. Bryan Spillers, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

Claimant alleges that on the evening of the 22nd day of July, 1951, while proceeding in his pick up truck over Patrick Creek road, leading to U. S. 52, in Wayne county, West Virginia, he drove into a break on the right side of the road, overturned and rolled down a bank, resulting in injury to his person and damages to his truck, which he claims was caused by respondent's negligence in permitting a break on the side of the road to exist unrepaired or to be safeguarded by suitable barriers or signs of warning.

Claimant testified that about six o'clock on the evening this accident occurred, he met a friend, Bill Ferguson, in the city of Wayne, with whom he discussed the possibility of procuring a cow from Ferguson's brother, who lived on the Patrick Creek road approximately five miles from the junction of U. S. route 52; together they drove to the Ferguson home and after ascertaining that the brother was not at home, claimant proceeded to return alone and approximately one and a quarter miles from the junction of U. S. route 52, as he rounded a curve on said road, he drove into the break complained of. Claimant further testified that when he and his companion drove over the road in question proceeding to the Ferguson home, he had not noticed the break because as he stated, it was on his left and "hardly noticeable"; and that at that time it was still daylight and the weather clear.

When he proceeded to return from whence he came, it was dark or beginning to get dark, necessitating the use of his truck lights, and as he rounded the curve, above stated, his lights were directed to the bank of the left side of the road causing him not to see the break in question on his right, and therefore to drive into it, causing the damages complained of.

After this case was heard the members of the court went to the scene of this accident and after careful investigation ascertained the following facts: Branch Creek road is a secondary dirt road with a rock base and covered at places with small gravel; at most places it is not very wide; proceeding west, to-

wards the Ferguson home, the break in question is readily and easily seen by anyone operating a motor vehicle, and proceeding east, the curve, which claimant testified to being rather sharp and immediately leading to the break, is not as sharp as the court was led to believe. It is a fairly wide curve, the road at that point being approximately 16 to 18 feet in width and the break is at least fifty feet from its crest, and one rounding said curve in the nighttime would sufficiently be straightened out for the lights of his motor vehicle to be showing straight ahead and make the break visible, if alert and using ordinary care and caution.

This court has held that a duty is imposed upon the state to guard all dangerous places on the public road by suitable railings and barriers so as to render the said roads reasonably safe for travel thereon by day or night, and the failure of such duty may present a moral obligation on the part of the state for which a claim may be awarded. We intend to still adhere to the above ruling, provided of course, that if one suffers injury and damages because of the lack of duty imposed on the state he may not recover if in any way, by his own negligence, or by his lack of due care and caution, he contributed to his own injury. It is elementary that a traveler on a public road must exercise care and caution and not shut his eyes against apparent dangers. We do not attempt to say that the respondent is free from blame for permitting the break to exist without being properly barricaded, for something should have been done to correct the situation which existed and brought about this accident, but we do believe that claimant had ample opportunity to observe the condition of the road and if he had used the ordinary care and caution required of him, he surely would, or should, have seen the break, especially when he travelled the road earlier in the evening when still daylight, and the break being on his left in full view while proceeding to the Ferguson home.

Jess W. Horn, a witness for claimant, testified concerning the break as follows: "But you go up a little rise and on the bend you would notice it, if you were *looking,* but if you didn't pay no mind you wouldn't notice it." (R. p. 39): "Did you have

any trouble getting around the curve?" "Not going up, you wouldn't, no." "Did you have any trouble coming back?" "If you aren't on the ball you would." (R. p. 41): From this we can see that anyone operating a motor vehicle over the road in question could see the break and avoid driving into it if as Horn says, "If you were looking" and "If you were on the ball."

Our Supreme Court has held that:

> "If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion." *Williams* v. *Main Island Creek Coal* Co. 83 W. Va. 464; 98 S. E. 511.
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> " * * * Defects may be either patent or latent. Where the defect is open and easily discovered the traveller cannot, acting upon the presumption which exists in his favor, run blindly into it * * *." *Boyland* v. *City of Parkersburg,* 78 W. Va. 749; 90 S. E. 347.
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> "A plaintiff who contributes proximately to his own injury by assuming risks may not recover damages for injuries, notwithstanding that defendant is not free from blame." *Lowe* v. *Norfolk & W. Ry. Co.* et al, 119 W. Va. 647; 195 S. E. 593.
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> "When a plaintiff is negligent and his negligence concurs and cooperates with that of defendant, as a proximate cause of the injury complained of, he cannot recover." *Keller* v. *N. & W. Ry. Co.,* 109 W. Va. 522.
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> "Whatever the surroundings, whether urban or rural, if the situation is such that a traveler, in the exercise of reasonable care, should look for impending danger, he must look efficiently and not carelessly or perfunctorily." *Casto* v. *Charleston Transit Co.,* 120 W. Va. 676.

The respondent's conduct in leaving the break in the side of the road open and unguarded may have constituted negligence which, in other circumstances of injury to person or property,

would have afforded grounds for an award, but, for the reason stated and bearing in mind the facts and attendant circumstances, we feel that such is not the situation in this case. We feel that claimant contributed considerably, by his lack of ordinary care and caution, to his injury and loss. Therefore, we deny an award and dismiss the claim.

(No. 752-S—Claimant awarded $202.90.)

HAZEN D. YOUNG, Claimant,

v.

STATE ADJUTANT GENERAL, Respondent.

Opinion filed January 16, 1952

JAMES CANN, JUDGE.

This case was submitted to this court under the shortened procedure section of the court act, and the record presented reveals that in the forenoon of June 29, 1951, one Kenneth L. Smith, a member of the West Virginia national guard, while driving one of its trucks, a GMC truck No. 4726012, in the city of Clarksburg, Harrison county, West Virginia, was stopped in line of traffic, behind a milk truck, at the traffic light located at the intersection of Sixth and Pike streets; the claimant was stopped immediately in the rear of the national guard truck. When Smith attempted to proceed, the milk truck did not move, so he looked for the driver of the truck and found none in the cab. He then attempted to move around the milk truck by first backing up, as he did so he heard the sound of a horn blown by claimant, warning him of his presence in the rear, but before Smith could stop he crashed into the front of claimant's automobile causing damages in the amount of $202.90.

The investigation made by the proper authorities reveals that the driver of the national guard truck was primarily at fault,

and nothing is shown that claimant in any way contributed to this accident.

The state agency involved concurred in this claim and recommended that an award be made, and the same was approved by the attorney general.

The majority of this court hereby makes an award in favor of claimant, Hazen D. Young, in the amount of two hundred and two dollars and ninety cents ($202.90).

ROBERT L. BLAND, JUDGE, dissenting.

I am sure that I would much prefer to act in concert with my colleagues than to record my dissent from their determination of a claim. However, because of the manner in which this claim has been filed and prosecuted in the court of claims and because the court has been restricted to the views of the adjutant general and the attorney general without any independent investigation by the court of claims of the real merit of the claim, I respectfully record my dissent to the majority opinion and the determination therein made. I also refer to my dissenting statement in claims No. 755-756-757-758-759, *Milkint et als* v. *State Road Commission,* determined at the present term of the court, and to my dissent in claim No. 760-S *Andrews* v. *Adjutant General.* (Reported elsewhere in this volume).

(No. 760-S—Claimant awarded $121.50.)

DOYLE ANDREWS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1952

1. The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspection as to their

condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v *State Road,* 5 Ct. Claims (W. Va.) 22.

2. The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Price* v. *Sims,* 58 S. E. (2d) 657.

JAMES CANN, JUDGE.

During the month of August, 1951, the claimant, Doyle Andrews, and one Worthy Preston Shock, were partners in a logging enterprise on the Hance Casto farm in Webster county, West Virginia, and were engaged in conveying logs from said farm to Elkins, in Randolph county, West Virginia. On the 31st day of August, 1951, about one o'clock P. M., while claimants' truck loaded with about 15 medium sized poplar logs and enroute from the above mentioned farm to Elkins, was crossing a state controlled and maintained bridge, known as the Jerry's Run Road bridge, in Webster county, the bridge broke and collapsed causing the rear end of said truck to go through the bridge. By reason of said accident claimant asks damages to the extent of $121.50.

The record as presented to this court shows that at the time of the accident the truck was hauling a weight of approximately five tons, and was licensed to haul 30,000 pounds, gross weight. The record further discloses that the stringers supporting the floor of the bridge, which were chestnut logs, had deteriorated, causing the collapse of the bridge. The record further reveals that no warning signs of any kind had been posted or placed at the approaches to the bridge, nor were there any signs as to load limits; neither does said record reveal that any inspection of said bridge, as required by our laws, had been made by the road authorities in charge.

This court has held on several occasions that the statute requiring inspection and proper maintenance of bridges, controlled

by the state road commission, is mandatory and failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for damages caused by the neglect of said duty.

The record before this court further reveals that the truck in question was not overloaded; that neither the petitioner nor the driver of this truck knew that the bridge was unsafe or that the stringers which supported it were in a rotten condition, and, further, that nothing appears upon which to base contributory negligence or assumption of risk on the part of claimant.

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

A majority of the court is of the opinion that the unsafe condition of the bridge, about which it was not shown that claimant had any knowledge, was the proximate cause of the accident, and the state is therefore morally bound, in view of all the facts and circumstances, to compensate claimant for his loss. Therefore, an award is made in favor of claimant, Doyle Andrews, in the sum of one hundred and twenty-one dollars and fifty cents ($121.50).

ROBERT L. BLAND, JUDGE, *dissenting.*

I deeply regret that I find myself at variance with my distinguished colleagues in the determination which they have made of this case. My chief opposition to the determination made of the claim grows out of the manner in which it was presented to this court, prosecuted and determined.

I would not for a moment wish to be understood as saying what I would do or would not do if the claim had been prosecuted under the regular procedure of the court. I quite agree with Judge Cann, who wrote the majority opinion of the court, that in the *Price* case, cited by him, our Court of Appeals held very distinctly that in certain circumstances a valid appropriation of the public funds of the state might be made by the legislature when

it appeared from the evidence that a moral obligation existed on the part of the state. My colleagues, however, overlook the difference between the manner in which the *Price* case was prosecuted in the court of claims and the manner in which the instant case was heard. In the *Price* case the claimant introduced testimony at the bar of the court where the members of the court had an opportunity to see the witnesses, exmaine them and where the state had a like opportunity to introduce its witnesses in opposition to the claim and have them examined and cross-examined by members of the court. In the one case, there was a full, open and complete hearing and investigation made; in the other case the court could only informally consider the claim on the *ex parte* record of the head of the agency concerned. I sometimes wonder whether or not if the head of an agency who is so quick and ready to concur in a claim for damages against the state of West Virginia—damages for which he himself by his concurrence in the claim shows himself to be guilty and responsible—would do so if he had to pay the money out of his own pocket. This case, in my judgment merely confirms and establishes the truth which I have been contending for some time now that the shortened procedure provision provided by the court act is a detriment rather than a help to a thorough investigation of the claim presented. If the legislature had intended to give to the head of a state agency the power to concur in the claim and have it passed when approved by the attorney general, it could easily have provided a revolving fund out of which such payments could be made. This, however, the Legislature did not do. On the contrary it created a court of claims, consisting of three members, who are charged with the duty and responsibility of conducting such investigation of every claim filed that would fully disclose the merits of the claim and whether or not it should be classified as an approved claim. I think the shortened procedure provision of the court of claims act should be abolished and that all claims, large and small, should be heard under the regular procedure of the court act.

For the reasons herein set forth I respectfully note this my dissent to the award made in this case.

(Nos. 755-S, 756-S, 757-S, 758-S and 759-S—Claimants Robert and Emogene Milkint and American Farmers Mutual Insurance Co. awarded $50.00; Ugo J. Massi and American Farmers Mutual Insurance Co. awarded $50.00; Louis and Virginia Milkint and American Farmers Mutual Insurance Co. awarded $50.00; Jacquelyn R. DelSignore and American Farmers Mutual Insurance Company awarded $50.00; Gerald H. Parks and American Farmers Mutual Insurance Company awarded $40.00.

ROBERT and EMOGENE MILKINT and AMERICAN FARMERS MUTUAL INSURANCE CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

UGO J. MASSI and AMERICAN FARMERS MUTUAL INSURANCE CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

LOUIS and VIRGINIA MILKINT and AMERICAN FARMERS MUTUAL INSURANCE CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

JACQUELYN R. DelSIGNORE and AMERICAN FARMERS MUTUAL INSURANCE CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

GERALD H. PARKS and AMERICAN FARMERS MUTUAL INSURANCE CO., Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 17, 1952

A. D. KENAMOND, JUDGE.

These claims submitted under the shortened procedure provisions of the court of claims act and approved by the attorney general, the state road commission having concurred in the claims and recommended the awards claimed, all grew out of the same incident and act of a paint crew of the state road commission. Each case involved an automobile damaged by paint spray.

