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WITNESS, the Honorable Clarence E. Case, Chief Justice of our Supreme Court at Trenton aforesaid, this 6th day of January, 1947.

JAMES J. GAVIN,
Clerk.

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JOHN A. LAIRD,
Of Counsel with Prosecutor.

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**Allocatur.**

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This writ is allowed.
Let is be sealed.

CHARLES W. PARKER,
J. S. C.

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## Return to Writ.

State of New Jersey, }
County of Essex, } ss.:

We, Joseph E. Conlon, Judge of the Court of Common Pleas in and for the County of Essex and State of New Jersey, and Russell C. Gates, Clerk of the Court of Common Pleas in and for the County of Essex, State of New Jersey, do hereby certify and return to the Supreme Court Judicature of the State of New Jersey, the judgment of the Court of Common Pleas and order and proceeding made and given by the Workmen's Compensation Bureau of New Jersey, Department of Labor, in the compensation proceedings of Patrick Breheny, petitioner-appellee, *vs.* County of Essex and Bankers Indemnity Insurance Company, respondents - appellants, together with all things touching and concerning the same as by the within Writ to us directed and commanded.

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In Witness Whereof, we have hereunto set our hands and official seal, this day of January, 1947.

Joseph E. Conlon,
Judge, Essex County Court
of Common Pleas.

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(Seal)

Russell C. Gates,
Clerk, Essex County Court
of Common Pleas.

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## Notice of Application to Vacate and Set Aside Determination of Facts and Rule for Judgment.

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU.

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PATRICK BREHENY,
Petitioner,

*vs.*

COUNTY OF ESSEX and BANKERS INDEMNITY INSURANCE COMPANY,
Respondents.

Notice of Application to Set Aside Determination of Facts and Rule of Judgment.

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*To Patrick Breheny, Petitioner, and David Roskein, his attorney and of counsel:*

TAKE NOTICE that I shall apply on February 26, 1946 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard before the Honorable John C. Wegner, Deputy Commissioner of the Workmen's Compensation Bureau at the Workmen's Compensation Bureau, 1060 Broad Street, Newark, New Jersey, for an order vacating and setting aside the determination and rule for judgment of the Workmen's Compensation Bureau dated July 14, 1943 on the ground that the said is void, illegal and against the public policy of the State of New Jersey.

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TAKE FURTHER NOTICE that the aforesaid application will be based upon the petition hereunto

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annexed and the evidence to be offered the said time and place in support thereof.

MAURICE C. BRIGADIER,
Attorney and of counsel with
County of Essex and Bankers
Indemnity Insurance Company.

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**Petition of County of Essex and Bankers Indemnity Insurance Company to Vacate and Set Aside Determination of Facts and Rule for Judgment.**

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NEW JERSEY DEPARTMENT OF LABOR,
WORKMEN'S COMPENSATION BUREAU.

| | |
|---|---|
| PATRICK BREHENY,<br>Petitioner,<br>*vs.*<br>COUNTY OF ESSEX and BANKERS INDEMNITY INSURANCE COMPANY,<br>Respondents. | Petition of County of Essex and Bankers Indemnity Insurance Company to Vacate and Set Aside Determination of Facts and Rule for Judgment. |

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The petition of County of Essex and Bankers Indemnity Insurance Company, the respondents in the above entitled proceeding, respectfully shows that:

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1. Patrick Breheny, while in the employ of the County of Essex, sustained accidental injury on

*Petition of County of Essex and Bankers Indemnity Insurance Company to Vacate and Set Aside Determination of Facts and Rule for Judgment.*

May 18, 1938 while he was in the act of raising a heavy plank with the aid of a fellow employee.

2. The Workmen's Compensation Bureau, upon
10 an original petition filed by the said Patrick Breheny for a compensation award, made a determination and rule for judgment on March 15, 1940 in favor of the said Patrick Breheny as petitioner and against the County of Essex and Bankers Indemnity Insurance Company as respondents for permanent disability to the amount of 40% of partial permanent total disability and for temporary compensation of 23 and 6/7ths weeks. Payment in full of this award was concluded on August 31,
20 1942.

3. On February 13, 1943 the said Patrick Breheny as petitioner filed a second petition against the County of Essex and Bankers Indemnity Insurance Company as respondents by which the said Patrick Breheny sought an additional award based upon an alleged increased permanent disability.

4. On July 14, 1943 the Workmen's Compensa-
30 tion Bureau made a determination of facts and rule for judgment under which the compensation for permanent total disability was increased from 40% to 100% of permanent total disability.

5. An appeal was thereupon taken by the County of Essex and Bankers Indemnity Insurance Company to the Essex County Court of Common Pleas and on September 26, 1944 a determination of facts and rule for judgment was en-
40 tered in said court which likewise ordered the pay-

ment by the respondents, County of Essex and Bankers Indemnity Insurance Company, to the petitioner, Patrick Breheny, of 100% total permanent disability.

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6. On November 25, 1944 the New Jersey Supreme Court allowed a writ of certiorari to review the aforesaid judgment of the Essex County Court of Common Pleas and upon the review, the New Jersey Supreme Court dismissed the writ with costs and entered an order affirming the judgment of the Essex County Court of Common Pleas, and thereupon the County of Essex and Bankers Indemnity Insurance Company appealed to the New Jersey Court of Errors and Appeals from the whole of the aforesaid judgment of the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals upon the aforesaid appeal rendered a judgment affirming the judgment of the New Jersey Supreme Court in January, 1946.

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7. No payment has to date been made by the County of Essex and Bankers Indemnity Insurance Company on account of the award of increased permanent disability or the costs and counsel fees allowed in connection therewith.

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8. On August 7, 1940, Patrick Breheny, the petitioner in the aforesaid proceedings in the Workmen's Compensation Bureau, made application to the County Employees Pension Commission of the County of Essex for a pension to become effective on August 16, 1940.

9. A hearing was held on such application on November 8, 1940 and subsequently on February 27, 1941 the County Employees Pension Commis-

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sion of the County of Essex and State of New Jersey granted the said Patrick Breheny a pension for a service connected disability in the sum of $1,312.50 which constituted 50% of an annual salary of $2,625; said pension was made retroactive to August 16, 1940.

10. By agreement entered into between the said Patrick Breheny and the County Employees Pension Commission of the County of Essex there was deducted from the aforesaid pension payments, paid pursuant thereto to the said Patrick Breheny, the sum of $40 bi-monthly from August 16, 1940, the date upon which the pension became effective, until August 31, 1942, when payments were completed on account of the original award in compensation of 40% permanent total disability.

11. Upon receipt by Patrick Breheny of the last payment on account of the original compensation award of 40% of permanent total disability, the said Patrick Breheny gave notice that beginning September 16, 1942 he would expect payment of the full amount of his pension without deduction. From that date down to the present date pension payments have been made to the said Patrick Breheny for the full amount thereof without deduction and the said Patrick Breheny has accepted and retained the same.

12. At no time was the Workmen's Compensation Bureau, the Essex County Court of Common Pleas, the New Jersey Supreme Court or the New Jersey Court of Errors and Appeals in-

formed of the fact that prior to the filing of the petition for increased permanent disability award on February 13, 1943, the said Patrick Breheny had, by his acceptance of the aforesaid pension effective as of August 16, 1940, severed his relationship as an employee of the County of Essex, his former employee. 10

13. At no time was the Workmen's Compensation Bureau, the Essex County Court of Common Pleas, the New Jersey Supreme Court or the New Jersey Court of Errors and Appeals informed that prior to the filing of the petition by Patrick Breheny on February 13, 1943 for an increased permanent disability award, the said 20 Patrick Breheny had become a former employee of the County of Essex and receiving a service connected disability pension ever since August 16, 1940.

14. The Bankers Indemnity Insurance Company, who has been made a respondent in the said compensation proceeding by reason of the fact that it is the insurance carrier, did not learn of any of these facts relating to the pension awarded to the said Patrick Breheny as aforesaid, until after 30 the judgment of affirmance had been rendered in the New Jersey Court of Errors and Appeals as aforesaid.

15. The County of Essex and the Bankers Indemnity Insurance Company state that by reason of R. S. 34:15-43, the said Patrick Breheny was not entitled to receive any award of compensation for increased permanent disability because prior to the filing of the petition by him on February 40

13, 1943 the said Patrick Breheny had severed the relationship of employment with the County of Essex and had become a former employee by reason of his acceptance of a service connected disability pension which had become effective as of August 16, 1940.

16. The County of Essex and the Bankers Indemnity Insurance Company state that by reason of R. S. 34:15-43 the judgment made in the Workmen's Compensation Bureau on July 14, 1943 awarding the said Patrick Breheny compensation for 100% of permanent total disability is illegal, void and against public policy and should be set aside and for nothing holden.

17. The petitioners in this petition, County of Essex and Bankers Indemnity Insurance Company, therefore, pray that an order may be made vacating and setting aside the aforesaid judgment and order of the Workmen's Compensation Bureau of July 14, 1943.

MAURICE C. BRIGADIER
Attorney and of Counsel with the
County of Essex and Bankers
Indemnity Insurance Company.

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**(Affidavit supporting Petition not printed.)**

**Order Discharging Rule.**

NEW JERSEY DEPARTMENT OF LABOR,
WORKMEN'S COMPENSATION BUREAU.

PATRICK BREHENY,
Petitioner,
*vs.*
COUNTY OF ESSEX and BANKERS INDEMNITY COMPANY,
Respondents.

On Rule to Show Cause.
Order Discharging Rule.

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In order to understand the situation in the instant matter, a brief review of the history of this case is necessary. In May, 1938, the petitioner met with an accident arising out of and in the course of his employment with the County of Essex and it was so determined by this Bureau upon a formal hearing of the claim petition, the disability being fixed at 40% of total. Thereafter, upon allegations that the petitioner's disability had increased, a petition seeking a reopening of the original award was filed and after formal hearing it was adjudged that the disability resulting from the original compensable industrial accident had increased and that the petitioner's disability was 100% of total.

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The respondents being dissatisfied with this decision took an appeal to the Essex County Court of Common Pleas where the judgment was affirmed and thereafter being still dissatisfied, took the matter to the Supreme Court upon a writ of certiorari where the award of the Essex Pleas was sustained. Thereafter the respondents took an appeal to the Court of Errors and Appeals where

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the judgment of the Supreme Court was affirmed and the award to the petitioner sustained. Upon the entry of final judgment in the Court of Errors and Appeals the cause was remitted to the Supreme Court and by the remittitur of that Court in turn remitted to the Essex County Court of
10 Common Pleas where the judgment presently resides.

Thereafter, a Rule was obtained from this Bureau which required the petitioner to show cause why the judgment entered in his favor should not be vacated, the basis of this rule being an allegation that the petitioner had been placed on the pension rolls by the County of Essex and that it was against public policy for him to be entitled to an award under our Workmen's Com-
20 pensation Statute. Pursuant to the rule to show cause, testimony in support of such rule has been taken and certain exhibits offered in evidence.

From the testimony so taken, it appears that the County of Essex through its insurance carrier had refused to comply with the judgment of this Bureau awarding increased compensation to the petitioner and that the petitioner being in destitute circumstances sought the aid of the Employee's Retirement System of the County of
30 Essex with respect to a service-connected pension and that the Retirement System entered into an agreement with the petitioner whereby it was agreed that pension payments would be made to him in accordance with the statutory schedule, said payments, however, to be refunded to the Retirement System when and if petitioner's claim for workmen's compensation was sustained and the award paid.

It seems to be the claim advanced on behalf of
40 the insurance carrier, the Bankers Indemnity

Company, that such an arrangement relieves it of its liability under its workmen's compensation policy on grounds of public policy, the insurance carrier relying upon the recently decided case of *De Lorenzo* v. *Board of Commissioners of the City of Newark,* 134 N. J. L. 7, 45 A. (2d) 686. In the *De Lorenzo* case, petitioner had received an award of workmen's compensation against the municipality and sought a declaratory judgment as to his rights to be likewise entitled to a pension. The Court in its opinion laid down no rule of public policy but simply determined that inasmuch as the petitioner's award of workmen's compensation was a judicial determination that the relationship of master and servant was in existence between the petitioner and the employing municipality that he was not entitled to be placed on the pension roll as this would require that the relationship of master and servant had been terminated.

In the instant case, it has been formally adjudicated in the Workmen's Compensation Bureau, in the Essex County Court of Common Pleas, before the New Jersey Supreme Court and before the Court of Errors and Appeals and is accordingly res adjudicata that the petitioner is entitled to be paid his workmen's compensation award and that these payments are to continue for some time to come. It is likewise res adjudicata under the reasoning of the De Lorenzo case that the relationship of master and servant does presently exist and while this may mean that the petitioner is not entitled to pension payments, the only one in a position to object to such payments in the County of Essex and so far as the record here shows, the County (Employee's Retirement System of the County of Essex) has not objected. No good reason founded upon public policy or otherwise

indicates that the insurance carrier which received a premium for insuring the County against loss arising out of workmen's compensation claims should escape its liability at the expense of the County. If it be said that it is contrary to public policy for a County or municipal employee to be
10 paid twice over for the same injury, once in the form of workmen's compensation benefits and once in the form of pension benefits and the taxpayer is thus obliged to pay twice over for the same injury, such reasoning is not applicable to the facts of the instant case for here by agreement between the petitioner and the County, the pension fund is entitled to be reimbursed out of the workmen's compensation payments and the taxpayer instead of being forced to pay twice over is, in fact, benefited
20 by being relieved of any contribution toward the pension payments.

In view of a recent enactment of the legislature (R. S. 43:10-18.15) it is extremely doubtful that any such public policy as relied on by the insurance carrier actually exists, at least insofar as employees of the County of Essex are concerned. This Act, which applies to the employees of Counties of over 800,000 inhabitants and which became effective in 1943 provides in the section above quoted,
30 the following:

> "The rights of any employee or beneficiary to receive any payments under the Workmen's Compensation Act of New Jersey, shall not be affected or impaired by any of the provisions of this act."

Even if the reasoning heretofore expressed be unsound, it is difficult to perceive on the merits how any relief could be afforded to the respondents

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upon his application. When the case was tried before this Bureau no question with respect to pension payments was raised nor was the question raised before the Essex Pleas, before the Supreme Court or before the Court of Errors and Appeals. Courts do not lightly set aside their judgments and normally only do so upon the grounds of fraud 10 or newly discovered evidence. In this case, there is neither allegation nor proof of fraud. The petitioner and the County of Essex entered into the pension agreement in good faith. The agreement was obviously of benefit to the petitioner in his destitute circumstances and as likewise to the benefit of the County. The claim of newly discovered evidence is equally untenable. In the case of Siberry *v.* National Sulphur Co., 117 N. J. L. 200, 187 A 567 (afterwards affirmed without opinion by 20 the Court of Errors and Appeals) the Court determined that the Workmen's Compensation Bureau could only open its own judgment upon the ground of fraud or newly discovered evidence and that evidence to fall within the category of newly discovered evidence must be such evidence as could not by the exercise of reasonable diligence have been procured at the time of the first trial. Obviously, the County of Essex which entered into the arrangement with the petitioner knew all the facts 30 in connection with the pension agreement while an exhibit intoduced in the present proceedings indicates that the Bankers Indemnity Company likewise knew of the arrangement. Apparently everyone connected with the proceedings knew the true facts with the exception of the Bankers Indemnity Company's present counsel. There is accordingly no grounds upon which this Court could open its previous judgment even if it was so minded and which action would in truth be tanta- 40

mount to a reversal by this Bureau of a judgment of the Court of Errors and Appeals.

In its argument before this Court on this Rule to Show Cause, the respondents contended that the Workmen's Compensation Bureau never did have jurisdiction to entertain the claim petition in view
10 of the pension arrangement which had been entered into between the petitioner and the County of Essex. There is clearly no merit to this contention. The Workmen's Compensation Bureau is, under the statute, the exclusive forum for the trial of workmen's compensation matters. This is the distinctive holding of our Supreme Court in the recently decided case of *Zietko* v. *N. J. Manufacturers Casualty Insurance Company,* 132 L. 206, 39 A. 2d 417. If the pension arrangement
20 in fact, precluded the petitioner from prosecuting his workmen's compensation claim (and in my opinion, it did not) at best, this constitutes a defense which the respondent should have raised but did not. As indicated above, the County of Essex of course, had full knowledge of the arrangement, having been a party to it, while the carrier seems likewise to have been in possession of the facts. The subject matter of the dispute was an alleged increase in the petitioner's disability and
30 certainly, the Workmen's Compensation Bureau is the only place in which such a controversy could be legally determined.

We have dealt at length with the merits of this controversy in the hope that this may terminate this long drawn out litigation, despite the fact that the matter could be decided upon the simplest of grounds, to wit: jurisdiction. As before stated, the original judgment of this Bureau was removed by appeal to the Essex County Court of Common
40 Pleas upon which appeal a judgment in favor of

the petitioner was entered in that Court. By successive steps the cause went to the Supreme Court and the Court of Errors and by those Courts was remitted to the Essex County Court of Common Pleas where the judgment presently resides. In these circumstances, no Deputy Commissioner has jurisdiction to vacate, set aside or otherwise disturb such a judgment and while this hardly requires the citation of authority the cases of *De Lorenzo* v. *Botany Worsted Mills,* 118 N. J. L. 418, 193 A. 349 and *Breen Iron Works* v. *Richardson,* 115 N. J. L. 305, 180 A. 192, are directly in point and dispositive. 10

For all of the reasons above stated, the rule to show cause is discharged, and a counsel fee of $350.00, payable to David Roskein, attorney for the petitioner, is hereby allowed for legal services made necessary upon this application, the said counsel fee to be paid $250.00 by the respondent, Bankers Indemnity Company, and $100 by the petitioner. 20

Harry S. Medinets,
Deputy Commissioner.

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## Notice of Appeal.

ESSEX COUNTY COURT OF
COMMON PLEAS.

| | |
|---|---|
| PATRICK BREHENY,<br>Petitioner-Appellee,<br>*vs.*<br>COUNTY OF ESSEX and BANKERS INDEMNITY COMPANY,<br>Respondents-Appellants. | On Appeal from the Workmen's Compensation Bureau.<br><br>Notice on Appeal. |

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To:

CLERK, ESSEX COUNTY COMMON PLEAS,
Newark, New Jersey.

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DANIEL A. SPAIR, Sec.,
Workmen's Compensation Bureau,
Trenton, N. J.

DAVID ROSKEIN, Esquire,
17 Academy Street, Newark, N. J.

Gentlemen:

PLEASE TAKE NOTICE that the respondents, County of Essex and Bankers Indemnity Insurance Co. hereby appeal to the Court of Common Pleas in and for the County of Essex from the order made in the above entitled matter on the 8th day of July, 1946 entitled "Order Discharging Rule" which denies the application of the respondents before the Workmen's Compensation Bureau for an order vacating and setting aside the determination and rule for judgment of the Workmen's Compensation Bureau, dated July 14, 1943 and which provides as follows:

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*Notice of Appeal.*

"For all the reasons above stated, the rule to show cause is discharged and a counsel fee of $350 payable to David Roskein, attorney for the petitioner, is hereby allowed for legal service made necessary upon this application, the said counsel fee to be paid $250 by the respondent, Bankers Indemnity Insurance Co., and $100 by the petitioner. 10

Harry Medinets,
Deputy Commissioner.

Maurice C. Brigadier,
Attorney and of counsel with
the Respondents-Appellants.

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ESSEX COUNTY COURT OF COMMON PLEAS.

PATRICK BREHENY,
Petitioner-Appellee,
*vs.*
COUNTY OF ESSEX and BANKERS INDEMNITY INSURANCE COMPANY,
Respondents-Appellants.

On Appeal from Workmen's Compensation Bureau.

Opinion.

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Appearances:

MAURICE C. BRIGADIER, Esq., for Respondents-Appellants.

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DAVID ROSKEIN, Esq. and JOHN A. LAIRD, Esq., for Petitioner-Appellee.

CONLON, J.:

This is an appeal from an order of the Workmen's Compensation Bureau, entered July 8, 1946, which denied an application of the Respondents-Appellants to vacate the determination and rule for judgment entered on July 14, 1943 awarding the petitioner compensation for permanent injury. As against that appeal there was filed a notice of motion to dismiss on the ground that no appeal legally lies from the discharge of such a rule. The motion to dismiss is disposed of by the determination herein of the question of this Court's jurisdiction to entertain the appeal.

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The Petitioner-Appellee, among other things, contends that this Court has no jurisdiction; that the original determination found by the Bureau on July 14, 1943 was duly appealed to this Court

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and that upon its subsequent affirmance here and in the Supreme Court and the Court of Errors and Appeals, the judgment was, in effect, remanded to the Bureau, and that the statute makes no provision for an appeal to this Court from a refusal by the Bureau to reopen it. It is contended that this Court has appellate jurisdiction over only the *judgments* of the Bureau and that a denial of a motion to reopen the determination by the Bureau is not such a judgment. 10

This matter has been in litigation for many years. The accident out of which the alleged injuries were sustained occurred on May 18, 1938. On March 15, 1940, the Compensation Bureau entered a determination and rule for judgment allowing temporary compensation for 23 6/7 weeks and partial permanent disability to the extent of 40%. The payments under this award were completed on August 31, 1942. 20

On February 27, 1941, as the result of an application by the petitioner, the Essex County Pension Comission granted him a pension for a service connected disability in the sum of $1,312.50 per annum which constituted 50% of his annual salary of $2,625.00, and which pension was made retroactive to August 16, 1940. The evidence also discloses that an agreement was entered into between the Petitioner and the Pension Commission whereby the Pension Commission deducted from the aforesaid pension payments the sum of $20.00 a week (the amount of the compensation award) from August 16, 1940, the date upon which the pension became effective, until August 31, 1942 when payments were completed by the respondents on account of the original award. 30

This arrangement was made by the parties apparently because they both understood that 40

Petitioner was not entitled to both compensation and pension for the same injury, but that circumstance was never revealed to the Courts.

On February 13, 1943, petitioner filed a new petition wherein he claimed additional compensation for increased permanent disability, and on
10 July 14, 1943, the Bureau made a determination and judgment increasing the permanent disability from 40% to 100%. On September 26, 1944, this determination of the Bureau was affirmed by the Essex County Court of Common Pleas. On April 10, 1945, the New Jersey Supreme Court filed an opinion (132 N. J. L. 584), affirming the Pleas, and on January 24, 1946, the Court of Errors and Appeals (134 N. J. L. 129) affirmed the Supreme Court.

20 On February 26, 1946, the respondents made application by rule to the Bureau to vacate its determination of July 14, 1943, whereby it had increased the award for permanent disability from 40% to 100%. The application to vacate was on the sole ground that subsequent to the accident, but previous to the award, to wit on February 27, 1941, the petitioner, as a county employee, was granted a pension under the Statute (N. J. R. S. 43:10-4).

There is, therefore, presented to the Court for
30 review the question whether the finding of the Bureau should be vacated, because, under the Compensation Act (N. J. R. S. 34:15-43) a County employee who is receiving a pension for disability is precluded from receiving compensation for such disability. This section so far as it affects the present situation, provides as follows:

> "Every employee of * * * county, * * * who may be injured in line of duty, shall be compensated under and by virtue of the provi-
40 sions of this article and Article 2 of this Chap-

ter (34:15-7 et seq.) * * *. Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this Section to compensation for such injury or disability."

It will be noted that the pension was allowed to the petitioner more than two years before the determination of the Bureau allowing the increased compensation. 10

The first question to be determined is whether this Court has jurisdiction to hear an appeal from a denial by the Bureau of an application to reopen a judgment.

