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Petition

(Filed Oct. 22, 1930)

New Jersey Supreme Court

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PETER F. CUMMMINGS,
Relator,

v.

POLICEMEN'S PENSION COMMIS-
SION OF THE BOROUGH OF BEL-
MAR, a municipal corporation
of the State of New Jersey,
Respondent.

On Mandamus

20

*To the Honorable Joseph L. Bodine, One of the
Justices of the Supreme Court of the State of
New Jersey:*

30

The petition of Peter F. Cummings, of the Bor-
ough of Belmar, in the County of Monmouth and
State of New Jersey, respectfully shows that:

(1) At the times hereinafter mentioned there
was duly adopted by referendum by the Borough
of Belmar, a municipal corporation of the State
of New Jersey, and in force therein an act entitled
"An Act providing for the retirement of police-
men and firemen of the police and fire depart-

40

Petition.

10 ments in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments'' (L. 1920, c. 160, p. 324) as amended.

20 (2) In June, 1922, your petitioner was employed as a regular officer of the police force of the said Borough, and continued on active duty in that capacity until October, 1922, resuming his duties in August, 1923. From August, 1923, until December 28th, 1929, petitioner regularly performed his duties on said force, excepting however, the month of October, 1929, when petitioner was ill.

30 (3) On December 28th, 1929, while on night duty on said force, petitioner was stricken with a chill, developed pneumonia and confined petitioner in a hospital where he was operated on for empyema. Ever since that time petitioner has been disabled and is still in that condition, being under the care and supervision of a doctor.

(4) At the time of his illness on December 28th, 1929, petitioner's annual salary was \$1,800.00, which continued until April 1st, 1930, but has not been paid thereafter.

40 (5) Pursuant to the act aforementioned, petitioner by written application dated May 17th, 1930, duly applied for a retirement to the Police Pension Commission of said Borough, and in said

Petition.

application indicated his willingness to appear for a physical examination before said commission at any time agreeable to the members thereof.

(6) Notwithstanding said application, the Pension Commission of said Borough has refused and still refuses to call to its assistance the aid of a police surgeon and otherwise act in determining whether petitioner is entitled to a pension by virtue of said statute, and has refused and still refuses to do any and all of the acts required of it by said statute to determine whether petitioner is entitled to a pension because of his disability heretofore described.

10

Petitioner, therefore prays, that a writ of mandamus may issue out of and under the seal of this Honorable Court, directed to the Policemen's Pension Commission of the Borough of Belmar, commanding it, pursuant to the statute in such case made and provided, to designate a physician to whom petitioner may apply for a certificate of permanent disability or, in the alternative, that said commission be commanded to call to its assistance the aid of the surgeon or physician representing either the Police or Fire Department and act in determining whether petitioner is entitled to the benefits under said statute.

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LESTER C. LEONARD,
Attorney for Relator.

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

PETER F. CUMMINGS, of full age, being duly sworn according to law, upon his oath deposes and says:

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Petition.

1. I am 31 years old and the petitioner mentioned in the petition hereto annexed, the contents of which I know of my own knowledge to be true.

10 2. In June, 1922, I was employed as a regular officer of the police force of the Borough of Belmar, a municipality in the County of Monmouth and State of New Jersey and remained on active duty in that capacity until October, 1922, when I resigned from the force to pursue my trade of tinsmith.

20 3. In August, 1923, I returned to said force and remained steadily on duty with the exception of the month of October, 1929, when I was ill, until December 28, 1929, at an annual salary of \$1,800.00.

30 4. Deponent, while on night duty on the evening of December 28, 1929, was stricken with a chill, pneumonia developed and deponent was confined to his bed at his home at No. 517 Seventh Avenue, Belmar, until the middle of January, 1930, when he was removed to the Freehold Hospital. Deponent was discharged from the hospital after being there two weeks and thereafter under his doctor's orders was confined to his home. He was there only a few days when on February 5, 1930, he was again taken in an ambulance to the Freehold Hospital where he was operated upon for empyema.

40 5. As the result of this operation deponent was confined to the hospital until March 18, 1930, and has been under the constant care and supervision of a doctor ever since and being unable to work.

Petition.

6. In December, 1929, deponent weighed between 150 and 155 pounds and now weighs 118 pounds.

7. Deponent received his salary as a regular policeman until April 1, 1930, but no further payments were received thereafter.

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8. By written application dated May 17, 1930, deponent applied for retirement to the Police Pension Commission of said Borough and in said application indicated his willingness to appear for a physical examination before said commission at any time agreeable to the members thereof.

9. Notwithstanding said application made and filed pursuant to the statute in such case made and provided, the Pension Commission of said Borough has refused and still refuses to call to its assistance the aid of the police surgeon and act in determining whether deponent is entitled to a pension by virtue of said statute, and has refused and still refuses to do any and all of the acts required of it by said statute to determine whether deponent is entitled to a pension because of his disability aforementioned.

20

30

10. Deponent therefore prays that a writ of mandamus may issue out of and under the seal of this Honorable Court, directed to the Policemen's Pension Commission of the Borough of Belmar, commanding it, pursuant to the statute in such case made and provided, to designate a physician to whom deponent may apply for a certificate of permanent disability or, in the alternative, that said commission be commanded to call to its assistance the aid of the surgeon or physician rep-

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Rule to Show Cause.

ability, or in the alternative to call to its assistance the aid of the surgeon or physician representing either the Police or Fire Department of said Borough and act in determining whether petitioner is entitled to the benefits of an act entitled, "An Act providing for the retirement of policemen and firemen of the police and fire departments in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments" (L. 1920, c. 160, p. 324), as amended.

And it is FURTHER ORDERED that both parties have leave to take deposition on five days' notice pursuant to the statute in such case made and provided.

Let this Rule be entered in the minutes.

J. L. BODINE,
J. S. C.

LESTER C. LEONARD,
Attorney for Relator.

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Depositions

NEW JERSEY SUPREME COURT

PETER F. CUMMMINGS,
Relator,

v.

POLICEMEN'S PENSION COMMISSION OF THE BOROUGH OF BELMAR, a municipal corporation of the State of New Jersey,
Respondent.

On Rule for
Mandamus

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DEPOSITIONS taken in the above stated cause, pursuant to stipulation, before the subscriber, Arthur W. Kelly, Supreme Court Commissioner, at the Borough Hall in the Borough of Belmar, N. J., on Thursday, the 13th day of November, 1930, at ten o'clock in the forenoon, in the presence of Lester C. Leonard, Esq., of counsel for the relator, and Joseph Silverstein and Edward A. Markley, Esqs., of counsel for the respondent; it being stipulated that said depositions be taken stenographically and the signature of the witnesses waived.

40

IT IS HEREBY STIPULATED that the Pension Act, known as Chapter 160 of the Laws of 1920, was duly adopted by the Borough of Belmar at the November election, 1928, and that Joseph Mayer, mayor of the Borough of Belmar, organized the Police Pension Board under the act at a meeting held on February 12, 1929. The members of the

Dr. George G. Reynolds, direct.

board are Joseph Mayer, mayor of Belmar, president; Raymond Stines, police officer, representing the police of Belmar; and George W. Swain, a citizen, who was also secretary of the board.

At the request of Mr. Leonard and in pursuance of his written notice to produce, counsel for the respondent has produced the entire police file of the borough and the entire pension file of the pension board with respect to Peter F. Cummings, Relator, and gives both to Mr. Leonard for his inspection.

10

DR. GEORGE G. REYNOLDS, a witness produced on the part of the relator, being duly sworn according to law, testified as follows:

20

Direct examination by Mr. Leonard:

Q. Doctor, you are a regular practicing physician and surgeon of this state? A. I am.

Q. And have been for how long? A. I have been practicing twenty-two years. I have been in this state about thirteen years.

Q. You are the head of a hospital in Freehold, are you not? A. I am.

Q. And have been for how long? A. Three years, since its establishment.

30

Q. And what portion of your practice, if any, is devoted to surgery? A. I think ninety per cent. of it; a large part of it, I think nearly ninety per cent.

Q. Do you know the relator in this case, Peter F. Cummings? A. I do.

Q. How long have you known him? A. I have known him, I should think, for ten or twelve years, pretty nearly all my stay in the state here.

40

Dr. George G. Reynolds, direct.

Q. Did you ever treat him before January, 1930? A. I think I have, yes.

Q. Do you recall when? A. I think it was eight or nine years ago, as long ago as that.

10 Q. For what? A. He had a pleurisy then at that time.

Q. Did you treat him any time between then and nine years prior? A. I don't remember anything of any seriousness unless it might have been a little cold or something of that kind, a grippe. I don't recall anything particular outside of that, but that cold.

Q. Were you acquainted with him during that period? A. Yes, and I would see him as one person would another, about town.

20 Q. Can you tell what the condition of his health was prior to January, 1930, or the latter part of December, 1929? A. Well, he seemed to be around, a normal individual.

Q. Did you examine him on New Year's Day or the 2nd day of January, 1930? A. I was called to the house on that day; yes, sir.

Q. Mr. Cummings' house? A. Yes, sir.

30 Q. Where? A. His father's home, 100 Parker Street.

Q. Freehold? A. Freehold.

Q. What was Mr. Cummings' condition at that time? A. He had pneumonia and pleurisy at that time.

Q. And ill? Was it a serious attack? A. A very serious attack.

40 Q. What treatment did you give him, if any? A. Why, he was treated at the time for a few days, I can't just remember how long, and then he was removed to the hospital.

Dr. George G. Reynolds, direct.

Q. And how long was he in the hospital? A. Well, he was in the hospital at that time two to two and a half weeks. He developed a pleurisy with effusion. We had to tap him and draw the fluid out from between the ribs.

Q. What is that condition called? A. Well, he had pleurisy following his pneumonia. We don't really call that an empyema unless the fluid becomes pus. But he went home from the hospital and he was home—I can't tell just how long—but he was returned to the hospital February 5th, admitted to the hospital again February 5th, and his lung had filled up with pus. This fluid had formed again and turned to pus and it had almost obliterated one lung. 10

Q. What lung, right or left? A. Left lung. No, let me see. Left lung, yes, it was the left lung, I remember, as he lay in bed. 20

Q. Did you have any X-rays taken? A. I did, yes.

Q. When was the first one taken? A. Right after his admission to the hospital.

Q. Was that in January? A. Yes, it was taken in January and others in February, when he was admitted the second time. 30

Q. Have you that X-ray? A. I have the one taken in February. I was unable to find the one taken in January.

Q. You have the one in February? A. February, at his last admission to the hospital.

Q. Did you rely upon those X-rays for your treatment of Mr. Cummings? A. I did very largely.

Q. Will you produce them, please? A. These were stored where they got soiled a little bit. 40

Dr. George G. Reynolds, direct.

Since the explosion out in Cleveland they are mighty particular, they won't let us keep X-ray films in the hospital. We have to store them anywhere we can to keep them outside, for fear of explosion. They are explosive.

10

Mr. Leonard: I will produce the first one here. There is no objection to that being marked, is there?

Mr. Markley: May I ask the doctor a question?

Mr. Leonard: Surely.

By Mr. Markley:

20 Q. Dr. Reynolds, did you take these X-rays yourself? A. I did, in the hospital.

Q. That is, you actually were the mechanic who took them? A. I did. I took them.

Q. Did you make a special study of X-rays prior to that time? A. I have been doing X-ray work for about six or seven years, been doing our own X-ray work.

Q. Do you do all the X-ray work for the hospital? A. I do all the X-ray work for the hospital.

30

Q. Yourself? A. Except the girl who is technician; she does the developing, but I take all the pictures myself.

Q. Do you read them all? A. Yes.

Q. Have you had a special study of X-ray work? A. No, I have never taken any special course outside of the technician coming down and staying with us sometimes a week or so at the time we bought the machine.

40

Q. What special qualifications, may I ask, have you for reading X-rays? As I understand it,

Dr. George G. Reynolds, direct.

most of that work is done by men who specialize in that field. A. Well, I think the average physician who has a knowledge of ordinary medicine can read an X-ray as plainly as this one, and of course when it comes to broken bones you can read as well as anyone; you can see where the bone is broken, that is all. Of course you come to some technical thing like an ulcer of the stomach or a duodenal ulcer or gall bladder condition, possibly a man who has had an extensive experience in that would be more qualified to read the X-ray. 10

Q. Is there a date on that? A. Yes, there is a date on this, January 11. This must have been the first, when he came to the hospital first.

Q. This is taken January 11th? A. January 11th, yes. 20

(X-ray marked Exhibit Rel. 1.)

By Mr. Leonard:

Q. Now, I show you an X-ray plate dated January 11, 1930, and marked Exhibit Rel. 1, and ask you to describe what you see in that plate. A. I think maybe if I get it over to the window I can see it.

Q. Yes, go over to the window. A. Now this right lung—the lung that is clear and filled with air is always dark like that; a fluid takes a light color like that. Now this lung is filled up at this time with a serous fluid. This was taken in January, before it became purulent or pus; and in other words this lung at this spot would be the same length as this length on this side. This lung that is filled up is cloudy at this point. 30

Q. When did you take the next one? A. They were taken at different intervals, and this next 40

Dr. George G. Reynolds, direct.

one was taken after he came back the second time, February 5, 1930. This fluid was taken from the rib by taking an aspirating needle and drawing the fluid out.

10 Q. And then he returned in February? A. He returned to the hospital in February and this had become purulent or thick pus, and it couldn't be removed in that way.

Q. Is that condition shown in the X-ray that you took in February? A. It was.

Q. Have you that X-ray here? A. Yes, February 5th.

Q. Produce it.

(Witness produces X-ray.)

20 *By Mr. Markley:*

Q. That is the date it was taken? A. Yes, sir; that is the date it was taken.

Q. By you? A. Yes, sir.

Mr. Leonard: I offer it in evidence.
(X-ray marked Exhibit Rel. 2.)

By Mr. Leonard:

30 Q. Looking at the plate taken on February 5th, 1930, and marked Exhibit Rel. 2, can you tell us whether there was any change in Mr. Cummings' lung condition? A. The only way that we can determine—you can see the same condition exists here; this is filled up. It has been drawn out here but this has changed to pus.

By Mr. Markley:

40 Q. You are referring now to the left side? A.

Dr. George G. Reynolds, direct.

Yes, the same side affected before. But this side practically clear.

Q. The right side is clear? A. Clear, filled with air. This side is filled up to here, a small amount of air going down in this area. (indicating).

10

Mr. Leonard: Witness pointing to the upper portion——

A. Up to the upper edge of the scapula, the shoulder blade, back there. That is the very edge of it there.

Q. What is about that? A. Well, the pus goes clear up to there. The pus comes up to the upper edge of the scapula on the right-hand side.

20

By Mr. Leonard:

Q. Was that pus removed, Doctor? A. It was removed.

Q. How? A. We had to take out a piece of the rib.

Q. What rib? A. About the ninth rib; usually take the ninth rib in the side; took out about two inches or two and a half inches and went through into the cavity and inserted a tube. We used a rubber tube—oh, about the size of an ordinary finger.

30

Q. Was he under an anaesthetic when that rib was removed? A. He was under an anaesthetic.

Q. Why was it necessary to remove the rib or a portion of it? A. In order to get the pus from the chest.

Q. Did you succeed in getting the pus out? A. Well, it drained for a long time. I should think

40

Dr. George G. Reynolds, direct.

there was at least three pints of pus removed at the time of the operation.

Q. Was that pus thick? A. Thick, yellow pus. That is the reason it made it necessary to remove a piece of the rib to get it out.

10 Q. Was this condition attendant with any fever? A. It was; he had a high fever all the time.

Q. By high you mean what? A. I didn't think to bring the chart down, but the fever ran all the way, a pus fever like that, from 102 to 104.

Q. Did he continue to remain in the hospital? A. He remained in the hospital until March 9, 1930.

20 Q. And he went to the hospital when? A. The last time, the second time, February 5th.

Q. The second time he was in the hospital over a month? A. Yes.

Q. And the first time he was there how long? A. I can't give you the exact date. I forgot to look it up, his first admission, this morning.

Q. After February did you take any X-rays? A. Yes, took another X-ray, and an X-ray labeled March 20, 1930.

30 Mr. Leonard: I offer that.

By Mr. Markley:

Q. Is that date on there, Doctor? A. It is on there.

Q. Is that the only one taken on that day? A. It is.

(X-ray marked Exhibit Rel. 3.)

Dr. George G. Reynolds, direct.

By Mr. Leonard:

Q. I show you X-ray marked Exhibit Rel. 3 and ask you, Doctor, to explain the condition of Mr. Cummings' lungs as shown from that X-ray. A. This was March 20th, and he left the hospital March 9th. This was taken after he left the hospital, some little time. This is the heart shadow, this shadow here; so that you can see the lung has filled out, the left lung, except an area down around here. 10

By Mr. Markley:

Q. What do you mean filled out? A. That is the lung that was compressed all up in the top, just when it was filled up with pus; and after the pus was removed by inserting a tube down here. By a blowing exercise that we gave him he has expanded the lung so it has come down here pretty near its full length again, with the area here in the side that has never filled in. 20

By Mr. Leonard:

Q. And did you take any other X-rays? A. Took another X-ray yesterday, but I didn't bring it this morning. It showed practically the same condition. This is a permanent condition in the side here. The X-ray was wet and didn't dry last night. I took it last evening, and it is practically the same as this here. 30

Mr. Markley: If the doctor is going to testify that I think we ought to have it produced eventually.

Mr. Leonard: Suppose we have the X-ray produced when it dries, and this testi- 40

Dr. George G. Reynolds, direct.

mony of Dr. Reynolds relating to it be subject to further cross examination, if you desire, and indeed be stricken out entirely if you desire.

10

Mr. Markley: Well, I don't want that but I would like a chance to——

Mr. Leonard: I mean his testimony relating solely to this last X-ray.

Mr. Markley: I would like to see the plate and submit it to our doctors, perhaps, for cross examination.

Mr. Leonard: Yes.

20

Q. As a result of the X-ray you took yesterday and your examination of Mr. Cummings yesterday can you state with reasonable certainty, Doctor, his present condition? A. You mean about his ability to work or his general physical condition?

Q. Yes, general physical condition with reference to his ability to work? A. He is in a weakened condition. He is physically weak. If he exercises himself to any extent he is very short of breath.

30

Mr. Leonard: Mr. Cummings, you step outside, will you, please, while this examination is going on, and close the door, please?

A. Now yesterday while he was up there having the X-ray taken I left him standing up just a few minutes, and he turned white and started to faint away and I had to get him out.

40

Q. In your opinion is he able to work at the present time? A. He would not be able to do

Dr. George G. Reynolds, cross.

any work unless it was some desk work, clerical work or something like that, where he would not be subject to any heavy physical exertion.

Q. Can you state with reasonable certainty what his future condition will be? A. I don't believe from his general condition now, after this length of time, that he will ever be strong. 10

Q. Will he ever be strong enough to undertake outdoor duties? A. That would depend on what the outdoor duties were. If there was anything that required any physical exertion I don't believe he will ever be able to do it.

Q. In your opinion, based on your examination of and acquaintance with Mr. Cummings, would you say he had a reasonable expectancy of life? A. I don't believe he will ever live very long. While we have never been able to isolate the tuberculous bacilli from the discharge and the pus, I am of the opinion that he undoubtedly is tubercular. 20

Q. From your examination of Mr. Cummings the first part of January, 1930, taking into consideration his state of health prior to that time as testified by you, can you state with reasonable certainty the cause of his condition as you found it in January, 1930? A. Well, the cause of it was pneumonia. Now what caused the pneumonia it would be impossible for me to tell, because I didn't see him until I was called to his bedside. 30

Mr. Leonard: I think that is all.

Cross examination by Mr. Markley:

Q. What is the name of this hospital, Dr. Reynolds? A. Freehold Hospital. 40

Dr. George G. Reynolds, cross.

Q. A private institution? A. A private institution. I own it.

Q. All owned by yourself? A. I own it.

Q. You are the head of it? A. I am.

Q. How large an institution is it, Doctor? A. We have twenty-five beds.

10 Q. Any other doctors associated with you? A. Oh, other doctors bring patients in there and see to them themselves or turn them over for me to see to if they want to.

Q. And you say that ninety per cent of your work is surgery? A. Well, it would be hard to figure it out, but I think it is very largely.

Q. Now you say you treated him about eight years ago for pleurisy? A. Pleurisy, yes.

20 Q. You didn't have the hospital at that time? A. I didn't have the hospital. It has only been established about three years.

Q. Where did you treat him at that time? A. At his father's place, his father's home, 100 Parker Street, Freehold.

Q. He lived there at that time, did he? A. He was, yes.

30 Q. Was that a serious case of pleurisy? A. I can't remember. He was confined to his bed for a few days. I can't remember just the length of time so far back.

Q. Was it a case of pneumonia too? A. No; no, that was pleurisy.

40 Q. Can you give us in a few words the difference between pleurisy and pneumonia? A. Yes, pleurisy is a condition in which the covering of the lung and lining of the chest becomes inflamed and as they breathe it gives them a great deal of pain. Sometimes there is pleurisy with effusion; that

Dr. George G. Reynolds, cross.

is, when fluid forms between the two layers, the covering of the lung and the lining of the chest.

Q. What was his general condition at that time?

A. Well, of course he was sick from the pleurisy but as I remember he was not confined to the house long.

10

Q. How long would you say? A. Oh, probably a week or ten days.

Q. Now have you treated him at any time at Belmar here? A. I never have been to Belmar to see him since he has been down here.

Q. Did you know his sister in Belmar, Mrs. Burke? A. I don't know that I ever met Mrs. Burke. I know some of his sisters.

Q. What are their names? A. I know Mrs. Cummings.

20

Q. Mrs. Cummings? A. Mrs. Sweeney, and Mrs. Geiger, and there is another small one and I can't remember her name, but I attended her in confinement, I remember.

Q. So that between eight or nine years ago, from the time when you saw him in January, 1930, you didn't treat him professionally? A. Not unless I may have seen him to give him a little medicine for cold or something, but there was no serious illness that I recall between those times.

30

Q. You say you treated him for cold and grippe between those times? A. Yes.

Q. How many times? A. I couldn't tell.

Q. You didn't look up your records? A. No, I wouldn't keep a record of that, no, if I just called at the house or he dropped into the office and got some medicine for a cold there wouldn't be any record made of it.

40

Dr. George G. Reynolds, cross.

Q. Have you the record of this case beginning January, 1930, here? A. The record of it from January?

Q. Yes. A. I didn't bring the chart, the record of it right through.

10 Q. You have the hospital record, I presume, of the case? A. We have, yes.

Q. And that shows his admission to the hospital? A. Yes, his admission and condition and treatment and temperature all from the time he was admitted until he was dismissed.

Q. Would it be possible for us to have that record? A. You could have a copy of it.

20 Q. Well, could we have the loan of the original? A. Well, I don't know but what you could have the loan of the original, with the understanding that it would be returned, because we have to keep a record of those things, you know.

Q. Surely. I didn't mean to remove the record at all. You could let us have the original and we could make a copy of the original. A. I think that would be all right.

30 Q. You don't know, of course, what other doctors have been treating Mr. Cummings between eight or nine years ago and the time when you saw him in January, 1930? A. No, I don't know anything about that.

Q. And I gather that when you say you saw him about town and thereby judged that he appeared to be normal, that was merely a casual affair? A. Yes, I wouldn't have anything special to impress it on my mind unless I am called upon to examine him, you know.

40 Q. But you were not called upon to examine him, as I understand it? A. No.

Dr. George G. Reynolds, cross.

Q. And you didn't mean when you said he seemed to be in a normal condition as giving a professional opinion, but merely looking at the man as he went along the street? A. That is all.

Q. You didn't know what his actual condition was? A. Nothing at all.

10

Q. So that between eight and nine years ago, when he had the pleurisy and when you treated him for coughs and colds in between, you didn't treat him again until January 2, 1930? A. That is right.

Q. And that was at the home of his father, 100 Parker Street, in Freehold? A. It was.

Q. You hadn't seen him prior to that? A. No, not for this illness, no.

Q. And when you saw him on January 2, 1930, was there any other doctor in attendance? A. No.

20

Q. Did you get a history of any other medical treatment prior to your visit on January 2, 1930? A. I just have a faint recollection, I can't be positive, that he said another doctor had called upon him down here before he was taken home.

Q. But you don't know that? A. Just as I say, it is just a recollection in my mind, but I couldn't be positive.

30

Q. No other doctor called you in? A. No.

Q. How long had he been at his father's house when you saw him January 2, 1930? A. I think I saw him about the time he was brought home or shortly afterwards.

Q. Brought home from where? A. From Belmar. He was down here, as I understand it, when he was brought home, when he was taken sick.

Q. So that you saw him without any other doc-

40

Dr. George G. Reynolds, cross.

tor and apparently there was no other doctor in attendance when you saw him on January 2, 1930?

A. That is right.

Q. And did you make an examination of him then? A. I did.

10 Q. Was he in bed? A. He was.

Q. And I think you diagnosed his trouble then as serious pneumonia and pleurisy? A. Yes.

Q. He had a temperature, I presume? A. High temperature.

Q. And what did your examination consist of? A. Physical examination of the lungs, going over with a stethoscope and by percussion, and I might say shortly after that he was seriously enough sick at that time so that he was very delirious.

20 Q. What did you do? You say you took him to the hospital? A. He was removed to the hospital.

Q. How soon after January 2nd? A. I can't remember exactly. I didn't get the date of the first admission, when he was first brought up to the hospital. I think he remained at home, if I remember well, in the neighborhood of a week before he was removed to the hospital.

30 Q. Of course your records will show that positively? A. It would show it positively.

Q. Did you make a record also of your first visit to his house on January 2nd? A. January 2nd; yes, sir.

Q. Did you make a record of what you found at that time? A. Well, I don't know as the record—it wouldn't be a hospital record. I don't know that there would be any record made to show that he had pneumonia at that time.

40 Q. You can't say positively how long he was at the hospital the first time, January, 1930? A.

Dr. George G. Reynolds, cross.

No, the record would have to show that. I couldn't tell you.

Q. As I understand it there wasn't any operation on that occasion? A. The only operation that was—there was no cutting, just an aspirating needle passed between the ribs and this serous fluid drawn off. 10

Q. When was he discharged from the hospital on that occasion? A. I didn't get the date of that, only his last admission. I came away in a hurry this morning and didn't think about the first admission.

Q. I suppose you have a fair recollection of his condition when he left the hospital? A. Yes, he left the hospital really before he should.

Q. Why was that, Doctor? A. Well, I don't know; he got homesick or something, and people don't like to stay in the hospital any longer than they have to, and he thought he would get along all right at home. He went back home and then is when he had this relapse and filled up with pus. 20

Q. Apparently your recollection was he was in the hospital on the first occasion about two weeks? A. About two weeks, two and a half weeks; that is my recollection. 30

Q. And then he was permitted to go home? A. Then he was permitted to go home.

Q. I suppose his temperature had gone down? A. Yes, he was improved. His temperature went down.

Q. Practically normal, I suppose? A. I think he was having a slight rise in temperature in the afternoons; normal mornings and up in the afternoon. 40

Dr. George G. Reynolds, cross.

Q. Your chart will show that? A. The chart will show that, the hospital record.

Q. Did you have him sign a release when he left? A. I can't remember for sure. I presume we have most of them.

10 Q. At any rate you permitted him to go at his own request? A. I permitted him to go home.

Q. Did you see him between that and the time he came back to the hospital? A. I did, yes.

Q. At his home? A. At his home, yes.

Q. Does your record show those visits? A. It will, yes.

20 Q. How many visits would you say between the time he went home in January and when he returned on February 5th, that you saw him? A. He was confined to bed all the time during that period at his home.

Q. And you saw him at his home? A. I did, yes.

Q. And you say he was confined to his bed all that period? A. He was confined to his bed.

Q. He wasn't out? A. No, he wasn't out.

Q. Are you sure? A. Yes, I am sure, because his condition would not permit it.

30 Q. Of course you don't know what happened in your absence? A. Well, I know he was too sick to get out.

Q. Now he returned on February 5th to the hospital? A. He was taken back to the hospital February 5th.

Q. Then he was discharged finally, as I understand it, on— A. March 9th.

40 Q. March 9th? Now did you see him after March 9, 1930? A. I did, I made several calls at the house after he went home.

Q. How many, would you say? A. Oh, six or

Dr. George G. Reynolds, cross.

seven, just guessing at it.

Q. And when was the last time you saw him professionally? A. I couldn't tell you.

Q. Your records would show? A. The records show that.

Q. Within what period of time would you say after March 9, 1930? A. Within what period of time did I see him? 10

Q. Yes. A. I should think I kept track of him at least a month after he left the hospital.

Q. Do you think it would be about up to April 9, 1930? A. I should think so.

Q. Did you go to his home during that period? A. I went to his home and then he used to come to the office once in a while.

Q. During that month? A. Yes, or right afterwards. I don't know, I couldn't tell you sure whether he was able to get up to the office or not the first month after his discharge. 20

Q. Now your final picture was taken on March 20, 1930? A. Yes, the last one.

Q. None taken after that until the one yesterday? A. One taken yesterday, which we could not bring.

Q. As I understand it, the picture of March 20, 1930, showed that his left lung, which was the affected lung, had almost its full length again? A. Yes, it had expanded considerably, filled up a lot. 30

Q. That means it had recovered to that extent? A. Yes.

Q. When you say it had expanded and had its full length— A. Yes.

Q. There was just a small area, I think you pointed out in the picture? A. Yes, there is quite 40

Dr. George G. Reynolds, cross.

an area in that left lung where it never filled out and probably never will.

Q. When you say it has not filled out what do you mean? A. I mean it is filled in with scar tissue; scar tissue and is not occupied by the lung tissue as it should be.

10

Q. But by far the larger part of the lung has filled up, hasn't it, as it appears in the X-ray? A. A large portion of it, yes.

Q. Will you just hold that up to the window for me, Doctor (referring to Exhibit Rel. 3)? Now those white lines represent the ribs, do they?