On September 5 and 6, a paint crew of the state road commission, under the foremanship of Clay Ferris, was spray painting with aluminum the bridge which spans Blackwater river on U. S. 219, at Thomas, West Virginia. The bridge structural steel is completely in the sub-structure and the roadbed located above the painting project. Evidently the paint crew failed to note a rising wind, which Ward Hudson, safety director for district 8 and investigator of the facts and circumstances in these cases, in a written report dated December 6, 1951, said carried specks of aluminum paint and caused damage to the several automobiles in the amounts shown in photostatic copies of proof of loss.

Claimants Robert and Emogene Milkint had their 1951 Plymouth sedan parked in front of their place of business approximately 80 feet from the bridge, said automobiles being generously sprayed with paint from the operation at bridge, with a resulting damage of $50.00.

Ugo J. Massie had his 1951 Ford sedan parked on a city street approximately 70 feet from the bridge and sustained damage of $50.00, amount necessary to remove paint specks and rewax antomobile.

Louis and Virginia Milkint had their 1950 DeSoto sedan legally parked about 50 feet from the bridge and the paint spray which carried to their automobile necessitated the expenditure of $50.00 for removal.

Jacquelyn R. DelSignore had his 1951 Ford sedan parked in front of his residence approximately 100 feet from the bridge and claims $50.00 to pay for removing aluminum paint and re-waxing car.

Gerald H. Parks had his 1950 Oldsmobile completely specked with aluminum paint on September 6, 1951, while driving across the state owned bridge on U. S. 219 at Thomas, West Virginia, the sub-structure of which was then being spray painted. His claim is for actual damage of $40.00.

The records submitted in all these cases rule out the possibility that the aluminum paint spray on the automobiles involved could have come from any source other than the operation of the state road commission paint crew. No other painting activities were known to have been carried on at that time in that locality either by public or private concerns or individuals. In each case the report made by Ward Hudson, safety director, showed that in his opinion the state road commission paint crew was at fault.

In view of the investigation made by the respondent in each of these cases having shown said respondent to be at fault, and of the recommendation of respondent that awards be made for the several amounts claimed, with the approval of the attorney general, a majority of the members of this court make the following awards:

To Robert and Emogene Milkint and American Farmers Mutual Insurance Company, fifty dollars ($50.00);

To Ugo J. Massi and American Farmers Mutual Insurance Company, fifty dollars ($50.00);

To Louis and Virginia Milkint and American Farmers Mutual Insurance Company, fifty dollars ($50.00);

To Jacquelyn DelSignore and American Farmers Mutual Insurance Company, fifty dollars ($50.00);

To Gerald H. Parks and American Farmers Mutual Insurance Company, forty dollars ($40.00).

ROBERT L. BLAND, JUDGE, dissenting.

Entertaining as I do certain pronounced and deepseated convictions with respect to the assertion, presentation and proof of claims against the state or any of its agencies, I am irresistably constrained to express my disapproval of the five several claims for which awards were made by a majority of the court in the above captioned cases, consolidated and heard together because they grow out of the same facts. Each of the said claims is predicated upon the alleged negligence of the state road commission in failing to anticipate and prevent an Act of God, and thereby avoid claim damages to five motor vehicles by reason of a sudden and heavy gust of wind that caused aluminum paint to be scattered in the air and deposited upon the motor vehicles of the several claimants in these combined cases. As appears from the majority opinion employes of the state road commission were engaged in painting the bridge more particularly described in said opinion. They were engaged in the exercise of a governmental function. Instead of having the several claims heard and defended in the court of claims under the regular procedure of the court act, the head of the agency concerned saw fit to send said claims to the court under the provisions of section 17 of said act, generally known and referred to as the shortened procedure. Under this procedure the head of the agency concerned prepares the record of the claim and files it with the clerk of this court together with a concurrence in such claim. Each of said claims if prosecuted in a court of law of the state would be held and treated as a *tort* action. From time immemorial since the birth of our great nation there have been claims against the sovereign commonwealths of the union with which each legislature has been called upon to deal, claims by the very nature of which were of a peculiar and distinct type and pecuniary in nature. It is a well and fundamentally recognized rule of law in each state of the union that a sovereignty cannot be sued without its consent. In West Virginia, however, we have a constitution which prohibits in any case the institu-

tion of an action at law or in equity against the state of West Virginia, save in the instance of a garnishment proceeding. Ninety per cent of the claims with which the court of claims has had its dealing since its creation ten and one-half years ago have been claims against the state road commission. This is only natural when we reflect upon our extensive and magnificent system of highways in the state. In view of the numerous accidents that have occurred from time to time on the highways of the state there have been innumerable claims filed and prosecuted upon the theory of the state's negligence in one way or another. One may examine the text books the country over and find that it is an elementary proposition that a state is not liable to respond in damages for the negligence of its officers, agents, servants and employes, in the absence of a prior statute authorizing the prosecuton of such claims. That fundamental principle of law has been distinctly recognized by our own Court of Appeals in the *Adkins* case and in other cases that have been heard in that august tribunal in *mandamus* proceedings against the auditor to compel him to pay requisitions made upon him which he had refused to pay. The only way, as a result of our appellate court's holding, that a claim sounding in tort may warrant a valid appropriation by the legislature and for which the public funds may be paid, is on the theory of the moral obligation of the state. In no other instance would the legislature itself have power to make a valid appropriation to satisfy a claim in damages. Anyone who will take the trouble to read the several opinions of the Court of Appeals must reach this inevitable conclusion. What constitutes a moral obligation has been clearly defined by the Court of Appeals in the *Cashman* case and in other cases, all of which follow the rule laid down in the case of *Woodall* v. *Darst,* 71 W. Va. 350. However, in spite of these pronouncements of our Court of Appeals the head of the state road commission has submitted these cases, sounding in tort and predicated upon alleged grounds of his negligence, to this court with his concurrence.

These several claims have been informally considered by this court upon the meagre record made and filed before the clerk of this court by the state road commission, thus depriving this

court of any independent inquiry or investigation as to whether or not one or more of the claims would constitute such a moral obligation of the state as our Court of Appeals has said it would be within the province of the legislature to make a valid appropriation. No defense whatever is made by the state against any one of the claims. This court is limited and restricted in its informal consideration of the claims to the facts set forth in the road commission record. Fortunately, however, it appears from the well-written opinion of the majority of the court that the primary and proximate cause of the damage claimed to have been sustained in each of the five cases is the result of an Act of God and not of any negligence that the state, as a sovereign commonwealth, could have anticipated and prevented. As far back as January 1942, a claim came to the court of claims from Berkeley county by a florist who sought an award against the state for the reason that while employes of the state were engaged in sweeping the dust from the highway of the state a heavy wind descended and spread the dust upon his flowers. I refer to case No. 38-S, *Walter R. Kniceley, d/b/a Knicely Florists* v. *State Road Commission,* reported in 1 Ct. Claims (W. Va.) 72. In our determination of that claim we held that the cause of the damage for which the claimant sought reparation was the result of an Act of God, and that case has been a well established precedent of this court from that date until the present time. Even the majority opinion in these cases does not now disapprove or reverse that holding.

For reasons herein set forth and many more which fill my mind at the moment I most respectfully record this my dissent.

No. 745—Stanley Copley awarded $50.25; Jennie Bell Copley awarded $350.00.)

JENNIE BELL COPLEY, ANNA MAYNARD, LOUISE COPLEY, and STANLEY COPLEY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 18, 1952

A claim for damages to property or person injured by negligence of state agent or employe while engaged in discharge of governmental function justifies appropriation of public funds on the basis of valid moral obligation of state.

Appearances:

E. A. Hansbarger, for the claimants.

W. Bryan Spillers, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

On June 30, 1950, claimants Jennie Bell Copley, Anna Maynard and Louise Copley were walking along a path alongside the hard surface of U. S. 52 enroute from their home in Big Branch to the village of Dunlow, Wayne county, when at a point about a half mile from Dunlow a truck driven by Richard Thompson of Radnor, skidded upon the highway of U. S. 52 and crashed into claimants, inflicting bodily injuries to three claimants, and damage to personal property of one of them.

Stanley Copley, the fourth named claimant, is the father of Jennie Bell Copley, and Anna Maynard, and grandfather of Louise Copley.

When the case was heard on January 16, 1952, neither Anna Maynard nor Louise Copley appeared before the court, and no

claim for an award in behalf of either was then presented. According to the testimony both had suffered only minor injuries.

Stanley Copley asked to be reimbursed for the following expenditures in behalf of Jennie Bell Copley, the minor daughter in the case:

To replace broken eyeglasses	$34.75
To repair damaged watch	7.50
To sew up cut under chin	3.00
To trip to physician	5.00
Total	$50.25

Testimony revealed that Jennie Bell Copley was struck down by Richard Thompson's skidding truck, causing bruises and pains, the latter persisting to the present time. Members of the court noted that Jennie Bell Copley bore the marks of a long cut under her chin which she will doubtlessly carry as a permanent blemish. No definite claim for recompense was made but her counsel asked the court to make some award in her behalf to compensate for her suffering and the permanent disfigurement. Her father stated that she lost no wages due to the accident, though she was unable for some time thereafter to perform usual household duties in his home.

Who or what was responsible for the skidding of Richard Thompson's truck and the resulting damage to claimants?

The accident occurred on a hairpin curve, the berm alongside the lane normally to be followed by Richard Thompson being somewhat higher than the 18 feet of hard surface. Early in the afternoon of the accident a state road commission crew under the foremanship of Hobart Marcum had shoveled calcium chloride onto the berm for the purpose of killing weeds. According to his testimony his supervisor, Kaye Booth, now deceased, had directed him to use up some calcium chloride which had been in storage for a long time and had lumped up as a result. Apparently the condition and quantity of this calcium chloride was such as to cause it on melting to overrun the lower hard surface, covering

its entire width for a length of 30 or more feet. According to foreman Marcum there were no signs to indicate the hazardous condition of the road at time of accident, which occurred about five-thirty o'clock in the afternoon. When questioned he revealed that he knew before and after the accident that the road was slippery by reason of melted calcium chloride. Men Working signs had been put up while the road crew applied the weed killer, but these signs were removed when the work of application was completed.

The accident was investigated by Corporal Russell Hogg, of the department of public safety, who testified that on the day of the accident he saw the injured claimants at a doctor's office, and upon their information he advised Richard Thompson, driver of the truck involved in the accident, to appear before a justice of the peace to answer charge of operating a motor vehicle on the wrong side of the road. Upon Thompson's insistence that he was not at fault for the accident but had unavoidedly skidded at the curve, Corporal Hogg went to the scene of the accident to make investigation. The corporal testified that, as he entered the hairpin curve at a speed of 25 miles per hour, he came upon the melted calcium chloride without warning and his car skidded some distance. After viewing the scene of the accident and surrounding circumstances he advised the justice of the peace of the same, resulting in the dismissal of Richard Thompson as being without fault. Corporal Hogg further testified that the melted calcium chloride covered the highway at the point of accident for a distance of 30 feet, and that no person rounding the hairpin curve in question would have any notice or opportunity to observe the hazardous condition of the road, and thus be able to avoid the same, until he would actually be upon it. He further testified that the road was unsafe and he therefore notified assistant supervisor Atkins, whereupon the road was sanded.

Forrest Damron, also engaged in hauling mine post as was Thompson, attempted to negotiate the curve with his truck just ahead of the latter, but skided off the hard surface about five feet. He was able to stop, desiring to ascertain whether he had struck any of the claimants.

When Damron and Thompson had passed over this highway earlier in the day they had found it in good condition, and the appearance of the road at time of accident was not such as to indicate the hazard that it actually was.

The state road commission offered no testimony, although C. N. Plymale, safety director for the district in which the accident occurred, was present at the hearing.

This court is mindful of the fact that the state road commission was engaged in a governmental function when its employes put a weed killer, calcium chloride, on the berm above point of accident. But, in view of the testimony offered before the court as to the condition and quantity of calcium chloride applied and as to the manner of its application, we have serious doubts whether proper and ordinary care was used. The state road commission might well have anticipated that calcium chloride as applied in its lumpy state on a hot afternoon, according to the testimony, would melt and flow down over and upon the highway and result in a hazardous and dangerous condition for the traveling public. According to the testimony melted calcium chloride is as hazardous as ice on a highway, although to the driver of a motor vehicle it appears to be nothing more than moisture.

Further testimony showed that after the application of the calcium chloride "Men Working" signs were then removed, no warning signs were put up, and no attention given to what became of the calcium chloride.

If a private individual owning land alongside a highway were to use calcium chloride as a weed killer on his land and the same were to be applied as in the instant case and in melting overrun the adjacent highway, thereby causing damage and injury to any one lawfully using said highway, would he not be liable for damages in any court in this state?