The statute giving this Court appellate jurisdiction over the Bureau (34:15-66) provides that:

> "Either party may appeal from the judgment of the Commissioner, Deputy Commissioner, or Referee to the Court of Common Pleas of the County in which the accident occurred, by filing with the Secretary of the Bureau and with the Clerk of the County where the accident occurred, a Notice of Appeal * * *". 20

It will be noted that by the statute an appeal will lie to this Court only from a "judgment" of the Bureau and it is contended that a refusal to reopen a judgment is not a judgment under the statute. 30

It has been specifically held to the contrary in the case of Ruoff *vs.* Blasi, 117 N. J. L. 47, affirmed 118 N. J. L. 314. In that case, in considering a similar situation, Justice Heher, speaking for the Court of Errors and Appeals, said:

> "The action of the Bureau in dismissing the employee's petition for a hearing and adjudi- 40

> cation of his claim on the merits is an appealable judgment within the intendment of chapter 149 of the Laws of 1918 (P. L. p. 429) as amended by chapter 25 of the Laws of 1932 (P. L. p. 38) vesting appellate jurisdiction in the respective Courts of Common Pleas. It
> 10 was plainly the legislative purpose to invest the Pleas with general appellate jurisdiction of the judgments and orders of the compensation bureau; that is implicit in the statutory procedural scheme."

I therefore conclude that this Court has jurisdiction to consider this appeal from the order of the Bureau refusing to reopen its determination and judgment of July 14, 1943.

20 On the question as to whether or not the petitioner is precluded from his recovery by reason of the fact that he is receiving a pension from the County of Essex for a disability, and that the Compensation Act provides that in such cases an employee shall not be entitled to compensation for such disability, the facts have already been sufficiently stated with one exception. It is admitted by the Respondents-Appellants that at the time of the original hearing before the Bureau the ap-
30 pellants knew that the petitioner was on a pension, and that there is not involved in the case any question of mistake, fraud or newly discovered evidence. The appellants' position is that, without any of those elements being present, an order allowing recovery in such a case is void, and that it is the duty of this Court, upon its being apprised of that fact, to declare the judgment void. The petitioner's contention, on the other hand, is that the dual payments constituted a defense which
40 was waived by the appellants, and that the Bureau had no jurisdiction to vacate the award since such

action would be tantamount to over-ruling the Court of Errors and Appeals.

It has been stated by the Court of Errors and Appeals in the case of P. Bronstein & Co., Inc. *v.* Hoffman, 117 N. J. L. 500, p. 507, that:

> "The compensation bureau is a creature of the statute. Its jurisdiction is special and limited; and it is invested only with such authority as is expressly conferred, or such as is by fair implication and intendment incident to and included in the authority expressly granted for the enforcement of the statute. Any reasonable doubt of the existence of a particular power in the bureau is to be resolved against the exercise of such authority."

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The Workmen's Compensation Act preserves to employer and employee the option of basing their respective rights and liabilities either on Article 1, or Article 2 of the Act. In this case they have adopted the provisions of Article 2 and therefore have accepted the elective compensation provision of that section and have agreed to be bound by it (Zietko *vs.* N. J. Manufacturers Casualty Insurance Co., 132 N. J. L. 206). The employee was not competent to narrow or increase his own rights nor was the employer competent to restrict or enlarge its liability (Micieli *vs.* Erie R.R. Co., 131 N. J. L. 427).

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Justice Heher, speaking for the Supreme Court in Miller *vs.* National Chair Co. (127 N. J. L. 414; affirmed 129 N. J. L. 98) declared that:

> "The parties are not at liberty in the making of a contract of hire to notify the essential provisions of Article 2, nor are they priv-

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ileged to contract out of the statute after the accident."

As has been stated above, the statute specifically deprives a former County employee of the right to compensation while he is on a pension. Any rights
10 the Petitioner may have or any liability that rests upon the Respondents must of necessity flow from the statute, and neither the Bureau nor this Court has jurisdiction to direct the payment of any compensation contrary to the provisions of the statute.

It follows therefore that the parties themselves cannot confer jurisdiction upon either tribunal by an attempted waiver, actual or implied, of the statute prohibiting a recovery. Nor can they by private agreement change the legal liability fixed
20 by the statute once they have elected to come under the provisions thereof (Micieli *v.* Erie Railroad Co., *supra*).

I therefore conclude that the award to the Petitioner is not provided for in the statute, and that the determination of the Bureau in question was void, and that the Bureau erred in not granting the motion to vacate and set aside the said determination and rule for judgment entered July 14, 1943.

30 It would seem that this matter requires further comment. In the record before me it is not revealed why, during this protracted litigation, there was concealed from the Bureau and the several courts which considered the matter, the essential fact that the petitioner was the recipient of a pension. The reason for that action may be inferred, but for present purposes it is not necessary to consider inferences.

The Petitioner by having agreed with the Pen-
40 sion Commission that the compensation which he

received under the original award was to be deducted from his pension payments clearly evinced knowledge that he was not entitled to both payments; and the employer, on the other hand, by deducting the compensation from the pension payments indicated that it also knew that dual payments were contrary to the statute. It is to be regretted that not only the Bureau but the several Courts which have considered this matter, have been called upon to consume their time in determining an issue which was not fully presented.

The order of the Bureau denying the motion to vacate its award was error. The motion to vacate should be granted and the determination of the Bureau of July 14, 1943 set aside and the award made thereunder vacated.

In accordance with Rule 9, Counsel will submit a determination embodying the ruling of this Court.

Dated: November 19, 1946.

JOSEPH C. CONLON,
Judge.

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## Determination of Facts and Rule for Judgment.

ESSEX COUNTY COURT OF COMMON PLEAS.

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An application was made in the Workmen's Compensation Bureau by the Respondents-Appellants for an order to vacate a determination and rule for judgment entered on July 14, 1943 by the Workmen's Compensation Bureau awarding the petitioner compensation for permanent injury. The application to vacate was on the sole ground that subsequent to the accident, but previous to the award, to wit on February 27, 1941, the petitioner as a County employee was granted a pension under the Statute (N. J. R. S. 43:10-4). An order denying and discharging that application was entered by the Bureau on July 8, 1946, and from said order the Respondents-Appellants appealed to this Court. As against that appeal the Petitioner-Appellee filed a notice of motion to dismiss on the ground that no appeal legally lies from the discharge of such an application.

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This Court after due and proper consideration did, on November 21, 1946, file its opinion which

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is made a part hereof, and for the reasons therein stated determines as follows:

That this Court has jurisdiction to consider this appeal from the order of the Bureau refusing to vacate its determination and judgment of July 14, 1943.

That by reason of the provisions of R. S. 34:15-43 the award made to the Petitioner by the Bureau for permanent disability was void, and that the Workmen's Compensation Bureau erred in not granting the motion to vacate and set aside its determination and rule for judgment entered July 14, 1943.

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It is, therefore, on this 11th day of December, 1946, Ordered and Adjudged that the determination and judgment of the Workmen's Compensation Bureau of July 14, 1943, including all allowances made thereunder, is void, and is hereby set aside and vacated in its entirety, and

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It is further Ordered and Adjudged that the petition filed by Patrick Breheny on February 13, 1943, in the Workmen's Compensation Bureau, for additional award based upon an alleged increased permanent disability be and the same is hereby dismissed.

No fees or allowances are granted on this application, and all fees and allowances heretofore granted in this matter are set aside.

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Dated: December 11, 1946.

Joseph E. Conlon,
Judge.

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NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU,

NEWARK, ESSEX COUNTY DISTRICT.

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PATRICK BREHENY,
Petitioner,

*vs.*

COUNTY OF ESSEX & BANKERS INDEMNITY INSURANCE CO.,
Respondent.

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February 26, 1946.

Before:

Hon. HARRY S. MEDINETS,
Deputy Compensation Commissioner.

Appearances:

DAVID ROSKEIN, Esq., for the petitioner.

MAURICE C. BRIGADIER, Esq., for the respondent.

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Mr. Brigadier: I would like to make an opening statement on the record: We have served, on behalf of the County of Essex and Bankers Indemnity Insurance Company, a notice of motion, to which there is annexed a duly verified petition, that we will apply this morning before the Honorable John C. Wegner, Deputy Commissioner, for an order vacating and setting aside a determination of facts and rule for judgment that was entered in this Bureau on July 14, 1943, on a

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petition that had been filed by Patrick Breheny, in which he sought an award for increased total permanent disability. He had previously been awarded 40 per cent, and by this petition he sought an increase from 40 to 100 per cent.

That award was made, and an appeal was taken to the Court of Common Pleas of Essex County, and it was affirmed, that is a finding made by which it was affirmed. A writ of certiorari was made before the New Jersey Supreme Court. The writ was dismissed and the judgment of the Common Pleas affirmed. An appeal was taken from the Supreme Court to the New Jersey Court of Errors and Appeals, in either January of this year or the early part of February—I don't have the exact date.

Mr. Roskein: January 28.

Mr. Brigadier: The remittitur is dated January 24.

Mr. Roskein: January 24. It was decided January 24.

Mr. Brigadier: The Court of Errors and Appeals affirmed the judgment of the Supreme Court.

The application was originally made returnable before Deputy Commissioner John C. Wegner, on the assumption that you, Mr. Medinets, were no longer sitting here, but this morning he directed us to appear before you to argue the matter.

The Court: I assume that is because of the fact that I heard the case originally.

Mr. Brigadier: I want the record to show that because my motion is returnable before John C. Wegner.

The Court: I assume Mr. Roskein has no objection to my hearing the motion.

Mr. Roskein: No objection. I have no objection.

Mr. Brigadier: Now, the application, as you will notice, the application is not to grant a new trial but an application to declare the judgment entered in this case to be null and void. I stress that to begin with, because that is the ground upon which we are basing the application. It is not
10 the ground of newly discovered evidence. It is not predicated on the theory that there was already a judgment of valid jurisdiction before you which we are seeking to reopen, but, on the contrary, we are urging that there is a void judgment by this Bureau and that this Bureau both under its inherent and statutory jurisdiction may declare a judgment which is void to be null and void at any time when the application is made.

The ground on which we base the application
20 and which we purport to support by the offer of evidence this morning pursuant to our notice is that on August 7, 1940—I am sorry—strike that out.

On August 7, 1940, Patrick Breheny, the petitioner in this proceeding, had made an application to the County Employees Pension Commission of the Court of Essex for a pension to become effective on August 16, 1940; that a hearing was had on this application, and that on February 27, 1941, the
30 said County Employees Pension Commission of the County of Essex granted the said Patrick Breheny maximum pension under the statute for service connected disability of 50 per cent of his annual salary, which pension was made retroactive to August 16, 1940; that from August 16, 1940, down to the present day, payments have been made and accepted by Patrick Breheny of this pension; that for a period of time, which I would like to call to your attention, although we are not seeking
40 to recover it or set it aside in any way, that he

had been receiving from us compensation payments from August 16, 1940, under the original award, until August 31, 1942. Those payments were made under the original award, and he received those and accepted those. As a matter of fact, by arrangement with the County of Essex, he returned to the County of Essex until August 31, 1942, $40 bi-monthly, that is, from his compensation checks. That is when we completed the payment of the original award. 10

From August 31, 1942, down to the present day, he has been receiving without any deduction the full payment of 50 per cent of his annual salary, and as I say, this petition for increased disability was filed on February 13, 1943.

The statement that I made that it was returned to the County of Essex should be modified to read that it was returned to the County of Essex Pension Commission; $40 bi-monthly was returned to the Essex County Pension Commission, not the County. 20

The petition for the increased disability award, as I said, was filed on February 13, 1943, and the rule for judgment and determination of facts made in the Bureau on July 14, 1943. Our contention is that this judgment is null and void, should be set aside and vacated for the following reasons: 30

One: That the entire proceeding is an illegal and void proceeding and against the public policy of the State of New Jersey, and since it involves an arm or agency of the State, it cannot be the subject of an estoppel or waiver.

Two: That the Workmen's Compensation Bureau was without any jurisdiction to render a judgment, since the basic prerequisites under the statute of the existence of an employer and employee relationship was not present, and that without that the Bureau had no jurisdiction. 40

We also offer an alternative third ground——

The Court: You mean in existence at the time of the accidental injury or at the time of the petition for the increased disability?

Mr. Brigadier: That is right, at the time the petition was filed for the increased disability. I want to make it clear that we are not addressing any motion to the original award or to any payments made even after the pension was granted. We are not seeking to recapture or recover or void the original award. Our first application is predicated or directed solely to the award made for the increased disability.

The Court: There would be no point in addressing your motion to the original award because that is all paid, and there is no provision in the statute for recapture of money paid improperly under the Compensation Act.

Mr. Brigadier: Well, I don't feel it is part of our problem. At the present time I am not raising that argument. I said I had an alternative theory that I would like to suggest at the present time as only an alternative, and that is that the judgment could be reopened rather than vacated in the alternative, I mean on this alternative theory, that the failure to disclose the non-existence of this relationship by the petitioner to the Court would be tantamount to an imposition by the Court that would warrant the reopening on the ground of fraud, irrespective of whether the facts were known to the defendant Essex County. Our position, incidentally, is that it wasn't known to the Bankers Indemnity, and intend to offer proof on that.

The Court: Was the Bankers Indemnity a party to the proceeding?

Mr. Brigadier: Yes, they were.

The Court: Was the judgment against the Bankers'?

Mr. Brigadier: Yes, it was. I am merely offering that simply to have that fact on the record for whatever value it may have. The application is not being based on newly discoverd evidence as it is rather obvious, it seems to me from the record, that the prerequisites could not be established here as required by law. 10

The Court: Is there any dispute about those facts, Mr. Roskein?

Mr. Roskein: Well, I don't want to make a categorial answer, your Honor, because I don't know what part of the statement made by counsel is truth and what parts are conclusions. I think in substance the facts are that there was an award entered for compensation for 40 per cent of total, which was paid by the respondent, the Bankers Indemnity Insurance Company, together with certain temporary disability, and during that time the petitioner—or during a portion of that period of time the petitioner was receiving payments under a pension between August 16, 1940, and August 31, 1942, and under an agreement between the County and the petitioner it appears that the petitioner reimbursed the County Pension Fund to the extent of $40 bi-monthly. 20

Mr. Brigadier: That is right. 30

Mr. Roskein: So he practically took all the money that he received from the Bankers Indemnity Insurance Company and paid it back to the County of Essex Pension Fund.

Mr. Brigadier: Until August 31, 1942?

Mr. Roskein: Until August 31, 1942; that was the date on which the compensation under the 40 per cent order terminated. The County, thereupon, continued paying this man a pension, un- 40

doubtedly under an agreement to be reimbursed when the petitioner received his money from the Bankers Indemnity Insurance Company.

If there is any fraud, it appears that the fraud is on the part of persons of which the petitioner, certainly not a party here, has no—should not
10 be charged with it. The County of Essex and Bankers Indemnity Company are parties under an agreement of insurance over which the petitioner has no control and which we have no interest in. This appears to be more of a dispute between the County of Essex and the Bankers Indemnity Insurance Company rather than one in which the petitioner Patrick Breheny is involved.

The Court: Let me clear up certain facts, and if I am in error——

20 Mr. Brigadier: There is one misstatement that Mr. Roskein made we ought to correct right now. There is nothing to show any agreement beyond the original award of 40 per cent between the pension fund and Breheny. You can check that.

The Court: Can't we agree that these are the facts, and if I am in error you straighten me out: That at the time of the hearing, resulting from the filing of the second petition for increased disability, the law was in existence which provided
30 that a man who was on pension shall not be entitled to compensation. The respondent didn't set that up as a defense in the proceedings, and there was no testimony in the proceeding to the effect that the petitioner was being paid a pension. The County of Essex, through its properly constituted agents, were aware of the fact that this man was being paid a pension at the time of the hearing, but didn't make it known to me during the course of the trial or didn't set it up in the answer.

40 Mr. Brigadier: We say didn't make it known to us. I don't think it is relevant.

The Court: When you say "us", who do you mean?

Mr. Brigadier: Bankers Indemnity.

Mr. Roskein: Any knowledge on the part of the employer is knowledge to the insurance company.

The Court: I don't want to argue the matter. I want to get the agreed facts on the record. Then it also appears that there was an understanding at the time of the hearing between the County authorities and the petitioner that he would reimburse the Pension Commission to the extent of the compensation that was to be paid to him.

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Mr. Brigadier: No. There was an understanding as to the original award which had already been filed long before, and on August 31, 1942. Don't forget: This disability, this petition for increased disability——

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The Court: Wasn't that agreement to continue?

Mr. Brigadier: No. I am prepared to show—what happened is that there was an exchange of letters between Breheny, that he gave to the Pension Commission, that the arrangement was until those payments were concluded.

The Court: What I would like to know is if there is any fraud, where it is if the facts are entirely within the knowledge of the respondent.

Mr. Brigadier: I said that only in the case—I didn't say there was fraud committed upon the respondent. It was a fraud in the sense that there was an imposition upon the Court in that the petitioner failed to disclose to the Court that there was no relationship of employer and employee on which he was predicating his right to compensation.

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The Court: There was that relationship at the time of the accident. All the rights and obligations flow out of that accident, and the relationship of the parties is as of that time.

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Mr. Brigadier: We don't agree to that, sir.

The Court: That is the law. It is well accepted.

Mr. Brigadier: Our contention is that the relashionship of employer and employee must continue throughout the entire payment of compensation.

The Court: Oh, no.

10 Mr. Brigadier: That is going to be our contention.

The Court: No. If that were so——

Mr. Brigadier: At any rate——

The Court: Many of our cases would fall because a man is hurt while working for one respondent, he has a period of disability and subsequently, in the vast majority of cases, they go to work for another employer. In the meanwhile there is an increase of disability. Just because he

20 went to work for another employer, and he is not working for the original employer, therefore, he is not entitled to the benefit of the Act on that basis?

Mr. Brigadier: I didn't say—I am prepared to meet that argument. What I want to know first is whether we are getting a stipulation of facts on the record, not a stipulation of an argument of law.

The Court: I want to get the facts.

30 Mr. Brigadier: We are not getting them because we are involved in argument of law. I will answer your argument: Of course, a man may work for two masters. He can work for one master, he can work for another.

The Court: Well, put in the record whatever testimony you wish.

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JACOB SEIDLER, called as a witness on behalf of the respondents, being first duly sworn, testified as follows:

*Direct examination by Mr. Brigadier:*

Q. Mr. Seidler, by whom are you employed? A. County of Essex.

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Q. In what office? A. County Treasurer's Office.

Q. As an employee of the County Treasurer's Office, have you been delegated any task with respect to the County Employees' Pension Commission of the County of Essex? A. Yes. I was appointed by the treasurer as secretary of the Pension Commission.

Q. That is the County Treasurer? A. That is the law, yes.

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Q. And as secretary of this Commission, you have in your possession the records of the Commission? A. I have.

Q. You have been served with a subpoena duces tecum to produce these records this morning? A. I have.

Q. In connection with the application of Patrick Breheny for petition? A. Yes.

Q. Will you produce those records? A. They are right here (indicating).

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Q. This is your entire file? A. That (indicating) is the entire Breheny file, with a few separate letters that I don't think have any bearing on this at all. I have the transcript of the testimony here, too, of the original hearing.

(Discussion off the record.)

Mr. Brigadier: I wish to offer in evidence the file produced by the witness as the file of the Pension Commission, County Em-

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ployees' Pension Commission of the County of Essex.

(The articles referred to were received in evidence and marked from R-1-A to R-1-AU.)

10 The Court: Counsel have agreed that counsel for the applicant will take the file marked R-1, constituting a number of pages, for the purpose of having a photostatic copy made thereof, one for himself and one for the petitioner's attorney, with the further understanding that the photostatic copies will be hereafter used in the proceedings in lieu of the original, which will be returned to the County after it has

20 served its purpose, and having the same photostated.

Is that your understanding, gentlemen?

Mr. Brigadier: Yes.

I wish to offer in evidence, as Exhibit R-2, stenographic transcript of the testimony taken in the matter of Patrick Breheny an application for pension for the County Employees' Pension Commission of the County of Essex, New Jersey. This

30 has also been produced by Mr. Seidler from the file of the Pension Commission.

The Witness: October 14, 1940.

Mr. Roskein: That is the date when the testimony was taken.

The Witness: That is the date of the hearing; we call it a formal hearing.

(The article referred to was received in evidence and marked R-2.)

Mr. Brigadier: Mr. Roskein, I direct your attention to Exhibit R-1, T. C. Moffatt

40 and Company, addressee of a letter appear-

ing as R-1-D, and in other letters contained within the same exhibit R-1, it is stipulated that they are agents that write the County business and place it with the Bankers Indemnity Insurance Company.

It is stipulated that Charles E. McCraith, Junior, is the attorney for the—counsel for the New Jersey Civil Service Association, Inc., Essex County Council #1. 10

William F. Grant, M. D., it is stipulated is or was the doctor who made the medical examination on behalf of the County Employees' Pension Commission.

By Mr. Brigadier:

Q. Mr. Seidler, pursuant to my request have you produced records to show the payment of pension that had been made? A. Yes. I have the payroll book right here. 20

Q. To Mr. Breheny, and that payroll book shows the date the payments had been made? A. That is right.

Q. Have you produced some of the checks showing those payments? A. Yes. I have six checks. You have them there.

Q. Now, I show you Check #160, dated February 28, 1941. A. $190.84. 30

Q. And that is the first check that was paid? A. That is the first check that was paid.

Q. And that was, as indicated on the check, total pension $710.84, deduction for compensation 520. A. Thirteen times forty $520 leaving a balance of $190.84.

Q. That was the first check he received? A. That is the first check that brought him to date.

Q. Brought him down to February 28, 1941? A. That is right. 40

Q. From August 1, 1940, to February 28, 1941. A. Pardon me. That is August 16, 1940.

Q. The check says August 1. I thought it should be August 16. A. August 16.

(The article referred to was received in evidence and marked R-3.)

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By Mr. Brigadier:

Q. I show you check to the order of Patrick Breheny, County Employees' Pension Commission, County of Essex, dated March 15, 1941, in the sum of $14.68, and ask you whether that was the next check he received? A. That is right, that is the next check after the big one. That covered the first half of March, with the $40 deduction taken off.

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Q. And beginning with that date of March 15, 1941, down to but not including December 15, 1942, were there monthly checks paid to him in the same amount of $14.28? A. I wish to correct that; semi-monthly, $14.68.

Q. I mean semi-monthly of $14.68. A. Semi-monthly of $14.68 until the end of August, 1942, inclusive.

Mr. Brigadier: Now, I will offer in evidence the check dated March 15, 1941.

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(The article referred to was received in evidence and marked R-4.)

By Mr. Brigadier:

Q. I show you check dated August 15, 1942, to the order of Patrick Breheny, $14.68, and ask you whether that was the last of the checks that he received in the amount of $14.68. A. That is right. Yes, sir.

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Q. That was the last payment that coincided with the deduction of compensation? A. That is right.

(The article referred to was received in evidence and marked R-5.)

By Mr. Brigadier: 10

Q. I show you check dated September 15, 1942, to the order of Patrick Breheny in the sum of $54.68, and ask you whether that is the first of the checks which he received for the full amount of pension without deductions? A. That is right, yes, sir.

(The article referred to was received in evidence and marked R-6.)

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By Mr. Brigadier:

Q. From September 15, 1942, down to January 31, 1946—strike that out. A. Down to date, I would say, but those are the last checks I could get. The others aren't back from the bank yet.

Q. I show you check dated January 31, 1946, to the order of Patrick Breheny in the sum of $54.68, and ask you if that represents the check for the monthly full payment of— A. Semi-monthly. 30

Q. Semi-monthly full payment of pension? A. It does.

Mr. Brigadier: I offer that in evidence.

(The article referred to was received in evidence and marked R-7.)

By Mr. Brigadier:

Q. Now, between September 15, 1942, and January 31, 1946, have payments been made to 40

Patrick Breheny semi-monthly for the full amount of pension, $54.68? A. $54.68, they have, on the first and fifteenth of the month.

Q. And since January 31, 1946, down to the present time have the payments continued? A. They have. The checks aren't back from the bank
10 yet.

