

Opinion No. 34.

State Highway Commission—Damages, Claim for—Claims.

HELD: There is no fund from which the Highway Commission may pay a claim for damages by fire caused by a spark from weed burning operations of the highway maintenance department.

February 1, 1935.

Mr. W. O. Whipp
Secretary, State Highway Commission
The Capitol

This will acknowledge receipt of your letter of January 28, from which it appears that on or about the 13th day of November, 1934, on the highway between the cities of Hysham and Big Horn, in this state, the Highway Maintenance Department was burning weeds and thistles, a northwest wind was blowing and a spark from the fire blew on a truck passing on the highway, which was owned by Mr. M. Zent of Hysham, Montana. The spark from the fire fell on a robe in the back of the truck and started a fire, which destroyed a radio and the side of the truck rack to the damage of Mr. Zent, in the amount of \$83.70.

The incident has been called to your attention by Senator Plumer and Representative Manning of Treasure County, and you have asked us to advise you whether or not this claim for damages is a proper charge against any of the funds of the State Highway Commission.

The maxim of the English law, "The King can do no wrong," is not a part of the jurisprudence of this country. (Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010.) But rather it is because the state is a public corporation and out of considerations of public policy the doctrine of *respondet superior* does not apply to it unless assumed voluntarily.

The general rule is stated in 59 C. J. 194, as follows: "A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature; and, in the absence of a statute so providing, a state cannot be forced to compensate a private individual for damages to property from the construction or operation of public works, but the legislature may make an appropriation for this purpose.

"Since the state is inherently sovereign at all times and in every capacity, the state, by taking over an enterprise usually of the nature of a private business, is not hampered by

the private character thereof, and so there is no basis for charging the state thus engaged with liability for torts of its officers and agents."

Accordingly, it is our opinion that there is no fund appropriated at present from which the claim presented to you may be paid. The legislature, however, has authority under the Constitution, to appropriate sufficient moneys for the payment of the same. (Mills v. Stewart, 76 Mont. 429.)