Applying the test of moral obligation on the part of the state to reimburse a claimant who suffered injury to his property or person by the negligent act or acts of employees of the state, we

call attention to the language of the Supreme Court of Appeals in the case of *Price* v. *Sims*, 58 SE (2d) (W. Va.) 657:

> "Moral obligation of state, declared by legislature to exist in favor of claimant for negligent injury to his property, will be sustained, and a legislative appropriation of public funds made for its payment will be upheld, when conduct of agents or employees of state which proximately caused such injury is such as would be judicially held to constitute negligence in an action for damages between private persons."

From this language can we not say that, since the private individual above mentioned would be liable for damages under the circumstances above set out, the state road commission would be liable under the similar circumstances which also prevail in this case?

Applying the test in the case of *State ex rel. Cashman* v. *Sims*, 130 W. Va. 430, does the factual situation by the instant record constitute such wrongful conduct on the part of the road commission employe as would be recognized in a court of law involving private parties? We think it does.

We therefore conclude that the employees of the state road commission, in applying calcium chloride on the berm above and alongside the hairpin curve at point of accident in this case were under duty to use ordinary and reasonable care in its application and mode of application so as to prevent its encroaching upon the highway thus making the same hazardous and dangerous to the traveling public. Further, we conclude from the testimony that neither the claimants in this case nor the driver of the skidding truck, involved in this accident, contributed in any way to the accident; that the same resulted solely from the negligent manner in which the employes exercised the governmental function herein set out.

We therefore make an award of fifty dollars and twenty-five cents ($50.25) in favor of Stanley Copley, and an award of three hundred and fifty dollars ($350.00) in favor of Jennie Bell Copley.

ROBERT L. BLAND, JUDGE, *dissenting in part, concurring in part.*

I cannot subscribe to the rule announced in the above *syllabus* and dissent to so much of the opinion of the court as holds that a claim for damages to property or person injured by negligence of state agent or employe while engaged in discharge of governmental function justifies appropriation of public funds on the basis of valid moral obligation of state. However, I do concur in the conclusion reached and in the awards made. The case has a very strong appeal to this court. No precautionary measures were employed after the completion of the work to warn persons using the road of the danger occasioned by the use of the calcium chloride.

I think that every case presented to the court of claims should be determined upon its own basis, and that the two claimants in whose favor awards are made have established by sufficient proof their rights thereto.

I would not want to be understood as agreeing to a proposition that would deny the state to discharge its governmental functions or hold that the rights of a pedestrian on the highway are superior to the rights of the state.

(No. 763-S—Claimant awarded $256.80.)

TRESSIE V. CLEAVER, *Admx.*, estate of Lemuel A. Cleaver, Jr., deceased, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed April 30, 1952

JAMES CANN, JUDGE.

The facts as disclosed by the record in this case show that on

the 18th day of September, 1951, Lemuel A. Cleaver, Jr., claimant's deceased husband, was then an employe of respondent in the construction of the Spring Run Fish Hatchery, near the Dorcas Post Office, in Milroy district, Grant county, West Virginia; that on the date aforesaid, in the course of his employment and at the direction of his employers, he made a trip to Petersburg, in said Grant county, in his own automobile, a 1941 Ford sedan; on his return from Petersburg to the place of his employment he was stopped by other employes of the respondent approximately 200 yards from where dynamite or other explosive blasting operations were being conducted by the respondent in the construction of said fish hatchery, and was told not to proceed any further until said blasting operations were completed. Whereupon the said Lemuel A. Cleaver, Jr. stopped his car as directed and was sitting in the left front seat thereof when a large stone came hurtling through the air as a result of an explosive charge set off by the employes of respondent and struck his car on the roof of same with such force and velocity that it pierced the roof of said automobile and struck him on the head and body causing him grave and serious injuries, resulting in his death shortly thereafter, and also causing considerable damages to his automobile.

The record further discloses that said Lemuel A. Cleaver, Jr. left surviving him at the time of his death, his widow, Tressie V. Cleaver, the claimant, and two children, all of whom are now receiving benefits from the West Virginia workman's compensation fund by reason of the death of the said Lemuel A. Cleaver, Jr. caused by injuries received while in the course of his employment. That said claimant on the 9th day of October, 1951, duly qualified as administratrix of her husband's estate and as such prosecutes this claim for the damages done to decedent's automobile as above set out, estimated by the exhibits filed to amount to $256.80.

It is contended by the claimant that the employes of the respondent in conducting explosive blasting operations at the time and place aforesaid disregarded and were unmindful of their duty to use all due care and caution so as not to endanger life

or property out of the area designated to be the danger area and also to use care and caution in the amount of explosives used in conducting said blasting operations in order not to endanger life or property out of said designated danger area.

Under the circumstances disclosed we are of the opinion to agree with claimant's contention and hold that the lack of due care and caution on the part of the employes of respondent, as stated, was the sole and proximate cause of the injuries received by the said Lemuel A. Cleaver, Jr., resulting in his death, and of the damages done to his automobile.

The state agency concerned concurs in this claim and the same is approved by the attorney general as one that, in view of the purpose of the court of claims statute, should be paid.

We therefore make an award in favor of claimant, Tressie V. Cleaver, *admx, etc.*, for the sum of two hundred fifty-six dollars and eighty cents ($256.80).

(No. 764—Claimant awarded $1100.00.)

B. STANLEY GILL, *et ux*, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 30, 1952

1. Negligence on the part of the state road commission as shown by its failure to eliminate a rockslide obstruction in a creek in the state road right-of-way, thereby damaging the property of a resident along said road, presents a moral obligation for which a claim for reasonable damages should be allowed.

2. Where proof of amount of damage claimed is of uncertain nature the court of claims will make an award for such sum as is reasonably shown by the evidence to be compensatory for the damage sustained.

Appearances:

Kay, Casto & Amos (Edward H. Tiley), for the claimant.

W. Bryan Spillers, first assistant attorney general, and *Arden J. Curry*, assistant attorney general, for the respondent.

A. D. KENAMOND, JUDGE.

This claim filed on March 6, 1952 listed property damages to the amount of $1,514.01. When the case was heard on April 16, 1952, permission was given to amend the bill of particulars increasing the claim to $1,604.26. Damages alleged were to property bought and occupied by B. Stanley Gill in December, 1949, said property being located along state route 14, on Alum Creek, Washington district, in Kanawha county. In August, 1950, a flood in that territory overran the Gill property, resulting, as alleged, in considerable damages to claimants' house and lot and to provisions and materials therein and thereon.

Counsel for claimants, in an opening statement, said this claim arises out of what they believed to be negligence on the part of the state road commission and its failure to remove from Alum Creek a rockslide, which caused the water to flow across the road and over and upon Mr. Gill's property.

By agreement between counsel for claimant and counsel for respondent it was stipulated that the Alum Creek which runs along the side of state route 14 is part of the right-of-way of the state road commission, that the slide occurred quite some time before the damage to the property, and that the state road commission had notice of it.

B. Stanley Gill testified in his own behalf, and Clarence G. Wilson, a neighbor and experienced construction worker, appeared as a witness in behalf of the claimant.

The state offered no evidence in resistance of the claim. Though three witnesses for the state were sworn, they were not called on to testify.

That the flooding of Alum Creek and resulting damage to the claimants' property did not fall within the legally accepted "Act of God" category was shown by the testimony. A week later Alum Creek was more heavily flooded, but by this time the state road commission had removed the rock slide so that the creek carried the larger volume of water and the claimants' property was not overrun. The court is constrained by the testimony to hold that the rockslide obstruction was the primary cause of damage to claimants' property.

In numerous cases decided by our Supreme Court of Appeals individuals have been held liable in damages to another for obstructing the natural flow of a water course during freshets or ordinary flood. Citations from two of these decisions should suffice.

> "For obstructing or diverting a water course, and thereby damaging another, the party is liable." *Neal et ux* v. *Ohio River R. Co.,* 47 W. Va. 316.

> "One can not negligently obstruct or divert the water of a natural course to the injury of another without liability." *Atkinson et al.* v. *Chesapeake & Ohio Ry. Co.,* 74 W. Va. 633.

This court is of the opinion that a moral obligation is involved in the Gill claim, and, supported by the Supreme Court's *syllabus* 2, *Utterback* v. *Sims,* 68 S. E. 2nd, 678, favors an award for an amount which in its best judgment is reasonably shown by the evidence to be compensatory for the damages sustained.

That the state road commission recognized an obligation to the claimant is shown by the fact that its agents agreed on September 21, 1950, to make partial reparation for damages, which agreement was not carried out. This partial reparation took into consideration only damages to claimants' lot. State road agents made no inspection of damage to foundation of house and to contents of basement, nor any attempt to estimate the cost of their reparation or replacement.

It is possible that claimant was damaged to the full extent of $1,604.26 as set forth in his amended bill of particulars. For the most part the various and several amounts were supported by cancelled check or bills for materials and labor. However, some of the lesser items, at least in part, appeared to the court to be of uncertain validity, and, in particular, the estimate of $500.00 for repair to house foundation and basement wall seemed not to be based on definitely determined requirements, whether basement wall would have to be replaced entirely or the existing wall could be repaired.

The court feels that eleven hundred ($1100.00) dollars is not an overestimate of the amount of damages sustained by the claimant and makes an award of that amount in his favor.

(No. 761—Claimant awarded $600.00.)

P. O. HIGGINBOTHAM, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 30, 1952

Where the state road commission, in the prosecution of a state highway relocation project, raises the grade of a public road to such height as to destroy an abutting landowner's means of access to such reconstructed road and fails to provide necessary and convenient ingress and egress for his benefit, and a claim is filed in the court of claims by such abutting landowner an award for damages will be made in his favor.

J. Howard Hundley, for claimant.

W. Bryan Spillers, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

In this case claimant P. O. Higginbotham seeks an award

against the state road commission in the sum of $2000.00. His claim arises out of a state highway relocation project in Kanawha county, West Virginia.

Claimant is the owner of an aggregate of about one hundred and twenty-five acres of land situate on the waters of Allen's Fork of Poca River, in Poca district of said county of Kanawha.

In the immediate neighborhood of claimant's farm the said Allen's Fork of Poca River runs in a general north and south direction. His farm lies on both sides of said creek. His residence is on the east side of the creek and his barn and a large part of his farming land on the west side of said creek.

For many years there has been a public road running and extending in a general north and south direction up and along Allen's Fork of Poca River connecting state route No. 21 and state route No. 34, and which road ran through claimant's farm and along and adjacent to the said Allen's Fork branch and on the east side thereof.

It was proved upon the hearing that claimant formerly had a good and ample means of ingress from this public road across Allen's Fork branch to and from his barn and farm, which are on the west side of said Allen's Fork branch and that said roadway and means of access was used constantly by him.

Deeming it necessary and expedient to widen, repair, build and pave the old road, the state road commission, in 1950, obtained a number of options from landowners along the route of the old road for right-of-way purposes.

On July 17, 1950, respondent obtained from claimant an option in writing to purchase a parcel of land shown on state road project No. 8574-(1), in Kanawha county. This option was to be of no effect unless exercised within six months. The evidence in the case fails to show that any notice of acceptance was given to claimant. However, a witness for the state did testify that respondent exercised the option "by taking posses-

sion and entering upon the land." It seems to have caused much misunderstanding and confusion as to what respondent should do if it purchased the land. No deed from claimant to the state has ever been made and the road commission has no record title to the land actually taken and used by it for right-of-way purposes.

The road commission filled in so much of the creek as had theretofore run on the route of the old road and pushed the channel over on claimant's land. A new channel was created. A large fill was made on the east side of said channel. At the point where claimant formerly had convenient access for many years to the road and from the road to his farm to his barn on the west side of the creek the newly built fill has entirely destroyed such access. Fill all along the west side of the road is from seven to eight feet in height and renders all vehicular travel from the road to claimant's land and barn prohibitive. Whereas claimant formerly had and enjoyed convenient and easy access, such access by reason of the newly made fills in the road has been rendered impossible.

One witness for the state testifed that a crossing could be made for one hundred dollars, while several witnesses for the claimant testified that it would cost one thousand dollars to provide claimant with necessary access.

The members of the court visited the land of claimant and had an opportunity to see and inspect the high fills made by the road commission.

There can be no question about the fact that by reason of the destruction of claimant's access and the impossibility of driving over the huge fill, that he has sustained manifest damages which might easily have been prevented by the road commission after making the fills.

The constitution of West Virginia provides that property may not be taken or damaged without compensation. Our Supreme

Court of Appeals, in the case of *Peddicord* v. *County Court*, 121 W. Va., 270, says:

> "Where the grade of a road is changed, resulting in damages to abutting property in its natural state, the owner thereof is entitled to compensation. * * *"

In making the fills on the road the state road commissioner acted within the lawful exercise of the power and authority vested in him by statute, but was in duty bound to provide reasonable access for claimant. This he has not done.