Q. In the same full amount? A. That is right.

Q. You haven't produced the checks because they haven't been returned from the bank? A. That is right.

Q. Since September 15, 1942, have any deductions been made of any amount from these pension checks? A. None whatsoever.

Q. He has been receiving the full amount of his pension? A. Full amount on pension.
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Q. Which I take it is 50 per cent of total annual salary? A. That is right.

Q. Is that the maximum pension under the law? A. That is right. Do you want the amount put in there? His salary was——

Q. Suppose you give us his annual salary? A. His annual salary was $2,625, and his pension is $1,312.50 per annum, which is equal to $54.68 semi-monthly.

30 The Court: I assume the stipulation in respect to having these exhibits photostated applies to all these records?

Mr. Roskein: Yes, your Honor.

By Mr. Brigadier:

Q. Now, have you produced here the minute book of the Pension Commission? A. I have.

Q. Will you turn to the minute that records
40 the action taken with respect to the application

of Patrick Breheny for pension? A. I have it here (indicating). February 27, 1941 minutes.

Q. Will you produce it, please?

The Court: Why don't you read into the record the part that you wish.

Mr. Brigadier: I haven't seen it yet. 10

The Witness: I would not want to part with this book.

(Discussion off the record.)

By Mr. Brigadier:

Q. Will you read beginning with "Newark, New Jersey," and ending down here at "1942."? A. Yes. (Reading) "Newark, N. J., Thursday, February 27, 1941. Meeting of the Pension Commission called to order by President Reed on above date at 2 P. M. 20

"Roll Call—Members present: Messrs. Reed, Renton, Crane and Verhoek. Excused—Mr. Richards. Quorum present.

"The Commission then took up the Disability Pension Application of Patrick Breheny, Painter at Overbrook; age 50 and 8 years' service; formal hearing on this case having been held on October 14, 1940. Moved, seconded and carried that he be granted a pension of $1,312.50 per annum (50% 30 of his annual salary of $2,625.00) effective August 16, 1940 less semi-monthly deductions of $40.00 each from that date until such time as his Workmen's Compensation payments will be terminated by the Compensation Bureau. These payments of $20.00 per week from the Compensation Bureau will continue until August 1942."

Mr. Brigadier: I think that is all.

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*Cross-examination by Mr. Roskein:*

Q. Are there any other minutes referable to Patrick Breheny? A. Not with the Pension Commission.

Q. Not with the Pension Commission? A. Not with the Pension Commission.

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Q. Have you got the minutes of the County of Essex or any of the subdivisions of the County? A. I haven't. The Clerk of the Board of Freeholders would have that.

Q. And are there any minutes of the Board of Freeholders in respect to Patrick Breheny? A. I could not say. I don't know what they have.

Q. Who is the secretary of that Board, of the Board of Freeholders? A. Robert Carpenter, Clerk of the Board.

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(Discussion off the record.)

By Mr. Roskein:

Q. Mr. Seidler, the reason the checks seemed to be in the amount of $14.68 on or about August 15, 1942, was because he ceased, the petitioner, Patrick Breheny ceased receiving his Workmen's Compensation of $20.00 a week? A. That is right, in accordance with the letter of the T. C. Moffatt & Company under date of—this is under date of

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August 3, your Exhibit R-1, letter of Moffatt August 3, in which they said, "We refer to the above captioned claim. Please be advised that on or about August 31, 1942, final payment of the award of 40 per cent of partial permanent total disability or 200 weeks at $20 a week in toto of $4,000 will be paid to Mr. Breheny." That is in accordance with their motion. I assume Mr. Moffatt notified us and we stopped making deductions.

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Q. Had not the subsequent award of total disability, which was entered by his Honor, Commissioner Medinets on July 14, 1943, been taken up on appeal to the Common Pleas Court and subsequently the Supreme Court and Court of Errors and Appeals for review, the County would have still continued taking off the $20 a week that Mr. Breheny would have been receiving in compensation. 10

Mr. Brigadier: Just a moment. I object on the ground, first, that this man is not competent to testify what the County would do, and moreover, it is a question of law. It is not a question of fact. It is question of what they are legally delegated and not delegated to do. The record speaks for itself as to what we did do. The interpretation is for you to make as to what those minutes mean under the terms of the minutes. 20

The Witness: I could not answer that question anyway.

The Court: I will draw my inferences from all the facts.

The Witness: I don't know.

By Mr. Roskein: 30

Q. Mr. Moffat was or the Moffat Company are the agents of the Bankers Indemnity Insurance Company; they always had complete access to your records and were fully advised? A. That is right.

Q. As to everything that was going on? A. Yes.

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Q. In your dealings in respect to the Workmen's Compensation claims, you dealt with the Moffat Company as representatives of the Bankers Indemnity Insurance Company? A. We did, in that particular case.

Q. And the County of Essex paid premiums, did they not, on their Workmen's Compensation insurance? A. They certainly did.

Q. And the payroll included those earnings of Patrick Breheny? A. Yes, sir.

Mr. Roskein: That is all.

(Witness excused.)

Mr. Brigadier: It is stipulated between Mr. Roskein and Mr. Brigadier that the state of the case of the Court of Errors and Appeals in the appeal taken to the Court of Errors and Appeals shall be received in evidence as a record of all the proceedings taken up to the argument before the Court of Errors and Appeals, up to and including the argument before the Court of Errors and Appeals, and also the opinion handed down by the Court of Errors and Appeals January 24, 1946, and the remittitur pursuant thereto on January 24, 1946. That will complete the record.

(The articles referred to were received in evidence and marked R-8, R-9, and R-10.)

Frederick J. Reynolds, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

*Direct examination by Mr. Brigadier:*

Q. Mr. Reynolds, on February 13, 1943, were you employed by the Bankers Indemnity Insurance Company? A. No. I wasn't employed until the 16th of February, 1943. 10

Q. And from February 16, 1943, down to the present date, have you been employed by the Bankers Indemnity? A. Yes, I have.

Q. In what capacity? A. Until January 2, of 1945 I was employed as claim manager in New Jersey. Since that time I have been claim manager in New York.

Q. So that between February 16, 1943, and—what was that date you just mentioned? A. January 2. 20

Q. January 2, 1945, you were the claim manager? A. In New Jersey.

Q. As claim manager would you be familiar with the papers and matters, reports, and so forth, investigation that would be on file in the Bankers Indemnity in connection with its case? A. I would.

Q. In that connection, were you familiar with the file of the case of Patrick Breheny against the County of Essex and Bankers Indemnity Insurance Company, a petition for increased disability award which was filed on February 13, 1943? A. I was. 30

Q. Three days before you came to work? A. Yes.

Q. From February 16, 1943, down to January January of 1945, had you been informed by anyone that Patrick Breheny had applied for and 40

had obtained a pension from the Employees' Pension Commission of the County of Essex?

Mr. Roskein: I will have to object to that.

The Witness: No.

10 Mr. Roskein: Your Honor please, it is immaterial whether this individual ever had knowledge or notice of a pension.

The Court: I am going to allow it.

Mr. Brigadier: Just let the record have the facts, that is all.

The Court: The fact that he might not have had knowledge does not lead to a conclusion that no one had any knowledge. It is merely proof that he in his official capacity had no knowledge or notice of those

20 facts.

By Mr. Brigadier:

Q. Is there anything in any of the records of the Bankers Indemnity Insurance Company, any communication, record, notice, investigation or anything else pertaining in anyway to the fact that Patrick Breheny had applied for or obtained a pension from the County of Essex Employees'

30 Pension Commission?

Mr. Roskein: I have to object to that, if your Honor please, as not the best evidence.

The Court: I will let it go in.

Mr. Roskein: The records are the best evidence.

The Court: There is no use pouring through all their files and records.

Mr. Roskein: I have no opportunity of cross examination.

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The Court: If there is any question in your mind, you can do it by cross examination and you may have access to the file if necessary.

What is the answer?

The Witness: The answer is no.

By Mr. Brigadier:

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Q. When did you first learn, Mr. Reynolds, that such an application had been made? A. Within the last week.

Q. And who informed you? A. Mr. McGrath.

Q. The gentleman that is here? A. Yes.

Q. By whom is he employed? Is he employed by the Bankers Indemnity? A. He is presently claim manager in New Jersey.

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Q. Of the Bankers Indemnity? A. Of the Bankers Indemnity Insurance Company.

Mr. Brigadier: That is all.

*Cross examination by Mr. Roskein:*

Q. Moffatt Company is your agent? A. I am not acquainted with their exact position with respect to the Bankers Indemnity.

Q. They were entrusted by the Bankers Indemnity to take charge of the Breheny case for the Bankers Indemnity Insurance Company? A. Certainly not.

30

Q. You had available, did you not, the records of the County of Essex if you sought to look them over? A. They could have been seen.

Q. Also the Pension Fund records were available to your inspection if you so desired to look at them? A. I assume so.

Q. Who is your superior, sir, or was your superior at the time this matter was pending? A.

40

Francis Van Orman, Vice-President and General Counsel.

Q. Whether or not he had any knowledge or not, you don't know? A. If he had knowledge, it wasn't in the file where every other bit of evidence was contained with respect to this action.

10 Mr. Roskein: That is all.

(Witness excused.)

---

William M. Connelly, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

20 *Direct examination by Mr. Brigadier:*

Q. By whom are you employed? A. Bankers Indemnity Insurance Company.

Q. How long have you been employed by them? A. June 1, 1944.

Q. In what capacity are you employed? A. Assistant manager.

Q. Did you have— I am sorry. I want to reframe the question.

Were you the one that called the attention of 30 the Bankers Indemnity to the fact that Mr. Breheny had applied for a pension? A. Indirectly, yes.

Q. Will you tell us how it came about? A. Well, I was working on another case in which a formal petition is now pending, and I had learned through one of the investigators that the man had also applied for a pension.

Q. When was that, incidentally? A. Sometime the first part of January, and in an effort to find 40 out whether or not that pension was going to be

granted, I wrote to the Pension Commission and asked them to permit me to sit in at the time of the hearing because we were very much interested from the liability under the Compensation Law that we were going to be called on to face. Unfortunately the hearing had already taken place, but Mr. Seidler called me and said that "We have passed on this pension and we are all ready to send out the drafts, but we would like to know whether there is anything we can do for you."

10

Q. I don't want you to go into detail on this other matter. Point out as briefly as you can how the Breheny matter arose. A. Rather than try to influence the Pension Plan or suggest anything to them, I took up the matter with Mr. Francis Van Orman, and some time the first part of February I was able to see him and we discussed it. I knew that this Breheny case had been going all the way up through the courts. I checked the angle as to whether or not he had been given a service connected disability pension.

20

Q. When was this that you checked the angle? A. The first part of February.

Q. Of this year? A. Of this year, 1946.

Q. With whom did you check it? A. I checked it with Mr. Seidler, then I learned for the first time that the man had been given a service connected disability pension.

30

Q. To whose attention did you call it? A. I called it to Mr. Van Orman's attention, and I believe Mr. Van Orman, after we had a discussion of it, contacted you.

Q. Then you sat down in a conference with me? A. We sat in a conference.

Q. Yes. A. And then I drew up some of the facts and I wrote you a letter.

40

Q. That was about a week ago? A. That is so.

Q. A little over a week ago? A. The date of my letter is February 14th. We had our conference the day before, I believe.

Q. Now, have you had occasion to examine the files in connection with this case of the Bankers
10 Indemnity? A. Well, I have gone through the files since, and I find no evidence anywhere that the man was receiving a pension.

Q. No memorandum of any kind from anyone? A. Nothing.

Q. No report? A. Nothing at all.

Q. Do you know Mr. Moffatt's connection with the—the T. C. Moffatt Company's relationship in this matter? A. The only relation it is that appar-
20 ently the T. C. Moffatt Company has written the County risk for a number of years. At first they wrote it, I believe, in the Royal Indemnity, then later on they placed it with our company because the service apparently wasn't satisfactory. But they have always controlled the County risk, and now they cover it with our company, and their request has been that in any dealings with the County we deal through them. They don't like us to deal directly because they want to keep their risk under control.
30
Q. Is there anything in any file from T. C. Moffatt Company communicating to the Bankers Indemnity in any way that there has been an application for pension or pension granted Patrick Breheny? A. I found nothing in the file whatever.

Q. No evidence of anyone else? A. I know of no one. T. C. Moffatt writes policies for other insurance companies as well as for the Bankers Indemnity.
40
Mr. Brigadier: Your witness.

*Cross examination by Mr. Roskein:*

Q. Why didn't you seek out and determine that a pension had been granted, if it had, prior to February of this year? A. As I said before, just in preparation of this one case that I was working up, I came across the citation of your case, Reinhold, I believe, against the City of Irvington. In digging into that and getting a copy of the brief and study of the facts, I thought that the issue raised was very much with our Breheny case as well as another one. Why the issue was not raised before, I don't know.

Q. Then it is because the law was brought to your attention as it should be around February of this year? A. Well, you know, the law——

Q. That caused you to make this inquiry? A. The reason I made this inquiry is I discovered this case, this citation that I obtained from somewhere, and in digging into it I thought it would apply to our case. Then I took it up with Mr. Van Orman.

Q. In the investigation of the Breheny case the occurrence of the accident to the employee, checking the payroll and so forth, that went through the regular routine, did it not? A. I would not know. That all happened before my time.

Q. And who was in charge of that investigation? A. Offhand I don't know.

Q. You don't know? A. I believe there was an investigator by the name of Tompkins, I think his name is.

Q. And subsequently, at the time of the reopening for increased disability, there was an investigation made by your company, was there not? A. I don't know that, Mr. Roskein.

Q. Isn't that the routine? A. Well, it may and it may not be. I should have assumed that would be the wisest thing to do.

Q. The defense was prepared, was it not, and produced in court? A. You are asking me to state something I don't know anything about.

Q. Weren't you connected with the company at that time? A. No. It is not two years yet, Mr. Roskein.

10 Q. You don't know what was done then in the preparation of the case? A. I only know what would be done at the present time.

Q. At the time when you went with the company, did you ever seek to peruse the records of the Pension Commission or the County, or to seek to determine whether a pension had been granted? A. I had no reason to. I was a new man. I had to break in on the job, and gradually some of these old cases that had come out by the system that

20 we have, and if I had the time I tried to dig into them.

Mr. Brigadier: I will be willing to stipulate with Mr. Roskein that we didn't do it, also be willing to stipulate that the records were available. Does that satisfy you?

Mr. Roskein: Yes.

The Court: They are public records. Of course they are available.

Mr. Brigadier: So that there will be no

30 question, we will concede that in the case.

Mr. Roskein: That is all, sir. Thank you.

(Witness excused.)

(Discussion off the record.)

Mr. Brigadier: I am requesting that we be afforded an opportunity to first brief the question, and then to come back for all argument plus the brief.

Mr. Roskein: You will submit me your

40 brief?

Mr. Brigadier: In advance.

Mr. Roskein: Sufficiently in advance.

Mr. Brigadier: Yes, because the purpose of the oral argument is that we should be fully acquainted with the material.

Mr. Brigadier: Mr. Brigadier is taking Exhibits R-9 and 10, and also R-1 and 2. 10

The Court: For what purpose?

Mr. Brigadier: I am going to have R-1 and R-2—we already have that in the record—photostatic copies made of them, and R-10 and R-9 I am going to run off typewritten copies for Mr. Roskein.

The Court: You have no objection to it, Mr. Roskein?

Mr. Roskein: No.

The Court: You will see to it that I get back the records as soon as possible. 20

Mr. Roskein: Let the records show my formal application at this time for a dismissal of the petition by the County of Essex and the Bankers Indemnity Insurance Company of the present application.

The Court: I will reserve decision, pending the filing of the briefs. How soon will those briefs be before me?

Mr. Brigadier: I will get mine in within seven or eight days. 30

The Court: When will your answer come in?

Mr. Roskein: About ten days thereafter.

The Court: Suppose I give each side ten days. You will serve a copy of your brief on Mr. Roskein within ten days. He will reply within ten days after the receipt of your brief, and I will dispose of the matter on the briefs and oral argument on March 40

26, at 10:30 o'clock in the forenoon, in my office in the City of Newark.

I wish to have the record show that the only exhibit left with me now is R-8 and the notice of the application to vacate.

Mr. Brigadier: R-3, 4, 5, 6 and 7 were
10 also taken by Mr. Brigadier.

---

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically before me at the time, place and date hereinbefore set forth.

20

---

Deputy Compensation Commissioner.

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by me at the time, place and date hereinbefore set forth.

JACOB BAER
30 Certified Shorthand Reporter.

40

## Exhibit R-1-A.

### Letter Dated August 7, 1940.

(160)

August 7, 1940

10

Patrick Breheny
19 Stuyvesant Avenue
Newark

Mr Henry Berg
Supt. of Plants & Structures

Dear Sir

I hereby make application for re-tirement on Pension effective August 16, 1940.

20

I make this application because of Physical disability incurred in the line of duty.

I am fifty years old and I have been employed in the County for eight years.

My Doctor is writing you a letter as to my Physical condition.

Trusting this application will meet with your approval I am very truly yours,

Patrick Breheny

30

50—8

Pension payts made to & incl. 8/15/40 √√

| | Annual | P/R |
|---|---|---|
| Sal ........................ | 2625. | 109.37√√ |
| Pens ½ ........................ | 1312.50 | 54.68√√ |
| from 8/16/40 if granted | | |

40

## Exhibit R-1-B.

### Memorandum.

On Feb. 26, 1941, Mr. Crane telephoned Mr. Speakman who then advised him to have the Breheny case settled as soon as possible by giving him
10 his pension as of August 16th, 1940 and deduct therefrom $40.00 per semi-monthly pay until such time as his workmen's compensation payments of $20.00 per week are terminated.

J. S.

| | Semi-Mo. Pension | Deduction | Net |
|---|---|---|---|
| | 54.68 | 40.00 | 14.68 |
| 8/16/40 to 2/28/41 | x 13 | x 13 | x 13 |
| | 710.84 | 520.00 | 190.84 |

20

30

40

## Exhibit R-1-D.

**Letter Dated March 4th, 1941.**

Copy

County Employees' Pension Commission
of the County of Essex

Room 528 Hall of Records
Newark, N. J., March 4th, 1941.

10

T. C. Moffatt & Co.,
35 Clinton St., Newark, N. J.
Att. Mr. A. L. Zimmerman.

Re: Claim #1-C-43551—County of Essex
Patrick Breheny—Injured Employee
(Dep't. of Plants & Structures)

20

Gentlmen:—

Regarding your letter of December 16, 1940 in the above matter, please be advised that at a meeting of the Pension Commission held on the 28th ultimo, Mr. Breheny was granted a pension of $1,312.50 per annum (one-half of his salary) effective August 16, 1940 less deductions of $40.00 per semi-monthly pay until such time as his $20.00 weekly compensation payments have been terminated.

30

Will you be kind enough to have a memorandum made for the future so that we may receive due notice from you as to when the last compensation payment is made to Mr. Breheny in order that we may resume our regular pension payment, and greatly oblige.

Yours very truly,

40

Secretary.

## Exhibit R-1-E.

### Letter Dated February 27, 1941.

COPY

COUNTY EMPLOYEES' PENSION COMMISSION
OF THE COUNTY OF ESSEX

10 Room 528 Hall of Records
Newark, N. J. February 27, 1941.

Mr. Patrick Breheny,
19 Stuyvesant Ave.,
Newark, N. J.

Dear Sir:—

At a meeting of the Pension Commission held today, your application for pension due to dis-
20 ability incurred in line of duty, was favorably acted upon. The Commission granted you a 50% pension effective Aug. 16, 1940 and subject to semi-monthly deductions of $40. each from that date until such time as your Workmen's Compensation payments of $20. per week will be terminated by the Compensation Bureau. There are now due you for the period from Aug. 16, 1940 to Feb. 28, 1941—13 semi-monthly pension payments of $54.68 each—$710.84 less 13 deductions
30 (for compensation) of $40. each—$520.00; balance due you to date, $190.84.

Please call upon the undersigned at your earliest convenience for signing the necessary papers to put same into effect.

Yours very truly,

Secretary.

Copy to County Counsel Vanderbilt
40 " " Mr. Charles E. McCraith, Jr.,
" " Superintendent Henry H. Berg.

## Exhibit R-1-G.

### Letter Dated February 1, 1941.

Essex Council No. 1

New Jersey Civil Service Association, Inc.
Headquarters: 28 East Park Street,
Newark, New Jersey

10

February 1, 1941.

Jacob Seidler, Secretary,
County Employees' Pension Commission,
Hall of Records,
Newark, New Jersey.

Dear Sir:

20

Will you kindly bring to the attention of the Pension Board that on January 13th I advised the County Counsel that Mr. Patrick Breheny agreed to reduction of his pension payments up to the termination of the compensation award on condition that pension be paid him from July 15, 1940 at the rate of $27.34 per week and continuing for 35 weeks from the date aforesaid.

I have been instructed to institute proceedings in the Supreme Court unless Mr. Breheny receives checks within the next few days.

30

Yours very truy,

Charles E. McCraith, Jr.
Charles E. McCraith, Jr.

cem:mw

2/3/41 called Speakman he said he would get in touch with McC.

40

## Exhibit R-1-H.

### Letter Dated January 24th, 1941.

January 24th, 1941.

G. Dixon Speakman, Esq.,
c/o Arthur T. Vanderbilt, Esq.,
744 Broad St., Newark, N. J.

10

Re: Patrick Breheny

Dear Mr. Speakman:—

I am in receipt of your letter of the 23rd instant together with copy of letter from Mr. McCraith under date of January 13th, 1941.

After a persual of same, permit me to submit the following counter-proposal for your consideration, allowing for the deductions totalling $968. requested by them:

20

Total amount of compensation awards $4,477.14 less credits requested of $968.00 leaving a net balance of $3,509.14 to be deducted from future pension payments, or an equivalent of approximately 175 weeks at $20. per week, which would cover the period from August 16, 1940 to December 31, 1943. This means that instead of receiving a regular semi-monthly pension check of $54.68 ($1,312.50 per annum pension) there would be a deduction of $43.33 semi-monthly (equivalent to $20.00 per week) leaving a net pension check of $11.35 semi-monthly for the above specified period. If his pension were granted by the Commission say for example, on February 15, 1941, he would be entitled to a total pension check of $136.20 covering the period from Aug. 16, 1940 to Feb. 15, 1941 (12 x $11.35), after which latter date he would receive semi-monthly pension checks of $11.35 each until January 15, 1944, when

30

40

*Exhibit R-1-H.*

his regular pension check of $54.68 would become effective.

Please let me know what you and Mr. McCraith think of this proposal and if it meets with your approval, please furnish me with brief, outlining the plan in full detail so that I may submit same to the Commission for its ratification. 10

Very truly yours,

County Treasurer

20

30

40

## Exhibit R-1-K.

### Letter Dated January 13, 1941.

COPY

Letterhead of

10

ESSEX COUNCIL No. 1

New Jersey Civil Service Association, Inc.
28 East Park Street, Newark, New Jersey

January 13, 1941

G. Dixon Speakman, Esq.,
c/o Arthur T. Vanderbilt, Esq.,
744 Broad Street,
Newark, New Jersey.

20

Dear Sir:

Pursuant to our conference, I took up with Mr. Patrick Breheny the matter of deduction of $20 per week being made from his pension payments until such time as the compensation award should terminate.

I pointed out to Mr. Breheny the possibility of resulting litigation in the event of his refusal and advised, without prejudice to his statutory rights, that he might obtain an immediate determination in his favor without expense if he were to accede to the suggestion.

30

I am today advised by Mr. Breheny that in order to avoid possible litigation he will agree to the deduction being made from his pension if consideration is given to the following:

Between July and November 1, 1938 he received no salary from the County and thus suffered a loss of wages of $872., less $20. per

40

*Exhibit R-1-K.*

week compensation or a net loss of $532. In addition he was required to pay a counsel fee to his attorney David Roskein of $250, medicines and doctors' bills, $60.; he refunded to the County his compensation payments beween May 15 and July 1, 1938 in the amount of $126., making a total of $968. 10

It will be observed from the above that he has not profited to the full amount of the award and it does constitute a considerable sum of money paid out by the head of a family who is obliged at the same time to support a wife and six children.