A. Yes, this is the ribs. This is the backbone.

20

Q. Now looking at the ribs on the left side, the lung shows that for a considerably larger portion it is black, isn't it? The picture shows a black area? A. Yes, but it is not filled like this side, out here.

Q. No, but I mean by far the larger part of the lung has filled out, hasn't it? A. I should think it is three-quarters, I would say, if you want me to give the per cent of it I should say it is about three-quarters expanded.

30

Q. Did you examine him yesterday or did you just take the X-ray? A. Just took the X-ray picture. I didn't make a physical examination of the chest yesterday. I don't know but I did listen to his heart. I think I did listen to his heart.

Q. Is his heart all right? A. Outside of being rapid; has a tendency to faint easily.

Q. Now you say that in your opinion Mr. Cummings has a tubercular condition? A. We have never been able to isolate the germ.

40

Q. What is your opinion? A. These cases are very apt to do that.

Q. Did you get any history of tubercular con-

Dr. George G. Reynolds, cross.

dition in his family? A. I don't believe there is any history of tubercular condition.

Q. Did you know his sister had a tubercular condition? A. I didn't know it. I know she was operated upon.

Q. Did you operate on her? A. I didn't, no. She was operated on at Spring Lake, I believe. 10

Q. Which sister are you referring to? A. The one that died a year or two ago.

Q. You didn't have that case? A. I didn't have that case, no.

Q. And as I gather it from you, Mr. Cummings is a tubercular type? A. He is a tubercular type.

Q. Was that your opinion eight or nine years ago when he had pleurisy? A. I don't believe so, no. 20

Q. When did you form that opinion? A. During his last illness.

Q. Now then could you tell from your examination of Mr. Cummings whether or not he had taken good care of himself? A. No, I don't think I could, outside of the fact that he has a—some people are normally thin and light weight and others have a tendency to be heavy. He was always of a thin nature, ever since I have known him. He has never been a man that put on flesh. 30

Q. Ever since you have known him for the last eight or nine years? A. Yes.

Q. Now then as I gather it from your testimony he is able to do some kind of work; I think you said he could do clerical work? A. He can, anything that don't require physical exertion.

Q. Work at a desk, I suppose you mean? A. Something like that, yes.

Q. For hard manual labor, you don't think he 40

Dr. George G. Reynolds, cross.

could do that? A. He couldn't do that; in fact I know he couldn't in his present condition.

Q. But for ordinary work, clerical work, desk work, work not requiring any great physical exertion, you think he can do? A. I think he can.

10 Q. Now as to the future, as to how much his condition will improve, it is more or less of a guess, isn't it, Doctor? A. It is.

Q. You wouldn't want to tie yourself down on that? A. It would be impossible for anyone to say. It would depend on the care that he takes of himself and the kind of work that he does.

Q. If he takes good care of himself he will stand a chance of continuing to improve, isn't that so, from what his condition was? A. Yes.

20 Q. Those X-rays show a progressively improved condition, don't they? A. That is from a withdrawal of the pus, you know.

Q. But I say they clearly indicate a very much improved condition? A. Yes. If it hadn't he would still have been in the hospital or some other place.

30 Q. But he has not been in the hospital since he left there on March 9th, has he? A. You see my office is in the hospital and he used to come to the office once in a while after that.

Q. But other than coming to the office he has not been? A. No, not for any treatment in the hospital, hospitalization.

Q. Now his condition has gradually improved, hasn't it? A. Apparently so, yes.

40 Q. And as you see him today, he is much improved over what he was, isn't he? A. Yes, I don't know how much improvement he has made in the last month or so, three months.

Q. You referred to the fact that if he took

Dr. George G. Reynolds, cross.

good care of himself his improvement would be greater than if he didn't? A. Sure; that is a perfectly natural conclusion.

Q. Assuming that he was, for instance, a heavy drinker; would that have any effect on his condition? A. It would.

10

Q. What effect? A. Well, of course I don't think he is a man that can stand heavy drinking at all.

Q. And what would be the effect of heavy drinking on his physical condition? A. Well, he probably would become sick again, become ill, go right down hill.

Q. Would have a relapse? A. Yes.

Q. And during this period since the time he left the hospital up to the present time would heavy drinking retard his improvement? A. It would.

20

Q. Have a serious effect, wouldn't it? A. Very serious.

Q. As a matter of fact he ought not to drink at all? A. He should not drink at all.

Q. And if he does drink heavily it is liable to give him a relapse? A. I couldn't state that.

Q. Did you know anything about his drinking habits, doctor? A. No, I don't know a thing. I have never seen him when I thought he was intoxicated. I have never seen any symptom of his being intoxicated.

30

Q. Would you say walking, walking in the fresh air, would be good for him? A. He has to go very slow. If he hurries just a little bit he is short of breath. He has to walk slowly.

Q. But for a condition such as he had would fresh air be the thing? A. Fresh air, yes.

Q. And ordinarily walking would be good,

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Dr. Daniel Traverso, direct.

wouldn't it, for him? A. Well, he would have to be moderate about it.

Mr. Markley: I think that is all.

Mr. Leonard: That is all, Doctor.

10

DR. DANIEL TRAVERSO, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Dr. Traverso, of what college are you a graduate? A. University of Arkansas.

20 Q. Are you admitted to practice in New Jersey? A. Yes, sir.

Q. How long have you been practicing? A. Three years.

Q. Where? A. Belmar.

Q. What does your practice consist of? A. General practice.

Q. Have you had occasion during your practice to treat Peter F. Cummings? A. I have.

30 Q. When did you begin to treat him? A. I can't give you any specific date.

Q. Approximately? A. Well, on and off since my opening here.

Q. Three years ago? A. Well, mostly during the year 1928 and 1929, on and off.

Q. What did you treat him for? A. Colds.

Q. Well, was it just one cold or various colds? A. Well, apparently it was just the same cold, coming back again on him.

40 Q. Well, he would have a cold and then it would

Dr. Daniel Traverso, direct.

disappear, you mean, and then he would have another cold? A. He would get another cold.

Q. Did he have a grippe? A. On one occasion he had a grippe.

Q. With a temperature? A. With a temperature and pain.

Q. Can you fix the time of that? A. No, I can't.

Q. What year was that? A. I think 1929.

Q. What part of 1929? A. I don't remember that date.

Q. So you treated him on and off during 1928 too? A. Well, at various times. I can't give you any definite date. I didn't keep a record of it because he would come in, I would see him, give him a prescription for his cold. I lived right next door to him at that time and he would drop in and I prescribed for him.

Q. Can you give us a little more concretely now how many times? A. No, I can't.

Q. Was it a dozen? A. Probably.

Q. Two dozen times? A. Probably half a dozen to a dozen times.

Q. During the course of the year? A. Yes.

Q. In 1928? A. Including 1929.

Q. And the same in 1929?

Mr. Leonard: No, he said including 1929.

Q. Half a dozen or a dozen times; is that right?

A. I would say nearly a dozen times.

Q. In 1928? A. And 1929.

Q. He had recurrent colds? A. Recurrent colds.

Q. Do you know anything about his drinking habits?

Dr. Daniel Traverso, direct.

Mr. Leonard: I object to the form of that question, Mr. Markley. I don't mean you are leading but I do object to the form of that question.

10

Mr. Markely: Well, suppose we change it a bit.

Mr. Leonard: It doesn't appear that the man had drinking habits.

Q. Do you know whether or not he was a drinking man? A. I can't say that I do. I never saw him drink. I never had occasion to examine him when he had been drinking, and at times I prescribed something for his cold, alcoholic stimulants for his cold.

20

Q. You prescribed alcoholic stimulants? A. Yes, for his cold that he had.

Q. You mean you prescribed whiskey? A. Whiskey at one time. I didn't give him any but I told him if he could get it to take it.

30

Q. Doctor, can you express any opinion as to his general condition of health in 1928? A. None other than thin. He is a sort of a thin fellow and he had this chronic cough; I called it chronic, and I thought at that time his condition was not exceptionally good, during the time that he had these coughs.

Q. You mean was not exceptionally good? A. No; but between those attacks of cough his health was fairly good. He is a thin fellow to begin with. In fact, the whole family—not the whole family but several members of the family are thin.

40

Q. And you say he had a chronic cough? A. Well, I called it chronic because it would come and go.

Peter F. Cummings, direct.

Q. How long had he had that cough coming and going, to your knowledge? A. Well, to my knowledge for throughout the year 1928 and 1929, at the time I saw him. His health during those attacks of cold was not very good. But between the attacks I thought that he was in fairly good shape. 10

Mr. Markley: That is all.

Cross examination by Mr. Leonard:

Q. Are you a police surgeon, Doctor? A. No, sir.

Q. You haven't examined Mr. Cummings since December, 1929, have you, the latter part of December, 1929? A. I attended to Mr. Cummings at the beginning of his last illness, when he first took with pneumonia. 20

Q. Have you examined him recently? A. No, sir.

Mr. Leonard: That is all.

Mr. Markley: That is all.

PETER F. CUMMINGS, the relator, being 30
duly sworn according to law, testified as follows:

Direct examination by Mr. Leonard:

Q. Mr. Cummings, what is your first name? A. Peter F.

Q. And where do you live? A. I live at 517 Seventh Avenue, Belmar. Now I am staying with my father at 100 Parker Street, Freehold. 40

Peter F. Cummings, direct.

Q. Were you employed on December 27, 1929?

A. I was.

Q. Where? A. In the Borough of Belmar.

Q. In what capacity? A. As policeman.

Q. On the Belmar force? A. Regular policeman, yes.

10 Q. How long had you been a policeman on the Belmar force? A. For eight years.

Q. Steadily? A. No, not steadily.

Q. What was your business before you became a policeman? A. Sheet metal worker.

Q. And what year did you go on the force? A. I was first appointed in 1922, by Mayor Bamford.

Q. In what month? A. June.

Q. And how long did you continue to remain on the force? A. Until I think it was October, that same year.

Q. Did you again return to the force? A. No, I quit and went back at my trade but I was appointed again by Mayor Mayer in May, 1923.

Q. The present mayor? A. Yes.

Q. In 1923? A. Yes, sir.

Q. What duties did you have on December 27, 1929? A. I was patrolling from ten at night until six in the morning.

30 Q. How long had you been on that night beat? A. For five days.

Q. Prior to that time? A. Yes, sir.

Q. And at what time did you start on your beat, on that night beat, on December 27, 1929? A. Eight o'clock.

Q. That night? A. Yes, sir.

Q. Did you go through the beat? A. I did.

Q. Until the next morning? A. The morning at four o'clock.

40

Peter F. Cummings, direct.

Q. What was the general state of your health before December 27, 1929? A. Why, in October, or when I went on my vacation in September, I had hurt my knee while working and I had rheumatism set in from it and I was laid up for about a month. I was laid up all during my vacation and then I came back to work on the first of October. 10

Q. You came back to work on the force? A. Came back to work on the force, and they had to take me home that night and I was home for a month, couldn't work from rheumatism.

Q. Apart from rheumatism what was the state of your health? A. It was all right.

Q. How much did you weigh at that time? A. At that time? 20

Q. Yes. A. I weighed around 150 pounds.

Q. How much do you weigh now? A. Now I weigh around 115, 118.

Q. What was the condition of your health on the evening of December 27, when you went on this night beat in the winter? A. I had pains in my chest and through here.

Mr. Leonard: Witness pointing near his left collarbone, clavicle. 30

Mr. Markley: I didn't see where you pointed.

A. Straight down from here (indicating neck).

Q. How long had you had those pains before you went on this winter's beat? A. I didn't have them at all until I went to work that night. When I went to work I had a kind of little pain but that didn't amount to anything until after, along in the night as I took my beat. 40

Peter F. Cummings, direct.

Q. While you were on your beat? A. Yes.

Q. Did you continue on your beat? A. I went through with it; yes, sir.

Q. When was it up? A. At four o'clock.

Q. Four o'clock in the morning? A. Yes, sir.

10 Q. What did you do at four o'clock in the morning? A. Went home and went to bed.

Q. Did you report? A. Signed off; yes, sir.

Q. Where? A. At police headquarters, downstairs.

Q. What did you sign on or in? A. There is a book we had to sign on the sheet.

Q. And then you went home? A. Then I went home.

20 Q. What did you do when you got home? A. I went to bed and I got up about ten o'clock and I had an awful chill.

Q. Did you call a doctor? A. Called Dr. Traverso, and he examined me and said I had a fever of 105.

Q. How long did you remain under Dr. Traverso's care? A. Well, I don't just know that. I went delirious the next day and I don't remember hardly anything during that time.

30 Q. Was it on December 30th you went out of your head? A. Yes, off and on, and I didn't know what day it was until after the crisis.

Q. How long did you remain in your bed at home in Belmar after December 28th? A. I stayed there until they took me to Freehold, up to my father's place.

Q. How long was that? A. That is what I don't know. I don't remember the day they took me up there.

40 Q. Were you able to be about or anything while you were in your room? A. No, I was in bed.

Peter F. Cummings, direct.

They took me up in the Belmar borough ambulance.

Q. Borough ambulance? A. Yes, fireman's ambulance.

Q. And then you were in Freehold? A. Yes.

Q. In Dr. Reynolds' hospital? A. No, they took me home first. 10

Q. Took you home, you mean your father's home? A. At my father's home.

Q. How long did you remain there? A. I was there about two weeks, a little more.

Q. In bed? A. In bed, yes.

Q. Then where did you go? A. They took me to the hospital.

Q. Dr. Reynolds' hospital? A. Dr. Reynolds' hospital, Freehold. 20

Q. Were you still delirious? A. No, not then. I had come out of it, see, after the crisis.

Q. How long were you at Dr. Reynolds' hospital? A. About two weeks at that time.

Q. Then where did you go? A. I went back home again.

Q. The doctor testified this morning that you left this hospital sooner than he expected or wanted you to. Why did you leave the hospital? A. Well, I asked him if I could go home and he told me—he took another X-ray of it and he didn't see nothing there, so he said he guessed it would be all right. 30

Q. Then you went home? A. Then I went home.

Q. How long did you remain home? A. I was home about five days at that time.

Q. Did you go back to duty? A. No, I didn't. I wasn't out of bed. 40

Peter F. Cummings, direct.

Q. Weren't you out of bed at all during the five days? A. Not at all.

10 Q. How did you get back from Freehold to your home? A. They carried me. They carried me down from the hospital on the bed and took me in the ambulance and then carried me home and laid me in bed again.

Q. When you mentioned your home you mean your home at Belmar? A. No, my father's at Freehold.

Q. That is your father's? A. Yes.

Q. How long did you remain at your father's home at Freehold? A. About five days I remained.

20 Q. And then they took you back to the hospital? A. Then they took me back to the hospital.

Q. What happened when you were taken back to the hospital? A. They took another X-ray and then the next day they operated on me.

Q. And how long did you remain in the hospital? A. About five or six weeks.

Q. At the end of those five or six weeks did you get weighed? A. I did.

Q. How much did you weigh? A. I weighed about 102.

30 Q. And when you were taken ill on your winter's beat on December 27th or 28th you weighed about how much? A. I weighed about 150.

Q. And after you left the hospital for the second time you went where? A. To my father's home.

Q. Been there ever since? A. Yes, off and on.

Q. Before this attack of pneumonia and empyema were you able to sleep regularly? A. Yes.

40 Q. Have any difficulty with your breathing? A. No, not before I was taken sick.

Peter F. Cummings, direct.

Q. Have you had any difficulty with your breathing after you were taken sick? A. Yes, I have.

Q. Have any difficulty now? A. Yes.

Q. Are you able to sleep? A. Sometimes I can and sometimes I can't. Sometimes I have to sit up in bed and put pillows on my lap and sleep that way. 10

Q. Since you left the hospital that second time after your four or five weeks stay there subsequent to the operation have you always slept in bed at your father's home? A. No, I had to sleep on a chair.

Q. How long were you required to sleep on chairs? A. As high as two weeks at a time.

Q. Two weeks? A. Yes. 20

Q. Two weeks immediately following your discharge from the hospital? A. Yes.

Q. You haven't slept on chairs since? A. Yes, I have, once since then.

Q. How long ago was that? A. Well, about a couple months ago, I guess.

Q. Have you done any strenuous outdoor or indoor work since your discharge from the hospital? A. No, sir; I haven't.

Q. Haven't done any work at all? A. No, sir; I haven't. 30

Q. Are you able to stand for any long periods on your feet? A. No, sir; I can't.

Q. What happens if you do? A. I get all out of breath and pains in my side.

Q. Do you feel able to undertake work of any sort? A. No, I have tried it but I can't. If I lift the least little thing I have to sit down and get my breath. 40

Peter F. Cummings, direct.

Q. What was your salary when you were on the police force December, 1929? A. Month or year?

Q. By the year. A. I got \$1,800 a year.

10 Q. And it was payable how? A. Twice a month, \$75 each.

Q. And did you receive all your salary for the month of December? A. I did.

Q. And after you were ill did you continue to receive any salary? A. I did for three months afterwards.

Q. Three months afterwards? A. 1930; yes, sir.

Q. Until when? A. Until March.

20 Q. So I understand you were paid your regular salary all the month of January that you were ill? A. I was.

Q. All the month of February that you were ill? A. Yes, sir.

Q. All the month of March? A. Yes, sir.

Q. And then your salary stopped? A. Yes, sir.

Q. When, the first of April? A. The first of April; yes, sir.

30 Q. Did you make any application to the Police Pension Commission of the Borough of Belmar? A. I did.

Q. For a hearing? A. I made an application for a pension.

Q. By letter? A. By letter; yes, sir.

Q. I show you what purports to be a letter in your handwriting, dated May 17, 1930, and addressed to the Belmar Police Pension Commission, and ask you if that is the written application or letter you refer to? A. Yes, sir.

40 Q. That letter was mailed from Belmar, was it not? A. Yes, sir.

Peter F. Cummings, direct.

Mr. Leonard: It can be admitted, can it not, that this letter was received by the commission?

Mr. Markley: Well, I have produced it for you out of the files.

Mr. Leonard: Well, that doesn't so appear on the files. 10

Mr. Markley: There is no objection to the letter. We don't object to the offer of the letter.

Mr. Leonard: Will it be admitted that this letter was received by the Belmar Police Pension Commission?

Mr. Markley: Yes, indeed.

(Letter marked Exhibit Rel. 4.)

20

Q. I show you another letter bearing the same date and purporting to have been sent from Freehold and ask you if you wrote that letter to the commission.

Mr. Markley: That was sent with the other one which you hold in your hand, which refers to it.

Q. You sent that letter? A. I don't know as I sent two letters. I sent one. 30

Mr. Markley: Let him read the one you hold in your hand. He sent another copy of it, that you hold in your hand.

Mr. Leonard: May I have this letter of May 17, 1930, marked for identification?

(Letter marked Exhibit A for Identification.)

40

Peter F. Cummings, direct.

Q. Mr. Cummings, did you receive any response from the Police Pension Commission to your letter of May 17th? A. No.

Q. Did you again write them? A. I wrote the secretary, Mr. Swain.

10 Q. When, do you recall? A. Not the date I don't, no.

Q. I show you what purports to be a letter from you addressed to Mr. Swain as secretary, bearing date June 12, 1930, and ask you if you sent that. A. Yes, I did.

20 Q. And in that letter you refer to a copy of your letter previously sent on May 17, 1930. I show you Exhibit A for Identification and ask you if that is a copy you sent with your letter of June 12, 1930? A. Yes, I guess that is the one.

Mr. Leonard: I offer both in evidence.
(Letters marked Exhibits Rel. 5 and Rel. 6.)

Mr. Leonard: It is admitted that these two letters were received, is it not?

Mr. Markley: Yes. How about the reply? Shouldn't we have the reply in?

30 Mr. Leonard: You may put that in if you desire.

Q. Did the Police Pension Commission or anyone acting in behalf of that commission ever designate a physician to whom you could go for a physical examination? A. No.

Q. Did it ever notify you of a hearing? A. No, sir.

40 Q. At which time you could present yourself for physical examination before the commission? A. No, sir.

Peter F. Cummings, direct.

Q. Did it in any way, directly or indirectly, afford you an opportunity of presenting yourself for physical examination so as to comply with the statute under which you applied for a pension?

A. Not for a physical examination, no.

Q. How was your salary sent to you after you were taken ill? A. Sometimes my sister would get it here at the borough hall.

10

Q. Always? A. I think she got it every time.

Mr. Leonard: By consent I offer in evidence eleven sheets from the Belmar Police Department, covering the month of December, 1929, containing the names of officers on the force and the time in which those respective officers made box calls to police headquarters; these records being the original records; it being stipulated in this connection that the name Cummings appearing thereon is the relator.

20

(Papers marked as one exhibit, Rel. 7.)

Q. Have you still your uniform? A. No, I haven't.

Q. Where is it? A. They sent over after it.

Q. When? A. I don't know just what date it was.

30

Q. Well, what month? A. In June, I think it was.

Q. Of this year? A. Yes, sir.

Q. After you had applied for a pension? A. Yes, sir.

Q. Did you have a gun? A. Yes, sir.

Q. Where is that? A. The chief stopped in the place at Jerseyville, right there, and asked me for the gun.

40

Peter F. Cummings, cross.

Q. How long ago was that? A. That was the same day.

Q. After you had made application for a pension? A. No, this here was in June.

10 Q. After you had made application? A. One of the specials wanted to go on; I think he wanted it for a special on the 15th, I think.

Q. The request for your service revolver was made before or after you made application for a pension? A. After.

20 Q. Had there been a request by anyone in the police department or anyone in authority in the Borough of Belmar for your service revolver, equipment, uniform or any other paraphernalia prior to the time you made application for a pension? A. No, sir.

Q. Have you, before your application for a pension or thereafter, received from the Belmar Policemen Pension Commission any pension? A. No, I have not.

Q. Or any part of the pension? A. No.

Q. Or any funds whatsoever? A. No, sir.

30 Q. Apart, of course, from your salary received the three months from the police department itself? A. Yes.

Mr. Leonard: That is all.

Cross examination by Mr. Markley:

Q. Did you get a reply from Mr. Swain, secretary of the pension board? A. Yes, sir; I have.

Q. Have you got that here? A. No, I haven't.

40 Q. Who has the letter, Mr. Cummings? A. Mr. Leonard.

Peter F. Cummings, cross.

Mr. Markley: Mr. Leonard, may I have the letter?

Mr. Leonard: Yes. (Produces letter.)

Mr. Markley: I offer in evidence letter from the Police Pension Board Commissioners of Belmar, signed by George W. Swain, secretary, dated July 3, 1930, addressed to Mr. Peter F. Cummings, 100 Parker Street, Freehold, New Jersey.

10

(Letter marked Exhibit Res. 1.)

Mr. Markley: Now I offer in evidence letter from Mr. Lester C. Leonard, dated August 5, 1930, to the Policemen's Pension Commission of Belmar.

(Letter marked Exhibit Res. 2.)

I offer in evidence a letter dated August 14, 1930, from G. W. Swain, secretary of the Police Pension Board of Belmar, to Messrs. Williams & Leonard, in reply to Mr. Leonard's letter of August 5, 1930.

20

(Letter marked Exhibit Res. 3.)

Q. Now, Mr. Cummings, I show you a paper and ask you whether that is your signature. A. That is my signature, yes.

30

Mr. Markley: I offer that in evidence.

Mr. Leonard: No objection.

Mr. Markley: I offer this paper in evidence, the same being a jurat and which is dated February 22, 1929.

(Paper marked Exhibit Res. 4.)

Q. Now, Mr. Cummings, I show you a notice directed to you dated December 15, 1929, and ask

40

Peter F. Cummings, cross.

whether you recollect receiving that. A. I got that notice; yes, sir.

Mr. Leonard: You mean a copy of that or the original?

10 Q. Well, you received a notice just like that? A. Similar to that. I don't know whether it was just like it or not.

Mr. Markley: I offer it.

Mr. Leonard: I object to its materiality and I object also to it upon the ground that the one week period therein referred to would not include either December 27th or December 28th.

20 Mr. Markley: This notice is dated December 15th, 1929.

(Paper marked Exhibit Res. 5.)

Mr. Leonard: I of course make no point that it is offered out of time.

Q. Now then, Mr. Cummings, do you know that during the year 1929 you lost sixty-four days? A. No, I don't know it.

30 Q. Do you know how many days you lost from work in 1929? A. No, I don't.

Q. You have no idea? A. No; I know I was sick for about six weeks, wasn't out of the house.

Q. When was that? A. That was from September to October.

Q. From September to October? A. Yes, around the 15th of September, when I went on my vacation, I went home and went to bed. When

Peter F. Cummings, cross.

I worked I worked during the summer with a sore knee besides that.

Q. You say you got sick on September 15th when you went on your vacation? A. I did and went to bed.

Q. What was the matter at that time? A. Rheumatism. 10

Q. Rheumatism where? A. Rheumatism in the right knee.

Q. Just in the right knee? A. Yes, right across the knee. It was swelled away up to that size (indicating).

Q. That was rheumatism? A. That was rheumatism.

Q. And that you say laid you up from September 15th? A. No, I was sick with it before that but I worked. 20

Q. You say you went on your vacation September 15th? A. Yes, sir.

Q. And was laid up with that condition for how long? A. I came back to work October 1st, and that night they took me home. I was in bed then all during October. I couldn't move either hand or foot. It was all through me then.

Q. Rheumatism? A. Yes.

Q. All through your system? A. Went all through me then. 30

Q. What do you mean by through you? A. Arms, went through this leg, down to my ankle and through this arm and up my shoulder and then went over this side (indicating left).

Q. This was rheumatism, you say? A. Yes.

Q. And who treated you for that? A. Dr. Traverso and Dr. Silverstein.

Q. Dr. Silverstein of Belmar? A. Asbury Park. 40

Peter F. Cummings, cross.

Mr. Leonard: At this time can Dr. Silverstein of Asbury Park be identified as the brother of the present borough attorney?

Mr. Markley: Yes, indeed.

10

Q. You say you were laid up all during October with that? A. Yes.

Q. When did you go back to work? A. I don't know; I think it was around the first of November.

Q. Now then do you know how many days you were off duty in December, 1929? A. In December?

Q. Yes. A. I was suspended for one week.

20

Q. Do you remember how many days you were off altogether in December, 1929? A. No, I don't.

Q. Part of the time as your employment as patrolman you were on desk duty, weren't you? A. Yes.

Q. And do you know that you were off sick on December 12th, 1929? A. December 12th?

Q. Yes. A. Not that I know of.

Q. Do you dispute that? A. No, I don't say. I don't know.

30

Q. Do you know that you were off December 15, 1929? A. That is when my suspension took place.

Q. What were you suspended for?

Mr. Leonard: Objected to as immaterial, that the period of suspension does not encompass December 27th and 28th, 1929.

40

Q. You can answer the question. A. Do you want me to answer?

Peter F. Cummings, cross.

Q. Yes. A. Want me to tell you the reason why?

Q. Yes. A. They was having a party on Twelfth Avenue.

Q. Belmar, you mean? A. In Belmar. And I went up to this place off duty and just as I went in the door one of the fellows went to grab me by the leg and he didn't and he hit me in the privates, and I went out in the kitchen and I was sick all night and the next morning I was too sick to get up and go to work and I got suspended for it. I got charged with being drunk and I didn't have a drink.

10

Q. Well, do you remember on December 14th going to Irvington? A. Well, that was the night.

Q. After Harry Stout? A. Yes, sir.

20

Q. With a warrant? A. Yes, sir.

Q. Did anybody accompany you on that trip? A. Officer Maloney.

Q. That was the night before you were suspended? A. It was the night before; yes, sir. I didn't go to work on the 15th and got suspended.

Q. You were charged with being drunk on the night of the 14th, weren't you? A. No, sir.

Q. Weren't you charged with coming back drunk from Irvington? A. No, sir.

30

Q. Isn't it a fact that you came back from Irvington in the car and that you were so drunk that you couldn't get out? A. No, sir; I was right in police headquarters that night.

Q. Isn't it a fact that you couldn't go in police headquarters, you were so drunk you couldn't get out? A. I came into police headquarters. Somebody came out of police headquarters and said, "Are you so drunk you can't get out of the car?"

40

Peter F. Cummings, cross.

And I said, "No, I am not." And I got out of the car and went in police headquarters.

Q. You hadn't been drinking? A. I had a couple glasses of beer, yes.

Q. Where, in Irvington? A. No, in Red Bank.

10 Q. Red Bank? A. Yes, sir.

Q. Isn't it a fact that on that trip to Irvington you stopped at a number of places for drinks? A. No, sir; it isn't.

Q. Well, in this notice that you got on December 15th the charges were neglect of duty and conduct unbecoming an officer? A. Yes, sir.

Q. Do you know what that conduct was? A. That I didn't come to work was the only thing I seen.

20 Q. The only thing you knew was that you didn't come to work? A. Yes, sir.

Q. And you didn't get your full pay for those seven days, did you? A. Seven days I didn't no.

Q. That was taken out of your pay, wasn't it? A. The seven days was, yes.

Q. Now do you remember that in April, 1929, you were off April 15th, 16th, 17th, 18th and 23rd?

Mr. Leonard: Objected to as immaterial.

30

A. No, I wasn't.

Q. You don't remember that? A. No.

Q. You wouldn't say you worked on those days, would you? A. I wouldn't say I worked, no.

Q. And you wouldn't say you were sick on those days? A. I wouldn't.

Q. You had a practice of frequently not reporting for duty, didn't you? A. No, I don't say I did.

40

Q. Wasn't it a fact that often you didn't re-

Peter F. Cummings, cross.

port? A. No. When I come back to work after—when I was sick there with the flu, the grippe, why I was supposed to be in on desk, and after I was in for two or three days then they put me out, and after that I never did get well. I didn't have no overcoat or anything.

10

Q. Do you remember the occasion of April 13, 1929, when you were driving an automobile while intoxicated—

Mr. Leonard: That is objected to, the form of it that is adopted.

Q.—into Marshall's at Eleventh Avenue and F Street, and the automobile only had three tires on it, one was off, and you had your police overcoat on?

20

Mr. Leonard: Objected to as being immaterial.