The claimant has shown himself entitled to an award.

An award is, therefore, made in favor of claimant P. O. Higginbotham for the sum of six hundred dollars ($600.00).

(No. 762—Claim denied.)

HALE ELECTRIC COMPANY, INC., Claimant,

v.

WEST VIRGINIA STATE BOARD OF EDUCATION,

Respondent.

Opinion filed June 27, 1952

1. The Court of Claims is not a court of law. It is not invested with and does not exercise the judicial power of the state in the sense of article eight of the constitution of the state. As a special instrumentality and arm of the legislature its peculiar function is to investigate the merit of claims asserted against the state, or any of its agencies, and recommend the disposition of such claims. The court is not bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claims.

2. The burden of proof rests upon a claimant in the Court of Claims to show his claim against the state, or any of its agencies, to be meritorious and one for which the Legislature should make an appropriation of public revenues in his favor for the satisfaction of such claim, and upon failure to successfully carry such burden, an award will be denied and the claim dismissed.

Howard R. Klostermeyer, Esq., for claimant.

W. Bryan Spillers and *Arden J. Curry,* assistants attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Hale Electric Company, Inc., a Pennsylvania corporation, with principal office in the city of Pittsburgh, and duly qualified to hold property and transact business in the state of West Virginia, seeks an award against West Virginia state board of education for $9,659.02. Its claims is divided into two items, one for the sum of $3,274.36 and the other in the sum of $6,384.66.

The two and one-half million dollar project of the West Virginia state board of education for the construction and equipment of a science hall on the campus of Marshall college, a state-controlled educational institution located in the city of Huntington, was divided into seventeen different contracts, according to plans, specifications and drawings made by L. D. Schmidt, registered architect, of Fairmont. Pursuant to its duly published advertisement, inviting proposals for these various contracts, sealed bids were opened at the board's office in the state capitol, in the city of Charleston, on the 4th day of December, 1947. Claimant had submitted two bids, one on contract No. 7, which according to the architect's instructions to bidders includes the general electrical installation, not including the general experimental laboratory equipment, section 29, paragraphs 17 to 45, both inclusive, but all others as shown on drawings E-1 to E-16 both inclusive, and specified under section No. 29; and the other on contract No. 10, which includes the electrical experimental laboratory equipment as shown on drawings E-1 to E-16, both inclusive, of section No. 29. Its bid on contract No. 7 was in the

sum of $178,293.00. Its bid on contract No. 10 was in the sum of $49,475.00. On the two contracts combined claimant was the lowest bidder. Contract No. 7 was awarded to claimant for the said sum of $178,293.00. Contract No. 10 was not awarded on account of limitation of funds.

It is the position of claimant Hale Electric Company that contract No. 7 provides that the contractor shall perform in a workmanlike manner all of the work described under Contract No. 7, which includes section 29 of the specifications and drawings E-1 to E-16, inclusive, in connection with the general installation, but not including the electrical experimental laboratory equipment as specified under section No. 29, paragraphs 17 to 45, inclusive; and that contract No. 10 is a contract covering the furnishing of all necessary tools, labor and equipment to complete in a workmanlike manner all work required for the furnishing and delivering to the building site electrical experimental laboratory equipment.

Claimant maintains that it was its understanding that both contracts 7 and 10 would be awarded to it and that it confidently expected that contract No. 10 would ultimately be awarded to it. It contends that the architect as the agent of the state represented to its president that both contracts 7 and 10 would be awarded to the lowest bidder on the two contracts combined. It also contends that the state board of education had advised it by letter that it would later be awarded contract No. 10. However, when proposals were again invited on contract No. 10 claimant again submitted a bid, but it was not the lowest bid, and the contract was awarded to the Standard Electric Time Company, of Huntington, West Virginia. With knowledge of this fact claimant admits that it started to do work, as it contends, required to be done under contract No. 10. While testifying in support of the claim claimant's president was asked the following question:

> "Q—After you were awarded Contract No. 7, did you have to make any preparations to perform the work, and what did you do?" and answered:

> "A—Yes, we did. To begin with, we had to buy conduit and fittings necessary for both contract No. 7 and contract No. 10, because the conduits had to be installed simultaneously. For one thing, slabs, and in masonry, before slabs could be poured, both sets of conduit had to be placed, therefore we estimated sufficient conduit and fittings to do the roughing-in work for both contracts as the building progressed."

The record of the claim is voluminous. The transcript of evidence consists of two hundred and fifty-seven pages. In addition to such evidence claimant introduced as its exhibit No. 1, a large volume, containing approximately three hundred and forty-five pages, prepared by architect Schmidt, and embracing all of the documents pertaining to the science hall project, such as advertisement for bids, instructions to bidders, the form of proposal, form of contract, specification, *etc.*

It was admitted by claimant's president that all of the work performed by it under what it contends was required to be done under contract No. 10 was done subsequent to the time that it had notice of the fact that contract No. 10 had been awarded to Standard Electric Time Company. After contract No. 10 had been awarded as aforesaid, claimant ceased to do any further work on the electrical project. Respondent thereafter contracted with Harry Goheen or Goheen Electric Company to complete the work of connecting the experimental laboratory equipment at a cost of $3,274.36. When claimant submitted its final estimate respondent, at the instance of the architect, deducted from said estimate the said sum of $3,274.36 which it had paid to Goheen for connecting the experimental laboratory equipment on the ground that such work was provided to be done under contract No. 7. Claimant also contends that it is entitled to be compensated on a *quantum meruit* basis the reasonable value, that is to say the sum of $6,384.66 for the labor and materials which it furnished for laying the conduit for installing the special experimental laboratory equipment which it maintains was originally called for by contract No. 10.

During the progress of the hearing of the claim a number of objections were made, and urged with insistence, to the admissi-

bility of evidence. The court's rule 9 relates to proof governing testimony. The Court of Claims is not a court of law. It is expressly provided in the act of the Legislature creating the Court of Claims that it shall not be invested with or exercise the judicial power of the state in the sense of article eight of the consttiution of the state. As a special instrumentality and arm of the legislature its peculiar function is to investigate the merit of claims asserted against the state, or any of its agencies, and recommend the disposition of such claims. The court is not bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claims. Judge Charles J. Schuck, a former member of the Court of Claims, an able and distinguished lawyer, was wont to say, when objections were made to evidence, that members of the court were lawyers, or, at least had license to practice law and would endeavor to separate the "wheat from the chaff."

Claimant agrees that the sole issue in the case is whether or not contract No. 7 which was awarded to claimant required claimant to lay the conduit for and otherwise install the special laboratory equipment referred to in paragraphs 17 to 45, inclusive, of section No. 29 of the specifications. Claimant contends that such installation was not included in contract No. 7 but was intended to be included in contract No. 10.

To establish the merit of its claim claimant bears the laboring oar. The claim has been presented with ingenuity and marked ability. Contract No. 7 reads in part as follows:

"WITNESSETH, That the Contractor and the Owner for the consideration stated herein agree as follows:

ARTICLE I, SCOPE OF WORK—The Contractor shall perform everything required to be performed and shall provide and furnish all of the labor, materials, necessary tools, contractors' equipment, and all utility and transportation services required to perform and complete in a workmanlike manner all the work required for the GENERAL ELECTRICAL INSTALLATION,

NOT INCLUDING THE ELECTRICAL EXPERIMENTAL LABORATORY EQUIPMENT SPECIFIED UNDER SECTION 29, PARAGRAPHS 17 to 45 INCLUSIVE, as part of the construction of a Science Hall on the Campus of Marshall College, Huntington, West Virginia, Project of the Owner, all in strict accordance with the drawings and specifications, including any and all Addenda, prepared by L. D. Schmidt, Architect, acting and in these contract documents referred to as the Architect, which drawings and specifications are made a part of this contract, and in strict compliance with the Contractor's proposal and the other contract documents herein mentioned which are a part of this contract; and the contractor shall do everything required by this contract and the other documents constituting a part hereof."

This contract is a solemn and binding instrument. It means what it says. It will be observed that the plans, specifications and drawings made by the architect are by its express terms made a part of the contract. Recourse must necessarily from time to time be made to the drawings. Everything required to be done by the specifications is set forth on the drawings. In claimant's proposal for Contract No. 7 we read: "Alternate No. 1-B. For special laboratory equipment install conduits only. Conduits to terminate at locations shown on drawings with metal caps installed at all openings. Where panel boards are to be installed all rough work shall be completed to provide for future installation of the mechanical panel board assemblies. Under contract No. 10 roughing-in panel board shells or bracket supports shall be supplied but installed under this contract."

Claimant made a deduction of $464.00 from its contract since the assemblies were not to be installed. As evidence that the conduits are within the terms of contract No. 7, they are indicated on the architect's drawings, and illustrated as E-1 panel A. The drawings show a conduit extending from panel A to items indicated on the equipment as experimental outlets. From panel A lines on the drawings are also shown to indicate conduits to panel SP-1-1a. Another conduit extends from panel A to the electrical laboratory panel, room No. 109. On the same drawing

there are in room G-10 additional experimental laboratory outlets which are indicated to connect to electrical panel A, in room G-13. In room G-46, physics shop, there are experimental outlets indicated and conduits shown, sizes indicated, *etc.*, and noted to connect to electric panel A, in room G-13. This same condition continues on many of the sheets on drawings E-1 to E-16.

Under date of December 22, 1947, H. K. Baer, secretary of the West Virginia board of education addressed a letter to claimant, reading as follows:

"Hale Electric Company, Inc.
1105 Washington Boulevard
Pittsburgh, Pennsylvania

Gentlemen:

We are returning herewith your bid proposal on Contract No. 10—Electrical Experimental Laboratory Equipment, Marshall College Science Building—together with your bid bond in the amount of $5,000.

We regret to inform you that the West Virginia Board of Education cannot accept any bids under this contract due to limitations of appropriated funds for the erection and equipment of the Marshall College Science Building.

We appreciate your bidding on this part of the science building project and trust that when funds become available we may have the pleasure of negotiating with you on the equipment items listed in the plans and specifications for the completion of this building.

Very truly yours,

(Signed) H. K. Baer
fdv H. K. Baer, Secretary
enc. State Board of Education"

Nothing is observed in the letter that could be construed as a representation that claimant would be awarded contract No. 10. Contracts are awarded publicly and in the manner prescribed by law. The architect is not the general agent of the state board of education. He would have no power to bind the board beyond the scope of his employment as architect for the project.

John E. Hale, president of claimant company, was the only witness who testified before the court in support of the claim. L. D. Schmidt, respondent's architect, testified in resistence of the claim on behalf of the board. H. K. Baer, secretary of respondent, introduced as a witness at the instance of the court, but not examined by the state, testified that in writing the letter to claimant above quoted, it was not his intention or purpose to represent that contract No. 10 would be awarded to claimant.

All other evidence was of a documentary character consisting of numerous exhibits, including the large volume hereinbefore referred to which embraced the specifications for the project, instructions to bidders and various forms to be used in making proposals and entering into contracts, *etc.* The writer of this statement cannot forego this opportunity to commend the magnitude of this splendid volume, dealing as it does with the minutest details of the vast project of the science hall. It is, indeed, an outstanding evidence of architectural skill.

We see nothing in contract No. 10 that has anything to do with electrical installation. It deals solely with the furnishing and delivery of experimental laboratory equipment to the site. Contract No. 7 relates to the general electrical installation throughout the four floors of the science hall. The architect's drawings are, we think abundantly sufficient to remove any doubt that claimant might have had as to what was required to be done under the terms of contract No. 7. The manifest purpose of the architect in contract No. 7 was, in the judgment of the writer, to advise prospective bidders that bids on contract No. 7 would not relate to furnishing the experimental laboratory equipment which was to be furnished and delivered to the building site under the terms of contract No. 10.

Claimant had a copy of the architect's large volume containing specifications, *etc.*, for approximately two months for inspection and study before making its proposals for contract No. 7 and contract No. 10.

Considering all the facts and circumstances developed upon the investigation and hearing of the claim we perceive no avenue

of escape from the conclusion that contract No. 7 awarded to claimant obliged claimant to do and perform everything for which it seeks an award in this proceeding.

The members of the court were much interested in their consideration of the excellent brief filed by learned counsel for claimant. It is regrettable that the court could not have had the benefit and assistance of a brief on the part of the state.

The burden of proof rests upon a claimant in the Court of Claims to show his claim against the state, or any of its agencies, to be meritorious and one for which the legislature should make an appropriation of public revenues in his favor for the satisfaction of such claim, and upon failure to successfully carry such burden, an award will be denied and the claim dismissed.

An award in this proceeding is, therefore, denied and the claim dismissed.

(No. 766—Claimant awarded $150.00.)