He will agree therefore, that if pension payments begin as of July 15, 1940 at the rate of $27.34 per week and continue for 35 weeks at that rate (to enable him to recapture actual disbursements and 20 the amount which the County has profited), then at the expiration of such period the pension payments may be reduced to $7.34 per week, representing the difference between his statutory pension and the amount of compensation payments, and continued in the reduced amount until the compensation award terminates.

This appears to be a very fair proposition on his part, particularly in view of my opinion that the Supreme Court would allow him a pension of half 30 pay from the time of sustaining the permanent disability or from the time that his salary was discontinuued, without regard to compensation payments.

Will you kindly bring this to the immediate attention of the County Pension Board and advise

40

*Exhibit R-1-K.*

me of their decision at the earliest possible moment.

Yours very truly,

CHARLES E. MCCRAITH, JR.

10 cem;mw

4,888.14
968

2 3,509.14

ded. 175 wks from 8/16/40 @ 20 wk to 11/25/43
12/31/43

43.33
20 20

23.33 from 8/15/40
wk

30

40

## Exhibit R-1-Q.

### Letter Dated December 16, 1940.

Telephone Market 3-0611

T. C. Moffatt & Co.
Insurance

Essex Building, 35 Clinton Street
Newark, N. J.

10

December 16, 1940.

County Employees' Pension Commission,
Hall of Records,
Newark, N. J.

*Att. Mr. Jacob Seidler:*

20

Re:—Claim #1-C-43551—The County of Essex—
Patrick Breheny—Injured Employee

(Dept. of Plants & Structures)

Gentlemen:

In accordance with your telephone request to the writer, we now wish to advise as follows in connection with the captioned claim:

According to the Determination rendered by the Compensation Court, it was established that the above employee sustained an injury while in the employ of The County of Essex on May 18, 1938, and he was paid temporary compensation for a period of twenty-three weeks and six days from May 18, 1938, up to and including October 31, 1938, at $20. per week, a total of $477.14. This amount was paid in two separate drafts, one in the amount of $125.71 and the other $351.43, both of which were sent to County Treasurer Crane on May 21, 1940.

30

40

*Exhibit R-1-Q.*

In addition to this temporary compensation payment, Mr. Breheny was awarded permanent compensation of 40% of partial permanent total disability, or 200 weeks, at $20. per week, a total of $4,000.

The first permanent compensation draft in the
10 amount of $1,480. in payment of seventy-four weeks of the award was forwarded to the injured's Attorney, and paid for the period from November 1, 1938, up to and including April 1, 1940, and since that time a payment of $80. once every four weeks has been made to the injured, the last draft paying up to and including December 9, 1940, bringing the total amount of permanent compensation paid from November 1, 1938, to December 9, 1940, inclusive, to $2,200., the next permanent draft of $80.
20 being due on January 6, 1941, and he will continue to receive these monthly payments until the entire award of $4,000. mentioned above has been paid.

For your further information, would advise that from November 1, 1938, up to and including August 15, 1940, the injured received permanent compensation amounting to $1,868.55, leaving a balance as of this last mentioned date of $2,131.45, the final payment date of which will be approximately August 10, 1942.

30 We trust the foregoing is the information you desire.

Yours very truly,

T. C. Moffatt & Co.,
A. L. Zimmerman
A. L. Zimmerman.

ALZ:FT

40

## Exhibit R-1-AP.

### Letter.

Patrick Breheny
18 Stuyvesant Ave.
Newark

Mr Jacob Seidler 10

Dear Sir I wish to inform you that I received the final compensation check amounting to $40. This along with your Pension check of $14.68 will pay for the first half of this month Sept 15. beginning Sept 16. I will expect the full amount of Pension

Thanking you in advance I remain very truly yours

PATRICK BREHENY 20

R 9/14/42

30

40

## Exhibit R-1-AR.

### Letter Dated August 3, 1942.

Telephone Market 3-0611

T. C. MOFFATT & Co.
Insurance

10

Essex Building, 35 Clinton Street
Newark, N. J.

August 3, 1942.

Jacob Seidler, Sec'y.,
County Employees' Pension Commission,
Hall of Records,
Newark, N. J.

RE:—Claim #1-C-43551—The County of Essex—(Dept. of Plants & Structures)—Patrick Breheny —Injured

20

Dear Mr. Seidler:

With reference to the above captioned claim, please be adised that on or about August 31, 1942, final payment of the award of 40% of partial permanent total disability, or 200 weeks, at $20. per week, a total of $4,000, will be made to Mr. Breheny.

This letter is in accordance with your request to our office on March 4, 1941.

30

If you desire any further information regarding this claim, please do not hestiate to call upon us.

Yours very truly,

T. C. MOFFATT & Co.,
A. L. ZIMMERMAN.
A. L. ZIMMERMAN.

FT.

8/16/31/42 Check for $14.68

40

9/1/15/41 " " 54.68

## Stipulation.

It is hereby stipulated between counsel for the respective parties in the case of Breheny *v.* County of Essex et al, that in lieu of printing the State of the Case of this cause when the matter was before the Court of Errors and Appeals, and which State of the Case was offered as an Exhibit before the Workmen's Compensation Bureau upon the motion to vacate the judgment entered therein, that the following be taken as matters of fact shown by such State of Case.

10

1. Under date of September 8th, 1938 petitioner executed a claim petition, alleging injuries arising out of and in the course of his employment with the County of Essex, which accident occurred on May 18th, 1938.

20

2. An answer to said claim petition on behalf of the respondents, County of Essex and Banker's Indemnity Insurance Company was filed under date of November 21st, 1938, denying all of petitioner's allegations with respect to accident, causal relationship, and notice and knowledge of the accident.

3. On February 13th, 1943 a petition for increased disability was filed.

30

4. On March 25th, 1943 an answer was filed on behalf of the respondents County of Essex and Banker's Indemnity Insurance Company, admitted that the petitioner was in the employ of the County of Essex at the time of the alleged accident, and setting up as the sole defense respondent's denial "that petitioner's disability has increased since the adjudication," of March 5th, 1940 at which time petitioner was awarded 40% of total disability.

40

*Stipulation.*

5. On July 14th, 1943 judgment was entered in the Workmen's Compensation Bureau, increasing Breheny's disability award to 100%.

6. On September 26th, 1944 the aforesaid judgment of the Bureau was affirmed by the Essex County Court of Common Pleas.

10

7. On November 25th, 1944 a Writ of Certiorari was allowed.

8. On April 13th, 1945 judgment of the Common Pleas was affirmed by the Supreme Court.

9. On January 24th, 1946 the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals.

20

10. It is specifically agreed that the State of the Case makes no reference to Breheny's status as a pensioner and that no such question was raised by the respondents in the Compensation Bureau, in the Essex Pleas, in the Supreme Court and in the Court of Errors and Appeals.

David Roskein,
Attorney for Petitioner-Prosecutor.

30

Maurice C. Brigadier,
Attorney for Respondents-Defendants.

40

**Employee's Claim Petition for Compensation.**

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU.

| | |
|---|---|
| PATRICK BREHENY,<br>Petitioner,<br>*vs.*<br>COUNTY OF ESSEX and BANKERS INDEMNITY INSURANCE CO.,<br>Respondent. | Received at Trenton............<br>Claim Petition No. ..........<br>Date of Accident ..............., 194.... |

10

If known, state name of insurance company: Bankers Indemnity Insurance Co.

Attorney for Petitioner: David Roskein, 17 Academy Street, Newark, N. J.

20

To the Workmen's Compensation Bureau of New Jersey:

Petitioner alleging that he sustained an accident arising out of and in the course of his employment with the respondent, respectfully states:

1. What is your name? Patrick Breheny.

2. Where do you live? 25 Norwood St., Newark, N. J.

30

3. Sex: Male.

4. Age: 55.

5. Marital Status: Married.

6. By whom were you employed at the time of the accident? County of Essex (Essex County Hospital) Cedar Grove, N. J.

40

7. What was the business of your employer? County Institution.

8. Did you give written notice to your employer at the time you were hired, or later, that Article 2 of the Workmen's Compensation Law of New Jersey should not apply to you? No.

10

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your injury? Yes.

11. If so, on what date? ..................

12. Did you notify your employer of such injury? Yes.

20

13. If so, what date? Employer had knowledge.

14. What was your regular occupation? Painter.

15. What kind of work were you doing at the time of accident? Painting.

16. When did the accident happen? May 18th, 1938.

30

17. Where did the accident happen? At the Essex County Hospital, Cedar Grove, N. J.

18. What was the nature of the accident, and how did it happen? While employed by respondent erecting scaffolding sustained injuries hereinafter set forth.

19. On what date were you compelled to stop work because of the injury? Shortly thereafter.

20. On what date were you well enough to work again? At intervals thereafter.

40

21. If still disabled, on what date do you think you will be able to work? ..................

22. Give nature of any injury from which you will recover: ..................

23. Has any permanent injury resulted? If there has been amputation or loss of usefulness of any member or impairment of any physical organ, explain fully: Injuries to body, limbs, internal injuries, heart, injury to nervous system. 10

24. Were your wages fixed by piece-work? ........

25. If so, what was your average weekly wage? ..................

26. If wages were fixed by the hour, state rate per hour: ..................

27. Give number of hours in ordinary working day: .................. 20

28. Give number of days in an ordinary working week: ..................

29. State the amount of weekly wages: $55.00.

30. Have you been paid compensation? Received compensation for some temporary and some permanent disability.

31. If so, how much? .................. Compensation Rate: .................. Temporary Disability: .................. Permanent Disability: .................. 30

32. Has your employer promised to pay you any compensation? ..................

33. If so, how much? ..................

34. Was medical aid required? Yes.

35. Did you receive any medical, surgical or hospital service? Yes. 40

36. Did you request your employer to furnish these services? ...............

37. Were they furnished? ...............

38. If so, between what dates? ...............

10 39. If not, what sum did you expend for medical, surgical or hospital services? ...............

40. Give name and address of physician and hospital: ...............

41. What other facts are there which you believe important? Petitioner's disability has materially increased since prior adjudication herein on March 15th, 1940. Judgment will be claimed for compensation for such temporary and perma-
20 nent disability to which petitioner may be entitled, together with medical costs and such other relief as he may be entitled to under the terms and provisions of the Workmen's Compensation Act of New Jersey.

42. Have you made claim to your employer for compensation? ...............

Your petitioner therefore prays that the Workmen's Compensation Bureau will determine the amount of compensation due your Petitioner from
30 said Respondent, under Revised Statutes of New Jersey, 1937, Title 34, Chapter 15, and the Acts supplemental thereto and amendatory thereof, and that our petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will pray, etc.

PATRICK BREHENY,
Petitioner.

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*Employee's Claim Petition for Compensation.*

State of New Jersey, } ss.:
County of Essex, }

Patrick Breheny, of full age being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

10

Patrick Breheny,
Petitioner.

Subscribed and sworn to before me, this day of February, 1943, at Newark, New Jersey.

Mortimer Wald,
An Attorney at Law of New Jersey.

20

(This affidavit may be sworn to before any person authorized to administer an oath.)

To the Respondent:

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. Unless an answer in duplicate is filed within ten days after the service of this notice, with the Secretary of the Bureau, in the State House at Trenton, the Petitioner will proceed with proof of claim according to law.

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Workmen's Compensation Bureau

..............................................................
Secretary.

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**Respondent's Answer to Employee's Claim Petition.**

NEW JERSEY DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU.

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PATRICK BREHENY,
Petitioner,

*vs.*

COUNTY OF ESSEX and BANKERS INDEMNITY INSURANCE CO.,
Respondent.

Received at Trenton Mar. 25, 1943.

Claim Petition No. 43013.

20 Attorney for Respondent Edwin Jos. O'Brien, 17 Lombardy St., Newark, N. J.

In answer to Claim Petition filed in this cause Respondent states:

1. Name of Respondent County of Essex (Essex County Hospital) Cedar Grove, N. J.

2. Was the petitioner in your employ at the time of the alleged accident? Yes.

3. State your business. County Institution.

30

4. Did you receive written notice from the Petitioner at the time of hiring, or later, that Article 2 of the Workmen's Compensation Law of New Jersey was not to apply to him? No.

5. Did you give such written notice to him? No.

6. Did you have knowledge of an injury occurring at the time alleged in the petition? See #36 and #37.

40 7. If so, on what date? .................

*Respondent's Answer to Employee's Claim Petition.*

8. Did you receive notice of an injury occurring at the time alleged in the petition? See #36 and #37.

9. If so, on what date? ..................

10. What was the Petitioner's regular occupation? Painter. 10

11. What kind of work was he doing at the time an accident is alleged to have occurred? See #36 and #37.

12. Did the Petitioner sustain an accident arising out of the Petitioner's employment with the Respondent at the time alleged in the petition? correct date. See #36 and #37.

20

13. Did the Petitioner sustain an accident in the course of his employment with the Respondent at the time alleged in the petition? See #36 and #37.

14. If the accident occurred on a date other than the one alleged in the petition, state the correct date. #36 and #37.

15. What was the nature of such accident, and how did it happen? See #36 and #37.

30

16. On what date was the Petitioner compelled to stop work because of injury? See #36 and #37.

17. On what date was the Petitioner well enough to work again? See #36 and #37.

18. If still disabled, on what date do you estimate he will be able to work? ..................

19. Give your understanding of the nature of any injury from which he should recover. See #36 and #37. 40

*Respondent's Answer to Employee's Claim Petition.*

20. Give your understanding of any permanent injury which has resulted. If there has been amputation or loss of usefulness of any member or impairment of any physical organ, explain fully. See #36 and #37.

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21. Were the wages fixed by piece-work? ........ ........

22. If so, what was the average weekly wage of the Petitioner? ..................

23. If wages were fixed by the hour, state rate per hour ..................

24. Give number of hours in an ordinary working day ..................

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25. Give number of days in an ordinary working week ..................

26. State the amount of weekly wages ..................

27. How much money have you paid the Petitioner as compensation (not including medical aid) since the accident? See #36 and #37.

Temporary Disability ..................
Permanent Disability ..................
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Compensation Rate ..................

28. Have you promised to pay compensation? ..................

29. If so, how much? ..................

30. What medical aid required? ..................

31. Were you requested to supply the necessary medical services required by law? ..................

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32. Did you furnish this service? ..................

33. If so, between what dates? ..................

*Respondent's Answer to Employee's Claim Petition.*

34. If not, give reasons for failure to do so ...............

35. Give name of physician and hospital rendering service at your direction .................

36. What other facts are there which you believe important? Failure to answer the foregoing questions is no waiver of respondent's defenses and no admission of petitioner's claims. Respondent denies that petitioner's disability has increased since the adjudication. 10

37. If you deny that compensation is payable in this case explain your reasons for this conclusion. Failure to answer the foregoing questions is no waiver of respondent's defenses and no admission of petitioner's claims. Respondent denies that petitioner's disability has increased since the adjudication. 20

EDWIN JOS. O'BRIEN,
Atty. for Respondent.

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*Respondent's Answer to Employee's Claim Petition.*

State of New Jersey, }
County of Essex, } ss.:

Edwin Jos. O'Brien of full age, being duly sworn according to law, on his oath deposes and says: That he is the attorney for respondent
10 named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

Edwin Jos. O'Brien,
Atty. for Respondent.

Subscribed and sworn to before me, this 24th
20 day of March, 1943, at Newark, N. J.

Elsie B. Smith.
Notary Public of New Jersey.

(This affidavit may be sworn to before any person authorized to administer an oath.)

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## Reasons for Reversal.

Petitioner-Prosecutor writes down the following reasons for reversal:

1. Because the Essex County Court of Common Pleas erroneously found that the Compensation Bureau had power and jurisdiction to void its judgment in this cause in the absence of fraud or newly discovered evidence.

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2. Because the Essex County Court of Common Pleas erroneously held the judgment entered in Breheny's favor in the Compensation Bureau to be void whereas it should have upheld such judgment as res judicata.

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3. Because the Essex County Court of Common Pleas erred in not holding that the Bureau originally had jurisdiction of the subject matter; that no questions of public policy were involved or could be raised after final judgment, and that the defendants not having raised any questions with reference to Breheny's status during the course of the litigation, are precluded from raising the question after final judgment.

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4. The Essex County Court of Common Pleas erred in reversing the order of the Workmen's Compensation Bureau whereas it should have affirmed said order.

David Roskein,
Attorney for Petitioner-Prosecutor.

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NEW JERSEY SUPREME COURT.

No. 245, May Term, 1947.

10 PATRICK BREHENY,
*Petitioner-Prosecutor,*

vs.

COUNTY OF ESSEX AND BANKERS INDEMNITY INSURANCE COMPANY,
*Respondents-Defendants.*

20 Submitted May Term, 1947, decided

On Certiorari.

Before DONGES, COLIE and EASTWOOD, JJ.

For Petitioner-Prosecutor, David Roskein, of Newark (John A. Laird, of Hoboken, of counsel).

For Respondents-Defendants, MAURICE C. BRIGADIER, of Jersey City.

The opinion of the Court was delivered by
30 EASTWOOD, J.:

This is a Workmen's Compensation case now in its tenth year of litigation. Certiorari has been allowed to review the determination of the Essex County Court of Common Pleas reversing and vacating the judgment of the Workmen's Compensation Bureau in favor of petitioner-prosecutor. A synopsis of the various judicial determinations involved in the litigation will be
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of aid in clarifying what is on the whole a rather confused picture of events. They may be concisely stated as follows:

Patrick Breheny, the prosecutor herein, sustained a compensable accident on May 16, 1938, while employed by the respondent County of Essex. Breheny filed a claim petition in the Bureau and was successful in securing an award of 40% of total disability on March 15, 1940. Thereafter, on August 7, 1940, he filed an application for a pension with the Essex County Pension Commission, and which was granted on February 7, 1941. In connection with the pension it appears that Breheny and the Pension Commission entered into an agreement that there should be deducted, from the pension moneys paid to Breheny, all amounts received by him under the Workmen's Compensation award from the insurance carrier, the Bankers Indemnity Insurance Company, one of the respondents herein. During the period that Breheny received compensation payments under the original 40% award made in his favor, such compensation payments were deducted by the County Pension Commission. On September 14, 1942, Breheny notified the Pension Commission that he had received his final compensation check and would thereafter expect to be paid the full amount of his pension. On February 13, 1943, Breheny filed a petition for increased disability, and on July 14, 1943, the disability award was increased to 100% of total by the Bureau. An appeal from the award was taken to the Common Pleas and the judgment of the Bureau affirmed by that Court on September 26, 1944. Cer-

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tiorari was then resorted to by respondents with the result that the judgment of the Pleas was affirmed by the Supreme Court on April 13, 1945, 132 N. J. L. 584. Again an appeal was taken to the Court of Errors and Appeals resulting in a
10 unanimous affirmance by that Court of the judgment of the Supreme Court, 134 N. J. L. 129, 45 A. 2d 700. Not satisfied with the determination of the Court of Errors and Appeals in favor of Breheny, application to vacate the judgment of July 14, 1943, was made by respondents herein to the Workmen's Compensation Bureau on February 26, 1946, on the ground that said judgment was void, illegal and against the public policy of the State of New Jersey, it being claimed
20 that the respondent, Bankers Indemnity Insurance Company, had acquired newly discovered evidence of the pension payments received by Breheny during the previous litigation, of which fact it had no previous knowledge. Respondents' motion to vacate the judgment was denied by the Bureau on July 8, 1946, the Commissioner ruling that the judgment of the Bureau as affirmed by the progressive steps through the Court of Errors and Appeals was res adjudicata;
30 that there was no question of public policy involved; that the Bureau had original jurisdiction to entertain the cause, and that the status of Breheny as a pensioner, not having previously been raised by the respondents as a defense, could not then be raised to void the judgment since it was apparent that the matters then urged for the first time did not constitute newly discovered evidence, and further that there was no allegation of fraud. The Commissioner further

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held that the judgment of the Bureau having been removed to the Essex County Court of Common Pleas on appeal, there was no longer any judgment in the Bureau which it had any power to vacate or disturb. Respondents then appealed from this determination of the Bureau to the Common Pleas and on December 11, 1946, the order of that Court was entered vacating the judgment of the Bureau. It is from the latter determination that the present proceeding emerges.

In the original claim petition and also in the petition for increased disability, the respondent, Bankers Indemnity Insurance Company, was directly named as a party defendant. It was proper for the petitioner so to proceed directly against the insurance carrier. Brown v. Conover, 116 N. J. L. 184, 183 A. 304. The original compensation award of 40% of total disability was entered against the County of Essex and the Bankers Indemnity Insurance Company and was paid by the insurance company. The proceedings for increased disability were defended by Bankers Indemnity Insurance Company without any participation on the part of counsel for Essex County. The progressive steps in the litigation, including the final proceedings before the Court of Errors and Appeals and the application thereafter in the Bureau to vacate the judgment, were fully participated in by Bankers Indemnity Insurance Company. It will thus be seen that the active defense of the proceedings in their entirety has, for all practical purposes, been undertaken exclusively by the respondent insurance carrier.

The principal defense relied upon is that the

judgment of the Bureau awarding increased permanent disability to Breheny is void on the ground that the Bureau lacked jurisdiction of the subject matter upon which such a determination could be made and since Breheny, by his acceptance of a pension, had severed the relationship of employer and employee between the County of Essex and himself. The statutory provision upon which the defense is based is claimed to be set forth in R. S. 34:15-43 providing as follows:

> "34:15-43. Public employees within workmen's compensation law
>
> "Every employee of the State, county, municipality or any board or commission, or any other governing body, including boards of education, and also each and every active volunteer fireman doing public fire duty under the control or supervision of any commission, council or any other governing body of any municipality or any board of fire commissioners of such municipality or of any fire district within the State, who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article two of this chapter (section 34:15-7, et seq.), but no person holding an elective office shall be entitled to compensation. Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this section to compensation for such injury or disability.

* * * * * *

> "Nothing herein contained shall be construed as affecting or changing in any way the provisions of any statute providing for sick, disability vacation or other leave for public employees or any provision of any retirement or pension fund provided by law." 10

It is said that the case of Reinhold v. Town of Irvington, 134 N. J. L. 416, 48 A. 2d 641, decided by this Court in 1946, is controlling, and that by the force of R. S. 34:15-43 and Reinhold v. Town of Irvington, supra, that prosecutor herein is barred from receiving the compensation award by reason of his acceptance of a pension. Assuming, but not conceding that the holding enunciated in Reinhold v. Town of Irvington, 20 supra, might be applicable to the facts in the matter at bar, we are nevertheless persuaded that the respondents herein cannot successfully defend and defeat prosecutor's rights under the determination and award heretofore made in his favor. It cannot successfully be denied that the employer, County of Essex, had full knowledge of the pension arrangement made with prosecutor. This being so, the respondent, Bankers Indemnity Insurance Company, stands in the 30 shoes of the County of Essex insofar as knowledge is concerned. R. S. 34:15-85. In fact, the record shows that the insurance carrier also had knowledge that the prosecutor was receiving said pension, and did not interpose a defense to that effect. Although Reinhold v. Town of Irvington, supra, was not decided until September 4, 1946, it cannot be gainsaid that such defenses as were availed of in that case were certainly available to the respondents herein from the very incep- 40

tion of the present litigation. The fact that such defenses were not judicially enunciated until Reinhold v. Town of Irvington, supra, was officially decided, does not in any way impair that principle of law. A determination of the Work-
10 men's Compensation Bureau is undoubtedly res adjudicata, to all questions of law and fact comprehended by the determination including those involving jurisdiction, the right to compensation and the nature and extent of the existing disability subject only to its correction on appeal. Drake v. C. V. Hill & Co., 117 N. J. L. 290, 187 A. 637.