A. Yes.

Q. You say you do remember that? A. Yes.

Q. What explanation have you of that? A. I just had a flat tire then. We were not supposed to use our cars and I didn't know it. I guess I had been off or something and they made new rules. When I come back I didn't know it. We were not supposed to use our own private cars.

30

Q. You remember driving into Marshall's, at Eleventh Avenue and F Street, do you? A. I had to fix a tire, yes.

Q. Do you remember getting in the mud with your overcoat? A. I remember getting a little on the tail of it, yes, when I leaned down to put the jack under it.

40

Peter F. Cummings, cross.

Q. That was at 3 A. M., wasn't it? A. No, it wasn't.

Q. What time was it? A. It wasn't that late.

Q. Do you know what time it was? A. Well, it was before that.

10 Q. What? A. It must have been before that.

Q. What time do you say? A. I don't think it was quite that late. The house was still open. I thought it was around one o'clock. I don't know just the time, for I won't say.

Q. Can you fix the time? A. No, I won't say.

Mr. Leonard: The materiality of this whole line is objected to.

20 Q. You didn't work on the night of December 28th, 1930, did you? A. I don't think so. I think it was the 27th. I worked in the morning.

Q. It was the night of the 27th and the morning of the 28th? A. Yes.

Q. Not the night of the 28th? A. No, the night of the 27th and the morning of the 28th.

Q. You knew that you were a part time patrolman, didn't you? A. Well, I suppose that is the way they appoint.

30 Q. That is the way you were appointed; isn't that so? A. Yes.

Q. You knew at the time you wrote your letter on May 17, 1930, that Mayor Mayer was waiting until your health had improved to such an extent that he could put you on trial, didn't you? A. Well, he said that but I never got no notice to that effect.

40 Q. Do you remember coming to see the mayor? A. I do.

Peter F. Cummings, cross.

Q. Before you sent in your letter of May 17, 1930? A. I do.

Q. In fact you had several talks with him, didn't you? A. No, I didn't.

Q. How many? A. Just the one.

Q. Just the one? A. Yes.

10

Q. Where did you have that? A. In his office.

Q. Where? A. Ninth Avenue and the railroad. I have had but not after I was sick, you know. I mean this year.

Q. Before you sent in this letter of May 17, 1930, you went and saw the mayor, didn't you? A. Yes, sir.

Q. How long before your letter of May 17, 1930, was that? A. I don't know just how long.

Q. Well, it was within a few days after they stopped your pay, wasn't it? A. Yes, it was.

20

Q. Your pay was stopped as of the first of April, 1930? A. Yes.

Q. And you saw him about getting back on the force, wasn't that it? A. No.

Q. Didn't you go to him to see whether you couldn't be reinstated and get your salary? A. No, I didn't. I come down to see about the salary, to see whether I could get paid half time.

30

Q. Didn't you come back at that time to see whether he wouldn't reinstate you on the force and give you your salary? A. Not exactly, no. I didn't say anything about coming back.

Q. At that time you didn't mention any pension to him? A. Well, that is what he told me. I saw Mr. Dillon and Mr. Dillon saw the mayor.

Q. I am talking about when you came to see the mayor. A. That is what I am talking. I am getting to that now.

40

Peter F. Cummings, cross.

Q. And you went to the mayor and asked him whether he wouldn't put you back on the force and give you your pay? A. No, I didn't.

Q. You didn't ask him for any pension, did you?
A. No, I didn't.

10 Q. You asked for your salary? A. Yes.

Q. You wanted to go back and work? A. I didn't ask to go back to work because I couldn't go back.

Q. You did ask him for your pay? A. I did, yes.

Q. And you didn't ask for any pension, did you? A. No, I don't think I did.

20 Q. And at that time he told you that as soon as you were physically able he wanted to put you on trial because of your previous conduct; and secondly he said he would like to have you present him with a doctor's certificate showing that you could stand trial, didn't he? A. Yes. No, he asked me to get a certificate if I could.

Q. And you say he said that? A. Yes, he said that.

Q. And you said you would do that, didn't you?
A. I said I would see and call him up.

30 Q. And you never did, did you? A. I never did.

Q. Instead of that you wrote this letter of May 17, 1930, later on? A. Yes.

Q. Sent that in? A. Yes.

40 Q. Now then when you received this letter of July 3, 1930, wherein you were advised—this is from Mr. Swain, secretary of the pension board: "The police pension commissioners of Belmar have received from the board of commissioners of the Borough of Belmar a statement of your status

Peter F. Cummings, cross.

as an officer in the police department. We are advised that you were suspended from the police force for conduct unbecoming an officer and that you were not disabled in the performance of your duties.

We are advised further by the commissioners that they are ready and waiting to grant you a hearing on the charges against you and will do so when you present a physician's certificate indicating that you are in the proper physical condition to appear before them to be heard on the charges. 10

When this shall have been done and a report is made by the borough commissioners to the pension fund commissioners we will then give your appeal for a pension consideration." You didn't do that, did you? A. No. 20

Q. As a matter of fact you made no answer at all to that letter? A. That was after I made application for pension.

Q. Yes, but you did nothing in response to that letter? A. No.

Q. Now when you saw the mayor shortly after your salary was stopped in regard to getting your salary—that was about the first of April, 1930, as I understand it—the mayor accused you then, didn't he, of drunkenness? 30

Mr. Leonard: That is objected to as immaterial. Whether the mayor did or whether the mayor didn't is immaterial to this case.

A. I don't remember whether I was or not. I just don't remember about that.

Q. Why can't you recollect that? A. Well, just a minute. I guess maybe he did accuse me of it. 40

Peter F. Cummings, cross.

Q. You recollect now that he did say to you——
A. Something about it, yes.

Q. That he had made an investigation, didn't he? A. I don't know as he said that.

Q. Or words to that effect? A. He said he had heard.

10 Q. And that he understood that you had been drunk repeatedly while on duty? A. No, he didn't say on duty.

Q. Well, words to that effect? A. Well, it wasn't exactly that either. He said I had been drinking heavy. He didn't say whether I was on duty or not.

Q. And didn't you admit to the mayor that that was so? A. No, I didn't.

20 Q. And didn't you say that the other officers drank too? A. I didn't say any such thing.

Q. Didn't you say that it was a fact that you had been drinking heavily but other officers drank heavily too? A. No, I said it to this extent——

Q. Didn't you state—— A. That since August the mayor said I had been drinking heavily.

By Mr. Leonard:

30 Q. What year? A. 1929. I told him I had before that but I quit in August and hadn't had anything to drink; I stopped drinking in August and didn't drink anything after that.

Q. August of the year 1929? A. 1929. I said I had been drinking before that.

By Mr. Markley:

Q. What did you say about the other officers?
A. I didn't say anything.

40 Q. Isn't it a fact that you admitted to the

Peter F. Cummings, cross.

mayor that you had been drinking heavily right along? A. No, sir.

Q. Not only up to August, 1929, but right up until the time you got sick? A. No, sir.

Q. Didn't you admit that to him? A. No, sir; I didn't. I said I wasn't.

Q. And didn't you further state to him that the other officers did, some of them had been also drinking heavily? A. No.

10

Mr. Leonard: Objected to as immaterial. What they did or didn't do would shed no light on this case.

Q. He told you at that time, didn't he, that you were through as a police officer?

20

Mr. Leonard: At what time was this?

Mr. Markley: I was speaking of the time when they had this conversation.

Mr. Leonard: When was that?

Mr. Markley: About the first of April, wasn't it?

A. I think it was about the first of May.

Q. The end of April then? A. Yes.

30

Q. It was right after your pay had been stopped, shortly after that, that this took place?

A. Yes, sir; I think it was around the end of April.

Q. Well, around the end of April then, all right. At any rate it was before you sent in this letter about the pension, wasn't it? You didn't send any letter about the pension until May 17, 1930?

A. Yes.

40

Peter F. Cummings, cross.

Q. And this took place before that? A. Before that.

Q. Now did not at that time the mayor tell you that you were through as a police officer? A. No, sir.

10

Mr. Leonard: Objected to as immaterial if he did.

A. He said, "You meet with the other two commissioners and myself and we will see what they can do, talk it over and maybe we can get a half time pension."

20

Q. As a matter of fact nothing was said about pension at all at that time? A. No, sir; there was, the mayor said that only: "We will try to get half pay," he says, "through a pension."

Q. Didn't you say a while ago back there that there was no talk about a pension? A. I didn't go with that intention of talking about it. I didn't say nothing about a pension.

Q. As a matter of fact there was nothing said about a pension? A. Yes, there was, the mayor said so.

30

Q. As a matter of fact you didn't want a pension, did you? You wanted your job? Isn't that what you wanted? A. Well, I wasn't able to do it.

Q. Isn't that what you went there to get? A. I wanted to get a job, yes.

Q. Now you have been troubled repeatedly with colds, weren't you, in 1929? A. I was, yes.

Q. And you had a chronic cough all through 1929, didn't you? A. Yes, to an extent.

40

Q. You say that when you went to work on the night of December 27, 1929, you had this pain in your chest; is that right? A. Yes.

Peter F. Cummings, cross.

Q. And when you went to work that night I think you said you had what was shooting pains?

A. Had pains right down through here.

Q. From your collarbone? A. Yes.

Q. That would be the left side? A. The left side.

10

Q. You had that when you went to work that night? A. No, I got that after. I had pain in my chest when I started and after I started I got pains through here and got worse later on.

Q. When you started you had pains in your chest? A. Yes, and later I got this other pain down here on the left side, and they got worse in my chest.

Q. You say when you started to work you had those pains in your chest? What part of your chest did you have those? A. Seemed to be tight right across here.

20

Q. Tight across there? A. Yes.

Q. On both sides? A. Yes.

Q. When did you first feel those pains before you went to work? A. Well, just about—I laid down for a while before, for a little while, about an hour, and then I got up and got dressed and went to work, and then I felt them just before I went out. They were not bad then.

30

Q. Just before you went out of the house? A. Yes.

Q. Now you say before you went to work you lay down for about an hour? A. Yes.

Q. And were the pains in your chest at that time? A. Not when I laid down. After I got out, just before I went to work.

Q. I understood you to say a moment ago you lay down because of the pains in your chest? A.

40

Peter F. Cummings, cross.

No, we always lay down before we go out for a couple hours.

(Previous testimony read.)

10 Q. You felt the pain, you say, in your chest just before you went out? A. Yes.

Q. To work? A. Yes.

Q. And those pains, I understand, were pains in the front? A. Yes.

Q. They were not up around your neck? A. No, they were not.

Q. They were in your chest, in the front? A. Yes.

20 Q. And I think you said they were sort of tightening pains? A. Kind of tight, yes.

Q. Had you ever had pains like that before? A. Well, we would, yes.

Q. What? A. We would get them once in a while, get out in a damp night, you would feel it; but they would go over, and that is what I thought they would do.

Q. Did those pains continue then? A. Kept getting worse as the night went through.

30 Q. In other words, they didn't leave you at any time? A. No, they didn't, kept getting worse.

Q. Just kept getting worse all the time? A. Yes.

Q. You had pleurisy before, hadn't you? A. Yes, I had.

Q. How many times? A. Once.

Q. And did you have the same kind of pains when you had pleurisy before? A. Well, I don't remember the pains so much this time. You see I was delirious about the next day.

40 Q. But the previous occasion you had pleurisy? A. Yes.

Peter F. Cummings, cross.

Q. Do you remember if you had pains? A. Yes, I did.

Q. Tightening pains in your chest? A. No.

Q. Where? A. They were down here on the side, right in the lung and chest, catching pains; go to get your breath and it would shut it off.

10

Q. Now, these pains, these tightening pains, you say they didn't get any better after you left the house? A. No, sir.

Q. Well, did they get worse? A. Yes, sir.

Q. Had you had any pains prior to that day, on the 26th? A. No, I hadn't.

Q. Or the 25th? A. No.

Q. They started before you started work on the 27th? A. Just before I went out to work.

Q. And I understand they got continually worse from that time on? A. Yes.

20

Q. And you hadn't had them before that? A. No, sir.

Q. You had been a pretty heavy drinker, hadn't you? A. No, sir; I hadn't.

Q. Hadn't you been a heavy drinker up to August, 1929? A. No, I wasn't. In August I did drink a little bit too much, and I cut it out.

Q. Now after you recovered from your illness—I think you left the hospital sometime in March, 1930, didn't you? A. Yes, sir.

30

Q. March 9th, I think it was, 1930? A. Somewheres around there.

Q. You drank heavily after that, didn't you? A. No.

Q. What? A. No, sir.

Q. Didn't you drink a whole lot after you came out? A. No, sir.

Q. Have you been drunk a number of times?

40

Peter F. Cummings, cross.

A. No, sir. I won't say I never took a drink but I will say I wasn't drunk.

Q. I am speaking now in reference to this illness and since you came from the hospital haven't you at times been drinking heavily? A. No.

10 Q. You say you have been drinking though? A. I have been, yes. I have drank since I came out of the hospital but I haven't been drunk.

Q. Where are you living now? A. Freehold.

Q. Have you some kind of business with somebody else? A. Well, I have been helping my sister out up there on the Jerseyville road.

Q. What do you mean helping her out? A. She was down there, see, and I just helped her in the gasoline stand.

20 Q. Gasoline station? A. Yes.

Q. On the Jerseyville road? A. Yes.

Q. Where? A. Just this side of Jerseyville.

Q. How far is that from Belmar? A. About ten miles, nine or ten miles.

Q. And your sister owns that or do you own it with her? A. No, she rented it.

Q. She rented the stand? A. Yes.

Q. Which sister is that? A. Elizabeth.

30 Q. Elizabeth? A. Sweeney.

Q. She has rented it? A. Yes, sir.

Q. Aren't you interested in that stand? A. No, she is.

Q. You say you helped her out? A. I put my name on the cards, on account of being known down here, and just stay around there just to help her out in case any fellows from Belmar come up.

Q. You put your name on the card, didn't you? A. For her benefit, yes.

40 Q. And it was a card advertising the place? A. Yes.

Peter F. Cummings, cross.

Q. Isn't that so? A. Yes.

Q. And you appear as proprietor on that card, didn't you? A. Well, it might look that way.

Q. Have you one of the cards with you? A. No.

Q. What does it say on that card? A. Just "Dutch Treat, Jerseyville Road Home-coming." 10
Some has my name and some doesn't. Those that have my name I give around here.

Q. Those were printed cards, weren't they? A. Yes, sir.

Q. How many did you have printed? A. 250.

Q. And you distributed those, didn't you? A. Yes, sir.

Q. Those had your name on? A. Yes, sir.

Q. And by your name I mean the name Cummings? A. Yes, Peter Cummings. 20

Q. Peter F. Cummings? A. Yes.

Q. And on those cards you appear as the proprietor, don't you? A. The ones that had my name on, I suppose.

Q. You have, you say, no financial interest? A. No.

Q. You put no money into that venture? A. No.

Q. How do you help out? A. Just by having the cards. I didn't have no money. 30

Q. You were down there helping with the work, weren't you? A. No, I wasn't doing any work. I couldn't do any work.

Q. What did you do then? A. Sometimes I would pump up gasoline, I would get five gallons half pumped and would have to stop.

Q. You did some pumping, didn't you? A. Yes, sir. 40

Peter F. Cummings, cross.

Q. This "Dutch Treat" is a sort of lunch counter? A. Lunch and sandwiches.

Q. Well, you have coffee and other things? A. Yes.

Q. Liquor? A. No, no liquor.

10 Q. You help there too, don't you? A. No, I—just in helping there, for she took care of it.

Q. Didn't you help her out? A. No.

Q. What? A. I wasn't there only just—sometimes I wouldn't be there, I mean only afternoons, and she was keeping me and I thought it was the least I could do to help her out.

Q. She kept you? A. No.

20 Q. Did you get any money out of it? A. No, might get a couple dollars once in a while. She don't make enough for to help anybody.

Q. Now you say that for two weeks after you returned from the hospital in March you slept part of the time in a chair, I think you said? A. Yes.

Q. And then on one occasion since then you slept in a chair? A. Yes.

Q. Outside of that you slept in bed? A. Yes, sir.

30 Q. And generally speaking, you sleep all right now, don't you? A. No, I don't.

Q. What do you mean by that? A. Well, I have got a bronchial asthma and wheeze. Now last night I don't think I got two hours sleep, just from coughing. You don't raise anything, but just a choking there in my throat.

Q. You have just still got a chronic cough, you think? A. No, it is bronchial asthma.

40 Q. You have a cough now? A. Yes, just that wheeze. You don't have a cough but you sit there and have a wheeze.

Peter F. Cummings, cross.

Q. You have a cough now? A. Yes, just that (illustrating).

Q. I believe you saw Dr. Reynolds for about a month after you left the hospital in March? A. I saw him?

Q. That is, you went to his place there or he came to your house? A. Yes, I went longer than that. 10

Q. How long? A. Well, this still drained for three months after I left the hospital. I had drains in there for three months after.

Q. Well, for how long after you left the hospital did you have any treatment from Dr. Reynolds? A. I had them off and on right along.

Q. Up until when? A. Well, the last time I was there I guess about a month ago. Been taking treatment right along up until then, about a month ago, I guess. I think that is the last time I saw him. 20

Q. Since then you haven't seen him? A. I haven't, no.

Q. Did you have any other doctors? A. No.

Recess till 1.30 P. M.

30

Trial of the cause resumed at 1.30 P. M.

PETER F. CUMMINGS, resumed.

By Mr. Markley:

Q. Mr. Cummings, how old are you? A. Thirty-one.

Q. And how tall are you? A. I am about five feet seven—seven and a half. 40

Peter F. Cummings, cross.

Q. Now, you said you started to work as a policeman for Belmar, I think you said, in September, 1922? A. In May or June, I think it was—June, under Mayor Bamford.

10 Q. When did you start? When is your recollection as to when you started? A. I think it was in June.

Q. How long did you work? A. Just a summer.

Q. Do you remember how much you got for the work you did? A. No, we got just a set wages, see?

Q. Then you say you went back again in September, I think, didn't you, 1923? A. No, I went back the following year under Mayor Mayer.

Q. Was that 1923? A. Yes.

20 Q. 1923? Mr. Mayer was not mayor until 1924. A. I was on just with Mayor Bamford, just the summer, see?

Q. According to our records September, 1923, you received \$28.50 for the work you did that year, that summer. A. What year was that?

Q. That was 1923. A. 1923?

Q. Yes, our records show you received \$28.50 in 1923. A. They paid us every month.

30 Q. You only worked a short time? A. We only got paid the second year. The first year I guess maybe it was 1923, that I was under Mayor Bamford.

Q. In 1923, we show you that we paid you \$28.50. A. For 1923?

Q. Yes. A. We got paid every month.

Q. Did you earn more than that? A. Yes.

Q. How much did you earn? A. Well, I don't just remember now. I think we got \$100 a month.

40 Q. In November, 1923, our records show you

Peter F. Cummings, cross.

worked as a watchman. Do you remember that?

A. No, I don't.

Q. And in 1924, according to our records, you earned \$775. A. That was when I went on under Mayor Mayer that year.

Q. You haven't worked steadily during all those years, have you, off and on? A. Off and on until after Mayor Mayer appointed me, then I went on steady ever since. 10

Q. You worked part time in July, 1924, part time in August, part time in September, 1924, didn't you? A. Yes.

Q. Only part time? A. Yes.

Q. Do you remember that? A. Yes. I believe that was the way they were all appointed, yes, part time. 20

Q. You worked part time, didn't you? A. Yes, not after Mayor Mayer appointed me as a regular. I went on and worked steady then in regular shifts.

Q. You were working part time then according to this paper you signed? A. According to that, yes.

Q. This is respondent's Exhibit No. 4. Now I notice that in January, of 1929, that you were at that time, according to our records, all of the months as take up until about January 27, 1930. A. That is when I had the grippe. 30

Q. You had the grippe then? A. Yes.

Q. In that month of January, 1929? A. Yes.

Q. You were out practically the whole month, weren't you? A. Yes.

Q. Who treated you at that time? A. Dr. Traverso.

Q. But you were laid up for about a month then, were you? A. With the grippe. 40

Peter F. Cummings, cross.

Q. In bed? A. Yes, sir.

Q. Did you have a temperature or did you not?

A. Yes, I did.

Q. Delirious? A. That is what the doctor was telling you about this morning. No, I wasn't delirious.

10

Q. At various times that you already testified I think you did desk duty rather than going out.

A. Yes, I did.

Q. Now, then, in November, 1929, you were out six days. Do you know what that was for? A. No, I don't. I don't remember.

Q. You testified that in October, 1929, you were out the whole month. According to our records you were only out eleven days. A. In October?

20

Q. Yes. Does that refresh your recollection at all? That is when you claim you had the pains, rheumatic pain, I think you called them. A. I thought I was out all that month.

Q. Well, according to the records you were out eleven days in October. Do you want to change your testimony at all or do you still say you were out the whole month? A. I wouldn't say, I am not sure. I say I thought I was out the whole month.

30

Q. In June you were out three days. Do you know what that was for? A. No.

Q. Don't remember? A. No. Oh, yes, I do.

Q. What was that? A. That was when I twisted my knee the first time, I think.

Q. In June? A. Yes.

Q. In April you were out six days? A. I don't know what that was for.

Q. I understand that for January, February and March, 1930, you were paid in full; is that right? A. Yes.

40

George W. Swain, direct.

Q. But you did no work for those three months?

A. No, I didn't. I was in the hospital at that time.

Q. Well, you were out of the hospital in February and you were out again in March? A. Yes.

Mr. Markley: That is all.

10

Mr. Leonard: That is all.

GEORGE W. SWAIN, a witness produced on the part of the relator, being duly sworn according to law, testified as follows:

Direct examination by Mr. Leonard:

Q. Mr. Swain, you were elected the first secretary of the Policemen's Pension Commission when it was organized in February, 1929, were you not?

20

A. Well, if that was the date that was down there.

Q. You were? A. Yes.

Q. And you still are the secretary? A. Yes, sir.

Q. And as secretary you have kept minutes of the Police Pension Commission, have you not? A. Yes, sir.

30

Q. As a result of the adoption of the Police Pension and as a result of a resolution passed by the commission of which you are secretary the procedure was adopted to deduct two per cent from the salaries of those officers on the force, was it not? A. Yes, sir.

Q. Now was two per cent deducted from the salary of Peter Cummings? A. Well, I left that entirely to the borough clerk.

40

George W. Swain, direct.

Q. Well, do you know? A. No, I don't know.

Q. You don't? A. No.

Q. This black book which I have before me is the minute book, is it not? A. Yes, sir.

10 Q. Didn't you as secretary of the Police Pension Commission have a list of those officers from whose salaries the two per cent was deducted? A. Well, I have a list of the roll, the payroll, the members of the force there.

Q. Is that part of your record? A. Yes.

Q. Will you please point out to me your records as secretary of the commission indicating the roll of the officers, as you call it? Have you those papers? A. Well, this is the list, these two sheets.

20 Q. Are they part of your record? A. Yes. Now, when I say that was a part of my record I made that up and put it in this book. It didn't go in the shape of a motion before the board, whether they audited that or not. I put it in so if the question came up as to the entrance of this man in the department I could speak intelligently, and I put down the date of their entries.

30 Q. And those two sheets which you have given me are the report of the minutes or records of the Police Pension Commission of which you are secretary? A. No, they are the members of the force to whom I went and got their statement of their entrance in the department.

Mr. Leonard: I offer those in evidence.

Mr. Markley: I object to them as immaterial, incompetent and irrelevant.

(Paper marked Exhibit Rel. 8.)

40 Q. Can you tell from your minutes, Mr. Secre-

George W. Swain, direct.

tary, when the Police Pension Act was inaugurated and put in operation in this borough?

(It is stipulated that it was February 12, 1929.)

Q. Do you know as secretary of the commission whether there was an assessment made to equal four per cent of the total salaries of those members of the police department fund? A. Well, the borough clerk, he made a report.

10

Q. Where is that report? A. This is from Mr. Joeck——

By Mr. Markley:

Q. What is the date? A. January 7, 1930.

Q. Well, that is later anyway. That is not it. A. Well, it states here the amount that has been secured from these men.

20

By Mr. Leonard:

Q. And this letter was sent to you as secretary of the Police Pension Fund by Mr. Joeck, treasurer of the Borough of Belmar? A. Yes, sir; that is right.

Q. And that is part of your records as secretary of the Pension Commission? A. Yes, sir.

30

Mr. Leonard: I offer it in evidence.

Mr. Markley: Objected to as incompetent, irrelevant and immaterial.

(Paper marked Exhibit Rel. 9.)

IT IS STIPULATED by and between the respective counsel that upon the inauguration of the statutory procedure under the Pension Act there was an assessment made under the act equal to four per cent of the total salary of the members of the

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Joseph Mayer, direct.

10 police force and that in ascertaining this percentage the salary of Peter F. Cummings was included, and that two per cent of the salary of Peter F. Cummings was retained for pension purposes from February 7, 1929, to the time when his salary stopped on April 1, 1930.

Relator rests.

Respondent's Testimony

20 JOSEPH MAYER, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Mr. Mayer, you are the mayor of Belmar?

A. Yes, sir.

Q. Belmar is under a commission form of government, I understand? A. Yes, sir.

Q. With three commissioners? A. Yes, sir.

30 Q. Who are the other two commissioners? A. Thomas S. Dillon and Thomas D. Joeck.

Q. Who is the Commissioner in charge of the police department? A. I am in charge of the police department.

Q. That commenced under your regime? A. Yes.

Q. And has been under your regime for how long as mayor? When did you take it over? A. I took it over in 1929. I am the supervising head of it now.

40

Joseph Mayer, direct.

Q. And have been since about when? A. Since the commission government came into power.

Q. When was that? A. December 6, 1927, with this exception: that among ourselves we turned the police department over to commissioner Thomas S. Dillon for the year 1928. He had direct charge of it during that period. 10

Q. Now then is there any ordinance of Belmar creating a police department? A. I know of no ordinance.

Q. I have here two ordinances which deal with salaries and wages. The first one I will show you is ordinance No. 158, which deals with salaries and wages. That is an ordinance that deals with the police department as to salaries and wages; isn't that so? A. Yes, sir. 20

Mr. Markley: May I mark that in evidence?

(Paper marked Exhibit Res. 6.)

Q. Then I show you another ordinance, 137, of the Borough of Belmar, which also deals with salaries and wages of various persons employed by the borough. Now outside of those two is there any other ordinance creating or dealing with the police department? A. Not to my knowledge. 30

Mr. Markley: I offer this in evidence.
(Paper marked Exhibit Res. 7.)

Q. Now I show you Exhibit Res. 4, which is signed by the relator, Peter F. Cummings, as of February 22, 1929, and it appears on its face it has been sworn to by the borough clerk, which designates the relator as patrolman on part time. 40

Joseph Mayer, direct.

Was that his position in the borough? A. Yes, sir.

10 Q. Now Mr. Cummings has testified here to a talk or conference that he had with you shortly after his salary had been stopped, as of the end of March, 1930, and he said the conference with you took place sometime between the 1st of April and the 1st of May. Do you remember that talk? A. Yes, sir.

Q. Where was it held? A. The talk you refer to was held in my office.

Q. Where? A. 720 Ninth Avenue.

Q. Now won't you tell us what occurred at that time?

20 Mr. Leonard: Objected to as immaterial unless it is offered for the purpose of showing an admission.

30 Q. Proceed. A. He called at my office and after chatting a little with him he said the purpose of his coming in was to find out why he couldn't continue to get his pay, as he was a member of the force, Belmar police force, and wanted to know if he wouldn't be continued as a member of the police force and his pay continued; and I told him that he was off the police force, that we had carried him all the time that he was ill in anticipation of his getting better, able to come in and be heard, if he so wanted to be heard, and that he was permanently off the force. And I took particular time to call to his attention, unknown to me before he took ill, as well as the subsequent times that he had been in the town and been under the influence of liquor. And he admitted to me
40 that he had been in town and had visited different

Joseph Mayer, direct.

places and had had some drinks. But he qualified it by stating that there were other members of the police force who were worse than he was. So the conference practically wound up with my telling him that he was definitely off the force, but that if he cared to I would be glad to give him a hearing, upon which would be proven the various things that I told him of his conduct as an officer and of his being on a visitation here; and he said he was in on his visits. I particularly called his attention to the duty he owed himself when he was claiming and he was trying to recover, to still continue drinking. In fact, I said to him, "I smell you now"; and he said he had a few drinks but that is all he had. 10

Q. At the time, you mean? A. At the time he was in my office. So he said, "Well, when can I get the hearing?" I said, "What I will ask you to do—we didn't know your condition and the condition that you have been in and reported to us is such that what I want you to do is to get a certificate from your doctor that you will be able to undergo an examination if you want that examination. If you feel you want to be tried we will be glad to give you that trial and all I ask you to do is to advise with your doctor at an opportune time when you are able to undergo this examination; and I asked about when he thought he would be ready, if he wanted an examination, and he said he would take and consult with his own physician and let me know. 20 30

Q. Did he do so? A. I never heard anything from him after that.

Q. Up until the time that there was received this May 17, 1930 letter for a pension? A. Yes. 40

Joseph Mayer, direct.

Q. Now was anything said by him at that time that he wanted a pension? A. No, sir.

Q. Was anything said by you about giving him a pension? A. No, sir.

10 Q. Was anything said by you that you would see after conferring with the other commissioners yourself about giving him half pay? A. No, sir; he was definitely told he was through.

Q. Now then, you say you called his attention to facts that had come to your attention about his drinking before he became ill, which you said was unknown to you at the time, and also matters that had come to your attention after he had come out of the hospital with respect to drinking? A. Yes, sir.

20 Q. Then what did you say to him and what did he say to you about the drinking before he became ill? A. Well, he admitted that he had been and that other ones had done the same thing. That was the only justification he offered for it.

Q. What about after leaving the hospital? A. He didn't deny it. He said he had been, admitted he had had a few drinks.

30 Q. Did he say to you that he had been drinking heavily up till August——

Mr. Leonard: Don't lead.

Mr. Markley: This is contradiction. I think I have a right to put it specifically.