FRED W. NORRIS, Claimant,

v.

STATE DEPARTMENT OF ARCHIVES AND HISTORY,

Respondent.

Opinion filed October 16, 1952

Where a claimant upon being solicited by the state archivist withdraws from his private collection of firearms a valuable antique derringer and the same is placed in the state museum for exhibition and the gun is at a subsequent date stolen from the museum and all efforts by the department of archives and the department of public safety to recover same are unsuccessful then because of the public-spirited gesture and purpose surrounding the lending of the said gun an award will be made to claimant in an amount to equal the present market value thereof.

Claimant, pro se.

Arden J. Curry, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

In the year 1933, claimant Fred W. Norris resided in the city of Charleston, West Virginia. His family and the late Clifford Meyers, at that time state historian and archivist of West Virginia, were close friends. It was the frequent custom of Mr. Meyers to visit claimant's home where he discussed art, literature and so forth with claimant and his family. On the occasion of one of these visits Mr. Meyers observed in claimant's collection of antiques and other valued possessions a double-barrel 41 caliber Derringer Early American Pistol which he admired exceedingly, and he solicited claimant to loan it to the department of archives for display in the state museum. A few days later claimant himself took the gun to the archivist's office in the state capitol in the city of Charleston, together with an affidavit of ownership. It was delivered to the archivist with the distinct understanding that it was to be kept on public display or promptly returned to claimant, and that it would remain claimant's property and be returned to him at any time upon demand therefor. Thereafter claimant became employed in the military service and was absent, in California and elsewhere, from his home in the city of Charleston for several years. In the year 1942 claimant, being in West Virginia, visited the state museum and observed that the card descriptive of his gun was publicly displayed but that the gun was missing! He inquired of the then archivist, Mrs. Bess Harrison, and was informed by her that his gun had been stolen in 1937, but that an investigation to determine its whereabouts was then in progress and that claimant would be advised when the investigation was concluded so that he might reclaim his property and remove it to his home. Nothing further was heard about the missing gun by claimant until March of the year 1952 when he again visited the state capitol and made further inquiry in respect to his property. It appears from the record of the claim that members of the state department of public safety had instituted and concluded a careful and thorough investigation

in relation to the missing gun but to no avail, and claimant was at that time informed by the state archivist that the investigation was closed. Claimant thereupon filed his claim in the court of claims, seeking an award of $150.00 to compensate him for the loss which he had sustained.

The investigation of the claim revealed the fact that the gun in question was not only an antique but a rare and unusual type of gun. Claimant made inquiry in the city of Pittsburgh as to the value placed upon guns of the same manufacture and age, and learned that $150.00 was considered to be a reasonable value. Claimant himself did not have the gun for sale. He placed a sentimental value upon his possession of it and gave it a high place and standing in his collection of firearms.

The department has interposed no defense to the claim and, as a matter of fact, is unable to explain or account for the loss of claimant's valuable property.

Where a claimant upon being solicited by the state archivist withdraws from his private collection of firearms a valuable antique derringer and the same is placed in the state museum for exhibition and the gun is at a subsequent date stolen from the museum and all efforts by the department of archives and the department of public safety to recover same are unsuccessful then because of the public-spirited gesture and purpose surrounding the lending of the said gun an award will be made to claimant in an amount to equal the present market value thereof.

An award is therefore made in favor of claimant Fred W. Norris in the sum of one hundred and fifty dollars ($150.00).

(No. 769—Claimants awarded $76.55.)

J. KELVIN HOLLIDAY and KATHLEEN HOLLIDAY, *trading as* THE FAYETTE TRIBUNE, Claimants,

v.

STATE AUDITOR, Respondent.

Opinion filed October 16, 1952

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and an award should be made. *Berkeley Printing & Publishing Company* v. *State Auditor.* 3 Ct. Claims (W. Va.) 231.

Appearances:

Mahan, White & Higgins (S. C. Higgins, Jr.) for claimants.

Arden J. Curry, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

Claimants, J. Kelvin Holliday and Kathleen Holliday, are partners, trading as The Fayette Tribune, and as such partners are the owners and publishers of a newspaper of general circulation in and about Oak Hill, in Fayette County, West Virginia.

The Honorable Edgar B. Sims, as auditor of the state of West Virginia, is by virtue of the statute in such cases made and provided, *ex-officio* commissioner of delinquent and forfeited lands.

It appears from a stipulation of facts agreed upon by counsel for claimant, by the assistant attorney general, representing respondent, who appeared in person, and from the exhibits and other evidence offered in this case, that Howard W. Carson was by respondent appointed deputy commissioner of forfeited and delinquent lands for Fayette county, West Virginia, and as such was requested by respondent, under authority of chapter 11A, art. 4 of the code of West Virginia, to institute a certain suit in the circuit court of said Fayette county for the sale or other dis-

position of certain parcels of land delinquent or forfeited to the state of West Virginia for the nonpayment of taxes. Said suit was filed by the said deputy commissioner, and as provided by sections 139 and 150 of said chapter 11A, art. 4 of the code, he contracted for and caused certain publications to be published in the newspaper of claimants, on May 31, June 7, June 14, August 2 and August 9, 1951, at a total cost of $112.25. From the sale of the lands proceeded against by said suit sufficient funds were not realized with which to pay the total costs of said publication, and as a result thereof $35.70 was paid to said claimants, leaving a balance due them of $76.55, for which this claim is made.

Both section 139 and section 150 of said chapter 11A, art. 4 of the code provide "That the cost of publication as provided therein shall be taxed to the state as part of its costs in the suits filed and shall be paid as hereinafter provided," which no doubt means as provided in sec. 163 of said chapter and article.

At the hearing of this case the respondent testified and emphatically declared that the claim of the claimants was not only a moral but a legal obligation of the state, that the same was justly contracted by the state according to law, that the state had received the benefit thereof and that the state should pay the same, but that he, as state auditor, was powerless to honor said claim because the Legislature had failed to provide by statute for payment of such claims in the event of a deficiency caused by the failure to realize sufficient funds from the sale of lands as provided in said chapter 11A, art. 4 of the code.

It may be true, as contended by respondent, that the Legislature did not *specifically* state in the statute in question how the costs incurred as provided by law should be paid in the event of a deficiency at any sale made by virtue of said statute, yet this court is of the opinion that when a publishing company, acting in good faith, publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just and legal obligation and an award should be made; that the integrity and credit of the state should at all times be held in-

violate. This opinion has been held by this court in several cases, particularly in the following: *Charleston Mail Association* v. *State Health Dept.*, 3 Ct. Claims (W. Va.) 174, and *Berkeley Printing & Publishing Co.* v. *State Auditor*, 3 Ct. Claims (W. Va.) 231.

The failure to pay the state's just and legal obligations because the head of the state department involved, after said obligations are incurred, discovers what he believes to be a technicality existing in the law under which the obligation was created, would be a blot upon the integrity and credit of the state and a condition might arise whereby its prospective creditors would demand cash payments, and justly so, before the performance of any contract for fear that later it would be discovered that a technicality in the statute, under which said contract was performed, existed, and payment would be denied.

To this practice we cannot subscribe. Therefore, for the reasons herein set out, an award is made in favor of claimants J. Kelvin Holliday and Kathleen Holliday, trading as The Fayette Tribune, in the amount of seventy-six dollars and fifty-five cents ($76.55).

(No. 767-S—Claimant awarded $127.50.)

PAUL C. HOGSETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 17, 1952

JAMES CANN, JUDGE.

The record in this case as submitted to us for our consideration reveals that sometime during the month of September, 1951, claimant, the owner of a 1950 four-door Packard automobile,

parked his car in the rear of the Greenbrier county courthouse, Lewisburg, West Virginia; while so parked it was damaged by fine sprays of yellow paint carried by the wind from the paint shop of the respondent situate some fifty feet away, which paint was being sprayed presumably on equipment of respondent. Attempts to remove the paint spots from claimant's automobile by simonizing were made to no avail, and it became necessary to repaint claimant's automobile at a cost of $127.50.

The record further reveals that George N. White, safety director for respondent, made an investigation of the claim on the 27th day of September, 1951, and stated that in his opinion the respondent was liable for the damage done to the automobile of the claimant. No act or omission on the part of claimant from which we could conclude that he was guilty of contributory negligence was shown, but the record does show that the respondent, or its agents and employes, by or through their neglect, default, or failure to use reasonable care under the circumstances, caused the damages complained of.

The respondent has concurred in the payment of this claim and the same has been approved by the attorney general. Therefore, a majority of this court recommend and make an award in favor of claimant, Paul C. Hogsett, in the amount of one hundred twenty-seven dollars and fifty cents ($127.50).

ROBERT L. BLAND, JUDGE, dissenting.

I am constrained to note my opposition to the award made in this proceeding by a majority of the court. The claim is informally heard upon a record prepared and submitted to the court by the state road commission. The members of the court of claims have made no independent investigation of the facts which constitute the basis for the award made. By its action the court of claims has simply approved such investigation of the claim as was made by subordinate employes of respondent.

Paul C. Hogsett carried insurance upon his automobile covered by a policy issued to him by the Farm Bureau Mutual Auto-

mobile Insurance Company. This company paid to the said Hogsett $127.50 to remunerate him for the liability which he incurred when having his automobile repainted. By virtue of a provision contained in the policy of insurance the nominal claimant in this proceeding is subrogated to the rights of the insurance company with power and authority to institute and conduct any suit or proceeding deemed necessary to be repaid the said sum of $127.50. As a matter of fact the claim is distinctly a subrogation proceeding asserted in this court by the insurance company in the name of its assured Paul C. Hogsett.

While the writer of this statement thinks that he understands reasonably well the rule or doctrine of subrogation he is nevertheless of opinion that the claim in question is not the type or character of claim which may be asserted and successfully maintained against a sovereign state. That excellent authority Blashfield, on Automobile Law and Practice, in Sec. 4171, very appropriately declares:

> "The doctrine of subrogation has long been an established branch of equity jurisprudence, owing its origin neither to the statute nor to custom but based upon equitable principles wherever justice demands its application, and the right of subrogation depends upon the facts and circumstances of each particular case, being allowed whenever the equities of the case demand it. * * *"

The rule of subrogation may be invoked between individuals when it could not be lawfully invoked in a proceeding against the sovereign state. The subrogee in this case, that is the Farm Bureau Mutual Automobile Insurance Company, has no inherent right against the state of West Virginia. Equity follows the law. It is a well recognized maxim.

(No. 771-S—Claimant awarded $75.00.)

SYLVIA HERBAUGH, Claimant,

v.

CONSERVATION COMMISSION, Respondent.

Opinion filed October 20, 1952

A. D. KENAMOND, JUDGE.

This claim submitted under the shortened procedure provisions of the court act arose out of the loss of a pocketbook at the bathhouse at Cacapon state park by Sylvia Herbaugh, of Winchester, Virginia, in July of the past season.

The claim is for $75.00 as compensation for loss of the pocketbook and its contents consisting of $35.00 in cash, eyeglasses, keys, and a lady's Bulova wristwatch. The claimant also carried her driver's permit in the pocketbook.

According to the investigation of the conservation commission of West Virginia, completed on July 29, 1952, the loss occurred by reason of the fact that the attendant at the bathouse at Cacapon state park, after accepting the pocketbook in the regular course of duty, placed the same in the wrong basket.

The state conservation commission concurs in this claim and it is approved by the attorney general.

The court of claims hereby makes an award in the amount of seventy-five dollars ($75.00) in behalf of claimant Sylvia Herbaugh, and recommends that same be authorized by the Legislature.

(No. 768—Claim denied.)

HENRY J. McKINLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 20, 1952

There are reasonable limitations to the right of the public to unobstructed use of a highway, and the state does not guarantee freedom from accident to persons traveling on its highways.

Appearances:

Charles M. Love, Jr., for claimant.

Arden J. Curry, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

On the morning of April 14, 1952, at about four-thirty o'clock, claimant Henry J. McKinley, of Elkins, West Virginia, was driving his Plymouth automobile over and upon U. S. route 33, in an easterly direction, enroute to Baltimore, whereupon at or near Bowden, Randolph county, West Virginia, he ran his car into a large tree which had slipped from the hillside and fallen across the highway during the preceding night. Claimant in his petition asserts that the front end of his car was demolished, that he was thereby deprived of the use of the same, and that he suffered cuts and bruises to his left knee. For all of this he seeks an award in the sum of $1500.00.

The hearing on this claim was held on October 16, 1952, in the court of claims place of meeting in the state capitol, when testimony revealed that the damages to claimant's car amounted to approximately $681.00. The major part of the testimony related to the weather conditions immediately before and at the time of accident, the probable time when the tree fell across the highway, the efforts of the state road commission to patrol the par-

ticular portion of highway involved and to keep it free from obstructions, and the claimant's approach to the point of accident.