Having actively participated in the present litigation from its inception, and not having raised
20 any defense based upon the pension status of the prosecutor herein at any time until after the final adjudication by the Court of Errors and Appeals, we conclude that respondents are estopped from raising for the first time this particular defense in the proceedings before the Bureau to vacate the judgment, and that the judgment in favor of prosecutor as approved by the Court of Errors and Appeals is res adjudicata and conclusive. Drake v. C. V. Hill &
30 Co., supra. The fact that Breheny was the recipient of a pension was in our poinion well-known to or should have been known by respondents and cannot be said to constitute newly discovered evidence. Nor is there any allegation of fraud in respondents' petition to vacate the determination and judgment of the Bureau. The Bureau was, therefore, powerless to recall its judgment and vacate or disturb it in any manner. Breen Iron Works v. Richardson, 115 N.
40 J. L. 305, 180 A. 192, affirmed 117 N. J. L. 150,

187 A. 145. Having failed to raise the defense of Breheny's pension, respondents are bound by the final judgment rendered in the cause by the Court of Errors and Appeals. Natural Products Refining Co. v. Court of Common Pleas, 125 N. J. L. 309, 15 A. 2d 754; Textileather Corporation v. Great American Indemnity Company, 108 N. J. L. 121, 156 A. 840; Cook v. Preferred Accident Insurance Company, 114 N. J. L. 141, 176 A. 178. **10**

The respondent insurance carrier has urged upon us that it would be violative of public policy to permit prosecutor to receive both payments under the compensation award and at the same time the benefits of his pension. In our opinion this contention is without substance. R. S. 34:15-43 insofar as it provides that no former employee who has been retired on pension by reason of injury or disability shall be entitled to compensation for such injury or disability contemplated protection of taxpayers and not protection of private corporations such as respondent insurance carrier. **20**

We have considered all the other points advanced by the respondents and find them to be without merit.

The judgment of the Common Pleas is accordingly reversed with costs. **30**

(Filed Sep. 4, 1947)

James J. Gavin, *Clerk.*

**40**

New Jersey State Library

## Remittitur.

NEW JERSEY SUPREME COURT.

No. 245, May Term, 1947.

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|---|---|
| PATRICK BREHENY, *Petitioner-Prosecutor,* vs. COUNTY OF ESSEX AND BANKERS INDEMNITY INSURANCE COMPANY, *Respondents-Defendants.* | On Certiorari. |

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This cause having been duly submitted by David Roskein (John A. Laird, of Counsel) attorney for petitioner-prosecutor and Maurice C. Brigadier, attorney for respondents-defendants, and the Court having inspected the record and judgment of the Essex County Court of Common Pleas and considered the reasons assigned for setting aside said judgment as well as the argument and briefs submitted by the respective parties, and being of the opinion that said judgment should be reversed, it is

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ORDERED, that the judgment of the Essex County Court of Common Pleas, be and the same is hereby reversed with costs, and the record and cause is hereby remanded to the Essex County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of the Court.

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Rule actually entered September 10th, 1947, on motion of JOHN A. LAIRD, of Counsel with petitioner-prosecutor.

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## Notice and Grounds of Appeal.

NEW JERSEY SUPRREME COURT.

PATRICK BREHENY,
*Petitioner-Appellee,*
vs.
COUNTY OF ESSEX AND BANKERS INDEMNITY INSURANCE COMPANY,
*Respondents-Appellants.*

20

To: PATRICK BREHENY, Petitioner-Appellee

and

DAVID ROSKEIN, his attorney.

30

TAKE NOTICE that the Respondents-Appellants, County of Essex and Bankers Indemnity Insurance Co., hereby appeal to the New Jersey Court of Errors and Appeals, the Court of last resort in all causes, from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court reversing the determination of facts and rule for judgment of the Essex

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*Notice and Grounds of Appeal.*

County Court of Common Pleas, on the following grounds:

1. The Supreme Court erred in reversing the determination of facts and rule for judgment of
10 the Essex County Court of Common Pleas in the above entitled cause dated December 11, 1946.

Dated: September 15, 1947.

Maurice C. Brigadier,
Attorney for Respondents-Appellants,
County of Essex and Bankers Indemnity Insurance Co.

20 Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this day of September, 1947.

................................
David Roskein,
Attorney for Petitioner-Appellee.

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47 OCT T.1947

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| PATRICK BREHENY,<br>*Petitioner-Prosecutor-Appellee,*<br>vs.<br>COUNTY OF ESSEX AND BANKERS INDEMNITY INSURANCE COMPANY,<br>*Respondents-Defendants-Appellants.* | On Appeal from New Jersey Supreme Court. |

## BRIEF OF REPONDENTS-DEFENDANTS-APPELLANTS.

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### Question at Issue.

The question on this appeal is whether a judgment of the Workmen's Compensation Bureau after affirmance by the Common Pleas, Supreme Court and Court of Errors and Appeals can be declared void for lack of jurisdiction over the subject matter on the part of the Court rendering the judgment when the facts which render the judgment void were not originally called to the Court's attention at the time of the rendition of the judgment and at the time of the affirmance thereof by the Court of Common Pleas, the Supreme Court and Court of Errors and Appeals.

The Bureau held it could not be declared void. The Pleas held it could be. On certiorari, the

Supreme Court reversed the Pleas and held that the original judgment was *res judicata* of the issue. This appeal is from the judgment of the New Jersey Supreme Court.

## The Facts.

On May 18, 1938, the petitioner, Patrick Breheny, while in the employ of the County of Essex, sustained an accidental injury while he was in the act of raising a heavy plank with the aid of a fellow employee.

On March 15, 1940, the Workmen's Compensation Bureau, upon an original petition filed by Patrick Breheny, made a determination and rule for judgment in his favor for permanent total disability and for temporary compensation of 23 6/7th weeks. Payment in full of this award was concluded on August 31, 1942.

On February 13, 1943, Patrick Breheny filed a second petition by which he sought an additional award based upon an alleged increased permanent disability.

On July 14, 1943, the Bureau made a determination of facts and rule for judgment under which the compensation for permanent total disability was increased from forty (40%) per cent to one hundred (100%) per cent of permanent total disability.

On appeal taken to the Essex Court of Common Pleas by the respondents, a judgment was entered on September 26, 1944, which likewise ordered the payment of one hundred (100%) per cent total permanent disability to the petitioner.

On certiorari allowed to the respondents as prosecutors, the New Jersey Supreme Court on November 25, 1944, affirmed the judgment of the

Pleas and on appeal to the New Jersey Court of Errors and Appeals, the judgment of the New Jersey Supreme Court was affirmed in January, 1946.

No payment has been made to date by the County of Essex and/or the Bankers Indemnity Insurance Company on account of the award of increased permanent disability or the costs and counsel fees allowed in connection therewith.

In February, 1946, the respondents-appellants served a notice of motion before the Bureau to vacate the judgment of the Bureau dated July 14, 1943, on the ground that the said judgment was void, illegal and against the public policy of the State of New Jersey. In support of this motion evidence was taken in the Bureau.

On July 8, 1946, the Bureau in effect denied this motion by an order erroneously entitled order discharging rule.

In support of the motion to set aside and vacate the judgment of the Bureau, the respondents offered in the Bureau the records of the Essex County Pension Commission and the testimony of Jacob Seidler, Secretary of the Commission.

The records of the Pension Commission show that on August 7, 1940, the petitioner made application to the Commission for a service connected disability pension to become effective on August 16, 1940.

A hearing was held on such application on November 8, 1940, and the testimony adduced at the hearing (Exhibit R-2) on behalf of Patrick Breheny, the applicant, discloses that the same was based on a service disability which was the same as that which constituted the basis of the compensation award.

On February 27, 1941, the Commission granted the said Breheny a pension for a service connected disability in the sum of $1,312.50 per annum which constituted fifty (50%) per cent of his annual salary of $2,625, and which pension was made retroactive to August 16, 1940. Under the statute this constitutes maximum pension that could be allowed for a service connected disability which resulted in a total incapacitation of the pensioner.

The evidence also discloses that an agreement was entered into between Patrick Breheny and the Commission whereby there was deducted from the aforesaid pension payments the sum of $40 bi-monthly from August 16, 1940, the date upon which the pension became effective, until August 31, 1942, when payments were completed by the respondents on account of the original award in compensation of forty (40%) per cent permanent total disability. The evidence shows that there was no agreement for any further deduction to be made after the completion of the payment by the respondents of the original award and that the aforesaid agreement was limited to the original award.

Upon receipt by Patrick Breheny of the last payment on account of the original award, the said Patrick Breheny gave the Commission notice that beginning September 16, 1942, he would expect payment of the full amount of his pension without deduction. From that date down to the present date payments have been made to the said Patrick Breheny by the Commission for the full amount thereto without deduction and the said Patrick Breheny has accepted and retained the same. To date no claim has been asserted or indicated as intended to be asserted by the Com-

mission with respect to any further compensation payments.

The record shows that at no time prior to the motion to vacate was the Bureau, the Pleas, the Supreme Court or the Court of Errors and Appeals, informed of the fact, that prior to the filing of the petition for increased permanent disability award on February 13, 1943, the said Patrick Breheny had, by his acceptance of the aforesaid pension, effective as of August 16, 1940, severed his relationship as an employee of the County of Essex, his former employer.

The record discloses that at no time prior to the motion to vacate was the Bureau, the Pleas, the Supreme Court or the Court of Errors and Appeals, informed that Patrick Breheny had applied for and accepted a service connected disability pension effective since August 16, 1940, prior to the filing by the said Patrick Breheny of the petition on February 13, 1943, for an increased permanent disability award. The testimony of Frederick J. Reynolds who became the Claims Manager of the respondent, Bankers Indemnity Insurance Company, on February 16, 1943, and continued in that capacity until January 2, 1945, as well as to the testimony of William M. Connolly, the assistant manager since June 1, 1944, establishes that the respondent, Bankers Indemnity Insurance Company, did not learn of any of the facts relating to the pension awarded to Breheny as aforesaid, until after the judgment of affirmance had been rendered in the New Jersey Court of Errors and Appeals.

The respondents served a motion upon the petitioner to vacate and set aside the judgment of the Bureau awarding increased permanent disability of one hundred (100%) per cent on

the ground that the said judgment is void, illegal and against the public policy of the State of New Jersey. The respondents contended as follows in support of this motion:

A. The judgment of the Bureau awarding an increased permanent disability is void because the Bureau lacked jurisdiction of the subject matter upon which it could make a determination and award since Breheny, by his acceptance of a pension had severed the relationship of employer and employee between the County of Essex and himself.

B. The judgment of the Bureau awarding increased permanent disability is illegal and against the public policy of the State of New Jersey, because prior thereto the said Breheny had accepted a service connected disability pension on account of which payments were and still are being made.

C. The factors which render the judgment void, illegal and against public policy were not contained in the record of the case and were not made known to the Bureau, Pleas, Supreme Court or Court of Errors and Appeals and had never been passed upon by any tribunal prior to this motion.

D. A void judgment may be set aside in the Bureau even after affirmance by Common Pleas, the Supreme Court and the Court of Errors and Appeals, where the facts rendering the judgment void were not part of the prior record, were not known to the Courts passing upon the matter and were, therefore, not considered or passed upon by the Courts considering the matter.

E. The Bureau possesses both statutory and inherent power to set aside a void judgment rendered by the Bureau.

The Bureau on July 8, 1946, in effect denied the motion to vacate the judgment of the Bureau from which denial the respondents appealed to the Essex County Court of Common Pleas.

On November 19, 1946, the Essex County Court of Common Pleas in an opinion by Judge Conlon determined that the order of the Bureau denying the motion to vacate its award was erroneous; that the motion to vacate should be granted and that the determination of the Bureau of July 14, 1943, be set aside and the award made thereunder vacated (Case, pp. 20 to 27).

Pursuant thereto an order was made by the Pleas on December 11, 1946, vacating the judgment of the Bureau of July 14, 1943.

A writ of certiorari was thereafter allowed by the New Jersey Supreme Court for the purpose of reviewing the judgment of the Court of Common Pleas. Upon this review the Supreme Court concluded that the judgment of the Court of Common Pleas should be reversed and entered judgment accordingly.

This appeal has been taken by the respondents-defendants-appellants, the County of Essex and the Bankers Indemnity Insurance Company, from the aforesaid judgment of the Supreme Court.

## POINT I.

**The judgment of the Bureau awarding an increased permanent disability is void because the Bureau lacked jurisdiction of the subject matter upon which it could make a determination and award since Breheny, by his acceptance of a pension, had severed the relationship of employer and employee between the County of Essex and himself.**

R. S. 34:15-43 provides as follows:

> 34:15-43. Public employees within workmen's compensation law.
>
> "Every employee of the state, county, municipality or any board or commission, or any other governing body, including boards of education, and also each and every active volunteer fireman doing public fire duty under the control or supervision of any commission, council, or any other governing body of any municipality or any board of fire commissioners of such municipality or of any fire district within the state, who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article 2 of this chapter (sec. 34:15-7, *et seq.*), but no person holding an elective office shall be entitled to compensation. Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this section to compensation for such injury or disability.
>
> "Nothing herein contained shall be construed as affecting or changing in any way

the provisions of any statute providing for sick, disability vacation or other leave for public employees or any provision of any retirement or pension fund provided by law."

In *DeLerenzo* v. *Board of Commissioners of Newark,* 134 N. J. L. 7, the New Jersey Court of Errors and Appeals construed the foregoing provision in relation to R. S. 42:12-1 under which a municipal employee sought an adjudication with respect to his demand for a pension. In this case the facts were substantially the reverse of those of the instant case. A municipal employee had received an award for both temporary and permanent disability compensation for injuries sustained while performing his duties in the employ of the defendant municipality. By reason of his injuries, the employee was unable to do any work for the municipality. Thereafter the injured employee made application for a pension and brought this suit to obtain a declaratory judgment with respect thereto. The Court below rendered a judgment in favor of the municipality and concluded, "that the application for the pension was properly denied because it was prematurely made, the plaintiff not having terminated his relationship to his employer under the Workmen's Compensation Act." On appeal to the Court of Errors and Appeals, held affirmed. The Court, on page 9 of the opinion, said as follows:

> "We agree with the court below that what the plaintiff received under the Pension Act is a reward for past services and safeguard against want in old age; what he receives under the Workmen's Compensation Act is

compensation for the disability resulting from the injury he sustained. The payment of workmen's compensation is based upon a contract of employment of which the terms of the act are a part; if the working man is injured he is entitled to be compensated for that injury under the Workmen's Compensation Act but based largely on his rate of pay.

"We distinguish between the status of a person receiving a pension and a person receiving workmen's compensation. The relationship of an employer and an employee is not consistent with the position of a pensioner as such, for the reason that a pensioner severs all relationship of employer and employee, he has no further duty to his employer nor is he entitled to any of the benefits which may accrue to an employee. An employee receiving workmen's compensation is under the relationship of employee and employer, as is indicated by the fact that such employee must continue to be carried on the public payroll pursuant to R. S. 34:15-44. The plaintiff must be one or the other and as he admittedly now receives workmen's compensation he is an employee. We therefore hold that the plaintiff cannot have the benefits of both statutes. Judson v. Newark Board of Works Pension Association, 132 N. J. L. 106; affirmed, 133 Id. 28."

In *Judson* v. *Newark Board of Works Pension Association,* 132 N. J. L. 136, affirmed by the Court of Errors and Appeals, generally for the reasons stated below in 133 N. J. L. 28, a municipal employee had been involuntarily retired and awarded his full pension and had accepted pay-

ments made thereunder to him. Thereafter the same employee made application for a second pension under another statute which is available for voluntary retirement. Upon his being denied the second pension, he applied for a mandamus. The Court denied his right to the second pension and stated the rule as follows on page 109 of the opinion:

> "It cannot be said that it is the policy of the state to pay two pensions for a single service. The mere statement of the proposition exhibits its unsoundness. The state's policy is made manifest by examining other provisions of our pension statutes. For example, it is provided that no one who is on pension may re-enter the employ of a municipality or the state unless he waives pension for the term of such employment. (R. S. 43:3-1); Cf. Turner v. Passiac Pension Commission, 112 N. J. L. 476 (also compare R. S. 43:3-3 and 43:3-4). Implicit in these statutory provisions is the plain intendment of the law to this effect: that a person may not receive pension and salary at the same time and we think it is almost a corollary thereof to say that the relator may not have two pensions for one service under the present state of the pension laws.
>
> "In conclusion, we cannot accept the view that it is merely technical to say that Mr. Judson was ineligible to apply for pension in February, 1943. To apply for retirement presupposes the status of being in service and actual retirement, the benefits of which he accepted. (Compare Plunkett v. Board of Pension Commissioners of the City of

Hoboken, 113 N. J. L. 230; affirmed, 114 Id. 273.)"

In the case of *Delaney* v. *Police and Fire Departments Pension Commission of the City of Elizabeth,* decided by the New Jersey Supreme Court, opinion by Justice Case (not reported), a member of the Fire Department of the City of Elizabeth sought a peremptory mandamus to compel the payents to him of a pension. He was appointed a member of the Fire Department in 1923 and while serving in that employment received injuries in 1933 and again 1941. February, 1944, he made application for retirement on pension effective April 1, 1944, and based his application upon a service connected disability. A pension was granted effective as of March 15, 1944. Pension installments were paid regularly until September 5, 1945, from which time forward, the pension commission has refused to pay the same. The refusal was based upon the fact that the City of Elizabeth under a determination of the Workmen's Compensation Bureau, was making payments by way of a compensation award for the same injuries referred to. Justice Case, in this opinion, stated as follows:

> "The position presently taken by the Pension Commission is that it is not obligated to duplicate the workmen's compensation payments and that it will withhold payment of the pension amounts until the compensation award is fully paid or falls short of the pension allotments.
>
> "It is relator's contention that when he applied for the pension (statutory authority for which is to be found in R. S. 43:16-1 and 43:16-2) he did not know of the provisions of

R. S. 34:15-43 bringing public employees within the workmen's compensation law and that had he known of it at the time he applied for his retirement he would not have based the latter application upon physical disability. The extent of his knowledge seems not to be material. The fact is that he applied for and was granted a pension on account of physical injury and impairment.

"The question presented for decision therefore is whether a member of the Fire Department is eligible to receive pension payments while he is currently receiving workmen's compensation benefits for the injuries because of which he was pensioned. A pertinent statutory provision is contained in R. S. 34:15-43, *supra*:

" 'Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this section to compensation for such injury or disability.'

"That statute does not in its language apply directly to the situation that here exists because the section relates to the authority for the granting of workmen's compensation and the workmen's compensation is not here in dispute. Nevertheless it is clear that the legislature considered it a matter of public policy that a public policy that a public employee shall not at the same time receive pension payments and workmen's compensation for the injury or disability on account of which he has been pensioned.

"Our Court of Errors and Appeals held as follows in DeLerenzo vs. Board of Commissioners of the City of Newark, decided January 31st, 1946:

" 'The relationship of an employer and an employee is not consistent with the position of a pensioner as such, for the reason that a pensioner severs all relationship of employer and employee, he has no further duty to his employer nor is he entitled to any of the benefits which may accrue to an employee. An employee receiving workmen's compensation is under the relationship of employee and employer, as is indicated by the fact that such employee must continue to be carried on the public payroll pursuant to R. S. 34:15-44. The plaintiff must be one or the other and as he admittedly now receives workmen's compensation he is an employee. We therefore hold that the plaintiff cannot have the benefits of both statutes.' "

In *Reinhold* v. *Irvington,* 134 N. J. L. 416, the New Jersey Supreme Court dealt with a case in which a fireman in the employ of the Town of Irvington suffered an accident arising out of and in the course of his employment. Following the filing of his first petition and before the hearing thereof the employee applied and obtained a pension from the Town Pension Fund for retirement from service because of the same disability. The Court held that by reason of R. S. 34:15-43 the employee was precluded by reason of his acceptance of the pension from obtaining any compensation award; that the statute appears to have been designed to meet the very situation

presented in that case and is a bar to a recovery by the employee.

It is the contention of the respondents-appellants that on February 13, 1943, when Patrick Breheny filed his second petition for an increased permanent disability, and an July 14, 1943, when the Bureau rendered a judgment of increased permanent disability, the jurisdictional of employment prerequisites were lacking and the Bureau was without any jurisdiction to render any judgment in favor of the petitioner and against the respondents.

It is the contention of the respondents-appellants that by reason of the foregoing citations of authorities, the relationship of employer and employee that had theretofore existed between the County of Essex and Breheny had been severed and that there was no existing relationship between them which could constitute the subject matter over which the Bureau could take any jurisdiction.

It is the contention of the respondents-appellants that the relationship of employer and employee and the duties and obligations that spring therefrom are the essential jurisdictional factors that must be present in order that the Bureau might have any jurisdiction to make an award in workmen's compensation.

It is the contention of the respondents supported by the foregoing authorities, that no such relationship existed between Breheny and the County of Essex at the time of the filing of his second petition and at the time of the rendition of the judgment by the Bureau, and that consequently the Bureau lacked jurisdiction over the subject matter and the judgment is, therefore, void.

Petitioner-prosecutor in his brief below relied upon R. S. 43:10-18.15 (L. 1943, C. 160, P. 462 sec. 15) as authority for the proposition that this statute intended to give County employees the benefits both of workmen's compensation and pension. The provision relied upon reads as follows:

> "The rights of any employee or beneficiary to receive any payment under the Workmen's Compensation Act of New Jersey, shall not be affected or impaired by any of the provisions of this Act."

It should be noted that the Pension Act expressly provides that the rights of any employee to receive any payments under the Workmen's Compensation Act of New Jersey shall not be affected or impaired by any provision of the Pension Act. It should further be noted that the provision which precludes the right to workmen's compensation when pension has been accepted is not in the Pension Act at all but constitutes act 34:15-43 of the Workmen's Compensation Act.

Under these circumstances how can it be said that the Pension Act which expressly saves the provision of the Workmen's Compensation Act that no employee retired on pension should be entitled to compensation for the injury or disability?

The very savings clause in the Pension Act is but further proof of the intention of the legislature as expressly set forth in R. S. 34:15-43 that no employee retired on pension by reason of injury or disability shall be entitled to compensation for such injury or disability.

Judge Conlon in the Common Pleas answered the contention of the petitioner-prosecutor as follows:

"Justice Heher, speaking for the Supreme Court in Miller vs. National Chair Co. (127 N. J. L. 414; affirmed 129 N. J. L. 98) declared that:

" 'The parties are not at liberty in the making of a contract of hire to modify the essential provisions of Article 2, nor are they privileged to contract out of the statute after the accident.'

"As has been stated above, the statute specifically deprives a former County employee of the right to compensation while he is on a pension. Any rights the petitioner may have or any liability that rests upon the respondent must of necessity flow from the statute and neither the Bureau nor this Court has jurisdiction to direct the payment of any compensation contrary to the provisions of the statute.

"It follows therefore that the parties themselves cannot confer jurisdiction upon either tribunal by an attempted waiver, actual or implied, of the statute prohibiting a recovery. Nor can they by private agreement change the legal liability fixed by the statute once they have elected to come under the provisions thereof (Micieli v. Erie Railroad Co., supra).

"I therefore conclude that the award to the petitioner is not provided for in the statute, and that the determination of the Bureau in question was void, and that the Bureau erred in not granting the motion to vacate and set aside the said determination and rule for judgment entered July 14, 1943" (Case, p. 25, ll. 35 to 40; p. 26, ll. 1 to 30).

In the opinion delivered by the Supreme Court it does not appear that the Court found it necessary to determine the issue of the voidness of the original judgment of the Bureau which had been affirmed by the Pleas, the Supreme Court and the Court of Errors and Appeals successively.

It is the contention of the respondents-defendants-appellants that the Supreme Court should have found, as did the Pleas below, that the original judgment of the Bureau awarding an increased permanent disability was void because the Bureau lacked jurisdiction of the subject matter upon which it could make a determination and award since the petitioner, by his acceptance of the pension, had severed the relationship of employer and employee as between the County of Essex and himself.