40 Q. Mr. Mayer, did he say to you that he had been drinking heavily up until August, 1929, and that then he had stopped drinking? Did he make any such statement as that to you at that time? A. He made no statement that he had stopped at all. He admitted that he had been drinking.

Joseph Mayer, direct.

Q. Didn't say that he had stopped in August, 1929? A. No.

Q. He never presented a doctor's certificate, I think you said? A. No, sir.

Q. Now I understand it, Mayor, that when Mr. Cummings sent his letter of May 17, 1930, to the Belmar Pension Commission that a copy of that letter was sent by Mr. Swain, the secretary, to the Board of Commissioners of which you were a member? A. Yes.

10

Q. On July 1, 1930; is that the letter, sending it to the Board of Commissioners for consideration?

(Letter Exhibit Res. 8 shown witness.)

A. Yes, sir.

20

Q. And then in response to that communication of July 1, 1930, I believe the borough clerk replied to Mr. Swain, secretary of the Pension Commission, as per this communication, did he not?

(Letter Exhibit Res. 9 shown witness.)

A. Yes, sir.

Q. And was that pursuant to a resolution of the Board of Commissioners? A. Yes, sir.

30

Q. You were the presiding officer of the Board of Commissioners? A. Yes, sir.

Q. And you were also the presiding officer of the Pension Commission? A. Yes, sir.

Q. The other members of the Pension Commission being Mr. Swain, citizen— A. And Mr. Stines, a representative of the officers.

Q. The representative of the police? A. Yes, sir.

40

Mr. Markley: That is all.

Joseph Mayer, cross.

Cross examination by Mr. Leonard:

Q. Well, Mayor, did you ever tell Cummings before he visited you in May, 1930, that he was off the force?

10 Mr. Markley: I object to the question. I think it is a little inaccurate, Mr. Leonard. It was sometime between the 1st of April and the 1st of May. It was not the 1st of May.

Mr. Leonard: Strike that out.

Q. Did you ever notify Mr. Cummings in behalf of the police department, or indeed, in behalf of the borough prior to April 1, 1930, when his salary stopped, that he was no longer a member of the police force? A. Prior to April 1st?

20

Q. Yes. A. No, sir.

Q. And you first informed him of that fact when he called upon you and asked why he did not get any more money; is that right? A. That is my first talk with him because he was not able—we had constantly kept in touch with him to find his condition.

Q. No, my question—your answer I suppose would be no to my last question. (Question repeated.) A. Yes, that is right.

30

Q. So that when he came before you and asked why he did not get any more money you considered that he was not on the Belmar police force? A. Yes, sir.

Q. And that he had ceased to be a member of the police force when? A. He really ceased to be a member of the police force before the rest of the year.

40

Joseph Mayer, cross.

Q. And what date? A. Our commissioners had a session on the day before the New Year and also on the New Year, to discuss his particular case, and on which the investigations had shown——

Q. No, I am not concerned with that at this time. I am asking you for the date. A. We had the meeting at that time. 10

Q. I am asking you for the date. A. That date was on the day before New Year's and New Year's Day.

Q. On the 31st day of December, 1929, and on January 1, 1930? A. I think that is correct.

Q. Are those the two dates you give on which Peter F. Cummings ceased to be a member of the police force of Belmar? A. We didn't give him a date to complete it at that time. We took action upon his dismissal; that is, we discussed his dismissal. 20

Q. No, Mr. Mayor, perhaps I don't make myself clear. You told Cummings when he visited you sometime in April, but after April 1, 1930, and asked you why he didn't get any more money, you told him that he had ceased to be a member of the police force? A. Yes.

Q. Now on what date did he cease to become a member of the police force? A. Well, he had ceased it, so far as the commission was concerned, on the first of the year; that is, subject to being well and get a hearing. If he hadn't been ill he would have been dismissed on that day. 30

Q. But he was ill? A. He was ill.

Q. And on what date was he dismissed or on what date did he cease to become a member of the Belmar police force? A. Well, he ceased on the stopping of his pay. 40

Joseph Mayer, cross.

Q. On April 1, 1930? A. Yes.

Q. And he was a member of the police force on December 27, 1929? A. Yes.

10 Q. And continued so up until April 1, 1930? Well, when he called upon you after that and you told him that he was no longer a member of the police force you said something to him about his presenting himself for a hearing, didn't you? A. No, not after; the same meeting.

20 Q. Why did you want him to present himself for a hearing if he were no longer a member of the police force? A. We were unable to give him a notice, and owing to his precarious condition our commission determined that on account of the grave character of his illness that we didn't want to serve notice on him of dismissal at the time, and we carried him over hoping till such time as the doctor would report him well enough that we could so notify him without any serious results; and the chief made some visitations to the hospital to find out his condition for us.

30 Q. Have you any resolution in the minutes of the Board of Commissioners or of the Police Pension Commission minutes reciting that Peter F. Cummings ceased to become a member of the police force on April 1, 1930? A. Nothing in the minutes.

40 Q. If you say, notwithstanding there is nothing on the minutes to that effect, that he ceased to become a member of the police force on April 1, 1930, what was your object in giving him notice to hear charges relating to some other period? A. I wanted to give him a hearing on the charge not only relating to the one month period when he went around but was unable on account of his illness to hear any charges, but on subsequent

Joseph Mayer, cross.

days when he had come down here and been in the same condition.

Q. But if he were no longer a member of the police force what was your object in giving him a hearing as if he were a member of the police force? A. Simply in a spirit of fairness, now that we felt that if he wanted a hearing we would grant him a further hearing. 10

Q. A hearing to get back on the force? A. A hearing to disapprove of the conditions that existed causing his dismissal.

Q. On April 1st? A. Any time after that we would have given him a hearing.

Q. By that did you want to afford him an opportunity to get back on the force? A. No, wanted to give him an opportunity to be heard. 20

Q. Were there any formal charges preferred? A. Yes, sir.

Q. Where? A. I told it to him in my office, gave him a detail of the charges.

Q. Did you tell him that before? A. I told him when he was ill in the hospital and I had seen a sort of continuous report that he was confined in a tuberculous condition.

Q. And you informed him for the first time when he called upon you sometime in April, 1930, that some charges had been preferred against him? A. In April, yes. 30

Q. Now were those formal charges embodied in writing? A. No.

Q. And you referred during that conversation to a certificate that he might present, did you not? A. Yes.

Q. Did you refer to the certificate described in the Pension Act that an applicant may present in 40

Joseph Mayer, cross.

order to obtain a pension? Is that the certificate that you refer to? A. No.

10 Q. What certificate did you refer to? A. I wanted a certificate and evidence that he was able to undergo an examination. I felt that the illness to me was that he was so ill and in such a condition that I didn't care to have the responsibility of insisting upon an examination when he was not physically able to undergo it.

Q. An examination to determine what? A. To determine the charges which had been brought, which I had confronted him with, by reason of his drunken condition on former occasions and his conduct as an officer both before and since January 1st.

20 Q. Did you feel that he was at that time still under the jurisdiction of the police department although you considered him no longer a member? A. No, I felt that it was just a feeling that we had among ourselves here as commissioners, to give him the privilege of a trial if he wanted to be heard upon the merits of the proposition which had caused his dismissal.

30 Q. And had those charges which you had not reduced to writing but which you say you had talked over with your colleague been in fact disproved, then was it your intention to return him to the force? A. I believe if they had been disproved that that would have resulted.

40 Q. And if he were unable by reason of his physical condition to return to the force, then what did you intend should happen? A. Well, if he would prove, if he could possibly prove that these were not so, and establish the fact that his conduct was good and did not warrant a permanent dismissal, why naturally we would be here to carry out the

Joseph Mayer, cross.

intent of his continuation and to further study the matter of his application.

Q. So the reason why you as a member of the Police Pension Commission refused to consider this man's application for a pension was because of the fact that the relator had refused to present to you as mayor a certificate showing good health, so as to enable you to examine him on some charges that you had not reduced to writing; is that right? 10

Mr. Markley: I object to that because the record officially shows that the reason why the commissioners refused to consider his application was because first he was guilty of conduct unbecoming an officer, and second, that he was not disabled in the performance of his duty, as appears from exhibit Res. 8. 20

(Question repeated.)

A. No, he was off the force previous to that and was notified by me of it.

Q. But that was the reason that you refused to consider his pension application, because he was off the force? A. He was off the force. 30

Mr. Markley: I object to that because the record also shows that the reason was that he was not disabled in the performance of his duty.

The Witness: Exactly so.

Q. Before you dismissed this man from the force on April 1, 1930, why didn't you afford him an opportunity of a hearing? A. He was ill and impossible of anybody getting in touch with him. 40

Joseph Mayer, redirect.

Q. Well, why didn't you wait until he recovered before you dismissed him without a hearing? A. We learned he had been recovered sufficient to be around here and be in an intoxicated condition.

Q. You learned that? A. Yes.

10 Q. You didn't see him in an intoxicated condition yourself? A. I didn't see him but the other officers did, who will testify later.

Mr. Leonard: I think that is all.

Redirect examination by Mr. Markley:

Q. Just one further question, Mayor. You were saying that you and your two fellow commissioners, that is, borough commissioners, Mr. Dillon,
20 Mr. Joeck, on December 31, 1929, and January 31, 1930, had considered this man's status? A. Yes.

Q. And at that time you had considered his conduct? A. Yes.

Q. Particularly with respect to his drinking, which had been called to your attention? A. Yes.

Q. And you were about to say and I think Mr. Leonard stopped you—properly so, but I want to ask you now what it was that you considered
30 at that time.

Mr. Leonard: Objected to as immaterial.

Mr. Markley: Well, you brought it out on direct and then stopped him. Now I want to find out what it was.

Mr. Leonard: It was not given in response to my question. I objected to its materiality because he was not dismissed
40 at that time.

Joseph Mayer, redirect.

A. Of his drunken condition previously and of a week just preceding when he had this dismissal, which brought it up and developed that it had been continuous for such a long period since; and one of the commissioners mentioned how he had seen him; both commissioners saw him at various times; and it was so seriously considered that a motion was absolutely made to dismiss him right at that time and not go along with him any further, but just drop him right then and there; but the report came or was conveyed to us— 10

Mr. Leonard: Not too much hearsay.

Q. What was the information as to his condition? 20

Mr. Leonard: Objected to as hearsay.

A. His condition was so critical that he was not expected to live.

Q. And was that one of the motivating reasons why you continued his salary for three months?

A. That was the only element in which we felt that—

Q. You didn't want to hit a man when he was down? A. That was right. 30

Q. Now outside of this communication of May 17, 1930, which is his letter applying for a pension, Exhibit Rel. 6, which is reiterated as Exhibit Rel. 4, and sent with his letter on June 12th, Rel. 5, did he give you any information upon which he based his claim to a pension? A. No, sir.

Q. And did he make any claim at any time, in 40

Joseph Mayer, recross.

writing or verbally, that his illness was caused by his work as a policeman? A. No, sir.

10 Q. This letter of May 17, 1930, says: "I hereby apply for retirement on pension from the Belmar Police Dept. as provided in section 2, chapter 160, of the laws of 1920. Will appear for examination by police physician at any time that may be convenient to you." Did he ever supplement that with any information as to the ground upon which he claimed a pension? A. No, sir.

Q. Now are those two communications of May 17th and June 12th the only ones that were received from him? A. Yes, sir.

20 Q. And as I understand it, the only one that was received from his counsel, Mr. Lester C. Leonard, was August 5, 1930? A. That is correct.

Q. Exhibit Res. 2.

Mr. Markley: That is all.

Recross examination by Mr. Leonard:

30 Q. You say on the last day of December, 1929, or the 1st day of January, 1930, a motion was made by one of the commissioners to dismiss this man? A. Yes.

Q. Is that motion in writing? A. No, I think we changed the action on it afterwards, on account of his condition; and our whole idea there was that on information that we had gotten that he just could not live, and we thought of it very seriously and hesitated about going on record at that time, rather leaving it hopeful that he would at least get out before we would be obliged to give him that notice.

40 Q. On what date occurred the meeting prior to

Joseph Mayer, recross.

the meeting of December 31, 1929? A. Well, we met each week, each Tuesday night.

Q. Have you a record of the prior meeting?

A. Of the minutes?

Q. Yes. A. Yes, it is here.

Q. Was any motion made at that meeting to dismiss this officer? A. No, I don't think prior to that, because he was under investigation at that time. 10

Q. No, now wait a moment, please. My question was was there any motion made at that meeting to dismiss this officer? A. Prior to December 31st?

Q. Yes. A. No.

Q. I am referring now to the meeting a week prior to that time. A. No. 20

Q. Was there any motion made to prefer charges, formal charges, against this man at that meeting?

Mr. Markley: Which meeting?

Mr. Leonard: The same meeting, the meeting on Tuesday night.

Mr. Markley: Before December 31st?

Mr. Leonard: Yes. 30

A. Yes, we had a report of the chief of police with charges, stating his dismissal.

Q. Wait. My question was, was there any motion made at that prior meeting to prefer charges against this officer? A. I don't think there was any motion made. The report was made but I don't think there was any motion. I am not sure about that. 40

Joseph Mayer, recross.

Q. Examine the record and see. You have the record before you. Do you recall the meeting two weeks prior to December 31, 1929? A. No, I wouldn't recall what transpired there without reference to the minutes.

10 Q. Well, the minutes are before you. Do you recall any motion at any meeting prior to April 1, 1930, made to the end that charges of a formal nature should be preferred against this officer? A. Yes, we discussed it and made a motion either the 31st or the 1st. We discussed it at one time and made a motion the next time.

Q. You say that motion is not on the minutes? A. It is not on the minutes but it was made.

20 Q. Now sometime prior to December 15, 1929, you decided to suspend this officer, did you not? A. No.

Q. Wasn't he suspended? A. No, he was suspended by the chief.

Q. By the chief? A. But that was during the week of December 15th.

30 Q. That was not brought to your attention at all? A. It was brought to my attention, naturally, when he made the report as to why he put him off.

Q. There was no motion made to suspend him? A. No, the matter was in the hands of the chief at that time.

Q. It came to your knowledge, however, as head of the police department that this officer had been suspended from December 15, 1929, to December 22, 1929, did it not? A. Yes.

40 Q. And it also came to your knowledge, did it not, that on December 22, 1929, this officer went back to work? A. No, I don't know that I knew anything about that.

Joseph Mayer, recross.

Q. You didn't? A. No. That is a matter that was over to the chief of police at the time.

Q. You knew that the period of suspension was to exist for only seven days though, didn't you?

A. I did not. The chief had taken him off and I inquired why the suspension and he told me—

10

Q. Now realizing what the chief told you, my question is, did you know that the period of suspension was only seven days? A. No, I don't think I did.

Q. And you didn't know that this man Cummings was doing night duty in the latter part of December, 1929? A. No, I don't think so. I really went in there to find where they were or who they were.

Q. You didn't know whether he was on the force or whether he was not? A. No, I only knew he was off at this time and the chief made a report of his being off.

20

Q. And you didn't take pains to inquire whether he ever got on again? A. I took the pains to ask the chief what the trouble was and he told me.

Q. No, I say you didn't take the pains to inquire whether he ever got on again? A. No, I didn't say anything.

30

Q. I think I asked you whether or not the charges, so-called, against this officer were ever reduced to writing? A. No.

Q. They never were? A. No. You mean by me, of course?

Q. By you as head of the police department or submitted to you in that capacity in writing. A. Well, the chief submitted a sheet to me in writing of dismissing him about his conduct, and then followed with an investigation during that week

40

Joseph Mayer, recross.

which developed numerous things by reason of the other officers coming in and reporting of being in a chronic condition for the past three months; and that developed right at that time by the chief when he made this report to me.

10 Q. My question, Mr. Mayer, was whether or not he had made written charges or whether any one else— A. The chief had.

Q. Had reduced to writing written charges against this officer and submitted them to you as the head of the police department? A. No, the chief made a report and I asked him at the time to make a complete record of them, of his conduct, in case it were needed, and I assume that he did.

20 Q. But that does not appear on the minutes of the commissioner? A. No.

Q. And you have never seen it? A. Yes, he brought down the list to me in going over the matter, and the times the various officers had seen him and the condition he was in and the development of the thing and I asked him to reduce it and take care of it himself in his own records.

Q. And you think he did? A. I think he did, yes.

30 Q. You haven't seen it? A. No. That is not this department.

Q. That is his department? A. Yes.

Q. Was there any formal resolution passed on which there was a vote taken to dismiss this man from the police force? A. A vote was not taken. On the results of the motion——

Q. No, pardon me. Your answer was that there was no vote taken? A. No vote taken.

40 Q. And the only remaining part of my ques-

Joseph Mayer, redirect.

tion would therefore be, was there any resolution passed? A. No.

Q. Did you take upon yourself the dismissal of this officer on April 1, 1930, because of what transpired after his sickness or because of what had transpired before his sickness? A. Both. Not upon myself. It was discussed at the meeting of the commissioners.

10

Q. And the dismissal, if in fact there was a dismissal, was based in part on what had come to your knowledge as to this man's conduct after December 27th and December 28, of 1929? A. No, sir; on both.

(Question repeated.)

A. Based in part, you say?

20

Q. Yes. A. Well, it had a bearing on it, of course.

Mr. Leonard: That is all.

Redirect examination by Mr. Markley:

Q. Were the three commissioners agreed on what you did? A. Yes, sir.

Q. Were they agreed on the 1st of April, 1930?

30

A. Yes, sir.

Q. In cutting off his salary? A. Yes, sir.

Q. And were you agreed at the meeting of December 31st and January 1, 1930? A. Yes, sir.

40

Thomas Joeck, direct.

THOMAS JOECK, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

10 Q. Mr. Joeck, are you one of the municipal commissioners of Belmar? A. I was so chosen, yes, sir.

Q. And what department have you charge of? A. Public works I believe is the official title.

Q. Director of public works? A. I believe that is the way it is stated in the statutes.

Q. You have just heard the mayor testify as to the action taken by the commissioners with respect to Mr. Cummings? A. Yes, sir.

20 Q. Do you recall the meeting of the three commissioners, that is, Mr. Dillon, the mayor and yourself, of December 31, 1929, and January 1, 1930? A. I do, very distinctly.

Q. Had you prior to that time personally observed the conduct of Mr. Cummings? A. I had, yes, sir.

30 Q. As commissioner of public works he was not under your jurisdiction, as I understand it? A. He was not.

Q. He was solely under the jurisdiction of the mayor? A. Yes, sir.

Q. Who had a right to determine his status? A. Yes, sir.

Q. Without consultation either with you or the other commissioner? A. That is my understanding of it.

40 Mr. Leonard: I submit his understanding is quite immaterial to this case.

Thomas Joeck, direct.

Q. But notwithstanding the fact that he was not under your jurisdiction did you inform the mayor of what you had personally known of Mr. Cummings? A. At that meeting in the latter part of December; I believe it was the day before the 31st.

10

Q. What was it you called to his attention?

Mr. Leonard: I object, upon the ground that it is immaterial; secondly, upon the ground that it is hearsay; thirdly, as a result of information, whatever it might have been, there was no motion made or resolution passed concerning the status of this officer and the minutes of that meeting do not show it, as it has been testified to by Mr. Mayer.

20

A. Why, that I had seen myself Mr. Cummings actually in the act of drinking, with the reports that we had had by hearsay——

Mr. Leonard: I object. I further object upon the ground that now this witness is attempting to introduce hearsay upon hearsay. I object to his testifying as to anything as to what somebody may have told him. It is bad enough for him to tell what he told the mayor.

30

A. I felt that the——

Mr. Leonard: I object also that it is immaterial entirely as to how this commissioner felt.

Q. Go ahead. A. I felt that the reports that

40

Thomas Joeck, direct.

we had heard were probably true, due to the fact that I had actually seen him doing it myself.

Mr. Leonard: I move to strike out the observations and conclusions of this witness.

10

Q. What had you seen him drinking? A. It looked like beer to me.

Q. Well, was he under the influence of liquor when you saw him? A. I couldn't say positively. It was my impression that he was.

Q. Hadn't you on other occasions seen him driving the automobile? A. I believe I did, yes, sir.

20

Q. Won't you tell us about that, that you personally saw? A. It was sometime during that year, I can't tell when, but it was close to the end of the year, when I was coming down Ocean Avenue—it was in the evening—and I saw a car going ahead of me that acted as if it was almost out of control; and naturally being—it was in Belmar, and naturally being one of the officers I was a little bit interested to see who it was, and I passed and recognized Mr. Cummings driving.

30

Q. What was it about the driving that attracted your attention? A. Why, the car was swerving from side to side.

Q. From one side of the road to the other? A. Yes, sir.

Q. Was he in uniform? A. I believe he was. It looked so. It was dark. I didn't stop him.

Q. What kind of an automobile was it? A. A Ford car.

40

Q. A borough car? A. Yes, sir.

Q. Did you call that to the commissioners' attention? A. I don't think I did, no.

Thomas Joeck, direct.

Q. Now, these reports that you refer to, whose reports were they? A. Why, the chief told me about it one day when he was up——

Q. Was it the chief's reports? A. Yes, sir.

Q. Any others? A. Well, nothing definite, only there was—I believe Mr. Cummings in his own testimony reported a party, and it was pretty generally known around town, by hearsay—— 10

Mr. Leonard: Objected to. Let's anticipate, at least, that the question will be received by the Supreme Court.

Q. Now as a result of the discussion and consideration received by the three commissioners at the end of December or the 1st of January, 1929, and 1930, what did you three commissioners determine, if anything? 20

Mr. Leonard: I object to it unless it can be shown that they determined it by resolution in their official capacity.

Q. Go ahead. A. We determined to dismiss him but withheld any definite action on it.

Q. Why? A. Because of his illness we felt that we didn't want to, in the precarious condition that he was, we didn't want to dismiss him at that time, fearing that it might have some further ill effect on his health. 30

Q. And when was it that you finally did cut him off, stop his salary? A. It was about the first of April, as I recall it.

Q. He was paid for January, February and March, 1930? A. Yes.

Q. And the 1st of April you actually— A. I 40

Thomas Joeck, direct.

recall that the voucher was here on this desk and the matter was discussed between us.

Q. Was the voucher approved? A. The voucher was not approved. It was not that I remember.

10 Q. There is no question about it he didn't get any salary after the 1st of April, 1930? A. No.

Q. Although a voucher was presented? A. The voucher was presented.

Q. And were the three commissioners unanimous at that time that he was not able to continue any longer?

20 Mr. Leonard: I object to it unless it appears by resolution, which is the only method by which the commissioners manifest their action or state of mind.

Mr. Markley: I will take the opportunity of answering one of your objections by saying that being in the department of the mayor that no resolution, in my humble opinion, was necessary, and that consultation with his colleagues was merely a matter of courtesy, he having the sole right under the law to dismiss the man.

30 Q. Now then, as of that date, as of April 1st, when no further voucher was approved, had further reports been made by the chief as to the conduct of Cummings since the first of the year?

Mr. Leonard: Objected to upon the ground of hearsay.

A. I haven't heard of anything.

Q. You don't know about that? A. No.

40 Mr. Markley: All right. That is all.

Thomas Joeck, cross.

Cross examination by Mr. Leonard:

Q. When was this dark night in which you noticed a Ford, as you described, zigzagging on the ocean boulevard at Belmar? A. I did.

Q. When was it? A. It was sometime during the latter part of 1929. 10

Q. Well, was it in November? A. I couldn't say exactly.

Q. Was it in December? A. I told you I couldn't say exactly.

Q. Was it in the fall or winter? A. It was in the fall.

Q. In the fall? A. Yes, sir.

Q. Not in the winter? A. No, sir.

Q. The Ford was not shimmying? A. I don't think so. 20

Q. You know what shimmying is? A. I ought to. I sell Fords, and handle them every day.

Q. Was this an old model Ford? A. It was not.

Q. It was a new model Ford? A. It was what we call Model A.

Q. And although the night was so dark that you couldn't see whether the driver had a uniform on, you took pains to notice that it was this man Cummings who was driving? A. I saw that it was a Belmar police car and he had a cap on; that is all I could determine; or rather, a police cap. 30

Q. From the fact that you saw a Ford car which you recognized as one you sold to the department? A. No, I did not.

Q. Pardon me; as one that was owned by the department, containing a driver with a cap on, you concluded it was this man Cummings? A. I recognized his face.

Q. You couldn't see his brass buttons or any- 40

Thomas Joeck, cross.

thing of that sort? A. Well, when you sit in a car like that——

Q. No, could you or couldn't you? A. Not distinctly, no, to be sure about it, because they are down below the side of the door.

10 Q. Well, after that you felt yourself more or less delegated to keep tabs on this officer, didn't you? A. Not particularly; it is not in my department; no reason why I should.

Q. And you finally learned that in December he was suspended, didn't you? A. Yes, we had the report here.

20 Q. You had the report that he was suspended and that you knew that it was for only seven days, didn't you? A. I don't recall that I knew any definite time. I supposed he was suspended for good.

Q. You did? A. I did, yes.

Q. Where did you glean that information? A. I didn't glean it, it was just a matter that was brought up here that Cummings was suspended.

30 Q. You thought he was suspended for good? A. Yes, until the meeting of December 31st, when the matter came up with the list of names to be reappointed, and we came to Cummings' name. I was surprised to see him name on there.

Q. Hadn't you learned before that time that he was ill? A. No, I hadn't because it only occurred a day or two before, and I didn't——

Q. It didn't come to your attention that this man, while performing night duty in December, was taken ill and pneumonia had developed? A. No, sir; I didn't know it until the night of December 31st.

40 Q. The only attention you gave to the whole

Thomas Joeck, cross.

matter was that when it came to your notice that this officer, sometime before, you had seen riding on the ocean boulevard on a dark night, driving a Ford car, was suspended, you concluded that he must have been suspended for good? A. Yes, I did, exactly.

Q. In other words, you inferred from the word "suspension" that he was dismissed? A. Yes.

Q. You know the difference between the words "suspension" and "dismissal," do you not? A. I do, yes.

Q. You are not a member of the Police Pension Commission? A. I am not.

Q. Can you tell the month of this occasion when you saw this officer drinking beer? A. No, but it was also in the fall.

Q. Also in the fall? A. Yes, sir.

Q. It was not on the same day when you saw him driving this Ford car? A. No, it was not.

Q. Or was he drinking at a bar? A. Well, I don't know as you would exactly call it a bar.

Q. He had beer? A. I say it looked like beer.

Q. You were not there drinking with him? A. No, I was not.

Q. And from where you stood, wherever that might have been, and thought you saw him drinking beer, you further observed that you thought he was under the influence of liquor didn't you? A. I said that.

Q. Was he in uniform at the time? A. He was.

Q. How many beers did you see this officer drink? A. Well, I was only in there a few moments. I don't know that he took a whole glass while I was in there.

Q. You didn't wait till he came out? A. No.

Thomas Joeck, cross.

Q. What made you think, Mr. Joeck, that this man was drinking beer? A. Well, beer has a certain color and has froth on it.

Q. So has soda and ginger ale a similar color, hasn't it? A. Yes.

10 Q. Well, now you tell us about it. What else about it? A. What do you want to know?

Q. What made you think he was drinking beer and not cream soda or sarsaparilla? A. Because I know they serve beer where he was drinking.

Q. The place where you were at that time you knew they served beer? A. Yes. I don't know whether it is intoxicating beer or not.

Q. Oh, it might have been near-beer? A. It might have been near-beer for all I know, yes.

20 Q. Oh, you don't claim that this man was drinking intoxicating beer? A. I didn't say so. But I said that I thought that he was under the influence of liquor when he was there drinking.

Q. You didn't see him drink anything else? A. No.

Q. You were commissioner at the time? A. I was commissioner at the time.

Q. You didn't make any special report of that? A. I did not.

30 Q. Did you make any special report of the car?

A. No. What was in the back of my mind was when it came up—

Q. I am not interested in what was in the back of your mind at that time. I haven't asked you that. A. I could give a very good reason for that.

40 Q. I think undoubtedly you could. But on what further occasion did you, Mr. Joeck, see this man drinking liquor or being under the influence of liquor? A. I didn't say that I had ever actually seen him under the influence of liquor. I said it

Thomas Joeck, cross.

gave me the impression that he was under the influence of liquor. And those are the only two times.

Q. Was he drunk? A. I don't know whether he was drunk or not.

Q. You know a drunken man when you see one, don't you? A. It might be a matter of opinion. 10

Q. I am asking your opinion. A. Well, I don't know. I have seen some men that I thought were drunk and I have heard other people say they were not, so I don't know.

Q. Then you testify under oath, Mr. Commissioner, that this place where you saw this man drinking what you thought was beer, which, for all you knew, might have been near-beer, that he was then and there under the influence of liquor? 20
A. I could say that I think that he was. I wouldn't be positive about it. I didn't talk to the man. I simply spoke to him and walked out.

Q. And he answered you? A. He did.

Q. Did you ever see him on any other occasion imbibe what you thought to be intoxicating liquor? A. No.

Q. Did you ever on any other occasion see him what you thought to be under the influence of liquor? A. Only that time in the automobile, and I thought that he was then from the action of the car. 30

Q. Was that before or after Ocean Avenue was paved? A. I beg your pardon.

Q. Was that before or after Ocean Avenue was paved? A. Well, he was not on the police force before that was paved.

Q. Did you take pains to notice the condition of the street on which the Ford was at the time 40

Thomas Joeck, cross.

you saw him? A. Why, certainly not, because I am Commissioner of Streets and know the condition of that road.

Q. Smooth as glass, wasn't it? A. No, not entirely. There are a few bumps in it.

10 Q. This was not at the place where there were some bumps? A. No.

Q. Did you take pains to notice what portion of that long avenue this Ford car was? A. Yes.

Q. Why didn't you stop the man if you thought he was drunk? A. I don't know offhand why I didn't.

Q. Did you make any complaint? A. I didn't, no, because that is not in my——

20 Q. No, I am not asking you the cause, I am asking you if you did make complaint. A. I didn't, no. I told you that before.

Q. Who is the head of the Department of Public Safety in this borough? A. Mr. Mayer. If it had been one of my men I would have quick enough.