The claimant stated that at the time of the accident Victor Goldberg was riding with him, that they were traveling at forty to forty-five miles per hour and talking as they went along, apparently not anticipating an obstruction in the highway, and suddenly about sixty feet ahead of them they saw a rather large tree lying across the full width of the road proper. At four-thirty o'clock in the morning it was beginning to get light and it was somewhat foggy. There was apparently no chance of stopping the car to avoid a crash nor any safe passage around the tree at either side of the highway.

Victor Goldberg's presence as a witness could not be secured, he being way down in Virginia. However, his affidavit corroborating testimony of claimant was presented to the court and admitted to record.

Don Isner and Okey Chenoweth, state road maintenance workers, testified for the claimant verifying the accident and the presence of the obstruction across the roadway.

These two workers also appeared as witnesses for the state, and to their testimony was added that of Dewey Phares, road supervisor in that neighborhood. The testimony adduced showed that there had been two hard rainstorms in the region of the accident on the preceding evening, one at about five-thirty or six o'clock and the other a few hours later. Sensing that, as a result of the rains, the highway in the vicinity of Bowden might be rendered hazardous by stone and other debris carried down from the steep hillside, Mr. Phares called Mr. Isner, who lived nearby, to patrol the highway, which he did by going over it more than once. At ten o'clock immediately preceding the accident the highway was free from obstruction.

The evidence revealed the fact that the first intimation or knowledge of the falling of the tree across the highway was given by the claimant himself to the road commission and that prompt steps were taken to remove the tree.

Counsel for the respondent maintained that, in view of the testimony, the state road commission could not be charged with negligence and asked that an award be denied.

To this, counsel for the claimant disclaimed any charge of negligence but asserted that an award is justifiable on the ground that the highway was "Out of repair."

The term "Out of repair" has by popular interpretation a much less comprehensive application than it has by judicial interpretation, the latter holding that repair applies to obstructions to the highway as well as defects therein. It is doubtless in the latter sense that the term "Out of repair" was used by counsel for claimant. While the state road commission is charged with keeping and maintaining the highways in reasonably safe condition for travel with ordinary care by day and night, there must be some reasonable limitations to the ability of the road commission to provide an unobstructed highway at all times and under all conditions. We believe those limits were reached in the present case. The highway on which accident occurred had been patroled for the discovery and removal of any obstruction brought down from the hillsides after the rainstorm of the preceding night. Who can say that the presence of a road crew on the spot could have prevented the falling of the tree, or being there at the time of the fall they could have removed the obstruction before some one came along in a motor vehicle, or would have had time to send out couriers to halt approaching traffic? As before stated the testimony revealed that the claimant was the first person to discover the obstruction, which might have occurred only a few minutes previously. While the testimony of the road workers showed that this particular tree somewhere up on the hillside had never been detected as a possible menace to the highway, they had at different times removed trees and other objects that might fall on the highway.

The court of claims has repeatedly held that "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." Clark v. *State Road Commission,* 1 Ct. Claims (W. Va.) 230, at page 231. *Harvey* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 345, at page 347. *Harmon* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 329. *Charlton* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 132. *Hutchison* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 217. *Hendricks* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 258. *Chartrand* v. *State Road Commission,* 5 Ct. Claims (W. Va.) 98. *Keystone Hardware, et al,* v. *State Road Commission,* 5 Ct. Claims (W. Va.) 143.

In view of the testimony in the case and other reconsiderations herein set forth, the court denies an award, recognizing that the claimant has recourse to a relief bill in the Legislature of which he is a distinguished member.

(No. 770—Claim denied.)

WILLIAM FLYNN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 20, 1952

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence, did not contribute heavily thereto.

Appearances:

Joseph Luchini, for claimant.

Arden J. Curry, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

Claimant William Flynn states in his petition that on the night of January 21, 1952, he was walking home and it was necessary for him to walk over the highway bridge spanning Stone Coal Creek on the secondary road at Lego, West Virginia; that the bridge had no section set apart as a sidewalk for pedestrians; and that while crossing the bridge a car came from the opposite direction and forced him off the bridge and into the creek bed, resulting in personal injuries that entailed hospitalization for a period of nine weeks and disabled him from his job as a coal loader from January 21, 1952 till August 4, 1952. He seeks damages in the sum of $2500.00.

Testimony as to the damages sought, adduced from the claimant, for the purpose of making a reasonable award, in the event of an award, showed that his hospital expenses had been paid from miners' insurance and that, since he received no other benefits during his disabilty, he did suffer loss of wages for nearly six and one-half months to the total amount of approximately $1600.00.

C. E. Allen, state road maintenance engineer, testifying for the respondent, stated that the bridge over Stone Coal Creek at Lego is not provided with a sidewalk for pedestrians, and cited legal opinion to the effect that the erection and maintenance of a sidewalk on any particular bridge is left to the discretion of the state road commission. Carl N. Montgomery, state road commission safety director, gave the length of the bridge as 20 feet, its width as 17 feet 8 inches, on both sides of which are vehicular traffic rails 9 by 9 inches, and the distance from the middle of bridge to creek bed as approximately 10 feet. These measurements were in practical agreement with the estimates of claimant.

The time of the accident must have been only a few minutes after midnight on the morning of January 21, 1952. Claimant said he had been at night service at church, had afterward stopped at the home of some of the folks, and set out toward the bridge about eleven-thirty o'clock. The night was dark, so dark that he could not see when he was entering on the bridge. He carried no light to guide his footsteps or to warn automobile drivers of his pres-

ence on the highway, though he had at times previously carried such a light. Considering the nature of the bridge, it would have been no more than ordinary prudence on this occasion. Seemingly he was too much accustomed to the bridge for his own safety. He had lived in its vicinity for some nine years and had crossed the bridge a thousand times. Even in the dark he had gotten on the bridge and was confident of being on its left side approaching traffic, about halfway across when he was crowded off the bridge by an automobile coming from the opposite direction. If the driver of the automobile saw the claimant on the bridge ahead or being crowded over its side, he successfully avoided apprehension by the hit-and-run method.

Before nearing the bridge claimant saw automobile lights on the hill beyond. A little later he saw the approaching car about 100 yards beyond the bridge. Considering the darkness of the night and the nature of the bridge, counsel for respondent suggested it would have been an act of prudence on the part of claimant to cover the distance of 10 feet to one end of the bridge, and thus be off the bridge before the car approached it.

Taken as a whole the evidence is not strong enough to support the claim that the state road commission's failure to maintain a sidewalk on the Stone Coal Creek bridge at Lego was the proximate cause of claimant's injury. Considering all the circumstances it is the opinion of this court that the claimant took a long chance in attempting to cross the bridge without a light even when no vehicular traffic was involved, and an even longer chance when he had warning that a vehicle was approaching. It is recognized that few people act with prudence on all occasions, which is all the more reason for regretting the claimant's unfortunate accident and resulting suffering and loss, but not a proper basis on which to ask the Legislature to make an appropriation.

An award is therefore denied.

(No. 751—Claim denied.)

W. L. MILLS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 22, 1952

The burden of proof rests upon a claimant in the court of claims to show his claim against the state, or any of its agencies, to be meritorious and one for which the Legislature should make an appropriation of the public revenues in his favor for the satisfaction of such claim, and upon failure to successfully carry such burden, an award will be denied and the claim dismissed. *Hale Electric Company* v. *Board of Education*, 6 Ct. Claims (W. Va.) 94.

Claimant, pro se.

Arden J. Curry, assistant attorney general, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding claimant, The Honorable W. L. Mills, an incumbent member of the West Virginia House of Delegates from McDowell county, seeks an award against the state road commission for the sum of $315.00 to compensate him for damages to his automobile in a mishap which occurred while he was driving on a state highway in Mercer county. Upon the hearing of his claim he decsribed the circumstances attending the accident in the following language:

> "On June 29, 1951, on the night of June 29, I was on my way from Kimball to Princeton, and on Route 52, near Maybeury, West Virginia, just as we start up grade from going out of Maybeury, I was going up the road and I came up on some dirt, where the grader had been grading along and thrown it up on the edge of the concrete, and I was running to the left hand side of that with one wheel near the center line, maybe over the center line, of the road, but I met some traffic and it was raining and the oncoming car looked to me like it was pushing me close and I had to either get into this ridge of dirt or let the car hit me, so I drove into the ridge of dirt. I don't know whether there was a rock or what there was in it, but as I hit in it something started sliding the wheel and

> I undertook to stop from hitting the ditch, but mud on the road made it slick and I hit into the ditch and tore the side of the car up. That is all there was to it."

The evidence upon the investigation of the claim was signally conflicting. It was, however, well established that on the afternoon prior to the occurrence of the accident employes of the state road commission were engaged in cleaning out the ditch running along the side of the highway. In the course of this work dirt from the ditch was thrown on the outer edge of the paved highway forming a ridge. It was this windrow of dirt that claimant observed and ran into, causing the damage to his automobile of which he complains.

It may be well to observe at this juncture that the court of claims has heretofore announced and applied the following rule in the prosecution of claims against the state.

> "The burden of proof rests upon a claimant in the court of claims to show his claim against the state, or any of its agencies, to be meritorious and one for which the Legislature should make an appropriation of the public revenues in his favor for the satisfaction of such claim, and upon failure to successfully carry such burden, an award will be denied and the claim dismissed."

It seems from the evidence that employes of the road commission are in the habit of discontinuing work about four o'clock in the afternoon, and had done so upon the afternoon preceding the occurrence of claimant's accident.

Respondent attempted to show that the entirety of the dirt ridge had been removed from the highway before its employes discontinued work at four o'clock on the afternoon of Friday. Claimant's accident occurred between ten thirty and eleven o'clock on Friday night. One witness from the state of Virginia, who traveled the highway regularly in the course of his employment, testified that he passed the point where the mishap is alleged to have occurred and saw no dirt on the highway. Another witness, whose daily custom was to travel the highway in question at frequent intervals also testified that he passed the point

where the mishap is supposed to have occurred about four o'clock in the afternoon of Saturday and saw no dirt on the road. Two graders, employes of the road commission, who had been engaged in cleaning out the ditch alongside the highway, testified that before they quit work on Friday afternoon they had removed all of the ridge of dirt which had been taken out of the ditch. It is difficult for the court to reconcile this conflicting testimony. There can be no question in the minds of the members of the court, after listening to all of the evidence and the frank, honest and straightforward manner in which claimant presented his case and the fact that his automobile *was* actually damaged to the extent that he was obliged to expend the sum of $315.00 for its repair and removal, that claimant was testifying to what he believed to be the truth, the whole truth, and nothing but the truth.

If the ridge of dirt had been removed by four o'clock on the afternoon preceding the night of the occurrence of the accident, it would be hard to understand how the presence of the windrow of dirt could have been responsible for the mishap. But all of the testimony in relation to the damage done to the car and the removal of the automobile from the point where the mishap occurred would seemingly afford strong corroborative proof of claimant's version of the accident. But whatever the truth may actually be, the question which addresses itself to the court for determination is whether or not, upon the actual showing made by the claimant, an award could properly be made in his favor in this proceeding. Claimant apprehended that an oncoming car might strike him. He was fearful that this would occur and in order to avoid it he deliberately drove his car into the ridge of dirt. There was ample room for claimant to travel in safety notwithstanding the existence of the ridge of dirt. The oncoming car passed claimant without stopping. There was room on the highway for both claimant's car and the oncoming car to use the highway in safety.

We believe that upon sober reflection claimant himself will conclude that his claim is not such a claim as would justify the Legislature in making an appropriation of the public revenues in his favor.

Being of opinion that claimant has not sustained the burden which rests upon him to establish his claim, an award is denied and the claim dismissed.

(No. 772-S—Margaret Weekley awarded $57.00; J. C. Weekley awarded $608.82; Cora Johnson awarded $30.00; Mrs. H. N. Crichton awarded $30.00.)

MARGARET E. WEEKLEY, J. C. WEEKLEY, CORA JOHNSON, and MRS. H. N. CRICHTON, Claimants,

v.

STATE ADJUTANT GENERAL, Respondent.

Opinion filed October 22, 1952

Where it appears that the proximate cause of the damages done to claimants was the sole, independent and negligent act of the agent of the state agency involved, and award will be made.

JAMES CANN, JUDGE.

On the 30th day of June, 1952, claimant Margaret E. Weekley, accompanied by one Cora Johnson and a Mrs. H. N. Crichton, was driving her husband's (claimant J. C. Weekley) 1950 Plymouth automobile east on Washington avenue, approaching Third street, west, in the city of Huntington, county of Cabell, state of West Virginia. As she neared the intersection of Washington avenue and Third street, west, she was compelled to stop in obedience to a red signal light, when an army vehicle 2-½ ton, 6 X 6 truck, No. 4874171, driven by Cpl. Carl L. Morton, battery C, 468th field artillery battalion, West Virginia national guard, Huntington, West Virginia, turned into Washington avenue from said Third street, west, veered into the wrong lane to the left and struck a motor vehicle owned by Carl V. Ridgley, of said city of Huntington, which was the automobile directly ahead of claimant, and who also had stopped in obedience to said red light traffic

signal, then struck the automobile driven by claimant causing damage thereto amounting to $608.72, and personal injuries to her and her companions, necessitating doctor and hospital expenses in the aggregate amount of $117.00.