## POINT II.

**The judgment of the Bureau awarding increased permanent disability is illegal and against the public policy of the State of New Jersey, because prior thereto the said Breheny had accepted a service connected disability pension on account of which payments were and still are being made.**

It is the contention of the respondents-appellants that the legislature has declared it to be against the public policy of New Jersey that any municipal employee receiving a pension shall also receive salary or compensation in lieu thereof. The provision with respect to compensation is found in R. S. 34:15-43 and clearly indicates that the compensation provisions thereof were not

intended to apply to an employee who had severed the employment relationship and who was now in the category of a former employee by reason of the fact that he had been retired on pension. That this is the meaning of the statute is further disclosed by the opinion of the Court of Errors and Appeals cited under Point I in the case of *DeLerenzo* vs. *Board of Commissioners of Newark,* by the opinion of Justice Case, in the case of *Delaney* vs. *Police and Fire Department Pension Commission of the City of Elizabeth,* and by the opinion in the case of *Reinhold* vs. *the Town of Irvington, supra.*

It is also borne out by the quotation set forth under Point I from the opinion of the Supreme Court in the case of *Judson* v. *Newark Board of Work's Pension Association.* From all of these authorities it is clear that it is against the public policy of New Jersey to allow a public employee to receive, at the one and the same time, a pension as well as other compensation for the same service.

It is the contention of the respondents that the judgment of the Bureau awarding compensation to a former employee in direct contravention of the provisions of R. S. 34:15-43 and in the direct contravention of the generally declared public policy of this State, constituted the rendition of a judgment which was illegal and void and against the public policy of New Jersey.

The Supreme Court in its opinion below concluded that R. S. 34:15-43, insofar as it provides that no former employee who has been retired on pension by reason of injury or disability shall be entitled to compensation, was intended for the protection of taxpayers and not for the protection of private corporations such as the respond-

ent insurance carrier. While it is true that the insurance carrier has throughout defended this proceeding and is now prosecuting this appeal, it has done so and is doing so by virtue of its right to do so on its own behalf as well as on behalf of the insured. We do not know of any rule of law or any authority for any rule of law which imposes a greater obligation upon the insurer than it does upon the insured. The liability of the insurance carrier, from the very nature of the insurance contract, can only be coequal with the liability of the insured. The Supreme Court has in effect announced a rule whereby the insurance carrier is deprived of the defense which the statute affords the insured itself. It is the contention of the respondents-defendants-appellants that the Supreme Court erred when it held that the statute which afforded a protection to the insured, the County of Essex, did not afford a similar protection to the insurance carrier for the same assured.

In doing so the Supreme Court appears to have overlooked the provisions of R. S. 34:15-44, which provides as follows:

> "34:15-44. Names of public employees carried on pay roll.
>
> "When any payment of compensation under this chapter shall be due to any public employee, the name of the injured employee, or in case of his death, the names of the persons to whom payment is to be made as his dependents, shall be carried upon the pay roll, and payment shall be made in the same manner and from the same source in which and from which the wages of the injured employee were paid. In event that

> any extraordinary payment larger than the weekly rate of compensation shall be due, such payment shall be made from any fund available for the maintenance or incidental expenses of the institution, department, board or governing body under and by which the employee was employed."

It is the contention of the respondents-defendants-appellants that there can be no judgment for compensation award against an insurance carrier unless there could likewise be a judgment for such an award against the assured.

Furthermore, it should be noted that in the instant case the Supreme Court has sustained the original judgment not only as against the insurance carrier but also as against the County of Essex, the assured for whose protection the legislature has enacted the provisions of R. S. 34:15-43.

## POINT III.

**The factors which render the judgment void, illegal and against public policy were not contained in the record of the case and were not made known to the Bureau, Pleas, Supreme Court, or Court of Errors and Appeals and had never been passed upon by any tribunal prior to the motion to vacate.**

An examination of the record in this case which has been put into evidence, discloses that at no point in the entire case up to and including the remittitur from the Court of Errors and Appeals was there any disclosure made, prior to the present motion, of the fact that Patrick Breheny had applied for and obtained a pension

prior to the filing by him of his second petition for increased disability award and prior to the judgment by the Bureau making such award on July 14, 1943.

The facts have been brought to the Court's attention for the first time on the return of the present motion to vacate and set aside the said judgment. Consequently, it cannot be argued that the present subject was ever considered or passed upon by any of these Courts since the subject matter was not even referred to or disclosed in any part of the record of the case. The evidence shows that it was called to the Bureau's attention for the first time after the judgment had been affirmed in the Court of Errors and Appeals, and in support of the present motion to vacate and set aside the judgment of the Bureau.

This point is self-evident from an examination of the record and, therefore, requires no further argument to support it.

The petitioner-prosecutor-appellee in his arguments below has referred to the answer of the respondents to the petition for increased disability (Case, pp. 80 to 83)) and in particular to the answer to the question "Was the petitioner in your employ at the time of the alleged accident?" which is answered by the word "Yes."

It was contended that this was an admission of the existence of a master and servant relationship upon which the Bureau could predicate its judgment for increased disability award. The petitioner - prosecutor - appellee, however, completely overlooks that the issue which is now raised is not whether the petitioner was in the employ of the County of Essex at the time of the alleged accident but rather whether at the time that he made the application for the increased disability award and at the time of the

granting thereof there existed any such master and servant relationship. The record establishes beyond any contradiction that prior to said time the petitioner had already applied for and obtained a pension, thus terminating the relationship of master and servant with the County of Essex.

At no time in the original proceeding for increased disability award was disclosure made by anyone to the Court of the severance of such relationship, nor was the issue in any way litigated before the Court.

The respondents-defendants-appellants therefore contend that the record discloses beyond any contradiction that the factors which rendered the judgment void, illegal and against public policy were not contained in the record of te case and were not made known to the Bureau, Pleas, Supreme Court or Court of Errors and Appeals in the prior proceeding and had never been passed upon by any tribunal prior to the motion to vacate the judgment which is now the subject of the present review.

## POINT IV.

**A void judgment may be set aside in the Bureau even after affirmance by Common Pleas, the Supreme Court and the Court of Errors and Appeals, where the facts rendering the judgment void were not part of the prior record, were not known to the Courts passing upon the matter and were, therefore, not considered or passed upon by the Courts considering the matter.**

In *Daniel* v. *Elmer,* 113 N. J. L. 227, opinion by

Justice Heher (New Jersey Supreme Court), the plaintiff recovered a judgment against the defendant in the Court of Common Pleas. The defendant appealed to the Supreme Court and the judgment was affirmed. Thereafter the defendant presented a petition to the Supreme Court in which he charged that the original judgment had been procured by fraud and upon false testimony and the defendant sought, from the Supreme Court, an order to show cause why the judgment of affirmance should not be set aside and the cause remanded to the lower court for a new trial. The Supreme Court held that the Appellate Court was without jurisdiction since the fraud had been practiced upon the lower court and that the application should be addressed directly to the trial court. Justice Heher, on page 229 of the Opinion, stated the following rule:

> "And there is no reason for entertaining appellant's application, assuming the existence of jurisdiction. Relief may be had in the court below. A court of original jurisdiction has inherent power, without the consent of the appellant tribunal, to order a new trial on the ground of newly discovered evidence, and to vacate its judgment upon the ground that it was the product of fraud or imposition, or the result of mistake, inadvertence or misapprehension, even though it has been affirmed on appeal. This is the rule in courts of equitable jurisdiction, and it applied with equal force to courts of law. Compare Putnam v. Clark, supra. Of course, such an application could not, after affirmance of the judgment, be grounded upon

errors appearing on the fact of the record, for the obvious reason that the appellate court has pronounced, in effect, that the judgment is free from error."

In *Putnam* vs. *Clark,* 35 N. J. Eq. 145 (New Jersey Court of Errors and Appeals, cited with approval by the Supreme Court in the above quotation), a petition was filed with the Court of Errors and Appeals for leave to file a bill of review on the ground of newly discovered evidence with respect to a decree of the Court of Chancery which had been affirmed on appeal to the Court of Errors and Appeals. The Court of Errors and Appeals dismissed the petition and held that the same should be addressed to the court of original jurisdiction, namely, the Court of Chancery. The rule was stated on page 150 of the Opinion as follows:

> "The Court of Chancery has inherent power, without the consent of the appellate tribunal, to review, on the ground of newly discovered evidence, its decree, though it has been passed upon on appeal, and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the superior court shall have been obtained. These propositions are established by the following citations: Needler v. Kendall, Castemp. Finch 468; Mitf. Pl. 88; Cooper's Pl. 92; 2 Hoff. Ch. Pr. 12; Tommey v. White, 1 H. of L. Cas. 160; Flower v. Floyd, L. R. (6 Ch. Div.) 297; Haskell v. Raoul, 1 McCord's Ch. 22; Perkins v. Lang, reported in a note to that case, and McCall v. Graham, 1 Hen. & Munf. 13. It must be

borne in mind that there is a distinction in practice between an application for a review on the ground of error on the face of the decree, and one based on newly discovered evidence. In the former, no bill of review can be filed after the decree has been passed upon by the appellate tribunal, but in the latter it is otherwise."

In the case of *Westfield Trust Co.* v. *Court of Common Pleas,* 115 N. J. L. 86 (New Jersey Supreme Court, Opinion by Justice Perskie, affirmed *per curiam* by the Court of Errors and Appeals, 116 N. J. L. 190, 191), the facts were as follows:

A default judgment was entered in the Morris County Court of Common Pleas. Therafter the judgment was docketed in the New Jersey Supreme Court. The original judgment was void because the plaintiff had failed to comply in the entry thereof with the requirements of the Practice Act of 1903. Thereafter application was made to the Common Pleas for an order vacating and declaring null and void the rule for judgment. The Common Pleas ordered that the judgment be vacated, made void and expunged from the record.

Thereupon application was made to the Supreme Court for an order setting aside the docketing of the judgment in the Supreme Court and for a writ of restitution. The Supreme Court held that the judgment as entered in the Common Pleas was void and ordered that a writ of restitution issue with respect to the judgment that had been docketed in the Supreme Court. Justice Perskie, on page 89 of the Opinion, said:

"First: What was the effect of the docketing of the judgment in the Supreme Court?

"It is the settled law that the effect of the docketing of the judgment, obtained in the Morris County Court of Common Pleas, in the Supreme Court merely gave a broader scope to its operation. Twist v. Woerst, 101 N. J. L. 7 (at p. 11). The judgment, however, remained for all intents and purposes, other than the latitude of its scope, the judgment of the Court of Common Pleas in which it was rendered. This being so, the court from which the judgment emanated retained control of its mandate, which control included the power to vacate the judgment on proper cause being shown. Daniel v. Elmer, 113 Id. 227; Anderson v. Independent Order of Foresters, 98 Id. 648; 126 Atl. Rep. 631; Blessing v. Blackburn Varnish Co., 93 N. J. L. 321, 326."

On page 91 of the Opinion he stated the following rule:

"A judgment may be set aside whether there was a total lack of authority to enter any judgment or only lack of authority, as here, to enter a particular judgment, when the entry of such a judgment was premature because the time for the filing of an answer had not expired. 34 C. J. 294. A void judgment may be vacated at any time. McLaughlin v. Cross, 68 N. J. L. 599, 601. But a mere irregularity in the entry of a judgment or the assessment of damages thereon, i.e., a mere perfunctory matter (Broad and Market National Bank v. Weisen, 99 Id. 331;

> 124 Atl. Rep. 48), when the court otherwise has jurisdiction of the parties and of the subject-matter generally and specifically, may, of course, be waived or barred. Fraley v. Feather, 46 N. J. L. 429, 431, Frank v. Smith, Ibid. 484. But when, as here, the court entered the judgment illegally, it was, in the language of section 133 of our Practice Act, utterly void. And being utterly void, it was a mere nullity. For a complete discussion of the differences between void and voidable judgments see 1 Black on Judgments (1890), ch. X, p. 194."

In *McLaughlin* v. *Cross,* 68 N. J. L. 599, the question arose as to whether a judgment rendered in a small cause court and docketed at the Court of Common Pleas could be vacated where the judgment was void. Justice Collins, speaking for the Supreme Court, stated the rule as follows:

> "It cannot be that a court is compellable to give effect to a void judgment, or is unable to effectuate an adjudication of avoidance. I apprehend that if the clerk of a Court of Common Pleas has doubt of the regularity of papers tendered for docketing he may submit the matter to the court. I see no reason why, if he fails to do so, the court may not, on due notice, expunge an invalid entry from its docket. Courts of general jurisdiction have control of all their records, subject, of course, to review in the case of those of inferior jurisdiction. Void judgments may be vacated at any time. 17 Am. & Eng. Encycl. L. 825; McKelway ads. Jones, 2 Harr. 345."

The Supreme Court in its opinion below concluded that the respondents-defendants-appellants in the present proceeding, not having raised any defense based upon the pension status of the prosecutor until after the affirmance by the Court of Errors and Appeals, were estopped from raising for the first time this defense in the proceedings before the Bureau to vacate the judgment, and that the former judgment as affirmed by the Court of Errors and Appeals is *res judicata,* and conclusive.

It is the contention of the respondents-defendants-appellants that a party to a proceeding cannot be estopped from calling to the Court's attention the fact that a judgment rendered by it is void even though the facts which rendered it void were known to such party at the time of the original proceeding and were not made known to the Court.

On the element of estoppel the Court failed to take into consideration the fact that the petitioner as well as the respondent knew that the petitioner had severed the relationship of master and servant and therefore the petitioner was equally at fault with the respondents in failing to disclose to the Court the facts that would show that the Court lacked jurisdiction of the subject matter. Under these circumstances, how can it be said that the petitioner has a right to a reliance upon an assertion of estoppel as to the very subject matter as to which the petitioner was equally at fault in concealing from the Court the facts essential to the Court's jurisdiction?

It is the contention of the respondents-defendants-appellants that the Supreme Court erred when it determined that the former judgment as affirmed by the Court of Errors and Appeals was

*res judicata* of the issue of lack of jurisdiction.

The record, as pointed out above, discloses beyond any contradiction that the issue had never been raised, that the facts were never presented, and that none of the Courts in their affirmances of the prior judgment passed upon the question of the lack of jurisdiction of the Court.

It is the contention of the respondents-defendants-appellants that a judgment affirmed on appeal is final and *res judicata* if it would have such effect in the absence of an appeal. Vol. 50, Corpus Juris Secundum, Sec. 624 on Judgments.

It is the contention of the respondents-defendants-appellants that a judgment which is void for lack of jurisdiction of the subject matter is without conclusive effect. Vol. 50, Corpus Juris Secundum, Sec. 703 on Judgments.

## POINT V.

**The Bureau possesses both statutory and inherent power to set aside a void judgment rendered by the Bureau.**

It is the contention of the respondents that the Bureau possesses both statutory and inherent power to set aside a void judgment rendered by the Bureau. The statutory power is contained in R. S. 34:15-58; R. S. 34:15-57 and R. S. 34:15-27.

R. S. 34:15-58 provides in the concluding paragraph thereof as follows: "The judgment of the Bureau shall be final and conclusive between the parties and shall bar any subsequent action or proceeding, unless reopened by the Bureau or appealed as hereinafter provided."

In *Rose* v. *Wagner Construction Co.,* 2 N. J.

Misc. 118 (New Jersey Supreme Court), the fundamental question raised was whether the commissioner had jurisdiction to open a judgment entered by him and to order a retrial. The Deputy Commissioner, after the entry of the judgment and the docketing thereof in the county clerk's office, had entered an order vacating the judgment and setting aside all judgments entered in any court. The Court, on page 119 of the Opinion, held:

> "It is claimed that the deputy commissioner had no power to take this action and that the previous judgment should stand irrevocably, except as affected by right of appeal. It is also claimed that after the judgment had been docketed or entered in the county clerk's office the commissioner lost all power over it.
>
> "We cannot agree to the proposition that the commissioner's power over his judgment ceased because it was docketed in the county clerk's office. As we read the statute, it did not become a judgment at all until so docketed or entered, and its entry in the county clerk's office was no different from the entry of a judgment in the Court of Common Pleas or in the Circuit Court. That office is the depository of the records of both courts and, under the statute, of the disposition by the commissioner, of these compensation cases; so that if he had jurisdiction to open the judgment at all the mere fact that it had been entered of record in the county clerk's office would not affect that jurisdiction.
>
> "We are brought, therefore, to the ques-

tion whether there was jurisdiction to open the judgment, and we concluded that there was. It is argued for petitioner, by analogy, that the powers of district courts to open judgments and award a new trial indicate a similar power here. But it must be remembered that in the case of district courts there is a statutory authority in that regard. On the contrary, in the case of justices' courts, it was plain that they had no power to award new trials, and it was for that very reason that the Supreme Court was liberal in setting aside judgments of justices' courts on certiorari in cases of surprise. A reading of the old decisions in Terhune v. Barcalow, 11 N. J. L. 40, 42, and of Combe v. Johnson, 12 Id. 205, will elucidate this point.

"But we consider that the statute does confer power to open such judgments, if not expressly, yet by plain implication. Section II of the Act of 1918, page 433, both in its form as there enacted, and as amended in 1921 (page 733), provides that 'the judgment of the said bureau shall be final and conclusive between the parties, and shall bar any subsequent action or proceeding, unless reopened by the said bureau or appealed as hereinafter provided.' It is argued for the prosecutors that the subsequent portion of the statute contains no provisions with respect to reopening judgment and does contain provisions with reference to appeal, and that we should, therefore, conclude that, because there is no provision for reopening as thereinafter provided, there can be no reopening. Our reading of the statute leads to precisely the opposite result. Taking the provision as a whole and in connection with

its context, our construction of the same is that the clause 'as hereinafter provided' refers to the appeal and not to the reopening; in other words, that a correct construction of the sentence calls for a comma after the word 'bureau.' So read, there is, as we have just said, a plain implication of power to reopen, and this implication is in no way impaired by the previous provision in section 10 with respect to modifying awards of compensation."

This case was cited with approval by the Court of Errors and Appeals and followed by that court in *Davis* v. *Wegner,* 128 N. J. L. 1. In that case Justice Colie, speaking for the Court, said:

"The attack directed against the setting aside of the award and granting a rehearing is based on the ground that the appellant Davis had no notice of the application and was thereby deprived of his right to be heard. The return to the writ of certiorari clearly sets forth that counsel for Davis gave notice of a motion to vacate the order setting aside the award and granting a rehearing and that motion was argued before the deputy commissioner in the presence of counsel for both sides, and thereafter the deputy commissioner entered an order denying the motion to vacate the previous order entered on August 9th, 1940, and set the case down for a hearing on its merits. Thus it appears that appellant has had his day in court on the question of vacating the prior award and will have his day in court on the merits when the rehearing is held.

"It remains only to consider whether the deputy commissioner had the legal right to vacate the previously entered award. The question has been before the Supreme Court in Rose v. Wagner Construction Co., 2 N. J. Misc. R. 118, and was there decided in the affirmative. We are of the opinion that R. S. 34:15-58 which reads in part, as follows: 'The judgment of the bureau shall be final and conclusive between the parties and shall bar any subsequent action or proceeding, unless reopened by the bureau or appealed as hereinafter provided' gives statutory sanction for the action taken by the Bureau."

The case of *Rose* v. *Wagner Construction Co., supra,* was also cited with approval in the case of *Plaskon* vs. *National Sulphur Co.,* 113 N. J. L. 253, by the Supreme Court which stated "the Workmen's Compensation Bureau had the jurisdiction to open its judgment." This case was reversed on other grounds in the Court of Errors and Appeals, 114 N. J. L. 109. In *Franzoi* v. *Rubinoff, Inc.,* 119 N. J. L. 184 (New Jersey Supreme Court), the question presented was whether the compensation bureau had the power to open an award more than 30 days after it had been made so as to include items for doctor's bills and hospital expenses incurred because of the injury and which were overlooked when the petitioner's case was before the Bureau. The compensation bureau entertained the application and included the items in the award. Common Pleas affirmed and on certiorari to the Supreme Court it was held that after the time for appeal had elapsed a judgment of the Bureau could not be reopened to include matters overlooked at the original hearing. The Court held, however, that

notwithstanding the fact that the time for appeal had expired the Bureau could vacate its judgment on the ground of newly discovered evidence or fraud. This is similar to the rule in the District Court as well, where it has, however, been held that the time limitation for the granting of a new trial in the District Court does not apply to the vacating of a void judgment. That as to a void judgment the application could be made at any time. This was held to be the law by Justice Donges in the Opinion written for the Supreme Court in the case of *New Jersey Cash Credit Corp.* v. *Zaccaria,* 126 N. J. L. 334.

On page 336 of the Opinion, Justice Donges, speaking for the Court, said:

> "Prosecutor contends that the court below was without power to open the judgment because of R. S. 2:32-121 which provides 'An application for a new trial, except for newly discovered evidence, shall be made within thirty days after judgment.' However, this is not a case of awarding a new trial after the entry of a proper judgment. The challenge here was directed to the validity of the judgment and a void judgment may be vacated at any time on motion of the party against whom it is entered. Collyer v. McDonald, 123 N. J. L. 547; Gloucester City Trust Co. v. Goodfellow, 121 Id. 546; Westfield Trust Co. v. Court of Common Pleas, 115 Id. 86; Gimbel Bros. v. Corcoran, 15 N. J. Mis. R. 538.
>
> "Prosecutor makes no serious attempt to argue that the affidavit upon which the default judgment was entered was sufficient. We think it was not in compliance with R. S.

2:32-118 and 119 in that it did not contain a copy of the instrument sued on, did not aver such facts as would warrant a recovery if such facts were proved by witnesses, and it did not appear that the affiant had competent knowledge of the facts sworn to.

"We therefore conclude that the court below was correct in holding the affidavit insufficient, that the court had power to set aside a void judgment more than thirty days after its entry, and that the record is such that the judgment cannot be sustained in the absence of compliance with the statutes cited."

Additional statutory authority for the power of the Bureau to modify its award is found in R. S. 34:15-57 which provides as follows:

"34:15-57. Summary hearing: power to modify and commute award:

"The commissioner, each deputy commissioner and each referee is hereby authorized to hear and determine the matter in dispute in a summary manner, and each shall have power to modify any award of compensation and to provide for the commutation of any such award."

This section was applied in the case of *Katz* v. *Zepela,* 10 N. J. Misc. 258 (New Jersey Supreme Court, affirmed *per curiam* by the Court of Errors and Appeals in 110 N. J. L. 14). On page 261 of the Opinion the Supreme Court, in discussing the case of *Rose* v. *Wagner Construction Co., supra,* said: "The effect of the above decision would seem to be to give the Bureau the

same control over its judgments that the Common Law Courts have, and the rule there is that the power may be exercised at any time that the cause remains under the Court's control provided the moving party embraces the first opportunity he has of presenting his case."

R. S. 34:15-27 provides as follows:

> "34:15-27. Modification of agreement, review of award:
>
> "An agreement for compensation may be modified at any time by a subsequent agreement. A formal award may be reviewed within two years from the date when the injured person last received a payment, upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased. An award may be reviewed at any time on the ground that the disability has diminished. In such case, the provisions of section 34:15-19 of this title with reference to medical examination shall apply."

This section recognizes that the control over a judgment in compensation remains in the Bureau both for the purpose of making an increased award as well as for the purpose of reviewing an award on the ground that the disability has diminished. Clearly, the legislature intended that the Bureau should retain full control over any award for compensation where the facts subsequently adduced justify a finding of increased or diminished right to compensation.

As pointed out above, the statute vests the Bureau with the same power possessed inherently by all the common law courts to control their judgments especially where the same when

rendered are void and, therefore, nullities.