Q. But you made no report about it? A. No.

Q. So those are the only two occasions that you can bring to mind? A. Yes.

Mr. Leonard: That is all.

30

By Mr. Markley:

Q. What was your reason for not reporting him at the time? You said you had a good reason. A. Why, I thought it was up to the mayor to take what action he saw fit. I wasn't going to squeal on the man.

40

Thomas S. Dillon, direct.

THOMAS S. DILLON, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Commissioner Dillon, you are one of the borough commissioners of Belmar? A. Yes, sir. 10

Q. Of what department are you the head? A. Commissioner of Revenue and Finance.

Q. Now do you remember the meeting of the three borough commissioners held at the end of 1929, around January, or rather, December 31st and January 1st, 1930? A. I do.

Q. When the commissioners considered the conduct of Mr. Cummings, the relator? A. Yes, sir; I do. 20

Q. Just tell us what transpired at that time, will you? A. Well, the matter was brought up in regards to the conduct, and we had about decided on his dismissal, only the mayor took into consideration his sick condition at the time, and he thought that he would like to give him a fair chance, and he thought perhaps it was only honorable and fair to wait till he recovered before he gave him a hearing. 30

Q. Then do you remember at the end of March that the question came up about stopping his salary? A. Yes, sir.

Q. As of the first of April, I believe it was stopped? A. The first of April, 1930.

Q. He got his March money? A. Yes, sir.

Q. And at that time were the three commissioners agreed to cut off his salary? A. Unanimous, yes, sir. 40

Thomas S. Dillon, direct.

Q. Bring to an end his employment? A. Yes, sir.

Q. Had you personally had any observation of Cummings in respect to his conduct? A. Well, not for the past two years I didn't.

10 Q. Not for the past two years? A. No, not as close as I was the year before.

Q. What do you mean by a year before? A. Well, a year before I was acting as chief of police. The first year that we took over commission government, the first year I acted as chief of police.

Q. That was 1928, I believe? A. Yes, sir.

Q. What was your observation then?

20 Mr. Leonard: Objected to as too remote and utterly immaterial to the issue in this case.

A. Well, I will say that in 1928 he performed his duty perfectly; no complaint whatever in 1928.

Q. And you don't know anything about his conduct after 1928? A. Well, I have heard a lot and I saw certain things.

Q. Well, that is what I want to get at, what you saw. A. It was 1928 and 1929.

30 Q. What was it you saw? A. Well, I saw him in a certain public place with his foot up on the bar standing there by the hour.

Q. Doing what? A. Drinking beer.

Q. In uniform? A. At times, sometimes in uniform and several times not.

40 Q. And how often would you say you have seen that? A. Oh, well, that would be hard to tell; perhaps sometimes a couple times a week, sometimes; probably Saturday night would be one of the main nights.

Winslow M. Brackett, direct.

Q. Well, was that then would you say, a weekly occurrence? A. Well, yes.

Q. And you say sometimes you would see him several times a week? A. Well, I wouldn't want to say several. That would be every day. I wouldn't want to say that.

10

Q. How often would you say? A. Well, three or four times a week, I should say.

Q. But you say you would see him with his foot up against the rail for hours? Did you have occasion to observe his condition, whether or not he was under the influence of liquor? A. Well, yes; I would notice his foolish speeches and things of that kind, that would give me an impression that he was a little off in the upper story, in my way of thinking.

20

Q. Well, did he speak that way when he was sober? A. No, sir.

Mr. Markley: Cross examine.

Mr. Leonard: No questions.

WINSLOW M. BRACKETT, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

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Direct examination by Mr. Markley:

Q. Chief Brackett, are you the chief of police now of Belmar? A. Yes, sir.

Q. And were you the chief during the year 1929? A. Yes, sir.

Q. And did you keep track of the number of days that Officer Cummings, the relator, was off

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Winslow M. Brackett, direct.

during that year? A. Yes, sir; I kept track of all the men.

Q. How many days was he off during the year 1929? A. Sixty-four.

10 Q. Part of that time that he was off he was suspended, was he not? A. Seven days.

Q. And that suspension was by you, I believe, was it not? A. Yes, sir.

Q. I show you Exhibit Res. 5. Was that your notice to the relator that he was suspended for seven days? A. That is a copy of it, yes, sir.

Q. And he didn't work for those seven days, did he, in December? A. No, sir.

Q. And he was not paid? A. No, sir.

20 Q. In this notice here you say he was suspended on charges of neglect of duty and conduct unbecoming an officer? A. Yes, sir.

30 Q. Do you remember the facts in respect to that? A. Well, the facts in respect to that were that he—I sent him and Johnny Maloney to Irvington, I think it is, to pick up Harry Stout with a warrant. I had a warrant for him. And it seems that when they came back from that trip—they were up there all day and away up into the night—came back from that trip, Johnny Maloney came in and reported that he couldn't find him and they had left the warrant up there. And I says to Maloney, "Where is Cummings?" And he says, "He is out in the car." I says, "What is the matter with him? Why don't he come in?" He says—

Mr. Leonard: I object to what he said on the ground that it is hearsay.

40 Q. Well, did he eventually come in? A. He eventually came and stood in front of the desk.

Winslow M. Brackett, direct.

Q. What was his condition? A. His condition was he was in a drunken stupor; he couldn't hardly talk. He was just hanging over the desk.

Q. And was that the reason why you suspended him at that time? A. No, the reason I suspended him was the party they had at Claussen's house, one of the other officers.

10

Q. When was that party? A. It was the night of the 14th, I think.

Q. What was his conduct then that resulted in his suspension? A. Well, there was quite a few boys in there and I noticed his car out in front and I walked around to the back and looked in the kitchen window and I saw him sitting in the kitchen in a stupefied condition and everybody lolling over him and fussing over him, and I made up my mind I was going to break the thing up; and I came back and wrote him his suspension.

20

Q. I show you this memorandum of the occurrence of April 13, 1929. I believe— A. I guess I remember what that was.

Q. Do you remember that occasion? A. Yes, sir; he reported to headquarters that night in—

Mr. Leonard: What date is this?

The Witness: April 13, 1929.

30

Mr. Leonard: Objected to as too remote and immaterial to the issue at bar.

Q. Tell us of that occasion. What happened at that time? A. He reported to headquarters seventeen minutes late and he was dressed in citizens' clothes. And later on I saw him at three o'clock coming down F Street with three shoes on the car, and one shoe was off. He had pulled his car out of the Moose on Thirteenth Avenue

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Winslow M. Brackett, direct.

and was coming down F Street and pulled into Marshall's at Eleventh Avenue and F Street, and there I saw him wallering around in the mud.

10 Q. Wallowing around in the mud? A. Wallowing, trying to fix his shoe, with a police overcoat on. I sent for him; I didn't go near him at all, I sent for him, that I wanted to see him. I stayed up that morning till four o'clock and I waited until three o'clock and he came down there.

Q. What was his condition? A. Well, his condition was just getting over a hangover. I don't know just exactly what you would call it, but I would think it would be a hangover.

20 Q. All right. Then what happened? A. I told him that I was sick and tired of his pulling around; and he said he didn't have an overcoat. I says, "You have got an overcoat on." He says, "No rubber overcoat." I says, "All right. I didn't know you didn't have a rubber overcoat;" and I ordered him a rubber overcoat and boots.

Q. That was what date? A. That was on the 13th of April.

Q. Do you remember the occasion of a number of days, April 15th, 16th, 17th, 18th and 23rd, 1929? A. Yes; he never notified me until—

30 Q. Did he report for duty on those days? A. No, he didn't. He notified me about an hour before that he couldn't come to work, that he was sick. And one night he called me up from Keyport and said that he would be a little bit late; and he didn't show up at all that night.

40 Q. Well, did you find out whether he was sick on those days, those five days? A. He wasn't sick on those days; and this day at Keyport and the day—there was another day I missed him that he

Winslow M. Brackett, direct.

called up, he didn't report that night. I think they had a meeting up there or something.

Q. Now then, did you also have occasion after the first of January, 1930, after he came from the hospital, to observe his conduct? A. Only from hearsay.

Q. You didn't see him personally? A. No.

Q. Drinking on any occasion after he came from the hospital? A. No, I didn't.

Q. Outside of these specific instances were there other occasions when he was under the influence of liquor? A. Well, I couldn't tell you. If there had been I would have had it, probably, on my report. Only from hearsay. It wasn't under my observation. I never liked to take anybody else's word for it.

Q. Now then I show you this memorandum of March, 1929. I believe that refers to an occasion when— A. Yes, they telephoned me from—

Q. What happened then? A. They telephoned me from the Moose.

Q. When was that? A. March 16th.

Q. 1929? A. 1929; that he would be a little bit late, he would be in at twelve o'clock. That is what he said; and he never came in all night.

Q. What did you find out? A. I found out he was up there.

Q. Intoxicated? A. Well, I didn't find out he was intoxicated. Nobody will ever tell you that at that time.

Q. You found out that he was up all night? A. The majority; up there till three o'clock in the morning.

Q. Up there till after twelve o'clock midnight? A. Yes.

Winslow M. Brackett, cross.

Q. And he didn't show up for work that night?
A. No, sir.

Q. At his regular call for duty, which would be what time, six o'clock? A. Well, eight or ten, whatever hours he was on at that time. I couldn't tell unless I looked at the books.

10

Mr. Markley: Cross examine.

Cross examination by Mr. Leonard:

Q. Chief, in testifying you had before you a typewritten paper? A. Yes, sir.

Q. Containing the date of April 13, 1929, which paper I show you and ask you by whom it was prepared. A. Prepared by me, sir.

20

Q. When? A. That same day.

Q. Was Cummings on duty when you saw him at the Marshall garage having his tire changed? A. He was, sir.

Q. On duty? A. He was, supposed to be on duty.

Q. And he had a police car? A. No, sir; he had his own car.

Q. His own car? A. His own car. No, sir; he didn't have the police car.

30

Q. You described him as wallering. A. Well, he was wallering—it was a rainy night and it was muddy and I don't know what you would call it, wallering, but he was rolling around trying to get this tire on this car and I don't know whether he succeeded or not. I didn't wait.

Q. You have changed tires? A. Plenty of them.

Q. You don't know whether he had difficulty in removing this tire or not, do you? A. The tire was off. He had ridden down F Street, so I was

40

Winslow M. Brackett, cross.

surprised that he hadn't changed it up there at the Moose, where he was in, but he went right down F Street with it.

Q. Let's have a better description of this wallering. What was he doing on this rainy night?

A. Well, he was on his knees trying to get this shoe on, wallering around in the mud in this blue uniform, blue coat uniform. 10

Q. Did he succeed in getting it on? A. I said I didn't wait.

Q. You didn't wait? A. I came on down and sent for him.

Q. Did you see him reach under the car, put the jack under the axle? A. No, sir; I didn't. I saw him practically on his belly with his overcoat, but later on I saw the condition of the overcoat and I knew he was on his belly. 20

Q. You saw both on his face and on his belly, as you call it? A. Yes.

Q. Out in this mud? A. Yes, sir.

Q. And that is the reason you used the word "wallering"? A. Yes, sir.

Q. You didn't suspend him for that wallering, did you? A. No, I—I didn't suspend him.

Mr. Markley: You gave him another chance? 30

Q. Mr. Markley says you gave him another chance. Do you wish to adopt his words? A. Sure.

Mr. Leonard: The witness adopts counsel's words and says that he gave him another chance. 40

Winslow M. Brackett, cross.

Q. Now the Claussen party, was he on duty then?

Mr. Markley: Supposed to be.

10 Q. Your counsel says that he was supposed to be. What do you say? A. He was on duty at that time, yes, sir.

Q. What date was that? A. It was on the 14th of April.

Q. About what hour? A. Oh, this lasted all night.

Q. Well, what hour did you see him? A. I saw him around two o'clock in the morning.

20 Q. About two o'clock in the morning of April 14th? A. Yes, sir.

Q. Do you ever use the word "lights" in keeping the record of the character of employment of your officers? A. "Lights"?

Q. Yes. A. No, sir; that is "lights out."

Q. You have, I notice, in reading— A. Some of them are "on lights" for a certain hour and they put down just "lights," that they are working on lights. They check off on the lights.

30 Q. What does the word "reserve" mean then? A. Well, he is on reserve duty; he was on in the police headquarters on reserve duty.

Q. Is that active duty? A. That is active duty, sure.

Q. Although they are on reserve duty they get full pay? A. Oh, yes, sure. Reserve duty is only—some of us, we will have bad nights and we will have three or four parties, we will have men on reserve duty in the police headquarters to make calls on any special calls.

40 Q. On April 15th, 16th, 17th, 18th and the 23rd,

Winslow M. Brackett, cross.

he was not on active duty; is that right? A. Not on duty, no, sir.

Q. Did you see him during that period? A. I went down to his house, I think, to see him, and he was not home. I think he had gone to Freehold.

Q. As a matter of fact, you don't know where he was? A. I don't know where he was. 10

Q. And you don't know his condition during that period of your own knowledge, whether he was ill or whether he was well? A. I don't, no, sir; of my own knowledge, I don't.

Q. He didn't get paid for those days that he was not there? A. Oh, yes; he got paid for those days.

Q. Got paid for those days? A. Yes. The only time he didn't get paid was for the seven days he was off when he was suspended. That was the only time. The other times he got paid right up. 20

Q. Now, at the Claussen party, you looked through a window, or were you a member of the party? A. I was not a member of the party.

Q. You looked through a window? A. I did.

Q. And you saw Officer Cummings sitting on the floor? A. No, I didn't say on the floor; I said he was sitting down in the kitchen. 30

Q. Oh, sitting in the kitchen? A. Yes, I didn't say on the floor.

Q. He was sitting in the kitchen? A. Yes.

Q. And how long did you observe him sitting in the kitchen? A. Well, I didn't observe him long, because I didn't stay there long; just walked up and looked in the window and walked back again.

Q. How many times did you walk up and look in the window and walk away? A. Once. And I waited around there— 40

Winslow M. Brackett, cross.

Q. Pardon me. I haven't asked any question now, yet. A. All right. I will wait.

Q. Now, why did you suspend this man from December 15th to December 22nd, seven days? A. On his conduct unbecoming an officer.

10 Q. What, his conduct while he was away on April 15th, 16th, 17th, 18th and 23rd? A. No. That was too far away from there to suspend him at that time. His conduct on April 14th.

Q. At the party? A. At the party.

Q. Because you saw him sitting in the kitchen in the Claussen house? A. Yes, when he ought to be on duty.

Q. When he ought to be on duty? A. Yes.

20 Q. That was on the 14th? A. Yes, sir; I think it was around the 14th, at Claussen's.

Q. You didn't ascertain how long he had been there? A. Well, as I was going to tell you before, I stood outside for a long while and his car was there when I went home.

Q. You don't know whether he was there or not? A. Well, his car was there.

30 Q. You don't know whether he was there or not? A. I saw him, yes. He might have gone out the back way after he seen me, or if somebody seen me. He might have seen me, I don't know.

Q. So the reason why you suspended him was merely because of his being in the Claussen house, sitting in the kitchen during the time that he was supposed to be on duty? A. Yes, and in a stupor condition. I say that he was drunk when he was in there.

Q. You do? A. Yes.

40 Q. You didn't smell liquor on his breath? A. I

Winslow M. Brackett, cross.

wasn't anywhere near him, but I know from looking at a man whether he is drunk.

Q. Did you see any glass in his hand? A. Not in his hand, no, sir; but I seen other people drinking there.

Q. What was there about him that you could see from where you stood looking through that window on this dark night that led you to believe that this man was drunk? A. Well, it wasn't a dark night; the house was all lit up. You could see everything going on there. Well, his facial expression and his eyes. I can tell when he has been drinking. 10

Q. How far were you from him? A. I was as far as from here to the first row of chairs.

Q. And about how far would you say that would be in feet? A. Well, not over fifteen feet at the most. 20

Q. And he was making faces? A. I didn't say he was making faces; I said I could tell by the expression on his face. I didn't say he was making faces.

Q. What was the expression on his face? A. Well, in a stupor condition, you know—

Q. No, I don't know. I don't drink. A. Well, maybe he wasn't drunk, I don't know, but he was in a stupor condition, it looked like to me. I wouldn't say he was drunk. 30

Q. Oh, you wouldn't say he was drunk? A. I wouldn't say he was drunk. He was in a stupor condition. I suspended him because he wasn't doing his duty, conduct unbecoming an officer.

Q. And you suspended him seven days? A. Yes, sir.

Q. And when he returned on the 22nd of De- 40

Winslow M. Brackett, cross.

ember you put him on night duty? A. I think I put him on desk at the time.

Q. When he reported on December 22nd he was placed on night duty? A. I think I put him on the desk to make it easy for him.

10 Q. When he returned on December 22nd, as a matter of fact, he was placed on night duty, wasn't he? A. Yes.

Q. And performed his duties properly on the 22nd day of December, 1929? A. As far as I know, yes, sir.

Q. Reported to you? A. Yes, reported to the desk.

Q. And the same is true of his duty, night duty, December 23rd? A. I have no complaint to make.

20 Q. And the 24th? A. No complaint to make.

Q. Did he serve on Christmas Day? A. I think so.

Q. The 25th, night duty? A. I think he was on night duty up to the time he was taken sick.

Q. Did you see him when he went on duty the night he was taken ill? A. No, I didn't.

30 Q. Was he on duty and did he perform his duties on the evening of December 27th, 1929, and the early morning? A. According to my records, yes, sir.

Q. On December 28th of the same year he was not there; 1929, you said? A. Yes.

Q. When you learned that he was ill? A. I couldn't tell you that, when I learned he was ill.

Q. Well, did he report on the 29th? A. No.

40 Q. Did you take pains to ascertain where he was? A. I did take pains to ascertain where he was and I found out that he was very sick, but I don't know just what date it was that I found that

William K. Berger, direct.

out, I couldn't tell. I understood that the first aid had taken him to his father's house in Freehold.

Q. And thence to the hospital? A. Thence to the hospital. That is all.

Mr. Leonard: I think that is all.

10

Redirect examination by Mr. Markley:

Q. Just two questions. This time that he was outside of this service station about 3 A. M. on April 13th, and you said he was wallowing in the mud, was the service station closed? A. Yes, absolutely.

Q. And at that time he was supposed to be on duty, you say? A. Yes, he was.

Q. He was not in the borough's car? A. No, sir.

20

Q. Was he supposed to do his duty in his own car? A. No, sir; he was not.

Q. He was supposed— A. The order went out that no personal cars should be used.

Q. He was to do patrolman's duty on foot? A. Yes, sir.

Mr. Markley: That is all.

30

WILLIAM K. BERGER, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Mr. Berger, you are a patrolman, are you, of the Borough of Belmar? A. Sergeant of police, yes.

40

William K. Berger, direct.

Q. You are sergeant now? A. Yes.

Q. And were you a member of the force in 1929? A. I was.

Q. And do you know Mr. Cummings, the relator? A. I do.

10 Q. Had you occasion to observe him at various times, as to his sobriety or drinking habits? A. Not while on duty.

Q. Well, when did you observe him? A. When I would go to a certain place, I met him several times at public places.

Q. What did you observe?

20 Mr. Leonard: Objected to. It doesn't appear that he was on duty. Moreover, it is not pertinent to this issue and the dates have not been fixed.

A. I saw Bud time and again in a public place standing up to the bar drinking one beer after another.

Q. How often did you see that? A. Quite frequently.

30 Q. Well, how many times a week? A. Well, I didn't go there so often. Maybe I would go there once or twice a week.

Q. Well, would you see him once or twice a week? A. Sometimes see him there and other times I wouldn't.

Q. Over what period of time did you see this, for how long all together? A. Well, practically the whole year of 1929.

Q. And how about after 1929? A. I didn't see him after. He was sick, went home sick.

40 Q. When he came out of the hospital did you see him after that? A. No.

Harry Pflug, direct.

Q. Didn't see him after that? A. Not to my knowledge, no.

Mr. Markley: Cross examine.

Mr. Leonard: No questions.

10

HARRY PFLUG, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Mr. Pflug, I understand you are not connected with the police department of Belmar? A. No.

20

Q. Are you connected at all with the borough in any official capacity? A. Just as a republican leader in Belmar.

Q. County committeeman? A. Yes.

Q. And you are a taxpayer and citizen. A. Taxpayer and citizen, yes, sir.

Q. Have you had occasion during the year, 1929, or 1930, to observe Peter F. Cummings, as to his drinking habits? A. Yes, I have seen Mr. Cummings drinking when off duty.

30

Q. How often?

Mr. Leonard: Of course, all this line is objected to, but I will not interrupt.

A. Well, of course, I drink myself and I wouldn't say that maybe once—I would see Mr. Cummings maybe once in every two weeks or three weeks or maybe a month.

Q. Did you see him on any occasion or occa-

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Harry Pflug, direct.

sions when he was under the influence of liquor?

A. Well, that is a question. Of course I see a man drinking and I wouldn't say he was intoxicated if he could stand up on his feet.

10 Q. Did you have any occasion to see him, observe him, when he was loud and boisterous while he was drinking? A. Why, I have heard him talk loud, yes, I have heard him talk loud, and I have seen him drinking the same as I have been drinking, up against the bar.

Q. What would he be drinking? A. Beer, mostly.

Q. What else? A. That is all I have seen him drinking, beer.

20 Q. You said mostly. Anything else? A. Beer, that is all.

Q. Have you seen him or had occasion to have him speak to you since the first of 1930? A. Yes, I have seen him in April. I am not positive of the date, but I am pretty sure it was in April.

Q. April, 1930? A. Yes.

Q. And what was that occasion? A. Well, that occasion was that Mr. Cummings was in this place drinking and he upbraided Mr. Mayer.

30 Q. In your presence? A. In my presence.

Q. Mr. Mayer was there, was he? A. No, Mr. Mayer wasn't there.

Q. Was he loud and boisterous at that time? A. He was at that time, yes; and as a friend of Mr. Mayer's I just explained to Mr. Mayer what Mr. Cummings was doing.

40 Q. But you can't tell what you explained to Mr. Mayer. What was he doing, that is what we want to know, in April? A. He was standing against the bar, drinking.

Harry Pflug, direct.

Q. You said he was loud and boisterous. How was he loud and boisterous? What did he say?

A. He said Mr. Mayer would never get in in this coming election. He said he had some power in this town and controlled quite a few votes and if there was any possible way of hurting Mr. Mayer in this coming election he was out to do it.

10

Q. Was he loud and boisterous? A. Yes, he was very loud and boisterous. Everybody in the barroom heard him as well as me.

Q. Was he under the influence of liquor, as far as you could tell? A. Well, he was drinking.

Q. Was he staggering? A. No, he wasn't staggering.

Q. He was standing against the bar, you say? A. Yes.

20

Q. How long was he there at that time, to your knowledge? A. Well, he was there when I came in and I was in there for about an hour and a half.

Q. Was he there when you left? A. Still there when I left, yes, sir.

Q. Still drinking? A. Still drinking.

Q. Was there any occasion since the first of this year, the first of 1930, that you had occasion to observe him drinking? A. I have seen him in the Moose a couple times coming in there drinking beer, but I never was in there long enough to observe how much he was drinking.

30

Q. Was he loud and boisterous on those occasions? A. No.

Q. But he was drinking? A. He was drinking.

Q. What was he drinking there? A. Beer.

Q. Anything else? A. I didn't see anything else. I wasn't there long enough to see him.

Q. On how many occasions did you see him

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George Bearmore, direct.

there in the Moose? A. About, I should say, two or three times after this one occasion.

Q. Since the first of the year, 1930? A. Yes.

Q. Had you seen him on the street on occasions before the first of the year, prior to his illness?

10 A. Yes, sir; I had seen him.

Q. Drinking? A. Yes, sir.

Q. And that would be during the year 1929? A. Yes, sir.

Mr. Markley: Cross examine.

Mr. Leonard: No questions.

20 GEORGE BEARMORE, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

Q. Are you connected with the police department of Belmar? A. Yes, sir.

Q. And were you connected with it in 1929? A. Yes, sir.

30 Q. And had you occasion to observe the relator Cummings frequently as to drinking? A. Well, I come to work at six o'clock in the morning, 1929, and worked till two o'clock in the afternoon; and I took care of the place, cleaned it up, and then I spent about six hours on desk and I go home at two o'clock, two o'clock in the afternoon, and so I didn't have much occasion to see Mr. Cummings, but I have seen him plenty of times.

Q. You have seen him plenty of times, you say?

40 A. Before that.

George Bearmore, direct.

Q. Before when? A. 1926, 1927 and 1928, and then I saw him 1929.

Q. Now what did you see in 1929? A. One morning I came to work, I saw Pete out in his car. I saw Pete out in his car and I says to Brackett, "He is out in his car." And I spoke to Pete and I woke him up, but of course he was off duty. Then it was time for him to go home. He was asleep.

10

Q. Could you tell whether he was under the influence of liquor? A. Yes.

Q. How could you tell that? A. I could tell by the looks of him. I can tell you are sober, and I can tell a drunken man when I see him.

Q. Would you say he was drunk at that time? A. He was drunk, under the influence of liquor.

20

Q. Have you seen him on other occasions under the influence of liquor? A. No, not since then under the influence of liquor, because I haven't saw much of him.

Q. When was that you saw him? A. It was 1929, I think it was along in January, the last of January, I think. But I couldn't say about the day and date, because I didn't make any note of it when I saw him there.

30

Q. How about later in January; did you have occasion to see him at all? A. I don't remember seeing him later in January that I know of.

Q. How about later in that year, 1929? A. I saw him various times when he has been under the influence of liquor.

Q. You have? A. Yes, sir.

Q. In the latter part of 1929? A. Yes. He worked nights, you see, and when he would work nights I saw him some mornings.

40

George Bearmore, direct.

Q. How about 1930? A. I never seen him under the influence of liquor in 1930. I don't remember seeing him under the influence of liquor in 1930. When was he taken sick?

10 Q. He was taken sick in December and was sick until sometime in March. March 30th he came out of the hospital finally. Have you seen him after that, March, 1930? A. Yes, I have seen him since that. I have seen him sober since that.

Q. Seen him drunk since then? A. No.

Q. Well, how often would you say during 1929, you have seen him under the influence of liquor, how many times? A. At various times, I don't know, couldn't tell you how many times.

20 Q. Well, was it more than a dozen times? A. No, it wasn't over that.

Q. Not over a dozen times? Was he in uniform on those occasions? A. Oh, he was in uniform the morning I woke him up in his car.

Q. Was he in uniform on a number of those occasions? A. Yes, sir.

30 Q. Did you ever see him in any drinking place? A. Well, I don't visit them places much myself, I don't have occasion. I live right opposite the Moose but I have no occasion to go over there, not very often.

Q. Had you seen him over there? A. I saw Pete over there one day, and he remembers the day that I saw him there. He was sober, and I says, "Pete, I am glad to see you." For something I had to go over, I don't know what now, but I went over and I seen him there.

Q. Was he drinking then? A. He had a glass of beer in his hand.

40 Q. You think he was sober on that occasion? A. He was sober.

Marion Van Note, direct.

Q. Was he in uniform? A. No, he wasn't in uniform at that time. He wasn't working then anyhow.

Q. You are a good friend of Pete's, aren't you? You and he are good friends? A. I am a good friend of Pete's, good friend of everybody.

10

Mr. Markley: All right. That is all.

Mr. Leonard: That is all, Mr. Bearmore.

MARION VAN NOTE, a witness produced on the part of the respondent, being duly sworn according to law, testified as follows:

Direct examination by Mr. Markley:

20

Q. Mr. Van Note, I believe you work part of the time in the police department? A. Yes.

Q. Particularly in the summer time? A. Yes, sir.

Q. You are part time patrolman, aren't you, in the summer time? A. Yes, sir.

Q. And have been for several years? A. About three years.

Q. Do you know the relator, Peter Cummings? A. I do.

30

Q. Have known him for some years? A. Several years, yes, sir.

Q. Friendly with him? A. Very friendly, yes, sir.

Q. Have you had occasion during 1929, and 1930, to see him under the influence of liquor? A. In 1930?

Q. Yes. A. Well, that is this year?

40

Q. Yes. A. Well, not while he was working but I seen him come in the club once.

Marion Van Note, direct.

Q. This year? A. Yes, sir; when I come out. You see I have been sick myself nine months, and he come in one day and I was pretty well down and out and so was Pete, and I kind of felt a little sorry to see him hitting it up that way, because I was in bad shape myself.

10 Q. You say hitting it up; what do you mean by that? A. Well, I didn't see the man drunk but he had been drinking a little bit.

Q. How could you tell that? A. Why, from his actions and his walk.

Q. What was there about his actions and walk that showed you that he was drunk? A. Well, he couldn't navigate no more than the law allowed. I have drunk considerable myself in my day and been around the liquor business all my life, so I can pretty near size a man up.

20 Q. You mean he was staggering in his walk, is that what you mean? A. Well, I don't know what you call wallowing, as the chief says; he wasn't walking a straight line by a great ways.

Q. What else was there about his actions that indicated to you he was drunk? A. His whole demeanor when I looked at it.

30 Q. What was there about his demeanor? Was he loud and boisterous or not? A. No, he was not.

Q. What was there about it that you could tell? A. He couldn't seem to collect himself. He was ill at the time, or had been very ill. I think at the time he had these tubes in his side.

40 Q. He still had the tubes in his side? A. Yes, I imagine so.

Marion Van Note, direct.

Q. Where was he when he was staggering at the time? A. He was up at the club.

Q. Had he been drinking there? A. I didn't see him drinking there. He came in as I was sitting down.

Q. How long were you there with him? A. Oh, I talked to him maybe four or five minutes. He went on inside and sat down and I came on home. 10

Q. What did you say to him? A. I told him to be a little careful. The man had been sick and I didn't like to see him going along that way.

Q. You referred to him being drunk? A. To drinking and the shape he was in.

Q. What did he say? A. He said he hadn't been drinking very much and wasn't going to. He said he wasn't drinking anything but beer. 20

Q. Well, was that sometime in April? A. I imagine so, because I got out of the hospital in April.

Q. April, 1930, that is? A. 1930, yes, sir.

Q. And it was up at the club? A. Yes, sir.

Q. And where is that, Belmar? A. Belmar.

Mr. Markley: Cross examine.