This claim was presented to the court under the shortened procedure section of the court of claims act and the record was prepared by the office of the adjutant general. A full and comprehensive investigation of this accident was made by the respondent which reveals that no fault is alleged against either of the two civilian drivers, Mrs. Weekley or Mr. Ridgley, that the proximate cause of the accident was either malfunction of the steering mechanism of the truck or error of the driver thereof, and that the investigation further did not determine definitely that the steering mechanism of the truck had locked as the driver thereof had claimed.

The record presented to this court complies in every respect to the requirements of the court act. It sets forth a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based; it further shows that the claimants, or either of them, did not through neglect, default or lack of reasonable care, cause the damages complained of. It further shows that the proximate cause of the damages complained of was the sole, independent and negligent act of the agent of the respondent. It still further shows that the amount of the claim is properly itemized and supported by proper invoices and statements and are all vouched for as to their correctness and reasonableness by the head of the state agency involved; and it further shows that the state agency involved has concurred in this claim and the same has been approved by the attorney general as one that, in view of the purposes of the court of claims statute, should be paid.

For the reasons set out, a majority of this court favors and grants an award in the amount of seven hundred twenty-five dollars and eighty-two cents ($725.82), to be paid as follows:

To Margaret E. Weekley the sum of fifty-seven dollars ($57.00), doctor and hospital bills occasioned by the personal injuries received;

To J. C. Weekley the sum of six hundred eight dollars and eighty-two cents ($608.82), representing damages done to his automobile;

To Cora Johnson the sum of thirty dollars ($30.00), doctor and hospital bills, occasioned by the personal injuries received;

To Mrs. H. N. Crichton the sum of thirty dollars ($30.00) doctor and hospital bills, also occasioned by personal injuries received.

It is recommended by the majority of this court that before the above claims are paid that proper releases be executed and delivered to the state agency involved.

ROBERT L. BLAND, JUDGE, dissenting.

The legislative interim committee, which worked out the scheme for the creation of the court of claims, in its report to the Legislature, emphasized the fact that it was not the intention of the committee that the shortened procedure provision of the court act should be resorted to or used in a case where an issue was presented by the record. The court of claims is naturally bound by the rules which it has heretofore adopted for its guidance and for the guidance of those state agencies which submit claims to it for determination. The interim committee also stressed the fact that the shortened procedure provision of the court act should only be used where it was plainly manifest that an award should be made. Under a rule of the court of claims all claims are treated as denied and therefore call for strict proof. In the instant case, proceedings involving several claims all presented by claimant Margaret Weekley the claim of her husband sounds in tort and is for damages occasioned to his automobile. The record of these several claims has been prepared by the head of the state agency concerned. It consists chiefly of affidavits with recommendation on the part of the head of the agency that awards should be made as set forth in the majority opinion.

The court of claims has had no opportunity whatever to make any independent investigation of the merit of the several claims, presented by the record. It has merely approved the conclusion of the adjutant general's office that the owner of the automobile damaged should be paid by way of remuneration in the sum set forth in the majority opinion. The effect of the manner of the presentation of these claims and the way in which they have been determined by the adjutant general is to defeat the very purpose of the court act. If the adjutant general, or any other single agency of the state, can investigate claims asserted against the state and make determination of such claims there would seem to be no real need for the court of claims. It may be true that the awards made to the parties other than the owner of the automobile are just, and it may be true that the amount of the award made in favor of J. C. Weekley is likewise fair and reasonable if, in fact, an award should under the law and under the facts set forth in the record be made at all. My chief grounds of objection to the determination of the case is based upon the manner in which it is presented to the court of claims. As an individual member of the court I am not satisfied with the result of respondent's investigation and determination of the claims for which awards are made by majority members of the court and cannot concur in such awards. My judgment constrains me to disapprove the investigation of claims in the manner in which such investigation has been made in the instant case. I think the awards made constitute a dangerous precedent and one that strikes at the very necessity for the continued existence of the court of claims.

(No. 765—Claim denied.)

CARLYLE D. FARNSWORTH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 23, 1952

1. Under the Act creating the state court of claims negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. *Farm Bureau Mutual Automobile Insurance Co. et al v. Adjutant General,* 5 Ct. Claims (W. Va.) 69.

2. When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Taylor v. State Road,* 5 Ct. Claims (W. Va.) 184.

Appearances:

W. L. Jacobs, for claimant.

Arden J. Curry, assistant attorney general, for respondent.

JAMES CANN, JUDGE.

On the 9th day of July, 1951, at about ten-thirty o'clock A. M. of that day, claimant, a resident of the city of Parkersburg, Wood county, West Virginia, was driving his 1950 Buick automobile in an easterly direction on and over state route No. 47, in said Wood county, enroute from Parkersburg to Marlinton, West Virginia. As he rounded a curve on said highway, about 20 miles from said city of Parkersburg, he heard or observed that his traveling bag which was on the rear seat of his automobile, had fallen to the floor thereof. Desiring to stop his automobile in order to replace his bag onto the rear seat, he proceeded to round the curve which led to a straight stretch of said highway about a quarter of a mile in length, and after traveling a few hundred feet thereon he drove onto the berm on the right of said highway and stopped. As he stopped the right front wheel of his automobile slipped over the edge of said berm causing said vehicle to be catapulted over what he described as a steep bank, causing such damages to said automobile that it became necessary to trade the same for a new one at a loss of $1600.00.

Considering all of the testimony introduced at the hearing of this case, the court is more concerned with the testimony of the claimant concerning the occurrence of the accident in question.

He states that the morning, of the day this accident occurred, was clear, visibility good, and the highway upon which he was traveling in good condition. As he rounded the curve in question and proceeded on the straight stretch no other motor vehicle was in sight. He further states that the grass on the berm to his right had been cut or mowed, but in such a manner as to give him the impression or illusion that said berm was at least 15 feet in width instead of the 5½ or 6 feet in width it actually was; and relying on said impression or illusion he proceeded on said berm on the assumption of the greater width. Was it necessary for claimant to proceed on said berm at all for the purpose intended? Could he have not, in view of the fact that no other motor vehicle was in sight, stopped his car momentarily on the highway, replaced his bag on the rear seat as intended without even getting out of his car, then proceeded on his way? Isn't that what an ordinary person under the same circumstances would have done? But forgetting this for the moment—the claimant and respondent introduced a number of snapshots portraying the surroundings at or near the scene of the accident. Claimant was asked if the pictures introduced by respondent actually or nearly portrayed the scene and surroundings at or near the scene of the accident; his answer was yes. Those pictures, larger and clearer than those introduced by claimant, portrayed a straight stretch of highway with a clear berm along the right side of one proceeding east, and further portrayed along the full distance of the highway and said berm, thick foliage, trees, bushes and weeds. It can be readily ascertained from said pictures that said foliage, trees, bushes and weeds were not on land level with said berm but grew on a bank adjacent thereto, and from this view and from the fact that a barn situate at or near the scene of the accident was far below the level of the said berm, and that a tree at or near the scene of the accident which gave clear evidence that it was seated way below the level of said road, certainly was indicative that a bank was at or very near from the edge of the road. The berm appears wide enough for any automobile to rest. From the above mentioned pictures, introduced by claimant and respondent, we are unable to understand how claimant was ever given the impression or had the illusion that the berm was much or any wider than it actually was. It was shown from the evidence that the employes

of respondent had sometime near the date of this accident mowed the grass on the berm to the point of the bank, but that the foliage, trees, bushes and weeds which grew along the bank were not cut or removed because, as they stated, there was no reason for cutting or removing the same, since an adequate berm existed which could be used by motorists finding the same necessary. The respondent or its agents were under no legal duty to anticipate the unusual, nor to guard against consequences which could not reasonably be expected. Bearing in mind that there were other ways, unattended by danger, if any, and reasonably convenient, which claimant could have used to accomplish his purpose, his testimony does demonstrate that, with full appreciation of the possible danger from the scene which confronted him, he voluntarily accepted the risk when he ventured too far over on the berm, without first making some reasonable attempt to ascertain the width of said berm. Our Supreme Court has stated that the essence of assumption of risk is venturousness.

Where one has knowledge of, or should have knowledge of, any apparent or possible danger, by reason of his surroundings, and under such circumstances, without any special exigency compelling him, he exposes himself to such apparent or possible danger, his act in such case may be deemed to have been done voluntarily.

We have held on numerous occasions that under the act creating the court of claims, an omission of duty on the part of the state agency involved, or its agents must be fully shown before an award will be made. Such negligence or omission of duty on the part of the respondent or its agents has not been proven to our satisfaction; nor has it been clearly established by the evidence that this claim is one which the state as a sovereign commonwealth should discharge.

Therefore, an award will be denied.

REFERENCES

ACT OF GOD

See

Milkint v. *State Road* 75

ADVERTISING, see Publications

ANIMALS

See

Hannas v. *Dept. Public Safety* 6

Linkinogger v. *State Road* 8

ASSAULT WITH A DANGEROUS OR DEADLY WEAPON

An award may be made by the court of claims in favor of a claimant who, while walking on a public highway in the nighttime from one county to his home in another county, was attacked, shot and seriously and painfully wounded by a guard at the state penitentiary at Moundsville, acting at the time as captain of the guard of a road camp while searching for an escapee from said camp, upon the theory of the moral obligation of the state to make reparation for the reckless and negligent conduct of its agent. *Bumgarner* v. *Board Control* 36

ASSUMPTION OF RISK

No award will be made in favor of a claimant, as administratrix of her deceased husband's estate, when said husband has contributed directly to the accident causing his death, notwithstanding that respondent is not free from blame. *Martin* v. *State Road* 51

If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion. *Williams* v. *Main Island Creek Coal Co.*, 98 S. E. 511. *Rutherford* v. *State Road* 66

AUTOMOBILES

An award will be made when it appears that the proximate cause of the damages done to claimant's motor vehicle was the independ-

ent and negligent act of an agent of the state road commmission and such damages were in no way brought about by any fault on the part of claimant. *Withrow* v. *State Road* 46

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *H. A. Pelfrey* v. *Adjutant General,* 5 Ct. Claims (W. Va.) 106; *John Kipp* v. *Adjutant General,* 5 Ct. Claims (W. Va.) 108. *Stewart* v. *Adjutant General* 57

BAILEE AND BAILOR

Where a claimant upon being solicited by the state archivist withdraws from his private collection of firearms a valuable antique derringer and the same is placed in the state museum for exhibition and the gun is at a subsequent date stolen from the museum and all efforts by the department of archives and the department of public safety to recover same are unsuccessful then because of the public-spirited gesture and purpose surrounding the lending of the said gun an award will be made to claimant in an amount to equal the present market value thereof. *Norris* v. *Archives & History* 102

See also

Herbaugh v. *Conservation Commission* 110

BLASTING OPERATIONS

See

Tabor v. *State Road* 4

Byard v. *State Road* 13

Roberts v. *State Road* 15

BRIDGES

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspection as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v. *State Road,* 5 Ct. Claims (W. Va.) 22. *Andrews* v. *State Road* 71

The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Price* v. *Sims,* 58 S. E. (2d) 657. *Id.*

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the

proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence, did not contribute heavily thereto. *Flynn* v. *State Road* 114

See also

Cramer v. *State Road* 26

CONTRIBUTORY NEGLIGENCE, see also Negligence

A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries notwithstanding the respondent is not free from blame. *Hamilton* v. *State Road Commission*, 5 Ct. Claims (W. Va.) 119. *Rutherford* v. *State Road* ... 66

If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion. *Williams* v. *Main Island Creek Coal Co.*, 98 S. E. 511. *Id.*

No award will be made in favor of a claimant, as administratrix of her deceased husband's estate, when said husband has contributed directly to the accident causing his death, notwithstanding that respondent is not free from blame. *Martin* v. *State Road* 51

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence, did not contribute heavily thereto. *Flynn* v. *State Road* 114

DAMAGES, Uncertainty of Amount

Where proof of amount of damage claimed is of uncertain nature the court of claims will make an award for such sum as is reasonably shown by the evidence to be compensatory for the damage sustained. *Gill* v. *State Road* 88