In the case of *Collyer* v. *McDonald,* 123 N. J. L. 547, the Court dealt with the power of a statutory court, and the District Court, to vacate a void judgment more than 30 days after its entry. Under R. S. 2:32-121 of the District Court Act, the power is conferred upon the District Court to grant a new trial within 30 days after the entry of judgment except on the ground of newly discovered evidence. The Court, however, held that where a void judgment has been entered, the limitation period as to 30 days does not apply and that the Court possesses the power to vacate a void judgment at any time. The Court, on page 549 of the Opinion, states the rule as follows:

> "Judgments entered in the absence of the defendants and without a jury were entered in violation of defendants' fundamental rights and were void, not merely voidable. A void judgment may be vacated at any time on motion of the party against whom it is entered. *Gloucester City Trust Co.* v. *Goodfellow,* 121 N. J. L. 546: 'Nor can laches run against a void judgment; it is a mere blur on the record; it is the duty of the court on its own motion to strike it off, whenever its attention is called to it.' Westfield Trust Co. v. Court of Common Pleas, 115 N. J. L. 86. The District Court has power to vacate a void judgment more than thirty days after its entry. Gimbel Bros. v. Corcoran, 15 N. J. L. Mis. R. 538."

In the case of *Gloucester City Trust Co.* vs. *Goodfellow,* 121 N. J. L. 546, the Court of Errors and Appeals in the Opinion of the Court by

Justice Perskie, on page 548, stated the rule as follows:

> "That judgment was, therefore, 'illegally' entered and was 'utterly void.' Since it was a void judgment, it should be vacated at any time. Westfield Trust Co. v. Court of Common Pleas, supra, and cases collated in the opinion of the Supreme Court."

To the same effect is the holding of the Supreme Court in the case of *Westfield Trust Co.* v. *Court of Common Pleas,* 115 N. J. L. 86, cited under a previous point in this brief.

In the case of *Gimbel Bros., Inc.* v. *Corcoran,* 15 N. J. Mis. 549 (New Jersey Supreme Court), Chief Justice Brogan, speaking for the Court on page 540 of the Opinion, said:

> "The prosecutor argues three points, the first of which is that the District Court lacked power to vacate the judgment after the expiration of thirty days, unless upon newly discovered evidence, relying on the seventeenth section of the District Court Act, supra. This argument seems to me to be without substance. In the absence of proof of liability a judgment should not have been entered against Mary Corcoran. It was a void judgment and might be vacated any time. McLaughlin v. Cross, 68 N. J. L. 591, 601; 53 Atl. Rep. 703. Under the proof as it appears in the return, this judgment is just as invalid as though the court lacked jurisdiction of the person.
>
> "The second point made is that the District Court was without jurisdiction because a first rule to show cause, designed to ac-

> complish the same purpose, was discharged and the prosecutor contends that the matter is therefore res judicata. This reason, too, seems to be unsound. This proceeding, in my view, is not an application for a new trial. While judgment may be entered where parties do not appear to defend, nevertheless it must be on proof. Here there was none making Mary Corcoran liable for the defendant. There is no substance, therefore, to the point that because a previous application to open or vacate the judgment was denied that the matter is at rest forever. It is the duty of the court to annul an invalid judgment. Its power to do so resides in its inherent jurisdiction and control over its judgment. Wardell v. Warshafsky, 10 N. J. L. Mis. R. 519; 159 Atl. Rep. 694.
>
> "It is next argued that this defendant should now be estopped from challenging the validity of the judgment. This judgment-creditor cannot be heard to urge the doctrine of estoppel under the circumstances of this case. Laches or estoppel are never invoked in support of an invalid proceeding or a void judgment. There has been no change in the position of the parties unfavorable to the judgment-creditor."

The respondents, therefore, contend that the Bureau possesses both statutory and inherent power to set aside a void judgment rendered by the Bureau.

## POINT VI.

**The Court of Common Pleas had jurisdiction to hear an appeal from a denial by the Bureau of an application to reopen a judgment.**

The petitioner-prosecutor contended below that the Court of Common Pleas had no jurisdiction to hear an appeal from a denial by the Bureau from application to reopen a judgment of the Bureau.

The respondents-defendants submit that the Court of Common Pleas does possess such jurisdiction as pointed out by Judge Conlon in his opinion:

> "The first question to be determined is whether this Court has jurisdiction to hear an appeal from a denial by the Bureau of an application to reopen a judgment.
>
> "The statute giving this Court appellate jurisdiction over the Bureau (34:15-66) provides that:
>
> > 'Either party may appeal from the judgment of the Commissioner, Deputy Commissioner, or Referee to the Court of Common Pleas of the County in which the accident occurred, by filing with the Secretary of the Bureau and with the Clerk of the County where the accident occurred, a Notice of Appeal * * *.''
>
> "It will be noted that by the statute an appeal will lie to this Court only from a 'judgment' of the Bureau and it is con-

tended that a refusal to reopen a judgment is not a judgment under the statute.

"It has been specifically held to the contrary in the case of Ruoff vs. Flasi, 117 N. J. L. 47, affirmed 118 N. J. L. 314. In that case, in considering a similar situation, Justice Heher, speaking for the Court of Errors and Appeals, said:

> 'The action of the Bureau in dismissing the employee's petition for a hearing and adjudication of his claim on the merits is an appealable judgment within the intendment of chapter 149 of the Laws of 1918 (P. L., p. 429), as amended by chapter 25 of the Laws of 1932 (P. L., p. 38), vesting appellate jurisdiction in the respective Courts of Common Pleas. It was plainly the legislative purpose to invest the Pleas with general appellate jurisdiction of the judgments and orders of the compensation bureau; that is implicit in the statutory procedural scheme.'

"I therefore conclude that this Court has jurisdiction to consider this appeal from the order of the Bureau refusing to reopen its determination and judgment of July 14, 1943" (Case, p. 23, ll. 15 to 40; p. 24, ll. 1 to 20).

## Conclusion.

The respondents-defendant-appellants respectfully urge that the judgment of the Supreme Court be reversed for the following reasons:

A. The judgment of the Bureau awarding an increased permanent disability is void because the Bureau lacked jurisdiction of the subject-matter upon which it could make a determination and award since Breheny, by his acceptance of a pension had severed the relationship of employer and employee between the County of Essex and himself.

B. The judgment of the Bureau awarding increased permanent disability is illegal and against the public policy of the State of New Jersey, because prior thereto the said Breheny had accepted a service connected disability penison on account of which payments were and still are being made.

C. The factors which render the judgment void, illegal and against public policy were not contained in the record of the case and were not made known to the Bureau, Pleas, Supreme Court, or Court of Errors and Appeals and had never been passed upon by any tribunal prior to the motion to vacate.

D. A void judgment may be set aside in the Bureau even after affirmance by Common Pleas, the Supreme Court and the Court of Errors and Appeals, where the facts rendering the judgment void were not part of the prior record, were not known to the Courts passing upon the matter and were, therefore, not considered or passed upon by the Courts considering the matter.

E. The Bureau possesses both statutory and inherent power to set aside a void judgment rendered by the Bureau.

F. The Court of Common Pleas had jurisdiction to hear an appeal from a denial by the Bureau of an application to reopen a judgment.

Respectfully submitted,

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# New Jersey Court of Errors and Appeals

| | |
|---|---|
| PATRICK BREHENY,<br>Petitioner-Appellee,<br>*vs.*<br>COUNTY OF ESSEX AND BANKERS INDEMNITY INSURANCE COMPANY,<br>Respondents-Appellants. | On Appeal from New Jersey Supreme Court. |

## BRIEF OF PETITIONER-APPELLEE.

### Question at Issue.

Is a judgment of the Court of Errors and Appeals *res judicata?*

Can the Bankers Indemnity Insurance Company, after litigating the merits through the Compensation Bureau, the Court of Common Pleas, the Supreme Court and the Court of Errors and Appeals, escape payment of a judgment against it individually, and its assured, the County of Essex, through the introduction of new matter before the Workmen's Compensation Bureau, which is admittedly not newly discovered evidence and where no fraud is alleged?

The assertion is now made that despite its knowledge of the facts, and despite no claim of fraud being made, the judgment of the Court of Errors and Appeals and of all the intermediate courts should be vacated upon the appellant's empty assertion that the Workmen's Compensa-

tion Bureau lacked jurisdiction of the subject matter at the time the case was tried.

This is the sole question at issue.

## The Facts.

We do not find ourselves in agreement with the statement of facts as given in the appellant's brief, and take particular exception to the statement (appellant's brief, p. 4) as to what the evidence shows with respect to deductions to be made from petitioner's pension payments, and also to the reference suggesting ignorance on the part of Banker's Indemnity Insurance Co., with respect to the pension award (appellant's brief, p. 5), this question having been determined against the appellant heretofore in the Bureau, by the Court of Common Pleas and by the Supreme Court. It is for these reasons that we believe we should set forth the following factual resumé.

In May, 1938, petitioner, in the employ of the County of Essex, met with an accident which was duly adjudicated on March 15th, 1940 upon a claim petition filed, to be compensable, as arising out of and in the course of Breheny's employment. The judgment in Breheny's favor was entered before the Department of Labor for 40% of total disability. Thereafter, petitioner's condition having grown worse, a claim for increased disability was filed on February 13th, 1943, resulting in an award, under date of July 14th, 1943, holding that Breheny had now become totally disabled. The employer and its insurance carrier, which had been originally named as a separate party defendant, being dissatisfied with this judgment prosecuted an appeal to the Essex County Court of Common Pleas where the judgment was

affirmed on September 26th, 1944. On November 25th, 1944 a Writ of Certiorari to review this judgment was allowed and under date of April 13th, 1945 the judgment of the Pleas was in all respects affirmed by the Supreme Court. Thereafter the respondents being still dissatisfied took an appeal to the Court of Errors and Appeals, and under date of January 24th, 1946 the judgment of the Supreme Court was affirmed unanimously by the Court of Errors and Appeals, in an opinion written for the Court by Mr. Justice Heher. Upon the coming down of the remittitur an application was made to the Workmen's Compensation Bureau to vacate Breheny's judgment upon the ground that on February 7th, 1941 Breheny, upon application made by him to the Essex County Pension Commission had been granted a pension, and that inasmuch as the petitioner occupied the status of a pensioner when his application for increased disability was heard, the Department of Labor lacked jurisdiction of the subject matter, and that despite the fact that this defense had never been raised (although knowledge of the facts was perforce admitted) that the judgment as affirmed successively in the Pleas, before the Supreme Court and before the Court of Errors and Appeals, was for this reason, void.

Pursuant to this motion, made before the Workmen's Compensation Bureau, the respondents took testimony with reference to the granting of the pension, it appearing from the proofs so taken that Breheny had entered into an agreement with the Pension Commission to the effect that there should be deducted from the pension moneys to be paid to Breheny, all amounts received by him as workmen's compensation from the insurance carrier, the Banker's Indemnity Insurance Co., and that pursuant to such agreement a sum equiv-

alent to such compensation payments, had been, in fact, deducted by the County (Pension Commission) during the time in which such compensation payments were made to Breheny, pursuant to the original 40% award made in his favor.

It also appeared from the evidence produced in the Bureau, in support of the motion to vacate, that when such compensation payments under the 40% award had been made in full, Breheny notified the County that he would expect his pension payments in full thereafter. The fact, of course, was that at that time he was receiving no further compensation payments which would permit of further deductions, the insurance carrier having declined to honor the award for increased disability, and having, as heretofore stated, appealed the matter to the Pleas, to the Supreme Court and finally to the Court of Errors and Appeals, such appeals being based upon the contention solely that the admitted increase in Breheny's disability was not due to the original accident, but was due merely to the natural progress of disease.

The application to vacate the judgment was denied by the Bureau in an order made by Deputy Commissioner Medinets (C., p. 11) in which he held the judgment of the Bureau as affirmed by successive steps through the Court of Errors and Appeals was *res adjudicata;* that no question of public policy was involved; that the Bureau had original jurisdiction to entertain the cause, and that the status of the petitioner as a pensioner, not having been raised by the respondents as a defense, could not be now used to avoid the judgment since it was apparent that the matters now urged did not constitute newly discovered evidence, and there was no allegation of fraud. The

Deputy Commissioner also held (citing cases) that the judgment of the Bureau having been removed to the Pleas on appeal, there was no longer any judgment in the Bureau which it had the power to vacate or disturb.

Upon appeal to the Essex Pleas that Court reversed Deputy Commissioner Medinets in an opinion filed under date of November 19th, 1946 (C., p. 20) and judgment pursuant to said opinion was duly entered December 11th, 1946 (C., p. 28).

As a possible aid to an understanding of this matter the following chronological table is furnished:

May 16th, 1938
Date of accident.

March 15th, 1940
Petition awarded 40% of total disability.

August 7th, 1940
Application filed for pension.

February 7th, 1941
Pension granted.

February 13th, 1943
Petition for increased disability filed.

April 8th, 1943
County Pension Act passed (R. S. 43:10-18.15).

July 14th, 1943
Disability award increased to 100% by Workmen's Compensation Bureau.

September 26th, 1944
Judgment of Bureau affirmed by Common Pleas.

November 25th, 1944
Writ of Certiorari allowed.

April 13th, 1945
Judgment of Pleas affirmed by Supreme Court (132 N. J. L. 584).

January 24th, 1946
Judgment of Supreme Court affirmed by Court of Errors and Appeals. (134 N. J. L. 129, 45 A. (2nd) 700).

February 26th, 1946
Application made to Workmen's Compensation Bureau to vacate judgment.

July 8th, 1946
Motion to vacate denied by Compensation Bureau.

July 17th, 1946
Respondent's appeal to the Court of Common Pleas from the refusal of the Bureau to vacate judgment.

November 19th, 1946
Opinion filed by Essex Pleas reversing Bureau and vacating judgment.

September 10th, 1947
Judgment of Essex Pleas reversed by Supreme Court.

The position taken by the Petitioner which was substantially upheld by the Supreme Court may be summarized as follows:

1. Breheny's compensation judgment, originally entered in the Bureau, and successively affirmed by the Pleas, the Supreme Court and the Court of Errors and Appeals is *res judicata* of Breheny's rights.

2a. The general statement that questions of public policy can be raised "at any time" means at any time while the matter is on appeal, and not

that the question may be held in reserve till after final judgment.

2b. The Bankers Indemnity Insurance Co., being a party defendant, no question of public policy with relation to a judgment against it can be raised, as the statute respecting compensation claims by pensioners is for the protection of public funds, and not for the protection of insurance companies.

3. On March 15th, 1940, when the Bureau originally determined that Breheny had met with an accident, arising out of and in the course of his employment, Breheny was not a pensioner. The relationship of employer and employee, having been established as of that date, it was immaterial upon a petition for increased disability that the relationship of employer and employee no longer existed.

4. Breheny's judgment having been appealed to the Court of Common Pleas, the Bureau lacked further power or control over said judgment, and could neither vacate nor modify the same.

## ARGUMENT.

### POINT I.

Under Point I the appellant argues that the Bureau lacked jurisdiction of the subject matter because Breheny by his acceptance of the pension had severed the relationship of employer and employee, between the County of Essex and himself, at the time his application for increased disability was heard.

Appellant cites no cases which support the argument that the compensation bureau lacked

jurisdiction of the subject matter, and it is obvious that the point lacks substance.

It can hardly be gainsayed that when Breheny filed his claim for compensation alleging that he met with an accident, arising out of and in the course of his employment the only tribunal capable of passing upon the merit of his claim was the New Jersey Department of Labor, Workmen's Compensation Bureau. Undoubtedly the Bureau had jurisdiction over the subject matter. In the rather recent case of *Dorman* v. *Usbe B & L Association,* 115 N. J. L. 337, 180 A. 413, the early case of *Ritter* v. *Kumkle,* 39 N. J. L. 259 is referred to as the leading case on this subject. A reference to the *Ritter* case discloses that the definition of jurisdiction there approved, is taken from a decision of the U. S. Supreme Court, which states the proposition in the following language:

> "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether, *on the case before the Court,* their action is judicial or extra-judicial—with or without the authority of law to render a judgment or decree upon the rights of the litigant parties." (Italics supplied.)

In *Breheny's* case before the Compensation Bureau no question of Breheny's status was raised by either pleadings or proof. The case before the Court was that of an employee seeking statutory compensation from his employer's insurance carrier and on the case before the Court that Court plainly had jurisdiction.

Now a decision of the Workmen's Compensation Bureau, as many cases hold, is *res adjudicata,* and in this connection the language by our Court of Errors and Appeals in *Drake* v. *C. V. Hill &*

*Co.,* 117 N. J. L. 290, 187, A. 637, is particularly appropriate. There the Court said:

> "The judgment of the Bureau is *res judicata.* It is final and conclusive as to all questions of law and of fact, comprehended by the determination, including those involving jurisdiction, the right to compensation and the nature and extent of the existing disability, subject only to correction on appeal and the authority vested in the Bureau to "reopen" its own adjudications and its continuing jurisdiction to modify the award of compensation to accord with an after-occurring enlargement or diminution of the incapacity so found to have ensued from the established compensable injury."

Thus it is seen that the Bureau had jurisdiction to determine Breheny's rights on the case it had before it, and that its adjudication with respect to his claim is final and conclusive between the parties. Such a judgment is not to be lightly disturbed. A case in point is that of *Plaskon* v. *National Sulphur Co.,* 114 N. J. L. 109, 176 A. 112, where a death claim petition had been dismissed in the bureau at the conclusion of the petitioner's case for failure to prove that the accident arose out of the employment. Thereafter, the Bureau undertook to reopen its judgment, and to permit proofs which clearly disclosed that in fact the accident was a compensable one. This action of the Bureau was affirmed by the Pleas, and in turn by the Supreme Court, but the Court of Errors and Appeals reversed on the ground that the Bureau lacked power to re-open its judgment when the evidence produced could not properly be classified as newly discovered evidence. In the instant case it is conceded that the new matter introduced in proofs before the Bureau, on the motion to vacate the judgment was not newly discovered evidence (C., p. 35, l. 5).

It clearly appears from the record, and was so found by the Deputy Commissioner (C., p. 15, l. 30) that not only the County but the insurance carrier was in complete possession of the facts with reference to the pension arrangement. Judge Conlon in the Pleas found to the same effect (C., p. 24, l. 25) stating:

> "It is admitted by the respondents-appellants that at the time of the original hearing before the Bureau the appellants knew that the petitioner was on a pension, and that there is not involved in the case any question of mistake, fraud or newly discovered evidence."

The bald fact is that all parties believed the pension arrangement to be legal until doubts were raised by the recent decision of the Supreme Court in *Reinhold* v. *Town of Irvington,* 134 N. J. L. 416-48 A. (2) 641. This is apparent from the testimony of defendant's witness Connelly (C., p. 55, l. 10) who, happening upon the decision in the *Reinhold* case, called the same to the attention of the Bankers Indemnity Co.'s general counsel, Mr. Van Orman (C., p. 55, l. 25). Accordingly the situation is that, conceiving the *Reinhold* case to present a legal defense not theretofore raised, the defendants sought to raise this question, despite the lapse of time, and despite the fact that the matter had been litigated through every available Court in the State of New Jersey without this legal proposition ever having been called to the Court's attention. Cases are legion to illustrate the illegality of such a procedure. In *Breen Iron Works* v. *Richardson,* 115 N. J. L. 302, 180 A. 192 (afterwards affirmed on the opinion below) 117 N. J. L. 150, the Court was dealing with a situation in which a consent judgment had been entered in the Workmen's Compensation Bureau without the taking of any testimony. Thereafter

the petitioner died and his widow filed a death claim petition, and upon the same coming on for hearing it was held that the consent judgment was a bar. Thereafter, and after the time to appeal had expired, the Supreme Court in *Federal Leather Co.* v. *DeRensis,* 113 N. J. L. 235, 174 A. 163, held that a consent judgment without a trial on the merits was not *res adjudicata* of a petitioner's rights. Thereupon an application was made to the Bureau in the *Richardson* case to re-open the judgment and proceed to a hearing on the merits, and the Bureau did re-open the judgment and did so proceed. The Supreme Court, in an opinion by Mr. Justice Parker, held that there being no allegation of fraud or of newly discovered evidence, the Bureau was *functus officio* and powerless to recall its judgment, citing *Miller* v. *McCutcheon,* 117 N. J. E. 123, 175 A. 155. The Court in the course of its opinion said:

> "Interest *rei publicae ut sit finis litium.* It is safe to say that if the De Rensis case had not happened along nothing more would have been heard of the claim of this petitioner. The rule that a re-hearing should be asked within the time allowed for appeal, a rule well established in this state is a sound one and carries weight in the present case."

See also *Franzoi* v. *Jacob Rubinoff,* 119 N. J. L. 575 and *Schaible* v. *Champenois,* 131 N. J. L. 436.

Assuming for the purposes of the discussion that Breheny's position as a pensioner was a defense (and we do not concede it for reasons which will be hereafter given) that defense should have been raised in the original trial before the Bureau. The question of the petitioner's status as an employee was a factual question for determination by the Bureau. In the case of *Butler* v. *Eberstadt,* 113 N. J. L. 569, 175 A. 159, the

question had to do with whether or not the plaintiff was a casual employee, whose rights against her employer could be determined only in a court of law, or whether she was a regular employee whose rights were only determinable in the compensation bureau. The Court of Errors and Appeals, in considering the question, said:

> "In the Bureau the referee, representing the Commissioner of Labor is judge of both law and fact. In a common law Court a jury determines the fact. The judge is powerless to do so. Therefore, as to a preliminary question of this character, the jurisdiction of the compensation bureau, and a common law court is co-equal. Since then the plaintiff's cause of action depended upon the character of her employment, whether casual or regular, and that was a fact question, it follows that the Court was without power in *limine* to dismiss the plaintiff's suit at law."

Let us consider a situation analogous to the case at bar. Suppose A files a compensation claim against B alleging that he was an employee injured in an accident, arising out of and in the course of his employment. B files an answer admitting the employment but denying the happening of any accident, and upon judgment being entered in favor of A, B appeals successively to the Court of Errors and Appeals where the judgment is affirmed. Is it conceivable that B could, thereafter succeed before the Compensation Bureau in having this judgment vacated on the ground that although the evidence was at all times available, he had not advised the Court that A was in fact a casual employee? There is nothing more "jurisdictional" in the statutory provision here relied upon (R. S. 34:15-43) to the effect that no "former employee who has been retired on pension" shall be entitled to compensation than in the statutory provision (R. S. 34:15-36) which

declares an employee to be one who performs service for another "exclusive of casual employments". If the status of an employee as casual is a question of fact to be determined as a defense upon the proofs, equally so is the defense that the employer and employee relationship has been terminated by the acceptance of a pension.

The defense was available in the trial court in 1943. The question is now *res adjudicata* by decision of the Court of Errors and Appeals and cannot be raised in 1947.

## POINT II.

Under this heading the appellant argues that petitioner's compensation award was illegal and against public policy.

In the Bureau it was found that the judgment was not contrary to public policy (C., p. 14, l. 30) while the judgment of the Court of Common Pleas completely ignored this contention. The Supreme Court found that there was no question of public policy in the case, and this is apparent and obvious under the facts. Here the insurance carrier which received a premium to cover the County for workmen's compensation seeks to escape liability and thus benefit itself financially, and at the same time cast a possible burden upon the municipal corporation. It will be recalled that under the arrangement existing between Breheny and the County, payments made by the insurance carrier were to be deducted from the payments made by the County, thus partially relieving the tax payer of a burden. There is nothing in the record upon which appellant's claim can be justly predicated that this arrangement was effective only during the duration of the initial compensation payments, *i. e.*, during the duration of the original 40%

award. This being so it is clear that if the insurance company is permitted to avoid liability as to the judgment returned against it, the taxpayer will be saddled with the entire compensation payments, whereas otherwise a part of this burden might be expected to be borne by the Bankers Indemnity Insurance Company.