Mr. Leonard: No questions. 30

Mr. Markley: With the exception of some medical testimony and testimony with respect to the X-rays that were produced by Dr. Reynolds, and the X-ray, the hospital record which is to be submitted to me for examination, my case is practically closed.

Peter F. Cummings, direct.

RELATOR'S TESTIMONY IN REBUTTAL

PETER F. CUMMINGS, recalled for relator.

10 *Direct examination by Mr. Leonard:*

Q. Some one has testified to the effect that you were one evening at the home of Mr. Clausen; is that a fact? A. That was a fact.

Q. Do you recall the date? A. It was just before my suspension, I think, the 14th of December.

Q. Were you on duty when you were there? A. I was not.

20 Q. What were your hours of duty that day? A. Six in the morning till two in the afternoon.

Q. What time were you at the Clausen house? A. At half past one the following night.

Mr. Leonard: Cross examine.

Cross examination by Mr. Markley:

30 Q. What date was that? A. I think it was the 14th of December or just before my suspension. It was the 15th I was suspended.

Q. Well, on the 14th of December you say you were on duty from when to when? A. Six in the morning till two in the afternoon.

Q. Wasn't that the time that you went up to Irvington? A. Yes, that was the night of Clausen's party.

Q. On December 14th? A. Yes.

40 Q. 1929? A. Yes.

Peter F. Cummings, cross.

Q. And you were sent to Irvington, weren't you, with a warrant for a man by the name of Harry Stout? A. Yes.

Q. Another police officer went along with you? A. Yes, sir.

Q. Who was that? A. Johnnie Maloney. 10

Q. What time did you return? A. Ten o'clock that night.

Q. Ten o'clock that night? A. Yes, sir.

Q. So you were on duty up till ten o'clock that night, weren't you? A. Well, my hours were six to two, but we got back to headquarters ten o'clock that night.

Q. Wasn't that the night that you were under the influence of liquor? A. No, it was the night I had a couple of beers, and the chief said I was in the kitchen drunk, and I didn't take a drink, and I have got proof of it. 20

Q. Isn't that the night that you couldn't get out of the car at the police station? A. They said I couldn't.

Q. And you finally did get out and come in staggering? A. No, some one said they wanted to see me. 30

Q. Wasn't it on April 13th— A. It was just before my suspension and I was suspended in December.

Q. What explanation have you for April 15th, 16th, 17th 18th and 23rd in not reporting to work? A. That is what I told you I forgot. I don't know.

Q. You were not home; the chief said he went to your home and you were not there, that you had not reported for work and that you were not 40

Report of Dr. Brothers.

sick, according to him, during that time. What explanation have you got for your absence during those five days? A. I don't remember that.

Mr. Markley: That is all.

Mr. Leonard: That is all.

10

**Report of Dr. Brothers, to be Considered as
Testimony in Favor of Respondent Pursuant to Stipulation**

James H. Brothers, M. D.

128 Broad Street

Newark, N. J.

20

Respondent: Borough of Belmar, New Jersey.

Relator: Peter F. Cummings, 31 years old, single, 100 Parker Street, Freehold, New Jersey.

Examination: December 7, 1930 at about 1 P. M., at the home of his father at the above address.

30

Previous history: This man claims to have been on the police force of Belmar, New Jersey and to have suffered an attack of Pneumonia with a relapse which culminated in an Empyema which necessitated the removal of one rib in the left side, anterior axillary line and drainage.

40

From his hospital chart, I see that he was in bed for seventeen days following this operation. He claims he has done no work since leaving the hospital with the exception that he has helped at times and is still doing so at the Dutch Treat Road Stand, near Freehold, which he claims his sister owns and runs. He says that he waits on customers for gas, etc. He admits that he has

Report of Dr. Brothers.

had colds and has had a cough for some time, some of this time being prior to the attack of pneumonia. He, however, denies that he was short of breath before this illness and denies that he ever had anything seriously the matter with him up to that time.

10

Present complaint: He claims he is short of breath, particularly on exertion and on going up and down stairs. He says that he has not attempted to do anything excepting the work at the road stand.

On arriving at his home, I had some difficulty in getting into the house and although he was apparently sitting in the window of the front room, he came back down stairs from upstairs for the examination, after I finally did get in. He was fully dressed with the exception that he did not have anything on in the way of a coat or vest. On removing his clothing, I find that he has a scar about 2½" in length, the left chest, anterior axillary line, which depressed and adherent to the underlying structures but through which there is no sign of hernia or cough.

20

He was smoking a cigarette and admits that he smokes eight or ten a day. (Cigarette smoking is certainly against his having any aggravation of a lung condition from Pneumonia or the pus which was later removed).

30

This man is thin although his ribs are fairly well covered. By thin I mean he is of that type of person; namely, one who will evidently never be very fat. His face, neck and hands are tanned. His hands show the grimy marks and some callouses such as are seen on a person who is working particularly with their hands.

40

Report of Dr. Brothers.

10 Examination of his lungs show that they present a normal percussion note. Vocal fremitus is normal and there is no sign of any cavity formation and no sign of any active T. B., at this time. (I do not believe this man ever has had a real active T. B.). The left side of his chest is slightly smaller than the right, this being due to his recent illness and the operation. He also has a tendency to hold his right shoulder higher than the left. Motion of his back and elbows are normal and he is in possession of his normal faculties, answering questions readily and quickly, and his cerebration is accurate and to the point.

20 The left lung which was the seat of this infection has practically expanded to the normal distance. The amount which it has not recovered in expansion is almost negligible when comparison is made with the other side. There are no flat areas to be demonstrated and my opinion is that this man has recovered from his pneumonia and the empyema in that this is no longer embarrassing him unless it is true, which point I do not fully believe that the scar is very tender. The scar from this operation may be tender but not extremely so in my opinion.

30 This man's principal trouble at this time is an Asthma. (This, of course, did not come from his Pneumonia but is a disease of itself). He is short of breath and wheezes on going up and down stairs. His chest presents the typical signs of an asthmatic patient; namely, it is a typical music box. The signs are worse posterior and in the anterior Apices. His complaint that he could not go up and down stairs was tested by me in that I had him go up fairly rapidly and down, from the

40

Report of Dr. Brothers.

first to the second floor of his home, one time directly after the other. His pulse rate was 96 per minute before the test and it was only 102 per minute after the test, showing that his heart is adequate for such exercises and that the rate does not increase beyond the normal limits for exercise. He, however, was wheezing after this test was made but this is due to the embarrassment of a slight increase in his blood pressure from the exercise which further clogged his lungs, which are, as stated, the seat of this Asthma.

10

His skin is fairly clear. His throat is red, being of the chronic type which may be the result of cigarette smoking. His teeth are in terrible condition and their removal might aid, somewhat, his Asthma by removing an embarrassing focal infection. With their removal, his system would have less to combat. He has one external hemorrhoid which is not occasioning him any trouble. The tip of his coccyx tends to be of the split type. This is not, however, complete and in any event it is a congenital defect and has nothing to do with his occupation as policeman.

20

This man is recovered, as stated above, from his Pneumonia and the pus that resulted from it. He is recovered in my opinion, from the operation which was necessary to drain this pus from his chest cavity. He is suffering now from an Asthma which has nothing to do with Pneumonia or pus that was removed from chest cavity. The Asthma is a separate entity and is a disease. He denies that it existed prior to his Pneumonia but I do not believe this, in that the doctor who treated him at Belmar stated, on testimony, that this man suffered from many colds for several years prior

30

40

Report of Dr. Brothers.

to his pneumonia and that these colds appeared to be a continuation one of the other rather than separate fresh ones. Undoubtedly, this man suffered at that time from Asthma and it was mistaken for a bronchial cold. This thought is also supported by the fact that he had a cough most of the time during this period. He did have this cough from an Asthma and would not necessarily have to have a cold if the asthma was present. The Asthma, of course, might predispose him to colds more than a normal person would be predisposed. He has at this time, as evidence of the Asthma in the quiet state; namely, when not exerting himself, a hacking loose cough which without examination might make an observer think that he was suffering from Tuberculosis. This cough, however, is typical of the Asthma subject.

His blood pressure is 122-76 which is again typical of Asthma, in that they usually have a low pressure.

He admitted that he is worse in changes of weather such as from cold to warm and warm to cold, and he also notices that his condition is materially worse if a cold breeze blows on his chest. This, again, is typical of Asthma. This man is not suffering at this time, in my opinion, from anything due to his occupation but is suffering from a disease which is seen in many people not exposed to the elements whatsoever and it is not necessary to have such an exposure to suffer from Asthma.

JAMES H. BROTHERS, M. D.

P. S. This man is capable of doing some sort of work at this time. The work, of course, should

Exhibits.

be of a character which would not expose him to too radical changes in temperature because these weather changes would tend to give him acute embarrassment due to his underlying Asthmatic condition. I have had several Asthma patients who continued their occupations more or less without material discomfort. One that I am thinking of in particular is following his trade of Lino-type operator for one of the large newspapers in Newark. He does of course, have days when the weather changes is extreme where he has more or less acute attacks which necessitates his laying off for a day or so until the spasm in his lung tissues has subsided. This man is capable of many occupations in my opinion.

10

20

J. H. B.

Exhibit Rel. 4

Belmar, N. J., May 17th, 1930.

Belmar Pension Commission,

Gentlemen:

30

I hereby apply for retirement on pension from the Belmar Police Dept. as provided for in Section 2, Chapter 160 of the Laws of 1920.

Will appear for examination by Police Physician at any time that may be convenient to you. Thanking you,

Yours very truly,

PETER F. CUMMINGS.

40

Exhibits.

Exhibit Rel. 5

Freehold, N. J., June 12, 1930.

10 Mr. George Swain, Secretary,
Pension Fund Commission,
Belmar, N. J.

Dear Mr. Swain:

On May 17th, 1930, I sent a letter addressed to the Pension Fund Commission, Belmar, N. J. As I have received no reply I assume the letter went astray and am therefore enclosing a copy of same herewith.

20 Will you please take the matter up with the other two Pension Fund Commissioners and let me know if I am following the proper course in applying this way. I assure you I will greatly appreciate any help you may be able to give me. With kind regards,

Yours very truly,

30 PETER F. CUMMINGS,
100 Parker St.,
Freehold, N. J.

*Exhibits.***Exhibit Rel. 6**

Freehold, N. J., May 17th, 1930.

Belmar Pension Fund Commission,

Gentlemen:

10

I hereby apply for retirement on pension from the Belmar Police Dept. as provided in Section 2, Chapter 160 of the Laws of 1920.

Will appear for examination by Police Physician at any time that may be convenient to you. Thanking you,

Yours very truly,

20

PETER F. CUMMINGS,
100 Parker St.,
Freehold, N. J.

Exhibit Rel. 8

BOROUGH OF BELMAR, NEW JERSEY,

POLICE DEPARTMENT, JANUARY 1ST, 1929.

30

Raymond Stines Married No children Age
26 at 1929

Entered Department July 1926.

Peter F. Cummings Not married Age 30 at
1929

Entered Department 1924.

John Maloney Not married Age 29 at 1929
Entered Department 1926.

40

Exhibits.

- Charles Bennett Married 1 child Age 37 at
1929
Entered Department Jan. 1926.
- Winslow M. Brackett Married No children
Age 55 at 1929
Entered Department Jan. 1, 1929.
- 10 Spencer Clausen Married 2 children Age
25 at 1930
Entered Department 1930.
- Isola Age 23 Not married
Entered Department 1929
-

SPECIALS ON DESK DUTY.

- 20 William K. Burger, Married All children over
16 Age 69 at 1929
Entered Department 1912.
- George L. Bearmore Married All children
over 16 Age 69 at 1929
Entered Department 1926.
- Samuel Newman Married No children Age
54 at 1929
Entered Department 1925.
- 30 John Voget Married All children over 16
Age 57 at 1929
Entered Department 1927.
- Wm. J. Briden, Not married Age 27 at 1930
Entered Department
- Measure Oliver Not married Age 23 at 1930
Entered Department 1930.
- Paul Capabianco Age at 1930
Entered Department 1930.

*Exhibits.***Exhibit Rel. 9**

BOARD OF COMMISSIONERS

BOROUGH OF BELMAR, N. J.

January 7, 1930.

10

Mr. George W. Swain, Secretary,
Police Pension Fund,
Belmar, New Jersey.

Dear sir:

I am enclosing herewith certified copies of resolutions passed by the Board of Commissioners of the Borough of Belmar, at their meeting held January 1, 1930, covering all appointments in the Police Department for the year.

20

These men so appointed, I understand, are eligible for pension and that I am obliged to deduct two per cent from their monthly salaries, and place such monies withheld, in the Police Pension Fund.

For your further information I wish to state that the amount in the Police Pension Fund account as of December 31st, 1929, is \$433.36. These funds come from the following sources:

30

Peter F. Cummings,	\$36.00
Charles Bennett,	36.00
John Maloney,	36.00
Raymond Stines,	36.00
Borough of Belmar,	288.00
Int. on Savings account	1.36

Total,	\$433.36
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40

Yours very truly,

Borough of Belmar,

J. A. JOECK,
Treasurer.

Exhibits.

Exhibit Res. 1

BELMAR POLICE DEPARTMENT.

July 3rd, 1930.

10 Mr. Peter F. Cummings,
100 Parker St., Freehold, N. J.

My dear sir:

The Police Pension Commissioners of Belmar have received from the Board of Commissioners of the Borough of Belmar a statement of your status as an officer in the Police Department.

20 We are advised that you were suspended from the Police Force for conduct unbecoming an officer and that you were not disabled in the performance of your duties.

We are advised further by the Commissioners that they are ready and waiting to grant you a hearing on the charges against you and will do so when you present a physician's certificate indicating that you are in the proper physical condition to appear before them to be heard on the charges.

30 When this shall have been done and a report is made by the Borough Commissioners to the Pension Fund Commissioners we will then give your appeal for a pension consideration.

Respectfully yours,

Police Pension Board Commissioners,

GEO. W. SWAIN,
Secretary.

*Exhibits.***Exhibit Res. 2**

WILLIAMS & LEONARD,

12 Broad Street,

Red Bank, New Jersey. 10

August 5, 1930.

RE: APPLICATION OF PETER F. CUMMINGS.

Policemen's Pension Commission,

Belmar,

New Jersey. 20

Gentlemen:

On May 17, 1930, Peter F. Cummings, an officer of the Belmar Police Force, made application for a pension. He received no word from the Commission until July 30, 1930, at which time, by letter, he was advised that after some action on the part of the Borough Commissioners, the Pension Commissioners would give the appeal consideration. 30

The Pension Act calls for immediate action by the Pension Board upon receiving application, and we are writing to advise you that unless the Pension Board proceeds forthwith in accordance with the statute, we shall be obliged, in Mr. Cummings' behalf, to apply for a peremptory writ of mandamus.

Very truly yours,

LESTER C. LEONARD. 40

Exhibits.

Exhibit Res. 3

BELMAR POLICE DEPARTMENT.

DAILY REPORT.

10

Aug. 14th, 1930.

Mess. Williams and Leonard,
12 Broad St., Red Bank, N. J.

Dear sirs:

20

In reply to your note of Aug. 5th, 1930, in the Peter F. Cummings matter would say, that our Police Pension Board applied to the Boro Commissioners for a statement as to the status of Mr. Cummings in his connection with the Police Dept. The following communication was received in reply to our enquiry.

Police Belmar Pension Commission

Dear sirs:

30

Peter F. Cummings was suspended from the Police Force because of conduct unbecoming an officer also that he was not disabled in the performance of his duties. Charges have been preferred against him and just as soon as Mr. Cummings will produce a physician's certificate certifying that he is ready and in a physical condition to hear the charges that have been preferred against him the Board of Commissioners of Belmar will be glad to meet with him at any time.

Very truly yrs,

40

Commissioners Borough of Belmar,
per J. A. JOECK,
Boro Clerk.

Exhibits.

Therefore no action can be taken upon his application for a pension.

Very respy yrs,

Police Pension Board of Belmar,
G. W. SWAIN, Secy. 10

Exhibit Res. 4

Borough of Belmar, New Jersey.

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

I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully, impartially and justly perform all the duties of the office of Patrolman on part time of the Borough of Belmar, according to the best of my abilities and understanding. So help me God. 20

PETER C. CUMMINGS 30

Sworn to before me this 22nd
Day of Feby 1929.

J. A. JOECK,
Borough Clerk.

40

*Exhibits.***Exhibit Res. 5**

BOROUGH OF BELMAR, NEW JERSEY,

OFFICE OF THE CHIEF OF POLICE.

10

Belmar, N. J., Dec. 15th, 1929.

Mr. Peter Cummings,
Belmar, N. J.

Dear sir:

20

Take notice that on and after today you are suspended for one week (seven day) from this date. Charges are neglect of duty and conduct unbecoming an officer.

Very truly,

WINSLOW M. BRACKETT,
Chief of Police.

Exhibit Res. 6

30

ORDINANCE NO. 158, BOROUGH OF
BELMAR, N. J.

SALARIES AND WAGES.

40

An Ordinance to amend an ordinance entitled
"An Ordinance to fix the Salaries and Wages of
Various Officials, Clerks and employees."

Passed and approved March 14th, 1922.

Be it ordained by the Council of the Borough
of Belmar that,

Exhibits.

1. Sec. 3 (b) be amended to read as follows:
"Service Superintendent, one thousand eight hundred dollars (\$1,800.00) per annum."

Sec. 3 (d) be amended to read as follows:
"Policeman on part time, one hundred and twenty-five dollars (\$125.00) per month."

10

Sec. 3 (e) be vacated and the following inserted in lieu thereof: "Office of Chief of Police on part time is hereby created at a salary of one hundred and fifty dollars (\$150.00) per month."

2. That this ordinance shall take effect when passed and published according to law.

Passed: January 29, 1924.

Approved: January 29, 1924.

Attest:

JOSEPH MAYER,

Mayor.

20

Fred V. Thompson, M.D.,
Borough Clerk.

The above ordinance was passed as to its third and final reading on January 29, 1924.

FRED V. THOMPSON, M. D.

Borough Clerk.

30

40

*Exhibits.***Exhibit Res. 7**ORDINANCE NO. 137,
BORO OF BELMAR, N. J.

10

SALARIES AND WAGES.

AN ORDINANCE TO FIX THE SALARIES
AND WAGES OF VARIOUS OFFICIALS,
CLERKS AND EMPLOYEES.20 Be it ordained by the Council of the Borough of
Belmar :

1. That from January 1, 1922 the salaries of
the following officers shall be not to exceed the
sums herein respectively named.

(a) Borough Manager one thousand six hun-
dred and eight dollars (\$1,608.00) per annum.

(b) Borough Clerk, nine hundred dollars
(\$900.00) per annum.

30 (c) Solicitor, four hundred dollars (\$400.00)
per annum.

(d) Collector, seven hundred dollars (\$700.00)
per annum.

(e) Treasurer, eight hundred dollars (\$800.00)
per annum.

(f) Assessor, five hundred dollars (\$500.00)
per annum.

40

Exhibits.

(g) Recorder, one hundred and fifty dollars (\$150.00) per annum.

(h) Overseer of Poor, fifty dollars (\$50.00) per annum.

(i) Auditor, one hundred dollars (\$100.00) per annum. 10

(j) Purchasing Board one dollar (\$1.00) per annum.

2. The salaries of all officials shall be in lieu of all fees.

3. That from January 1, 1922 the salaries or wages of the following clerks and employees shall be not to exceed the sums herein respectively named. 20

(a) Accountant one hundred and fifty dollars (\$150.00) per annum.

(b) Service Superintendent one thousand five hundred dollars (\$1,500.00) per annum.

(c) Policeman on full time one dollar (\$1.00) per annum.

(d) Policeman on part time one hundred dollars (\$100.00) per month. 30

(e) Police Reserve on active duty twenty five dollars (\$25.00) per annum.

(f) Fireman on active duty twelve dollars (\$12.00) per annum.

(g) Fire Reserve on active duty one dollar (\$1.00) per annum. 40

Exhibits.

(h) Fire Engineer one hundred twenty dollars (\$120.00) per annum.

(i) Water Superintendent one thousand three hundred twenty dollars (\$1,320.00) per annum.

10 (j) Water Works Engineer one thousand three hundred twenty dollars (\$1,320.00) per annum.

(k) Water Works Firemen one hundred dollars (\$100.00) per month.

(l) All employees not specifically mentioned one hundred dollars (\$100.00) per month.

20 4. That in addition to the salaries and wages herein provided, additional compensation may be granted as provided by law.

5. No compensation for any service rendered shall be due or paid in excess of such sums as shall have been appropriated by the Council applicable for such service.

30 6. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed.

7. This ordinance shall take effect when published according to law.

Passed: March 14, 1922.

Approved: March 14, 1922.

Attest:

WILLIAM B. BAMFORD,
Mayor.

40

FRED V. THOMPSON,
Borough Clerk.

Exhibits.

The foregoing ordinance was passed as to its third and final reading on March 14, 1922.

FRED V. THOMPSON,
Borough Clerk.

10

Exhibit Res. 8

BOROUGH OF BELMAR, N. J.

OFFICE OF THE BOROUGH CLERK.

July 2, 1930.

(copy)

20

Mr. George W. Swain, secretary,
Belmar Police Pension Commission,
Belmar, N. J.

Dear sir:

This is to acknowledge receipt of your communication of July 1st, 1930 to the Board of Commissioners of the Borough of Belmar relative to Peter F. Cummings.

30

They requested me to notify you that Peter F. Cummings was suspended from the Police force for conduct unbecoming an officer, also that he was not disabled in the performance of his duties.

Charges have been preferred against him and just as soon as Mr. Cummings will produce a Physician's certificate certifying that he is ready and in physical condition to hear the charges that have been preferred against him the Board of Com-

40

Exhibits.

missioners will be glad to meet with him at any time.

Yours very truly,

10

Borough Clerk.

July 1, 1930.

To the Board of Commissioners
of the Borough of Belmar, N. J.

Joseph Mayer, Mayor.

20

Thomas S. Dillon, Dept. Rev. & Finance.
Thomas D. Joeck, Dept. Highways, Parks &
Public Buildings.

Gentlemen:

30

A resolution was passed at a meeting of the Police Pension Board held June 30th, 1930 that the following communication received on or about May 18th, 1930 be made known to you. The communication is from Peter F. Cummings (police officer.)

Belmar, N. J., May 17, 1930.

Belmar Pension Commission.

Gentlemen:—

40

I hereby apply for retirement on pension from the Belmar Police Department as provided for in Section 2 Chapter 160 of the Laws of 1920. Will appear for examination by Police Physician at

Exhibits.

any time that may be convenient to you, thanking
you

Yours very truly,

PETER F. CUMMINGS.

10

Before acting upon this appeal it will be necessary for our Board to receive from you the status of said Cummings as an officer in the Police Department, may we have the Status?

Very respectfully yours,

Police Pension Board of Belmar,
GEORGE W. SWAIN,
Secretary.

20

Exhibit Res. 9

BOARD OF COMMISSIONERS,
BOROUGH OF BELMAR, NEW JERSEY.

OFFICE OF BOROUGH CLERK.

30

July 2, 1930.

Mr. George W. Swain, Secretary,
Belmar Police Pension Commission,
Belmar, N. J.

Dear sir:

This is to acknowledge receipt of your communication of July 1st, 1930 to the Board of Commis-

40

Order Allowing Peremptory Writ

sioners of the Borough of Belmar relative to Peter F. Cummings.

10 They requested me to notify you that Peter F. Cummings was suspended from the Police force for conduct unbecoming an officer, and also that he was not disabled in the performance of his duties.

Charges have been preferred against him and just as soon as Mr. Cummings will produce a Physician's certificate certifying that he is ready and in physical condition to hear the charges that have been preferred against him the Board of Commissioners will be glad to meet with him at any time.

20

Yours very truly,

J. A. JOECK,
Borough Clerk.

Order Allowing Peremptory Writ

(Entered March 6, 1931)

30

A Rule to Show Cause having been granted in the above entitled matter by a Justice of the Supreme Court at Chambers, pursuant to the statute in such case made and provided; and the matter coming on to be heard on the return thereof by the said Justice in the presence of Lester C. Leonard, attorney of relator and Joseph Silverstein, attorney of respondent, and Edward A. Markley, of counsel for respondent.

40

And the Court having heard the arguments of

Order Allowing Peremptory Writ

counsel therein, and having duly considered the same; and it appearing that Peter F. Cummings, the relator, a member of the police department of the Borough of Belmar, desiring to retire therefrom by reason of injury or disease duly made in writing an application to the Policemen's Pension Commission of said Borough for such retirement; but notwithstanding, said Pension Commission failed to call to its or their assistance the aid of the surgeon or physician representing either the police or fire department of said Borough as prescribed by an act entitled "An Act providing for the retirement of policemen and firemen of the police and fire departments in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments" (L. 1920, c. 160, p. 324) as amended;

It is, on this *6th* day of *March* 1931, ORDERED that a peremptory writ of mandamus issue out of and under the seal of the Supreme Court of Judicature of the State of New Jersey directing the said Policemen's Pension Commission of the Borough of Belmar to call forthwith to its or their assistance the aid of the surgeon or physician representing either the police or fire department of said Borough pursuant to the statute aforementioned in such case made and provided to the end that said Pension Commission may consider the application for said retire-

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Order to Mould Pleadings

ment and arrive at a decision in accordance with the procedure prescribed by said statute;

10 And it is FURTHER ORDERED that in the event the respondent desires to appeal to the Court of Errors and Appeals the pleadings may be molded so as to permit a final judgment to enter;

And it is FURTHER ORDERED that costs be taxed against the respondent.

Let this Rule be entered in the minutes.

J. L. BODINE,
J. S. C.

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Order to Mould Pleadings

(Entered April 20, 1931)

30 The above entitled cause having been heard on verified petition for mandamus and a rule to show cause having been granted thereunder and testimony being taken pursuant to the order of the Court, and the Court having allowed a peremptory writ of mandamus and application now being made to the Court by Edward A. Markley, counsel for respondent, counsel for relator consenting thereto to vacate the peremptory writ of mandamus and to allow an alternative writ of mandamus and to so mould the pleadings as to permit an appeal of the judgment of this Court;

40 It is on this 20th day of April, 1931, ORDERED that counsel for the respondent prepare an alternative writ of mandamus so framed as upon demurrer there to present the identical questions

Alternative Writ of Mandamus

decided by this Court upon the said rule to show cause, and that the same be prepared and filed within ten days from the date of this order and that upon filing said writ and a demurrer thereto, judgment may be entered overruling the demurrer; and

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It is FURTHER ORDERED that if counsel for the respondent and relator cannot agree upon the form of said pleadings that they apply to this Court for the settlement of the same.

By the Court,

J. L. BODINE,
J. S. C.

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On motion of

EDWARD A. MARKLEY,
Attorney for Respondent.

I consent to the entry of the above order.

LESTER C. LEONARD,
Attorney for Relator.

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Alternative Writ of Mandamus

(Filed April 20, 1931)

New Jersey, ss.:

The State of New Jersey to Policemen's Pension Commission of the Borough of Belmar, a Municipal Corporation of the State of New Jersey, GREETING:

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Alternative Writ of Mandamus

10 1. Whereas at the times hereinafter mentioned, there was duly adopted by referendum by the Borough of Belmar, a municipal corporation of the State of New Jersey and in force therein, an act entitled "An act providing for the retirement of policemen and firemen of the police and fire departments in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments," (P. L. 1920, Chapter 160, p. 324), which act has been amended since its enactment in 1920.

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2. Section 2 of said act provides:

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"Any member of such police or fire department who shall have received permanent disability in the performance of his duty, shall, upon certificate of the surgeon or physician of the police or fire department, or other physician designated for that purpose by the pension commission, be retired upon a pension equal to one-half of his salary at the time of his retirement; where, however, a person being a member or employee of the police or fire department shall desire to retire by reason of injury or disease, said person shall make application in writing to the pension commission for such retirement, whereupon the pension commission shall call to their as-

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Alternative Writ of Mandamus

sistance the aid of the surgeon or physician representing either the police or fire department, and the person making the application may likewise call to his aid a regularly licensed and practicing physician or surgeon. The president of the board of pension commissioners is authorized to administer oaths to said physicians or any other person called with respect to the matter before the commission shall determine, by resolution, whether said person is entitled to the benefits of this act. In case the two physicians called as hereinbefore provided fail to agree upon the physical condition of the applicant, then the pension commission may call a third disinterested, licensed and practicing physician and surgeon, and the determination of a majority of said three physicians, who being first duly sworn in the case, shall be reduced to writing and signed by them, and the pension commission shall consider the same in arriving at their decision.”

3. On May 17th, 1930, the relator, Peter F. Cummings, sent to the respondent the following letter:

“Belmar, N. J.,

May 17th, 1930.

Belmar Pension Commission.

Gentlemen:

I hereby apply for retirement on Pen- 40

Alternative Writ of Mandamus

sion from the Belmar Police Dept. as provided for in Section 2; Chapter '160' of the Laws of 1920.

10 Will appear for examination by Police Physician at any time that may be convenient to you, thanking you

Yours very truly,

PETER F. CUMMINGS''

4. Notwithstanding said letter the respondent failed to call to its or their assistance the aid of the surgeon or physician representing either the police or fire departments of said Borough of Belmar.

20 We therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that immediately after the receipt of this writ, you do call forthwith to your assistance the aid of the surgeon or physician representing either the police or fire department of said borough to the end that you may consider the application for said retirement and arrive at a decision in accordance with the procedure prescribed in said statute or cause to us of the contrary therefore signify, lest in your default complaint should come to us repeated; and how you shall execute this, our command, certify to our justices of our Supreme Court of Judicature at Trenton on the fifth day of May next, together with this, our writ and this is nowise omit at your peril.

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WITNESS, WILLIAM S. GUMMERE, chief justice

Demurrer

of our Supreme Court of Judicature, at Trenton,
this 20th day of April, 1931.