EMPLOYES, State

1. **Hours of labor on state public works; penalty.** The service and employment of all laborers and mechanics who now are or hereafter may be employed by or on behalf of this state, or by any contractor or subcontractor, upon any of the public works of the state, is hereby limited and restricted to eight hours in any one calendar day, except in cases of extraordinary emergency; and it shall be unlawful for any officer of the state, or any contractor, or subcontractor whose duty it shall be to employ, direct or control the service of such laborers or mechanics, to require or permit any such laborers or mechanics to work more than eight hours in any calendar day, except as hereinbefore provided. *Mullins* v. *State Road* 28

Where a former employe of the state road commission who had been required and allowed to discharge the duties of night watch-

man for a period of time in excess of eight hours per calendar day seeks an award in the state court of claims for remuneration for such overtime work, an award will be made in his favor for such sum as the evidence adduced upon the hearing and investigation of his claim shows him to be reasonably and justly entitled to. *Id.*

EVIDENCE

The Court of Claims is not a court of law. It is not invested with and does not exercise the judicial power of the state in the sense of article eight of the constitution of the state. As a special instrumentality and arm of the legislature its peculiar function is to investigate the merit of claims asserted against the state, or any of its agencies, and recommend the disposition of such claims. The court is not bound by the usual common law or statutory rules of evidence . The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claims. *Hale Electric* v. *Board Education* 94

Where a former employe of the state road commission who had been required and allowed to discharge the duties of night watchman for a period of time in excess of eight hours per calendar day seeks an award in the state court of claims for remuneration for such overtime work, an award will be made in his favor for such sum as the evidence adduced upon the hearing and investigation of his claim shows him to be reasonably and justly entitled to. *Mullins* v. *State Road* 28

Where proof of amount of damage claimed is of uncertain nature the court of claims will make an award for such sum as is reasonably shown by the evidence to be compensatory for the damage sustained. *Gill* v. *State Road* 88

Violation of a statute [W. Va. Code, chapter 17, article 8, section 10 (1537)] alone is sufficient to make the violator *prima facie* guilty of negligence, but to justify recovery it must be shown by a preponderance of the evidence that the violation was the proximate cause of the damage. *Rich Valley Dairy* v. *Adjutant General* 39

1. In an action to recover damages based upon negligence, negligence will not be presumed from the mere proof of injury, but it must be proved as alleged. *Tsutras Bros.* v. *State Road* 43

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

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence, did not contribute heavily thereto. *Flynn* v. *State Road* 114

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Taylor* v. *State Road,* 5 Ct. Claims (W. Va.) 184. *Farnsworth* v. *State Road* 123

GLASS, PLATE GLASS BROKEN BY ROCKS, Etc.

In an action to recover damages based upon negligence, negligence will not be presumed from the mere proof of injury, but it must be proved as alleged. *Tsutras Bros.* v. *State Road* 43

GOVERNMENTAL FUNCTIONS

A claim for damages to property or person injured by negligence of state agent or employe while engaged in discharge of governmental function justifies appropriation of public funds on the basis of valid moral obligation of state. *Copley* v. *State Road* 81

HIGHWAYS AND ROADS

There are reasonable limitations to the rights of the public to unobstructed use of a highway, and the state does not guarantee freedom from accident to persons traveling on its highways. *McKinley* v. *State Road* 111

Where the state road commission, in the prosecution of a state highway relocation project, raises the grade of a public road to such height as to destroy an abutting landowner's means of access to such reconstructed road and fails to provide necessary and convenient ingress and egress for his benefit, and a claim is filed in the court of claims by such abutting landowner an award for damages will be made in his favor. *Higginbotham* v. *State Road* 91

If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion. *Williams* v. *Main Island Creek Coal Co.*, 98 S. E. 511. *Rutherford* v. *State Road* 66

JURISDICTION

Claims with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state are expressly excluded from the jurisdiction of the state court of claims by subsection 7 of section 14 of the court act. *Dauenheimer* v. *State Road* 43

Claims with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state are expressly excluded from the jurisdiction of the state court of claims by subsection 7 of section 14 of the court act. *Raynes* v. *WVU* 61

A case in which the state court of claims declines to make an award for reason that it feels bound by the refusal of the Supreme Court of Appeals of West Virginia to issue a rule in *mandamus* proceeding to compel the state auditor to pay an award made by the said court of claims in a companion case, and ratified by the Legislature. *W. Va. Insurance* v. *State Road* 41

LANDLORD AND TENANT

Pursuant to the purpose and spirit of the act of the Legislature creating the state court of claims, an award may be made for claims against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state received distinct value and benefit; and by virtue of the same act an award may be made to a claimant for losses arising from such benefit having been afforded the state. *Cohen* v. *Employment Security* 17

LARCENY

Where a claimant upon being solicited by the state archivist withdraws from his private collection of firearms a valuable antique derringer and the same is placed in the state museum for exhibition and the gun is at a subsequent date stolen from the museum and all efforts by the department of archives and the department of public safety to recover same are unsuccessful then because of the public-spirited gesture and purpose surrounding the lending of the said gun an award will be made to claimant in an amount to equal the present market value thereof. *Norris* v. *Archives & History* 102

MISDEMEANOR, Penalties

Any officer or agent of the state, or any contractor or subcontractor, whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the state, who shall intentionally violate any provision of this section, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be fined not to exceed one thousand dollars or imprisoned for not more than six months, or both fined and imprisoned, in the discretion of the court having jurisdiction thereof. Code, chapter 21, article 4, section 2349 (2). *Mullins* v. *State Road* 28

MORAL OBLIGATION

An award may be made by the court of claims in favor of a claimant who, while walking on a public highway in the nighttime from one county to his home in another county, was attacked, shot and seriously and painfully wounded by a guard at the state penitentiary at Moundsville, acting at the time as captain of the guard of a road camp while searching for an escapee from said camp, upon the theory of the moral obligation of the state to make reparation for the reckless and negligent conduct of its agent. *Bumgarner* v. *Board of Control* 36

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and an award should be made. *Berkeley Printing & Publishing Company* v. *State Auditor.* 3 Ct. Claims (W. Va.) 231. *Holliday* v. *Auditor* 105

Negligence on the part of the state road commission as shown by its failure to eliminate a rockslide obstruction in a creek in the

state road right-of-way, thereby damaging the property of a resident along said road, presents a moral obligation for which a claim for reasonable damages should be allowed. *Gill* v. *State Road* 88

(As to requirement that the Legislature, when appropriating money to pay a claim, make an express declaration or finding of fact that a *moral obligation* exists on the part of the State, see the opinion of the State Supreme Court of Appeals in *Adkins* v. *Sims*, 127 W. Va. 786; 34 S. E. 2d 585.)

NEGLIGENCE

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence did not contribute heavily thereto. *Flynn* v. *State Road* 114

Where it appears that the proximate cause of the damages done to claimants was the sole, independent and negligent act of the agent of the state agency involved, an award will be made. *Weekley et al* v. *Adjutant General* 120

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Taylor* v. *State Road*, 5 Ct. Claims (W. Va.) 184. *Farnsworth* v. *State Road* 123

Violation of statute [W. Va. Code, chapter 17, article 8, section 10 (1537)] alone is sufficient to make the violator *prima facie* guilty of negligence, but to justify recovery it must be shown by a preponderance of the evidence that the violation was the proximate cause of the damages. *Rich Valley Dairy* v. *Adjutant General* 39

Failure of motorist to stop at stop sign constitutes *prima facie* negligence and makes him responsible for all damages resulting proximately from his failure to stop. *Somerville* v. *Delbosa*, 56 S. E. (2d) 756. *Id.*

An award will be made when it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of an agent of the state road commission and such damages were in no way brought about by any fault on the part of claimant. *Withrow* v. *State Road* 46

A claim for damages to property or person injured by negligence of state agent or employe while engaged in discharge of governmental function justifies appropriation of public funds on the basis of valid moral obligation of state. *Copley* v. *State Road* 81

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. *Robison* v. *State Board of Control*, 3 Ct. Claims (W. Va.) 66, *Webb* v. *State Road* 62

Under the act creating the state court of claims, negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. *Tsutras* v. *State Road* 43

Negligence on the part of the state road commission as shown by its failure to eliminate a rockslide obstruction in a creek in the state road right-of-way, thereby damaging the property of a resident along said road, presents a moral obligation for which a claim for reasonable damages should be allowed. *Gill* v. *State Road* .. . 88

A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries notwithstanding the respondent is not free from blame. *Hamilton* v. *State Road Commission*, 5 Ct. Claims (W. Va.) 119. *Rutherford* v. *State Road* 66

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspection as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v. *State Road*, 5 Ct. Claims (W. Va.) 22. *Andrews* v. *State Road* 71

The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Price* v. *Sims*, 58 S. E. (2d) 657. *Id.*

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *H. A. Pelfrey* v. *Adjutant General*, 5 Ct. Claims (W. Va.) 106; *John Kipp* v. *Adjutant General*, 5 Ct. Claims (W. Va.) 108. *Stewart* v. *Adjutant General* 57

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See also

Herbaugh v. *Conservation Commission* 110

OBSTRUCTIONS, in Roads and Right of Ways

Negligence on the part of the State Road Commission as shown by its failure to eliminate a rockslide obstruction in a creek in the state road right-of-way thereby damaging the property of a resident along said road, presents a moral obligation for which a claim for reasonable damages should be allowed. *Gill* v. *State Road* 88

There are reasonable limitations to the right of the public to unobstructed use of a highway, and the state does not guarantee freedom from accident to persons traveling on its highways. *McKinley* v. *State Road* 111

PAINTING OPERATIONS

PEDESTRIANS

To secure an award a pedestrian suffering injury while crossing a highway bridge must show conclusively that the state road commission's failure to maintain a sidewalk on said bridge was the proximate cause of his injury as asserted in his claim, and that other forces, including his own lack of prudence, did not contribute heavily thereto. *Flynn* v. *State Road* 114

PRIMA FACIE JURISDICTION, see Jurisdiction

PROOF OF CLAIM, see also Evidence

The burden of proof rests upon a claimant in the court of claims to show his claim against the state, or any of its agencies, to be meritorious and one for which the Legislature should make an appropriation of the public revenues in his favor for the satisfaction of such claim, and upon failure to successfully carry such burden, an award will be denied and the claim dismissed. *Hale Electric Company* v. *Board of Education*, 6 Ct. Claims (W. Va.) 94. *Mills* v. *State Road* 117

Under the act creating the state court of claims negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. *Farm Bureau Mutual Automobile Insurance Co. et al* v. *Adjutant General*, 5 Ct. Claims (W. Va.) 69. *Farnsworth* v. *State Road* 123

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PROXIMATE CAUSE

Failure of motorist to stop at stop sign constitutes *prima facie* negligence and makes him responsible for all damages resulting proximately from his failure to stop. *Somerville* v. *Delbosa*, 56 S. E. (2d) 756. *Rich Valley Dairy* v. *Adjutant General* 39

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PUBLIC WORKS

Hours of labor on state public works; penalty. The service and employment of all laborers and mechanics who now are or hereafter may be employed by or on behalf of this state, or by any con-

tractor or subcontractor, upon any of the public works of the state, is hereby limited and restricted to eight hours in any one calendar day, except in cases of extraordinary emergency; and it shall be unlawful for any officer of the state, or any contractor, or subcontractor whose duty it shall be to employ, direct or control the service of such laborers or mechanics, to require or permit any such laborers or mechanics to work more than eight hours in any calendar day, except as hereinbefore provided. *Mullins* v. *State Road* 28

PUBLICATIONS

When a publishing company publishes legal notices, contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and an award should be made. *Berkeley Printing & Publishing Company* v. *State Auditor*, 3 Ct. Claims (W. Va.) 231. *Holliday* v. *Auditor* 105

REAL ESTATE, Leases

Pursuant to the purpose and spirit of the act of the Legislature creating the state court of claims, an award may be made for claims against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state received distinct value and benefit; and by virtue of the same act an award may be made to a claimant for losses arising from such benefit having been afforded the state. *Cohen* v. *Employment Security* 17

RES JUDICATA

A case in which the state court of claims declines to make an award for reason that it feels bound by the refusal of the Supreme Court of Appeals of West Virginia to issue a rule in *mandamus* proceeding to compel the state auditor to pay an award made by the said court of claims in a companion case, and ratified by the Legislature. *W. Va. Insurance* v. *State Road* 41

ROCKS AND ROCKSLIDES

Negligence on the part of the state road commission as shown by its failure to eliminate a rockslide obstruction in a creek in the state road right-of-way, thereby damaging the property of a resident along said road, presents a moral obligation for which a claim for reasonable damages should be allowed. *Gill* v. *State Road* 88

STATE NOT GUARANTOR

There are reasonable limitations to the right of the public to unobstructed use of a highway, and the state does not guarantee freedom from accident to persons traveling on its highways. *McKinley* v. *State Road* 111

STATUTE OF LIMITATIONS

See

SUBROGATION

See