Over and beyond this, however, we defy counsel to cite a case from any Court of respectable authority in support of the proposition that a litigant may have in his possession a defense based upon a question of public policy, may conduct a litigation through all the courts in the state, including the court of last resort, await the decision of that tribunal and then pulling an ace from his sleeve, if the decision of the court of last resort be against him, litigate the matter all over again, upon the basis that a question of public policy was involved. The leading case of *Kennedy* v. *Cooms,* 91 N. J. L. 100, 106 A. 210, is authority for the proposition that questions of public policy need not be raised in the trial court, but may, if apparent on the record be raised in the Supreme Court, or in the Court of Errors and Appeals. This we concede, but we again assert that no authority can be found for the proposition that after the Court of Errors and Appeals has decided a controversy a litigant may have another bite at the cherry upon application to the trial court for permission to start all over again, upon an entirely new and different theory of law, based upon facts at all times available but not raised. Compare *Miller* v. *McCutcheon, supra* (117 N. J. E. 123).

In the case at bar this is precisely the position which these defendants take, namely, that with full knowledge of the facts in their possession, which facts allegedly show that Breheny's judgment as entered before the Workmen's Compen-

sation Bureau, in the Court of Common Pleas, in the Supreme Court and in the Court of Errors and Appeals, was void as against public policy, they could litigate the matter as a purely medical question and reserve for future use the question of public policy. In other words, having gambled on the outcome of the case tried upon one theory, they now seek to dispose of the cause upon a different theory when disappointed with the judgment of the Court. Courts do not set aside their judgments in order that litigants may at their pleasure retry the issues. *Interest rei publicae ut sit finis litium.*

In effect these defendants say to the Court of Errors and Appeals "What do we care how you decide the *Breheny* case, we can always upset your judgment on the ground of public policy."

(b) In the original claim petition filed, and on the petition for increased disability Bankers Indemnity Insurance Co., was named directly as a party defendant. That is proper for a petitioner to proceed directly against the insurance carrier, in this fashion, has been adjudicated by our Supreme Court in *Brown* v. *Conover,* 116 N. J. L. 184, 183 A. 304. In the case at bar Breheny's original judgment of 40% of total was entered against the County of Essex and Bankers' Indemnity Insurance Co., and was paid by the latter. Breheny's petition for increased disability was directed against these same respondents and the defense was undertaken by Bankers Indemnity Insurance Co., through its own counsel, no representative of the Essex County Counsel's Office participating. As already pointed out respondent's present counsel has conceded in the motion to vacate, made on behalf of not only the county, but Bankers Indemnity Insurance Co., that the facts relative to the pension situation

cannot be classed as "newly discovered evidence". As disclosed by the record counsel stated (C., p. 35, l. 5).

> "The application is not being based, on newly discovered evidence as it is rather obvious, it seems to me from the record, that the prerequisites could not be established here as required by law".

Accordingly, it will be seen that Bankers Indemnity Insurance Co., with both presumptive and actual knowledge of the true situation, undertook the defense of Breheny's claim without raising any question of Breheny's status as an employee before the trial Court, or before any of the appellate tribunals before whom the matter thereafter came. Having failed to raise this defense (if defense it was) Bankers Indemnity Insurance Co., has become bound by the final judgment rendered in this cause by the Court of Errors and Appeals. A few cases will serve to illustrate the principle here relied upon. In *Natural Products Refining Co.* v. *Court of Common Pleas,* 125 N. J. L. 309, 15 A. (2nd) 754, a hearing was had in the Compensation Bureau to determine among other things whether the compensation found due was payable by the New Jersey Manufacturers Casualty Insurance Co., or by the American Mutual Liability Insurance Co., the Bureau determining that the New Jersey company was liable. On appeal the Pleas reversed, finding that the liability should be charged against the American company, and remanding the matter to the Bureau to determine the extent of petitioner's disability. On this remand the American Company sought to introduce further proofs, the Court of Errors and Appeals ruling that it was not entitled to produce such further proofs in that the factual matters, sought to be proven, were not newly dis-

covered but could have been introduced upon the original hearing. The Court said:

> "We think the appellant was bound by the case it made out at that hearing. When, on appeal, the question was decided against it, that judgment was final, unless set aside on certiorari. No steps were taken to disturb it. The procedure adopted of seeking a new trial in the Bureau on evidence which had theretofore been withheld cannot be approved. The second judgment of the Bureau was, therefore, without warrant and was properly set aside."

In *Textileather Corporation* v. *Great American Indemnity Co.,* 108 N. J. L. 121, 156 A. 840, the question was whether the American Mutual Liability Insurance Co., or the Great American Indemnity Co., was responsible for payment of a compensation judgment. The Court of Errors and Appeals in an opinion by Mr. Justice Bodine approved the action of the trial Court (Judge Dungan) in directing a verdict against the American Company upon the sole ground that that company was estopped to deny its liability

> "because it took over the entire defense of the proceeding brought against the plaintiff for compensation".

In *Cook* v. *Preferred Accident Company,* 114 N. J. L. 141, 176 A. 178, Cook brought an action for personal injuries against a Mrs. Dunne and recovered a judgment. The defense of this action was undertaken by Preferred Accident Company who carried Mrs. Dunne's insurance, but after the verdict the insurance company refused to pay the judgment on the ground that the driver of Mrs. Dunne's car was under the lawful age to operate an automobile. The Court held that inasmuch as there was evidence indicating that an

agent of the Preferred Company had knowledge of the true facts, by undertaking the defense of the action against Mrs. Dunne, the insurance company was now precluded from denying its liability to the plaintiff, Cook. The *Cook* case held the insurance company liable though it was not even a defendant in the original action.

A somewhat analogous situation may be found in *O'Brien* v. *Scandinavian Lines,* 94 N. J. L. 244, 109 A. 517. Here the petitioner met with an accident on navigable waters, and under the erroneous belief that the claim was covered by the New Jersey Workmen's Compensation Act a settlement of the claim, pursuant to such Act, and approved by the Workmen's Compensation Bureau was entered into. Thereafter the United States Supreme Court decided in the case of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, that Admiralty had exclusive jurisdiction over such claims. The defendant, upon the strength of this decision, having refused to pay the compensation agreed upon, suit was instituted upon the agreement. Our Court of Errors and Appeals held that the mistake was a mistake of law, and that the contract to pay compensation under the State Act was nevertheless binding. Surely, it would seem that a contract entered into under a mistaken notion of law can be no more binding than a judgment of a Court of record where such judgment is pronounced through the failure of a defendant to raise a legal defense.

Although the decision of the Court below is not based upon any finding with respect to public policy, the point may, nevertheless, require some further discussion. It must be conceded, we think, that the purpose of the statute (R. S. 34:15-43) with respect to the rights of a pensioned employee to compensation, was passed for the protection

of the public funds. Certainly there was no legislative intent to limit the amount of money which an injured employee might collect. For example, if an employee had insured himself against accidental injury the fact that he was collecting weekly benefits under such a policy would not deprive him of his right to collect compensation benefits. In the instant case no question of public policy is involved, even so far as the County of Essex was concerned, in that under the arrangement entered into, the amounts collected by Breheny, in the form of workmen's compensation, paid by Bankers Indemnity Insurance Co. were credited against his pension payments, and the County of Essex had its pension obligation correspondingly reduced. Incidentally, it may be said that the pension was granted upon the distinct understanding that the County would take credit for the compensation payments made, and nothing appears which would limit such deductions to Breheny's original 40% award as distinguished from his award for total disability. No question of public policy appearing as respects the County, it is doubly apparent that no question of public policy can arise insofar as Bankers Indemnity Insurance Company is concerned.

We know of no reason why this insurance company, which accepted a premium in consideration of the protection to be afforded the County through the issuance of this insurance policy, should be permitted to escape payment of the judgment rendered against it by reliance upon a statute passed not for the protection of private corporations, but for the protection of the taxpayer at large.

We call attention to the fact that the present litigation has been instituted, not for the benefit of the County, but in an attempt by the insurance

carrier to duck the obligation arising under its policy, and to saddle the County through its Pension Commission, with the obligation of paying Breheny's pension in full, rather than only in part.

If, in fact, it is illegal for Breheny to be receiving compensation while being carried on the pension rolls, then it would seem that it is the pension which must fall. Under the case of *Di Lorenzo* v. *Board of Commissioners,* 134 N. J. L. 7-45 A (2d) 686, it was held that the claimant having been granted workmen's compensation was not in a position to claim rights under the City pension plan. It is *res adjudicata* that Breheny is entitled to Workmen's Compensation. On March 15th, 1940 a judgment in his favor for Workmen's Compensation was entered in the Bureau, and he occupied the status of one receiving workmen's compensation benefits when his application for a pension was made and when it was granted in February 1941. Under the *Di Lorenzo* case *supra* it may be that Breheny could not have required the Pension Commission to put him on its pension list, but this obviously has nothing to do with the validity of his workmen's compensation claim.

If the County of Essex, acting independently (and not merely as guided by counsel for the insurance carrier) considers Breheny's position an improper one, there is nothing to prevent it from discontinuing his pension. This is precisely what was done in the case of *Delaney* v. *Police & Firemen Department Pension Commission of the City of Elizabeth,* decided by the New Jersey Supreme Court in an opinion by the then Justice Case (unreported). There a member of the firemen department sought a peremptory mandamus to compel the payment to him of a pension, it appearing

that a pension had been theretofore granted him and instalments paid regularly until an award of Workmen's Compensation had been entered in his favor, whereupon the City discontinued his pension payments. The Supreme Court held that the City of Elizabeth was justified and upheld its position that

> "it is not obligated to duplicate the Workmen's Compensation payments and that it will withhold payment of the pension amounts until the compensation award is fully paid or falls short of the pension allotment".

Our argument as heretofore made assumes generally that the law as laid down in the *Reinhold* and *Di Lorenzo* cases are applicable to Breheny. That this is extremely doubtful, as a matter of fact, was alluded to by Deputy Commissioner Medinets in his order refusing to vacate Breheny's judgment (C., p. 14, l. 35). There the Deputy Commissioner pointed out that an employee of the County of Essex stands in a different position than does the ordinary municipal employee. This is by reason of the fact that on April 8th, 1943, and before the judgment in Breheny's favor presently disputed, was entered, such judgment not having been entered until July 14th, 1943, the legislature passed R. S. 43:10-18.15. This Act which applies to the employees of Counties of over 800,000 inhabitants (and this would embrace County employees of the County of Essex) contains the following provision:

> "The rights of any employee or beneficiary to receive any payments under the Workmen's Compensation Act of New Jersey, shall not be affected or impaired by any of the provisions of this Act".

The Act in question was introduced in the Legislature by a member of the Essex County dele-

gation at a time when the Essex County authorities were fully acquainted with the developing situation in the *Breheny* case, and is a clear legislative pronouncement that at least insofar as Essex County employees are concerned no public policy existed to deny a County employee both compensation and rights to assistance from the pension fund to which the employee had contributed a portion of his salary, normally over a period of many years. Certainly the paragraph quoted must be given some significance, and a fair interpretation would seem to be that if a County employee receives a compensation award he can then make application for pension benefits and receive the same. The minimal effect of this section is to indicate the absence of any public policy with respect to compensation and pension benefits, whether the legislature succeeded by the language employed in effecting its purpose or otherwise.

The language must be given some effect. It must have been intended in some way to change existing law.

## POINT III.

The argument under Point III merely calls attention to the fact that the question of the petitioner's status was not contained in the record of the case and was not made known to the Bureau, to the Pleas, to the Supreme Court or to the Court of Errors and Appeals. This raises the question of why? The record indicates very clearly that Bankers Indemnity Insurance Company did not raise the question because they did not at that time consider that the facts presently relied on constituted a defense, and that it was not until the Supreme Court decided the case of *Reinhold* v.

*Town of Irvington,* 134 N. J. L. 416, it first occurred to Bankers Indemnity Insurance Company that they had overlooked a possible defense. William M. Connelly testifying for the respondent, on the application to vacate Breheny's judgment said: (C., p. 55, l. 5):

> "As I said before, just in preparation of this one case that I was working up I came across the citation of your case, Reinhold, I believe, against the City of Irvington. In digging into that and getting a copy of the brief and study of the facts, I thought that the issue raised was very much with our Breheny case as well as another one, *Why the issue was not raised before, I don't know* * * * The reason I made this inquiry is I discovered this case, this citation that I obtained from somewhere, and in digging into it I thought it would apply to our case. Then I took it up with Mr. Van Orman." (Mr. Van Orman is General Counsel of Bankers Indemnity Company.) (Italics supplied).

The respondent in its answer filed to the claim petition did not contest the existence of the relationship of master and servant. The portion of the answer referred to reads as follows (C., p. 80, l. 25):

> "2. Was the petitioner in your employ at the time of the alleged accident? Yes."

The sole defense set up in this answer is as follows (C., p. 83, l. 20):

> "Respondent denies that petitioner's disability has increased since the adjudication."

Clearly under this admission the Bureau having jurisdiction over the parties was entitled to determine the issue between those parties, *i.e.*, whether the disability had in fact increased, and whether or not the relationship of master and

servant still existed between the parties was a matter of no moment. An illustration will suffice to prove this point, which incidentally was commented upon by the Deputy Commissioner during the course of the hearing (C., p. 38, l. 14). Suppose A, an employee, files a workmen's compensation claim against X and receives an award. Thereafter A is employed by Y and while in Y's employ finds that his disability, due to his industrial accident, has increased and accordingly he files a petition seeking an increase in his award against X. It is obvious that X cannot defeat A's claim upon a showing that the employer-employee relationship no longer subsists in that A is now employed by Y. In other words, there need be no employer-employee relationship in existence when a claim for increased disability is made.

When Breheny's original claim petition was filed, and when the adjudication thereon was made, the relationship of employer and employee existed between Breheny and the County, and the fact that thereafter that relationship terminated by the granting of the pension becomes immaterial. As heretofore pointed out Breheny's right to his compensation award was adjudicated on March 15th, 1940, and when, in February, 1943, an application was made for increased disability the sole question for determination was whether or not such increase, attributable to the accident had, in fact, occurred. As stated in *Tucker* v. *Beltramo*, 117 N. J. L. 72, 186 A. 821,

> "The final judgment of the Bureau is nevertheless *res judicata*. It is, * * * final and conclusive as to all matters comprehended by the determination, subject only to the exercise of that tribunal's authority to re-open its own adjudications, correction on appeal and modification under the reviewing power vested in the Bureau by the Act of 1931, *supra,* for an increase or diminution of

> the incapacity. * * * The statutory review does not contemplate the undoing of what has been finally determined. * * * The extent of the disability, insofar as it may have subsequently increased, or diminished, or ended, is properly the subject, and the only subject of review under this clause. *This is the full extent and limit of the continuing jurisdiction*". (Italics supplied.)

Accordingly it will be seen that on the re-opening the question of an employer-employee relationship was entirely immaterial, as that question had been decided in March, 1940, and was *res judicata.* The hearing in February, 1943, was confined solely to a determination having to do with the subsequently increased disability flowing from the original accident. "This is the full extent and limit of the continuing jurisdiction".

## POINT IV.

Under this heading the argument is advanced, through several pages, that a void judgment may be set aside at any time. We do not argue the point as it is conceded, but upon what authority does the appellant contend that the judgment in the case at bar is void? Certainly the parties were present and represented by counsel. Certainly the issue as presented to the Bureau was tried and determined. Without question the Workmen's Compensation Bureau has exclusive jurisdiction to determine controversies of this nature, and on the case as presented to the Court its action was judicial and not extra-judicial. To repeat, the definition of jurisdiction as given by the United States Supreme Court in *State of Rhode Island* v. *State of Massachusetts,* 12 U. S. 883 is as follows:

> "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether, *on the case before the Court* their action is judicial or extra-judicial —with or without the authority of law to render a judgment or decree upon the rights of a litigant party." (Italics supplied).

To state that the Workmen's Compensation Bureau lacked jurisdiction of the subject matter (and it is upon this proposition that appellant's whole case depends) is to state an absurdity.

## POINTS V and VI.

Appellant's argument under Points V and VI go to the proposition that the Bureau possessed power to vacate its judgment, and the Court of Common Pleas had power to hear an appeal from the Bureau's denial to vacate.

The argument, of course, must be based upon the assumption that the judgment was void, and we believe that we have amply demonstrated heretofore that the judgment was a valid one. Appellant's argument must likewise assume a judgment residing in the Bureau, and we maintain that there is no such judgment.

It will be recalled that the Bureau's judgment was removed by this very appellant to the Essex County Court of Common Pleas, and that by successive steps initiated by Bankers Indemnity Insurance Company, the case was carried to the Supreme Court and eventually to the Court of Errors and Appeals. Upon affirmance the Court of last resort remitted the matter to the Supreme Court which in turn remitted the matter to the

Essex County Court of Common Pleas, and there it resides. That the Bureau was completely devoid of continuing jurisdiction has been authoritatively settled by the case of *Di Lorenzo* v. *Botany Worsted Mills,* 118 N. J. L. 418, 193 A. 549. There a judgment of the Bureau had been taken by appeal to the Passaic Pleas and the record, upon the filing of the notice of appeal, accordingly removed to that Court. Subsequently the petitioner applied to the Bureau for a reopening of the judgment and the petition being granted the matter was placed on the Bureau's calendar for re-trial. Upon a Writ of certiorari the Supreme Court reversed the action of the Bureau in vacating its judgment, upon the distinct ground that the record, having been removed to the Court of Common Pleas, the Bureau was without jurisdiction to entertain the application. In so holding the Court said:

> "We are clearly of opinion that the order cannot stand. The appeal having removed the record to the Court of Common Pleas, the Deputy Commissioner and the Bureau had no jurisdiction of the cause to entertain an application for a re-hearing."

In the *Di Lorenzo* case, as will be noted, the action had only progressed as far as the removal of the cause to the Court of Common Pleas by the filing of a notice of appeal. The matter had not even been argued in the Pleas. In the instant case, not only was the matter argued and disposed of in the Pleas, but went by further appellate steps all the way to the Court of Errors and Appeals. In that there was no longer any judgment residing in the Bureau there was nothing upon which the Bureau could adjudicate, either upon an application to re-open a non-existent judgment or vacate a non-existent judgment, and the Bureau

lacking power could not be legally reversed for failing to exercise a power which it did not possess.

## Conclusion.

This case has nothing to do with "double payments", of both compensation and pension. This is a scarecrow set up in the field by the Bankers Indemnity Insurance Co. for its own purposes. The fact that Breheny is entitled to workmen's compensation is *res adjudicata,* but any rights which he may have to pension payments are not, and if the County desires to do so it could terminate his pension payments at any time. If anything falls it is the pension, not the workmen's compensation award, for the validity of that award has been definitely settled by the Court of Errors and Appeals.

This litigation was not instituted by the County of Essex other than as its actions were controlled by the insurance carrier under the terms of its workmen's compensation policy. The institution of this expensive litigation is not being paid for by the County, nor is it in the County's interest. The contrary is the fact. If the County felt that there was any impropriety in Breheny's position, or any harm being suffered by it, its obvious remedy would be to discontinue the pension payments. The fact is, however, that Banker's Indemnity Insurance Company refused to make good on its policy by paying the judgment returned in Breheny's favor even after that judgment had been upheld by the Court of Errors and Appeals. Breheny was in destitute circumstances with a wife and six children to support, (C., p. 67, l. 15) and was clearly entitled to pension benefits as distinguished from ordinary public charity.

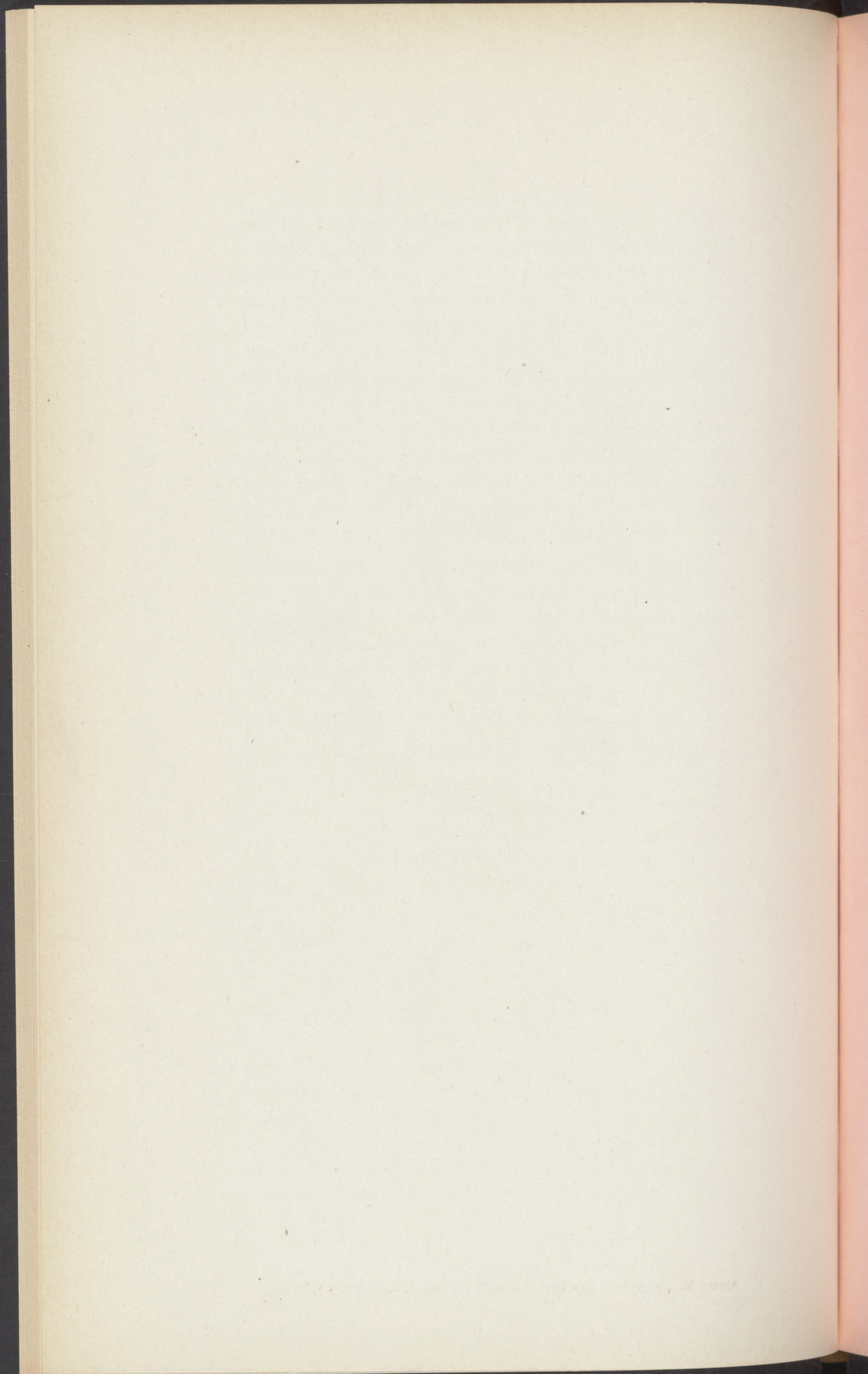
If the insurance carrier had a defense to the claim it was obligatory upon it to plead and prove its defense, and this it failed to do, and having failed to raise the defense, and having gambled on the outcome of the litigation instigated and controlled by it, it cannot now make a joke out of the time and effort that has been expended by the Courts, and incidentally by counsel, over a period of years, to suit its pleasure. Clearly the Bureau originally had jurisdiction of the subject matter in the posture of the case as presented to it. Certainly no one can look at the face of the record and assert that the judgment was "void".

If any question of public policy is present in the instant case that policy does not require the vacation of Breheny's judgment, making valueless all the time, labor and expense on the part of the parties, of the Court and of counsel, but rather public policy requires that there should be an end of litigation, and that the wholesome doctrine of *res judicata* should be upheld.

Respectfully submitted,

David Roskein,
Attorney for Petitioner-Appellee.

John A. Laird,
Of Counsel.



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WITNESSES FOR THE STATE


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