FRED L. BLOODGOOD,
Clerk.

LESTER C. LEONARD,
Attorney for Relator.

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Demurrer

(Filed April 20, 1931)

And the said respondent comes and says that it should not be compelled to call to its assistance the aid of the surgeon or physician representing either the police or fire departments of the Borough of Belmar to the end that he may consider the application for retirement of the relator as by said writ said respondent is commanded to do, because it says that the matters contained in the said writ in manner and form as the same are stated and set forth are not sufficient in law for the said relator to have or maintain his aforesaid writ of mandamus against it and that it is not bound by the law of the land to obey the command of said writ of mandamus to call to its assistance the aid of the surgeon or physician representing either the police or fire department of said Borough to the end that it may consider his application for said retirement as by said writ it is commanded to do; and the said respondent, according to the form of the statute in such case made and provided, state and declare to the Court here the following causes of demurrer to the said writ of mandamus, that is to say:

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Demurrer

10 1. The relator was suspended from the police force because of conduct unbecoming an officer, which suspension occurred prior to December 28th, 1929. Charges were preferred against the said relator and he was advised that he would be granted a hearing on said charges when he was in sufficiently good physical condition to appear for hearing and trial. Relator failed to appear for hearing and trial.

2. The relator was not employed as a regular officer of the police force during the year 1929 but was a patrolman on part time up to the time of his suspension.

20 3. The relator had no tenure of office and therefore could be relieved of his duties as a part time officer at any time without hearing.

4. The relator was not a member of the police force of the Borough of Belmar at the time he sought a pension.

30 5. The relator did not receive permanent disability in the performance of his duty as a member of the police department of the Borough of Belmar.

EDWARD A. MARKLEY,
Attorney for Respondent.

Served April 13th, 1931.

Rule Overruling Demurrer

(Entered April 20, 1931)

This matter being opened to the Court by Lester C. Leonard, attorney for relator;

Whereupon all and singular the premises aforesaid being seen and it appearing to the Court here that the alternative writ of mandamus by said relator presented and by the said respondent demurred to, is good and sufficient in law and that the demurrer thereto is not well taken and that judgment be entered in favor of Peter F. Cummings, relator, against Policemen's Pension Commission of the Borough of Belmar, respondent.

By the Court,

J. L. BODINE,
J. S. C.

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Order to File Pleadings

(Entered April 20, 1931)

The above entitled cause having been heard on verified petition for mandamus and a rule to show cause having been granted thereunder and testimony having been taken, pursuant to the order of the Court and the Court having allowed a peremptory writ of mandamus and application having been made to the Court by Edward A. Markley, counsel for respondent and Lester C. Leonard, counsel for relator consenting thereto to vacate the peremptory writ of mandamus and

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Stipulation re Moulding of Pleadings

to allow an alternative writ of mandamus and to so mould the pleadings as to permit an appeal of the judgment of this Court; and further application now being made to file the pleadings as moulded pursuant to the order of this Court;

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It is on this 20th day of April, 1931, ORDERED that counsel for the respondent file with the Clerk of this Court within ten days of the date hereof, order to mould pleadings, alternative writ of mandamus, demurrer to alternative writ of mandamus and rule overruling demurrer and entering judgment.

J. L. BODINE,
J. S. C.

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Stipulation re Moulding of Pleadings

(Filed April 20, 1931)

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It is stipulated and agreed between counsel for the parties in the above entitled action that no technical advantage is to be taken of either counsel or either party in this case on the pleadings as moulded. It is stated and agreed to between the attorneys that the pleadings were moulded in the form as filed for the purpose of having a judgment entered from which the respondent may appeal to the Court of Errors and Appeals. The pleadings as now moulded are the result of an honest attempt on the part of the attorneys for

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Stipulation re Testimony

both parties to so mould the pleadings that an appeal may be taken.

LESTER C. LEONARD,
Attorney for Relator.

EDWARD A. MARKLEY, 10
Attorney for Respondent.

Stipulation re Testimony

(Filed April 20, 1931)

It is hereby stipulated by and between the attorneys of the parties that the testimony taken under the rule to show cause for mandamus and the written report of physical examination made by Dr. James H. Brothers, are to be considered as taken under the alternative writ of mandamus herein and both are to be considered by the Court of Errors and Appeals in determining whether or not the judgment of the Supreme Court is to be affirmed. 20

Dated, April 10, 1931. 30

LESTER C. LEONARD,
Attorney of Relator.

EDWARD A. MARKLEY,
Attorney of Respondent.

Notice of Appeal

(Filed April 20, 1931)

To:

LESTER C. LEONARD, Esq.,
Attorney of Relator.

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PLEASE TAKE NOTICE that the Policemen's Pension Commission of the Borough of Belmar, respondent, appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

EDWARD A. MARKLEY,
Attorney for Respondent.

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Served April 13th, 1931.

Grounds of Appeal

(Filed April 20, 1931)

NEW JERSEY COURT OF ERRORS
AND APPEALS

30

The appellant states the following grounds of appeal:

The Supreme Court erred in holding that a peremptory writ of mandamus should issue

1. Directing the Policemen's Pension Commission of the Borough of Belmar to call forthwith to its or their assistance the aid of the surgeon or physician representing either

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Grounds of Appeal

the Police or Fire Department of said Borough to the end that said Pension Commission may consider the application of the relator for retirement.

2. As there was no evidence that the relator was a member of the Police Department of the Borough of Belmar at the time he applied for retirement. 10

3. As there was no evidence that the relator was a member of the Police Department of the Borough of Belmar at the time he claims he became disabled.

4. As there was no evidence that the relator received permanent disability in the performance of his duty as a member of the Police Department of the Borough of Belmar. 20

5. As the evidence showed that the relator was not employed as a regular officer of the police force of the Borough of Belmar during the year 1929 but was a patrolman on part time up to the time of his suspension.

6. As the evidence showed that the relator had no tenure of office and, therefore, could be relieved of his duties as a part time officer at any time without hearing. 30

7. As the evidence showed that the relator is not now and never was permanently disabled.

8. As there is no evidence that the relator 40

Grounds of Appeal

is or was at any time permanently disabled.

10 9. As the evidence showed that the relator was suspended from the Police Department of the Borough of Belmar because of conduct unbecoming an officer which suspension occurred prior to December 28, 1929, the date when the relator claims he became permanently disabled.

10. As the testimony of the **respondent** contradicted the testimony of the relator on material questions.

20 11. As there was no evidence that the relator duly applied for a retirement to the Policemen's Pension Commission of the Borough of Belmar.

30 12. As the evidence showed that charges were preferred against the relator and he was advised that he would be granted a hearing on said charges when he was in sufficiently good physical condition to appear for hearing and trial. The evidence further showed that relator failed to appear for hearing and trial.

40 13. As Justice Bodine, sitting alone, had no jurisdiction to order that a peremptory writ of mandamus issue out of and under the seal of the Supreme Court of judicature of the State of New Jersey directing the Policemen's Pension Commission of the Borough of Belmar to call forthwith to its or their assistance the aid of the surgeon or physician representing either the Police or Fire De-

Grounds of Appeal

partment of said Borough to the end that said Pension Commission may consider the application of the relator for retirement.

14. As P. L. 1927, Ch. 210 which authorizes a Justice of the Supreme Court in term or vacation to allow writs of peremptory mandamus, is contrary to Article 6, Sections 1 and 5 of the Constitution of the State of New Jersey and, therefore, is unconstitutional and void. 10

EDWARD A. MARKLEY,
Attorney of Respondent-Appellant.

Served April 13, 1931. 20

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Statement of Affairs

Statement of Affairs of the said Company in the year ending 31st December 1901. The following is a statement of the assets and liabilities of the said Company as at the said date.

ASSETS
Fixed Capital £ 100,000
Reserves £ 20,000
Current Assets £ 10,000
Total £ 130,000

EDWARD A. MARSHALL
Attorney at Law

Dated April 15 1902

New Jersey Court of Errors and Appeals

PETER F. CUMMINGS,

Relator-Respondent.

vs.

POLICEMEN'S PENSION COMMISSION OF THE BOROUGH OF BELMAR, a Municipal Corporation of the State of New Jersey,

Respondent-Appellant.

*On
Mandamus.
On Appeal
from
Supreme
Court.*

BRIEF OF RELATOR-RESPONDENT.

FACTS.

The relator, Peter F. Cummings, was stricken with pneumonia on the night of December 27th, 1929, while under salary, on active duty, and in a police uniform of the Borough of Belmar. For nine weeks he lay in bed, part of the time in the hospital, losing in weight 48 pounds.

He received from the borough his regular salary as policeman during his illness, and until April 1930, when payments were stopped. He has never resumed his duties on the force since the pneumonia attack.

Six weeks after the cessation of his salary, and on May 17th, 1930, Cummings made an application to the Policemen's Pension Commission for relief under Chapter 160 of P. L. 1920 (Ex. Rel. 4, p.

137), and receiving no answer renewed his application on June 12th of the same year (Ex. Rel. 5, p. 138).

Upon the Pension Commission's refusing to inaugurate the procedure directed by the Act, an application was made for a writ of mandamus. On the return of the rule Mr. Justice Bodine after examining the depositions and hearing the arguments of counsel awarded a peremptory writ. The pleadings were thereafter moulded by consent in order to permit the present appeal.

The borough urges numerous grounds for reversal under the four following points appearing in its brief:

1. The relator was not entitled to apply for a pension under Section 2 of Chapter 160 of the Laws of 1920.
2. The relator's legal right is in doubt and therefore no writ of mandamus should be allowed.
3. A proper application was not made by the relator for a pension.
4. Justice Bodine's order for a peremptory writ of mandamus should be reversed because Chapter 210 of the Laws of 1927 which authorizes a Justice of the Supreme Court to allow a peremptory writ of mandamus, is contrary to Article 6, Sections 1 and 5 of the Constitution of New Jersey and is therefore unconstitutional.

These points will be considered in their order.

THE ISSUE.

Apart from the question of jurisdiction now raised for the *first* time, the borough's grounds for reversal seem to be built almost entirely upon the erroneous assumption that before an applicant is entitled to a writ of mandamus he must make out

a case as would entitle him to an actual award of a pension by the statutory commission.

The preliminary question raised on the application for the writ was whether the pension commission in refusing to *hear* the applicant's case did not fail to perform the duty which the pension act, by the language 'shall call', makes mandatory. The assumption of that duty is all the writ herein directs, and not how the commission shall decide. The elaborate arguments of fact advanced by the borough in its brief might well be addressed to the commission in opposition to an award, but whether Cummings is or is not entitled to an award has little bearing on his statutory right to present his facts to the only tribunal contemplated by the Act; i. e., the Pension Commission. His right to have these facts so considered is in no way shaken by the contention that if considered the facts would not justify an award. The Act recites that the facts are to be heard and considered by the Pension Commission and not by the Supreme Court as the borough now contends.

The borough says in substance that the relator is not entitled to a pension award. Assuming but not admitting this to be so, it is no reason why he should be pre-judged and refused the statutory right to his day in court before the commission. The bare right to be heard is quite different from the right to a pension. This distinction was observed in *Simmons v. Policemen's Pension Commission of Deal*, 8 M., 408 at 409 where the court said:

'for it will appear on a reading of the statute quoted above that the decision of the question whether the relator is entitled to a pension is committed to the pension commission, and all that the court should direct to be done is that the commission should proceed to consider the question in the manner provided by

the statute, which so far it seems to have refused to do.'

POINT I.

As to the Borough's Insistence That Relator Was Not Entitled to Apply for a Pension.

The borough's first argument in this connection is that relator's petition for the writ is not sufficient because no permanent disability is therein alleged. Suffice to say relator's application for the writ was predicated upon the Pension Commission's refusal to inaugurate the procedure set forth under the latter portion of Section 2. In this portion the words 'permanent disability' do not occur. It was held in the *Simmons Case (supra)* that Section 2, 'is properly to be divided into two parts' wherein two separate and distinct procedures are outlined. Cummings made his application under the second part, of which in the *Simmons Case* it was said:

'The procedure is that in such case such injured member desiring to retire makes application in writing to the commission, whereupon it is made the duty of that commission to call upon the police surgeon to make the examination and certify. Anticipating that such certificate may be adverse to the applicant, the statute further provides that the applicant himself may call in a regularly licensed physician and surgeon and if the two disagree, then the pension commission is to call in a third disinterested surgeon, and a majority vote of the three, after they have been duly sworn, shall be reduced to writing and signed and laid before the commission, which body then is to proceed to take the testimony of the physicians, or any other person, and to decide, after consideration of that testimony and of the written finding of the three physi-

cians, whether the applicant is entitled to the benefits of the Act.

The above seems to be a clear cut alternative scheme of procedure and it is plain that the relator made his application under the second portion of the section.'

Never having chosen to proceed under the first part of the section there is no reason why the applicant in his petition for a writ should allege a fulfillment of the requirements of that part.

The borough next argues that Cummings was not a member of the Belmar police force, neither at the time of his attack nor at the time of his application. That he was not a member of the police force when injured, the Borough attempts to support by claiming it had no 'established police department, all of its policemen being part time policemen' (Brief, p. 14). Exhibit Rel. 8, p. 139, contains a list of the members of the police department of the Borough of Belmar of January 1st, 1929. It will be observed that Cummings appears third in the list under the sub-caption 'Police Department' and does not appear under the list of specials.

On January 7th, 1930, ten days after Cummings was stricken, the borough treasurer notified the secretary of the Police Pension Fund (Ex. Rel. 9, p. 141) of the appointments to the police department for the coming year and designated four men as being entitled to the benefits of the Act, and from whose salary the statutory 2% should be deducted. The name of Peter F. Cummings is first in the list.

It was stipulated (Record, p. 73) that the general assessment pursuant to the Act and equal to 4% of the total salaries of the members of the police force had been made in 1929, 'that in ascertaining this percentage the salary of Peter F. Cummings was included, and that 2% of the salary of Peter F. Cummings was retained for pension purposes from

February 7, 1929, to the time when his salary stopped on April 1, 1930.'

That he was not a member of the force when applying for a pension is next advanced. What transpired between December, 1929, when he was injured and in May, 1930, when he made his application? Nothing. His salary continued until April 1st, then stopped. His application for a pension followed. After repeated demands to the Pension Commission its secretary on July 3d, 1930 (Ex. Res. 1, p. 142) informed Cummings that the Borough Commissioners had suspended him and had advised the Pension Commission that he was not disabled in the performance of his duties. The only record of any suspension is that of a seven-day period from December 15th, 1929, to December 22d, 1929 (Ex. Res. 5, p. 146). Thereafter Cummings resumed his duties and was in the actual performance of them when stricken on December 27th, 1929. There is no record of any other suspension except the oral recitation by the mayor that on January 1st, 1930, the commissioners met (p. 81). The mayor said, 'We took action upon his dismissal; that is, we discussed his dismissal'. He also said they would have actually dismissed him on that day had he not been ill. Why was his dismissal considered? What had he done? When? Was it prior to December 27th, 1929, or during the three or four days after Cummings was stricken with disease? The Mayor admitted Cummings was a member of the police force on December 27th, 1929. (P. 82, l. 2.) If his dismissal were 'considered' on January 1st why was his salary paid for four months after his attack, and why was the Policemen's Pension Commission never informed of the alleged suspension until after the application for a pension? The mayor also admitted that the first time he ever spoke to Cummings about charges was in April, 1930, and that the charges were never embodied in writing and no mention was made of

them in the minutes.

The main argument put forth by the borough under this point seems to be that Cummings was a drunkard. If this be true the borough has much to explain. That it for years had permitted him to wear the uniform of an officer is opposed to the contention.

The personal habits of an officer may perhaps be the subject of inquiry by the Pension Commission in determining the proximate cause of the alleged disability, but the relevancy of that subject matter to the single issue before the Supreme Court the borough has not disclosed. The borough has even gone so far as to characterize the relator (Brief, p. 7) as a 'confirmed, habitual drunkard'. If a borough permits a 'confirmed and habitual drunkard' to remain for years on its police force, deducts from his salary the statutory 2% and includes his salary in fixing the statutory 4% for general assessment, then it should not voice indignation when the man simply seeks to have his claim to a pension heard by the Pension Commission.

POINT II.

As to the Borough's Insistence That Relator's Legal Right is in Doubt.

It may or may not be that relator's legal right to a pension is in doubt, but that does not go to his inherent right to have that doubt resolved for or against him by the Pension Commission. The award of the writ by the Supreme Court was a matter of discretion. Until it is shown that the discretion was abused or was exercised under a misconception of the law, the findings should not be disturbed.

In *Erion v. Pension Commission of the City of Hoboken, et al.*, 104 N. J. L. 454 cited under this point by the borough, the application was for a

pension and not for a writ to compel the commission to determine the presence or absence of the right to the pension claim. The application was denied because the right to the pension had never been established by the proper tribunal.

Here the application is not for a pension, but to compel the proper tribunal, the Policemen's Pension Commission, to function and determine the *bona fides* of the relator's claim, not in his absence and without a hearing, but pursuant to the clear and explicit method outlined by the Act. In the *Erion Case* there was no such refusal on the part of the commission, and the decision impliedly holds, as does the *Simmons Case*, that the opinion of the Supreme Court cannot be substituted for that of the Pension Commission on the question of whether an applicant is entitled to a pension as distinguished from the mere right to have his case heard.

POINT III.

That a Proper Application Was Made by the Relator for a Pension.

It does not appear that relator is a lawyer or had legal advice when his application was made. If he did not couch it in language satisfying the discerning eye of the appellant that is no reason for rejection. The Act does not require grounds to be set forth but says only that the application shall be in writing for retirement. This Cummings did in the first of his applications which reads as follows: (Ex. Rel. 4, p. 137.)

Belmar, N. J., May 17th, 1930.

Belmar Pension Commission,
Gentlemen:

I hereby apply for retirement on pension from the Belmar Police Dept. as pro-

vided for in Section 2, Chapter 160 of the Laws of 1920.

Will appear for examination by Police Physician at any time that may be convenient to you. Thanking you.

Yours very truly,

PETER F. CUMMINGS.

POINT IV.

As to the Borough's Insistence That the Single Justice Was Without Authority to Award a Peremptory Writ.

The right of Mr. Justice Bodine to sit for the Supreme Court on the return of the writ pursuant to Chapter 210 of the Laws of 1927 was not questioned in any way by either party. It is now raised for the first time.

Like that in *North Hudson County Railway Company v. Flanagan*, 57 N. J. L., 236 at 238 the real question now raised is not as to the jurisdiction of the Supreme Court, but as to the mode in which jurisdiction was acquired over the subject matter; i. e., through the medium of one Justice instead of three or indeed all of the members of the court. In the *North Hudson Case* it was said, 'Jurisdiction cannot be conferred upon a court by mere consent, but objection to the mere mode of the acquisition of such jurisdiction may be waived.' The court further said, and so it may be said here, that, 'The law is well settled that he cannot, after attempting to obtain a favorable result there, deny the right of the court to try the case.'

* * * * *

It is respectfully urged that the judgment of the Supreme Court be affirmed.

LESTER C. LEONARD,

*Attorney for and of Counsel
With Relator-Respondent.*

New Jersey Court of Errors and Appeals

PETER F. CUMMINGS,
Relator-Respondent,

v.

POLICEMEN'S PENSION COMMISSION OF THE BOROUGH OF BELMAR, a municipal corporation of the State of New Jersey,
Respondent-Appellant.

ON MANDAMUS

On Appeal from
Supreme Court

BRIEF IN BEHALF OF APPELLANT

1

Statement of the Case

This appeal brings before this Court for review an order of Justice BODINE granting a peremptory writ of mandamus (p. 154). The order required the Policemen's Pension Commission of the Borough of Belmar to forthwith call to its assistance the aid of the surgeon or physician representing either the Police or Fire Department of the Borough pursuant to Chapter 160 of the Laws of 1920 (p. 324) to the end that the Commission consider the application for retirement of the relator

and arrive at a decision in accordance with the procedure prescribed in the statute.

The order further provided that in the event the respondent desired to appeal to this Court the pleadings might be molded so as to permit a final judgment to be entered (p. 156, ll. 1-10).

The pleadings were therefore molded by an order duly entered (p. 156). An alternative writ was granted to the relator to which the respondent demurred and an order was then entered overruling the demurrer and entering judgment in favor of the relator (p. 163). An order to file pleadings was also taken (p. 163). In order to make the molding of the pleadings complete, stipulations were entered into providing that the testimony taken under the rule to show cause for the writ of mandamus and the written report of Dr. Brothers' physical examination of the relator, should be considered as taken under the alternative writ of mandamus and that both should be considered by this Court in arriving at a determination of the merits (p. 165). This practice of molding the pleadings so that an appeal might be taken is in accordance with the authorities. *Trinkle v. Donnelly*, 98 N. J. L. 298.

From the judgment thus entered in favor of the relator this appeal was taken (p. 166). We shall refer to the appellant as the respondent and to Mr. Cummings as the relator.

2

Grounds of Appeal

The grounds of appeal are fourteen in number (p. 166). They will be argued under the following points:

I. The relator was not entitled to apply for a pension under Section 2 of Chapter 160 of the Laws of 1920.

II. The relator's legal right is in doubt and therefore no writ of mandamus should be allowed.

III. A proper application was not made by the relator for a pension.

IV. Justice Bodine's order for a peremptory writ of mandamus should be reversed because Chapter 210 of the Laws of 1927 which authorizes a Justice of the Supreme Court to allow a peremptory writ of mandamus, is contrary to Article 6, Sections 1 and 5 of the Constitution of New Jersey and is therefore unconstitutional.

V. For the foregoing reasons the judgment below should be reversed and judgment should be entered in favor of the appellant.

I

The relator was not entitled to apply for a pension under Section 2 of Chapter 160 of the Laws of 1920.

The relator by this proceeding seeks to put in operation the provisions of Chapter 160 of the Laws of 1920 (p. 224) to the end that he may obtain a pension from the respondent for the remainder of his life on the ground that he was a regular and full time member of the Police Department of Belmar and that as such he received permanent disability in the performance of his duty as such policeman.

In his petition for the writ of mandamus the relator alleges that on December 28, 1929, while on night duty on said force, he was stricken with

a chill, developed pneumonia and was confined in a hospital thereafter where he was operated on for empyema; that ever since he has been disabled and that he is under the care and supervision of a doctor (p. 2, ll. 20-30).

The statute in paragraph 2 provides (P. L. 1920, p. 325):

“2. Any member of such police or fire department who shall have received permanent disability in the performance of his duty, shall, upon certificate of the surgeon or physician of the police or fire department, or other physician designated for that purpose by the pension commission, be retired upon a pension equal to one-half of his salary at the time of his retirement; where, however, a person being a member or employee of the police or fire department shall desire to retire by reason of injury or disease, said person shall make application in writing to the pension commission for such retirement whereupon the pension commission shall call to their assistance the aid of the surgeon or physician representing either the police or fire department, and the person making the application may likewise call to his aid a regularly licensed and practicing physician or surgeon. The president of the board of pension commissioners is authorized to administer oaths to said physicians or any other person called with respect to the matter before the commission shall determine, by resolution, whether said person is entitled to the benefits of this act. In case the two physicians called as hereinbefore provided fail to agree upon the physical condition of the applicant, then the pension commission may call a third disinterested, licensed and practicing physician and surgeon, and the determination of a majority of said three physicians, who being first duly sworn in the case, shall be reduced to writing and signed by them, and the pension

commission shall consider the same in arriving at their decision.”

The relator does not claim any permanent disability in the performance of his duty as a policeman resulting from injury. His sole claim is that he received disability (no permanent disability is alleged in the petition) in the performance of his duty as a policeman in that he was stricken with a chill while on night duty as a policeman and that as a result he developed pneumonia.

The allegations of the petition are therefore insufficient to bring the alleged claim within the statute because there is no allegation of permanent disability.

The relator is only thirty-one years of age (p. 4, ll. 1-10). Under the statute, if he is granted a pension, he would receive it for the rest of his life and it would be equal to one-half of his salary at the time of his retirement. He was receiving a salary at the rate of \$1,800 per annum (p. 4, ll. 15-20). The amount involved is large considering the youth of the relator and the fact that this statute has only been recently adopted in Belmar and the pension fund so far created is small.

The respondent contends that there are a number of reasons why it should not be compelled to proceed in accordance with the provisions of the statute with respect to the relator's claim. These reasons are as follows:

1. The relator was not a regular member of the police department at any time. He was a part time patrolman who had no tenure of office and could be discharged without cause at any time. He ceased to be a member of the police force prior to his application for a pension and therefore he was not entitled to such pension.

2. He was not a member of the police department at the time he applied for retirement because of alleged disability.

3. He did not receive permanent disability in the performance of his duty as a policeman.

4. He did not contract the disease which caused him disability in the performance of his duty as a policeman; and

5. There was no proof that he was permanently disabled but on the contrary the proof is that he was not permanently disabled.

The following is a summary of the testimony which must be considered in order to decide the questions involved:

The relator took office on February 22, 1929, as a "patrolman on part time of the Borough of Belmar." When he took office he took the oath of office as such patrolman on part time (Exhibit Res. 4, p. 145). He testified that his signature appeared on the oath of office (p. 47, ll. 30-40). He knew that he was a patrolman on part time (p. 54, ll. 25-30). Prior to this last appointment on February 22, 1929, he had previously at times been a patrolman on part time for a period of eight years (p. 36, ll. 1-10). However, the employment had not been steady and when he was not employed as a policeman he was employed as a sheet metal worker (p. 36, ll. 10-15).

His first employment as a part time policeman was in 1922 from June to October. He then went back to his trade and again was appointed a part time patrolman in May, 1923 (p. 36, ll. 15-25). For the work he did in 1923 he received \$28.50 (p. 68). In 1924 he earned \$775 (p. 69). His work was on and off each year. He only worked "part time" (p. 69, ll. 1-20).

The relator was a confirmed, habitual drunkard as appears clearly from all of the testimony in the case including his own. His suspension as a part time patrolman on December 15, 1929, was the culmination of a long series of serious offenses. The following testimony shows the utter disregard which the relator had for his office as a policeman and his failure to keep the rules of the police department of which he was a member.

Brackett, Chief of Police of Belmar, testified (p. 108, ll. 18-40; p. 109; p. 110; p. 111, ll. 4-5):

“Q. In this notice here you say he was suspended on charges of neglect of duty and conduct unbecoming an officer? A. Yes, sir.

“Q. Do you remember the facts in respect to that? A. Well, the facts in respect to that were that he—I sent him and Johnny Maloney to Irvington, I think it is, to pick up Harry Stout with a warrant. I had a warrant for him. And it seems that when they came back from that trip—they were up there all day and away up into the night—came back from that trip, Johnny Maloney came in and reported that he couldn't find him and they had left the warrant up there. And I says to Maloney, 'Where is Cummings?' And he says, 'He is out in the car.' I says 'What is the matter with him? Why don't he come in?' He says—

“Mr. Leonard: I object to what he said on the ground that it is hearsay.

“Q. Well, did he eventually come in? A. He eventually came and stood in front of the desk.

“Q. What was his condition? A. His condition was he was in a drunken stupor; he couldn't hardly talk. He was just hanging over the desk.

“Q. And was that the reason why you suspended him at that time? A. No, the reason I suspended him was the party they had at Claussen's house, one of the other officers.

“Q. When was that party? A. It was the night of the 14th, I think.

“Q. What was his conduct then that resulted in his suspension? A. Well, there was quite a few boys in there and I noticed his car out in front and I walked around to the back and looked in the kitchen window and I saw him sitting in the kitchen in a stupefied condition and everybody lolling over him and fussing over him, and I made up my mind I was going to break the thing up; and I came back and wrote him his suspension.

“Q. I show you this memorandum of the occurrence of April 13, 1929. I believe—
A. I guess I remember what that was.

“Q. Do you remember that occasion? A. Yes, sir; he reported to headquarters that night in—

“Mr. Leonard: What date is this?

“The Witness: April 13, 1929.

“Mr. Leonard: Objected to as too remote and immaterial to the issue at bar.

“Q. Tell us of that occasion. What happened at that time? A. He reported to headquarters seventeen minutes late and he was dressed in citizens' clothes. And later on I saw him at three o'clock coming down F Street with three shoes on the car, and one shoe was off. He had pulled his car out of the Moose on Thirteenth Avenue and was coming down F Street and pulled into Marshall's at Eleventh Avenue and F Street, and there I saw him wallowing around in the mud.

“Q. Wallowing around in the mud? A. Wallowing, trying to fix his shoe, with a police overcoat on. I sent for him; I didn't go near him at all, I sent for him, that I wanted to see him. I stayed up that morning till four o'clock and I waited until three o'clock and he came down there.

“Q. What was his condition? A. Well, his condition was just getting over a hangover. I don't know just exactly what you would call it, but I would think it would be a hangover.

“Q. All right. Then what happened? A. I told him that I was sick and tired of his

pulling around; and he said he didn't have an overcoat. I says, 'You have got an overcoat on,' He says, 'No rubber overcoat.' I says, 'All right. I didn't know you didn't have a rubber overcoat'; and I ordered him a rubber overcoat and boots.

"Q. That was what date? A. That was on the 13th of April.

"Q. Do you remember the occasion of a number of days, April 15th, 16th, 17th, 18th and 23rd, 1929? A. Yes; he never notified me until——

"Q. Did he report for duty on those days? A. No, he didn't. He notified me about an hour before that he couldn't come to work, that he was sick. And one night he called me up from Keyport and said that he would be a little bit late; and he didn't show up at all that night.

"Q. Well, did you find out whether he was sick on those days, those five days? A. He wasn't sick on those days; and this day at Keyport and the day—there was another day I missed him that he called up, he didn't report that night. I think they had a meeting up there or something."

Dillon, one of the commissioners of Belmar, testified (p. 106, ll. 27-40; p. 107, ll. 1-25):

"Q. Well, that is what I want to get at, what you saw. A. It was 1928 and 1929.

"Q. What was it you saw? A. Well, I saw him in a certain public place with his foot up on the bar standing there by the hour.

"Q. Doing what? A. Drinking beer.

"Q. In uniform? A. At times, sometimes in uniform and several times not.

"Q. And how often would you say you have seen that? A. Oh, well, that would be hard to tell; perhaps sometimes a couple times a week, sometimes; probably Saturday night would be one of the main nights.

"Q. Well, was that then would you say, a weekly occurrence? A. Well, yes.

“Q. And you say sometimes you would see him several times a week? A. Well, I wouldn't want to say several. That would be every day. I wouldn't want to say that.

“Q. How often would you say? A. Well, three or four times a week, I should say.

“Q. But you say you would see him with his foot up against the rail for hours? Did you have occasion to observe his condition, whether or not he was under the influence of liquor? A. Well, yes; I would notice his foolish speeches and things of that kind, that would give me an impression that he was a little off in the upper story, in my way of thinking.

“Q. Well, did he speak that way when he was sober? A. No, sir.”

Joeck, one of the commissioners of Belmar, testified (p. 95; p. 96):

“Q. But notwithstanding the fact that he was not under your jurisdiction did you inform the mayor of what you had personally known of Mr. Cummings? A. At that meeting in the latter part of December; I believe it was the day before the 31st.

“Q. What was it you called to his attention?

“Mr. Leonard: I object, upon the ground that it is immaterial; secondly, upon the ground that it is hearsay; thirdly, as a result of information, whatever it might have been, there was no motion made or resolution passed concerning the status of this officer and the minutes of that meeting do not show it, as it has been testified to by Mr. Mayer.

“A. Why, that I had seen myself Mr. Cummings actually in the act of drinking, with the reports that we had had by hearsay—

“Mr. Leonard: I object. I further object upon the ground that now this witness is attempting to introduce hearsay upon hearsay. I object to his testifying as to anything as to

what somebody may have told him. It is bad enough for him to tell what he told the mayor.

“A. I felt that the——

“Mr. Leonard: I object also that it is immaterial entirely as to how this commissioner felt.

“Q. Go ahead. A. I felt that the reports that we had heard were probably true, due to the fact that I had actually seen him doing it myself.

“Mr. Leonard: I move to strike out the observations and conclusions of this witness.

“Q. What had you seen him drinking? A. It looked like beer to me.

“Q. Well, was he under the influence of liquor when you saw him? A. I couldn't say positively. It was my impression that he was.

“Q. Hadn't you on other occasions seen him driving the automobile? A. I believe I did, yes, sir.

“Q. Won't you tell us about that, that you personally saw? A. It was sometime during that year, I can't tell when, but it was close to the end of the year, when I was coming down Ocean Avenue—it was in the evening—and I saw a car going ahead of me that acted as if it was almost out of control; and naturally being—it was in Belmar, and naturally being one of the officers I was a little bit interested to see who it was, and I passed and recognized Mr. Cummings driving.

“Q. What was it about the driving that attracted your attention? A. Why, the car was swerving from side to side.

“Q. From one side of the road to the other? A. Yes, sir.

“Q. Was he in uniform? A. I believe he was. It looked so. It was dark. I didn't stop him.

“Q. What kind of an automobile was it? A. A Ford car.

“Q. A borough car? A. Yes, sir.”

Mayer, mayor of Belmar, testified (p. 78, ll. 13-40; p. 79, ll. 1-8):

“Q. Now then, you say you called his attention to facts that had come to your attention about his drinking before he became ill, which you said was unknown to you at the time, and also matters that had come to your attention after he had come out of the hospital with respect to drinking? A. Yes, sir.

“Q. Then what did you say to him and what did he say to you about the drinking before he became ill? A. Well, he admitted that he had been and that other ones had done the same thing. That was only justification he offered for it.

“Q. What about after leaving the hospital? A. He didn't deny it. He said he had been, admitted he had had a few drinks.

“Q. Did he say to you that he had been drinking heavily up till August—

“Mr. Leonard: Don't lead.

“Mr. Markley: This is contradiction. I think I have a right to put it specifically.

“Q. Mr. Mayer, did he say to you that he had been drinking heavily up until August, 1929, and that then he had stopped drinking? Did he make any such statement as that to you at that time? A. He made no statement that he had stopped at all. He admitted that he had been drinking.

“Q. Didn't say that he had stopped in August, 1929? A. No.

“Q. He never presented a doctor's certificate, I think you said? A. No, sir.”

Berger, a sergeant of the police of Belmar, testified (p. 120, ll. 13-35):

“Q. Well, when did you observe him? A. When I would go to a certain place, I met him several times at public places.

“Q. What did you observe?

“Q. Mr. Leonard: Objected to. It doesn't appear that he was on duty. Moreover, it is not pertinent to this issue and the dates have not been fixed.

"A. I saw Bud time and again in a public place standing up to the bar drinking one beer after another.

"Q. How often did you see that? A. Quite frequently.

"Q. Well, how many times a week? A. Well, I didn't go there so often. Maybe I would go there once or twice a week.

"Q. Well, would you see him once or twice a week? A. Sometimes see him there and other times I wouldn't.

"Q. Over what period of time did you see this, for how long all together? A. Well, practically the whole year of 1929."

Bearmore, an officer of the police department, testified (p. 125, ll. 3-40):

"Q. Now what did you see in 1929? A. One morning I came to work, I saw Pete out in his car. I saw Pete out in his car and I says to Brackett, 'He is out in his car.' And I spoke to Pete and I woke him up, but of course he was off duty. Then it was time for him to go home. He was asleep.

"Q. Could you tell whether he was under the influence of liquor? A. Yes.

"Q. How could you tell that? A. I could tell by the looks of him. I can tell you are sober, and I can tell a drunken man when I see him.

"Q. Would you say he was drunk at that time? A. He was drunk, under the influence of liquor.

"Q. Have you seen him on other occasions under the influence of liquor? A. No, not since then under the influence of liquor, because I haven't saw much of him.

"Q. When was that you saw him? A. It was 1929, I think it was along in January, the last of January, I think. But I couldn't say about the day and date, because I didn't make any note of it when I saw him there.

"Q. How about later in January; did you have occasion to see him at all? A. I don't

remember seeing him later in January that I know of.

“Q. How about later in that year, 1929? A. I saw him various times when he has been under the influence of liquor.

“Q. You have? A. Yes, sir.

“Q. In the latter part of 1929? A. Yes. He worked nights, you see, and when he would work nights I saw him some mornings.”

On December 15, 1929, the relator was suspended for one week because of neglect of duty and conduct unbecoming an officer (p. 146, ll. 10-20). The reason for this suspension is given in the quoted testimony of the Chief of Police, *supra*. At the end of the week, on December 22, 1929, he was permitted to return to work pending consideration of the matter by the Mayor, Mr. Mayer, who was supervising head of the Police Department (p. 74). The Borough has no established police department, all of its policemen being part time policemen (p. 75). Pending consideration of the matter by the Mayor, and the Chief of Police, the relator became ill on December 28, 1929. On December 27, 1929, prior to taking up his work on the evening of that day and the morning of the 28th, he had pains in his chest and across his chest from one side to the other. These pains were shooting pains which ran from his collar bone to the left side of his chest and across both sides of his chest. These pains were pains that made his chest feel sort of “tight.” This condition existed before he went out to work as a patrolman on that evening. The relator’s own word proves that he did not get this trouble while working as a patrolman but that he had it before he went out on the evening of the 27th to go to work. We quote verbatim from his testimony as follows (p. 60, l. 30; p. 61, l. 35):

“Q. Now you have been troubled repeatedly with colds, weren't you, in 1929? A. I was, yes.

“Q. And you had a chronic cough all through 1929, didn't you? A. Yes, to an extent.

“Q. You say that when you went to work on the night of December 27, 1929, you had this pain in your chest; is that right? A. Yes.

“Q. And when you went to work that night I think you said you had what was shooting pains? A. Had pains right down through here.

“Q. From your collarbone? A. Yes.

“Q. That would be the left side? A. The left side.

“Q. You had that when you went to work that night? A. No, I got that after. I had pain in my chest when I started and after I started I got pains through here and got worse later on.

“Q. When you started you had pains in your chest? A. Yes, and later I got this other pain down here on the left side, and they got worse in my chest.

“Q. You say when you started to work you had those pains in your chest? What part of your chest did you have those? A. Seemed to be tight right across here.

“Q. Tight across there? A. Yes.

“Q. On both sides? A. Yes.

“Q. When did you first feel those pains before you went to work? A. Well, just about—I laid down for a while before, for a little while, about an hour, and then I got up and got dressed and went to work, and then I felt them just before I went out. They were not bad then.

“Q. Just before you went out of the house? A. Yes.

“Q. Now you say before you went to work you lay down for about an hour? A. Yes.”

It will be noted that the relator had to lie down for an hour because of his condition. It will also be noted that he was repeatedly subject to colds throughout 1929. He admitted that he had been a heavy drinker up to August of 1929 (p. 58, l. 20; p. 58, l. 30). He failed to report for work on 64 working days during 1929 (p. 108, ll. 1-10).

When he became ill with pneumonia the relator's wages were continued up until the first of April, 1930, a period of three months (p. 42, ll. 10-30). The relator by that time having recovered sufficiently to continue his heavy drinking as appears from the quotations, *supra*, the Mayor summoned the relator to his office and informed him that he was "off the police force." At the same time he was informed by the Mayor that as soon as the relator desired he would be given a hearing but that before giving him a hearing the Mayor wanted a certificate from his doctor as to whether he was sufficiently recovered to go to trial. The Mayor informed the relator of the discovery of the heavy drinking of the relator both prior and subsequent to his illness. The relator admitted that he had been drinking after recovering from his illness but stated that the other members of the police force likewise were heavy drinkers. The conference ended by the Mayor informing the relator that he was "definitely off the force" but that if he, the relator cared to, the Mayor would be glad to give him a hearing upon which would be proven the various violations of duty and conduct unbecoming an officer which appeared in the testimony quoted, *supra*. The Mayor particularly called the relator's attention to his duty to himself to stop drinking in view of his alleged impaired physical condition. The relator asked when he could have his hearing and

the Mayor stated he could have it as soon as he wished (pp. 76, 56 and 57). This conference was held at the end of March, 1930, when the salary of the relator was terminated (p. 76, ll. 1-10).

The relator never requested a time to be fixed or fixed a time himself for his hearing or trial (pp. 56 and 57). Instead, on May 17, 1930, about a month and a half later, he sent in a letter applying for retirement on a pension under Section 2 of Chapter 160 of the Laws of 1920, quoted *supra* (p. 137, ll. 30-40). On June 12, 1930, he reiterated his application (p. 138). On July 3, 1930, after a meeting of the Pension Commission the relator was sent a letter by the Secretary of the Commission advising him that he had been suspended from the Police Force for conduct unbecoming an officer and further, that he was not disabled in the performance of his duty; that the Commissioners were ready and waiting to grant him a hearing on the charges preferred against him (p. 142). He never responded to this request to appear for trial.

He knew at the time that he wrote his letter of May 17, 1930, that the Mayor was waiting to put him on trial as soon as he was ready (p. 54, ll. 30-40). He admitted that he did not ask for any pension when the Mayor told him at the end of March, 1929, that he had to stand trial for his many offenses (p. 56, ll. 1-15). He finally admitted that when the Mayor saw him at the end of March that the Mayor told him that he would have to stand trial (p. 56, ll. 20-30). The relator stated that he informed the Mayor that he would let the Mayor know when he was ready for trial and that he never did inform the Mayor that he was ready to meet the charges against him (p. 56, ll. 20-30).

Instead he wrote the letter asking for a pension (p. 56, ll. 30-40).

It is therefore undisputed that when he made his application for a pension he had already been suspended from the police force for his various offenses and that in order to avoid trial and as a clever move on his part, the relator applied for a pension.

He was therefore not a member of the police force at the time he applied for his pension.

Finally, he was not permanently disabled. The statute provides that in order to entitle a member of the police to a pension he "shall have received permanent disability in the performance of his duty." It has already been proven that he did not contract the disease in the performance of his duty, but rather it was contracted prior to going on duty as a result of excessive drinking and as a result of repeated colds (p. 60, l. 35, *et seq.*). He had a chronic cold all through 1929 as well as repeated colds (*idem*). He previously had suffered from pleurisy (p. 62, l. 40). His own doctor, namely, Dr. Reynolds, admitted that he was able to work.

The doctor's testimony is as follows (p. 18, ll. 38-40; p. 19, ll. 1-16):

"Q. In your opinion is he able to work at the present time? A. He would not be able to do any work unless it was some desk work, clerical work or something like that, where he would not be subject to any heavy physical exertion.

"Q. Can you state with reasonable certainty what his future condition will be? A. I don't believe from his general condition now, after this length of time, that he will ever be strong.

"Q. Will he ever be strong enough to undertake outdoor duties? A. That would de-

pend on what the outdoor duties were. If there was anything that required any physical exertion I don't believe he will ever be able to do it."

And again Dr. Reynolds testified as follows (p. 31, ll. 32-40; p. 32, ll. 1-4):

"Q. Would you say walking, walking in the fresh air, would be good for him? A. He has to go very slow. If he hurries just a little bit he is short of breath. He has to walk slowly.

"Q. But for a condition such as he had would fresh air be the thing? A. Fresh air, yes.

"Q. And ordinarily walking would be good, wouldn't it, for him? A. Well, he would have to be moderate about it."

In this connection it should be borne in mind that as a patrolman the relator would get ample fresh air and the proper amount of exercise.

Dr. James H. Brothers, one of the leading doctors of the City of Newark, who examined the relator at the request of the respondent, testified as follows (p. 135, ll. 27-40; p. 136, ll. 1-14; p. 136, ll. 38-40; p. 137, ll. 1-20):

"This man is recovered, as stated above, from his Pneumonia and the pus that resulted from it. He is recovered in my opinion, from the operation which was necessary to drain this pus from his chest cavity. He is suffering now from an Asthma which has nothing to do with Pneumonia or pus that was removed from chest cavity. The Asthma is a separate entity and is a disease. He denies that it existed prior to his Pneumonia but I do not believe this, in that the doctor who treated him at Belmar stated, on testimony, that this man suffered from many colds for several years prior to his pneumonia and that these colds appeared to be a continuation one of

the other rather than separate fresh ones. Undoubtedly, this man suffered at that time from Asthma and it was mistaken for a bronchial cold. This thought is also supported by the fact that he had a cough most of the time during this period. He did have this cough from an Asthma and would not necessarily have to have a cold if the asthma was present.

"This man is capable of doing some sort of work at this time. The work, of course, should be of a character which would not expose him to too radical changes in temperature because these weather changes would tend to give him acute embarrassment due to his underlying Asthmatic condition. I have had several Asthma patients who continued their occupations more or less without material discomfort. One that I am thinking of in particular is following his trade of Linotype operator for one of the large newspapers in Newark. He does of course, have days when the weather changes is extreme where he has more or less acute attacks which necessitates his laying off for a day or so until the spasm in his lung tissues has subsided. This man is capable of many occupations in my opinion."

Furthermore, the relator admits that he has been working pumping gasoline at a gasoline station and lunch room of which he is proprietor (p. 65, ll. 35-40; p. 65, ll. 20-26; p. 66, ll. 1-5) since he has applied for a pension from the police department. The relator has had this splendid recovery from his illness despite the fact that he has continued his drinking habits. A friend of his, Marion Van Note, testified as follows (p. 128; p. 129, ll. 1-29):

"Q. This year? A. Yes, sir; when I come out. You see I have been sick myself nine months, and he come in one day and I was pretty well down and out and so was Pete, and

I kind of felt a little sorry to see him hitting it up that way, because I was in bad shape myself.

“Q. You say hitting it up; what do you mean by that? A. Well, I didn’t see the man drunk but he had been drinking a little bit.

“Q. How could you tell that? A. Why, from his actions and his walk.

“Q. What was there about his actions and walk that showed you that he was drunk? A. *Well, he couldn’t navigate no more than the law allowed.* I have drunk considerable myself in my day and been around the liquor business all my life, so I can pretty near size a man up.

“Q. You mean he was staggering in his walk, is that what you mean? A. Well, I don’t know what you call wallowing, as the chief says; he wasn’t walking a straight line by a great ways.

“Q. What else was there about his actions that indicated to you he was drunk? A. His whole demeanor when I looked at it.

“Q. What was there about his demeanor? Was he loud and boisterous or not? A. No, he was not.

“Q. What was there about it that you could tell? A. He couldn’t seem to collect himself. He was ill at the time, or had been very ill. I think at the time he had these tubes in his side.

“Q. He still had the tubes in his side? A. Yes, I imagine so.

“Q. Where was he when he was staggering at the time? A. He was up at the club.

“Q. Had he been drinking there? A. I didn’t see him drinking there. He came in as I was sitting down.

“Q. How long were you there with him? A. Oh, I talked to him maybe four or five minutes. He went on inside and sat down and I came on home.

“Q. What did you say to him? A. I told him to be a little careful. The man had been sick and I didn’t like to see him going along that way.

“Q. You referred to him being drunk? A. To drinking and the shape he was in.

“Q. What did he say? A. He said he hadn't been drinking very much and wasn't going to. He said he wasn't drinking anything but beer.

“Q. Well, was that sometime in April? A. I imagine so, because I got out of the hospital in April.

“Q. April, 1930, that is? A. 1930, yes, sir.

“Q. And it was up at the club? A. Yes, sir.

“Q. And where is that, Belmar? A. Belmar.”

The relator admits that he has been drinking since leaving the hospital after his illness (p. 64, ll. 9-15), this despite the fact that his doctor testified that drinking would have a very serious effect on him, retarding his improvement and causing a relapse (p. 31, ll. 7-27).

The fact that the relator applied for reinstatement in the police department is conclusive proof that he was not permanently disabled. He himself admits that he made application for reinstatement in the month of April, 1930. His testimony is as follows (p. 60, ll. 29-34):

“Q. As a matter of fact you didn't want a pension, did you? You wanted your job? Isn't that what you wanted? A. Well, I wasn't able to do it.

“Q. Isn't that what you went there to get? A. *I wanted to get a job, yes.*”

There is not the slightest semblance of proof in the case that the pneumonia with which the relator was suffering at the time the police trial was deferred and which he claims has totally disabled him, was contracted while in the performance of his duty as a member of the police department. Dr. George G. Reynolds, the relator's own doctor,

testified as follows on this point on direct examination (p. 19, ll. 25-35):

“Q. From your examination of Mr. Cummings the first part of January, 1930, taking into consideration his state of health prior to that time as testified by you, can you state with reasonable certainty the cause of his condition as you found it in January, 1930?
A. Well, the cause of it was pneumonia. Now what caused the pneumonia it would be impossible for me to tell, because I didn't see him until I was called to his bedside.”

The following conclusions necessarily result from the foregoing testimony. First, the relator was not a regular member of an established police force. The Borough did not have an established police force. Admittedly he was a part time employee. For a period of eight years he had been employed on and off as the requirements of the Borough dictated. Belmar is a summer resort where a great many people reside in the summer and very few in the winter. In summer a number of policemen are needed; in the winter very few are required. He had no tenure of office and could be discharged without cause at any time at the will of the Borough. *Hulse v. Policemen's Pension Commission of Long Branch*, 136 Atl. (N. J. S.) 197, 198 (not officially reported). This case refers to Chapter 152 of the Laws of 1917, which in Article XVI, section 3 (P. L. 1917, p. 360) provides:

“* * * and provided, further, that it shall be lawful for the board, body or person in the respective municipalities of this State having authority to employ members of the police department therein, to employ officers or men temporarily in case of emergency or for parts of years, in cases where their

services are not needed throughout the entire year, and discharge them at the expiration of such temporary employment.”

Under this statute a part time employee of the police department would be entitled to a pension provided he was such an employee at the time he applied for the pension and provided he came within the other provisions of the statute such as the provision requiring that he shall have received permanent disability in the performance of his duty. *Hulse v. Policemen's Pension Commission of Long Branch*, 136 Atl. 197, *supra*.

The relator's entire employment from 1922 as shown, *supra*, was part time. His oath of office was as a part time member of the force. He repeatedly was discharged without hearing and just as often he was employed again when the great number of summer residents at this seashore resort required a greater number of policemen.

Even if he were a regular employee of the police department his continued absence with pay from December 27, 1929, to April 1, 1930, in and of itself would terminate his membership on the force, keeping in mind that during that period the undisputed testimony shows that he was about town drinking heavily. P. L. 1917, Chapter 152, page 359 in Article XVI, section 3, further provides:

“* * * *provided*, that any member of any such police force who shall be absent from duty without just cause for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force * * *.”

If, notwithstanding the foregoing, it should still be contended that the relator could not be removed except for cause and after a hearing, it neverthe-

less appears without dispute that when he was suspended he was offered a hearing and that although he said he would take advantage of the offer he refused to do so.

It also appears without dispute that he was not a member of the police force at the time he applied for retirement on May 17, 1930. We submit that under the Pension Act quoted at the beginning of this point under which the application for pension was made, he must be a member of the police force at the time of making the application. The statute says, "any member of such police or fire department who shall have received permanent disability in the performance of his duty, etc." Not being a member of the police force on May 17, 1930, he is not entitled to the benefit of the statute.

It further appeared without dispute that he did not receive any permanent disability in the performance of his duty as a policeman. His own testimony shows that he contracted the disease while off duty. Neither his doctor nor the doctor of the Borough could say that his disability resulted from his employment. The specific facts testified to by the plaintiff show that he was suffering from the symptoms of pneumonia while he was home and off duty.

Finally, the proof is demonstrative that he was not permanently disabled as a result of the pneumonia. The statute requires "permanent disability." These words have a plain meaning. A man who is capable of running a gas station is certainly not permanently disabled. The statute provides for a pension for life at half pay. The relator, as shown, is a young man thirty-one years of age. It was not the intent of the Legislature

and the statute does not contemplate paying half pay for life to a thirty-one year old man who is capable of doing work. By permanent disability is meant total disability not partial disability. If a policeman loses a finger that is permanent disability, but it is only a partial permanent disability. For such a disability no pension would be allowed. The fact that the relator's lungs might be weak, while a disability of some duration, is not a total permanent disability. The testimony of the doctors clearly indicates that to be so.

Dr. Brothers, wholly disinterested, a leading physician and surgeon, says that the relator's pneumonia and empyema has entirely cleared up and causes him no trouble and that his present disability, if any, is due to asthma which did not come from his pneumonia but is a disease separate and apart by itself and entirely disconnected from pneumonia (p. 134, l. 20; p. 136, l. 35). Dr. Brothers says the relator is fully recovered from his pneumonia and the pus resulting from it known as empyema. Dr. Brothers says he can work at a number of occupations and is only incapacitated to the extent that asthma ordinarily incapacitates a man (p. 136, l. 40; p. 137, l. 20). There is no contention made by the relator that the asthma is disabling or if it is, that it was acquired as a permanent disability in the performance of his duty as a policeman.

For these reasons we respectfully submit that the relator is not entitled to apply for a pension under Section 2, Chapter 160 of the Laws of 1920.

II

The relator's legal right is in doubt and therefore no writ of mandamus should be allowed.

If it has been demonstrated in Point I that the relator is not entitled to a pension then it is not necessary to argue this point. However, even if the question be regarded as debatable, which we deny, the law is settled that a mandamus will not issue where the relator's legal right is in doubt. Under such circumstances the right must first be established by an appropriate legal proceeding. *Erion v. Pension Commission*, 104 N. J. L. 464.

In the cited case, the Supreme Court in denying a pension under Chapter 160 of the Laws of 1920, the very act under which the present relator is seeking a pension, at page 464 said:

“This defense obviously necessitates a construction of the legislation in question for the purpose of determining the legal right of the relator to receive the amount in question. Furthermore, the validity and legality of her claim is denied by the defendants. The briefs of counsel upon both sides give no consideration to that fact, although it presents the main objection at this time to the granting of the writ. The rule of law is settled that a writ of *mandamus* will not go where the legal right of the relator is in doubt or at all unsettled, and that the right must first be established by a suit at law to recover the amount in dispute, or by a writ of *certiorari* where that writ may be properly invoked. Thus, a distinguished author upon the subject observes: ‘The right which it is sought to protect must be clearly established, and the writ is never granted in doubtful cases.’ *High Extr. Rem.* 12, and

cases cited. *Michaelson Pavement Co. v. Newark*, 38 N. J. L. 396; *Clark v. Jersey City*, 42 Id. 94; 18 R. C. L. 225, and cases cited."

Until the relator's right has first been established in an appropriate legal proceeding, the application for the peremptory writ of mandamus is premature. For this reason the present judgment below should be reversed.

III

A proper application was not made by the relator for a pension.

Application for a pension in the case at bar consisted merely of a short letter in which the relator said (p. 137, l. 30): "I hereby apply for retirement on pension from the Belmar Police Department as provided for in Section 2, Chapter 160 of the Laws of 1920." This letter is directed to the Belmar Pension Commission (p. 137, l. 28). Nothing is said as to the ground upon which retirement is sought. No evidence is submitted or offered as to the ground for retirement. Nothing is said as to whether the applicant claims disease or injury as the cause of any alleged disability. Nothing is said as to whether he has been permanently disabled or if permanently disabled, whether it resulted from the performance of duty. The Pension Commission is a separate and distinct body of the municipal government and is entitled to some statement of the claim presented other than the mere formal statement that an application is being made for a pension. We respectfully submit that the application in question does not comply with the statute and that until a proper appli-

cation is made, the Pension Commission is not required to consider the matter.

In the second paragraph of the application it is stated that the applicant is willing to appear for examination by a police physician (p. 137, l. 35). This, however, is wholly unnecessary until a determination is made that the alleged disability was acquired in the performance of duty, which is a condition precedent to any proper application under the statute. The relator makes no contention in his application that he was wholly disabled in the performance of his duty.

IV

Justice Bodine's order for a peremptory writ of mandamus should be reversed because Chapter 210 of the Laws of 1927, which authorizes a Justice of the Supreme Court to allow a peremptory writ of mandamus, is contrary to Article 6, Sections 1 and 5 of the Constitution of New Jersey and is therefore unconstitutional.

Justice BODINE, sitting alone in chambers, upon the return of a rule to show cause made returnable before him at chambers (p. 6) granted a peremptory writ of mandamus. Ordinarily the hearing on a rule to show cause for a mandamus would have to be before the Supreme Court *en banc*. Under P. L. 1927, Chapter 210 (p. 396) the practice followed by Justice BODINE is authorized. That statute not only authorizes a Justice of the Supreme Court to grant a rule to show cause, but also to make it returnable at his cham-

bers where it may be heard by him alone and his judgment is then authorized to be entered in the Supreme Court as a judgment of that Court.

The writ of mandamus is one of the prerogative writs of the Supreme Court. Under the settled law of this State the Supreme Court is a constitutional court and the powers which inhered in the Court at the time of the adoption of the constitution must be unassailable by legislation. *Traphagen v. W. Hoboken Township*, 39 N. J. L. 232. The statute does not provide that the Supreme Court may by rule designate certain justices of the court to act for it. The statute is clearly an attempt on the part of the Legislature to deprive the Supreme Court of a power which inhered in that court at the time of the adoption of the constitution and is in direct conflict with Sections 1 and 5 of Subdivision 1 of Article 6 which reads as follows:

“The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; *a supreme court*; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require.”

Section 5, Subdivision 1, of Article 6 reads as follows:

“The supreme court shall consist of a chief justice and four associate justices. The number of associate justices may be increased or decreased by law, but shall never be less than two.”

In the case of *New Brunswick v. McCann*, 74 N. J. L. 171, the Supreme Court held that the act of 1906 (P. L., p. 18) which directs a Justice of the Supreme Court to re-hear in a summary way the charges against a policeman or board of commissioners, is void because it is an attempt to confer upon a statutory tribunal the prerogative right of the Supreme Court to review by *certiorari* the proceedings of the municipal board. In the course of the opinion Justice REED said at page 173:

“It is entirely settled that the legislature cannot strip the Supreme Court of its ancient power to issue the prerogative writs of *mandamus*, *quo warranto* and *certiorari*. In the case of *McCullough v. Essex Circuit Court*, 30 *Vroom* 103, the Supreme Court held that the appeal taken to the Circuit Court from an action of the township committee in passing an ordinance was properly dismissed by the Circuit Court. The dismissal, thus approved, was for want of jurisdiction in the Circuit Court, although the statute expressly authorized such an appeal. The statute was held to be an infringement upon the exclusive power of the Supreme Court to review such a proceeding by its prerogative writ.

“In *Green v. Heritage*, 35 *Vroom* 567, it was held by the Court of Errors and Appeals that the legislature could not confer upon the circuit Court power to review the judgment of District Courts in matters of law which might be reviewed by the Supreme Court on *certiorari*. It was held that it did not matter that the proceeding for the review was styled an appeal. It is true that in the opinion the fact was mentioned that a writ of error might, at the option of a litigant, be taken directly from the Circuit Court to the Court of Errors and Appeals, and thus a review by the Supreme Court could be evaded. In this respect that case differs from this case, for in this case the

certiorari would go to the Justice of the Supreme Court to review his rehearing of a municipal act. But the line of reasoning in the *Heritage* case is that the right of the Supreme Court to review attaches to the original proceedings whenever they are instituted, so that whenever there is an attempt to divert the appellate power over such proceedings to another tribunal, whether then existing or then created, it is an infringement upon the prerogative power of the Supreme Court.

“The doctrine thus enunciated is illustrated and supported by those cases in which the legislature has conferred upon tribunals other than the Supreme Court a power which has a semblance of being appellate, but which have been held for the purpose of supporting the legislation to be an original and not an appellate power.”

In the case of *Wood v. Fithian*, 24 N. J. L. 838 the contention was made that the act authorizing certain Justices of the Supreme Court during term time to sit apart for the hearing of common business, was unconstitutional. In the course of the opinion Justice PORTS, speaking for this Court, said:

“This assignment is intended to bring up the question as to the constitutionality of the third section of the act, relative to the Supreme and Circuit Courts, *Rev. St.* 196, which provides, ‘That it shall be lawful for the justices of the Supreme Court, at every term thereof to designate in such way as to *them may seem proper*, one or more of their number to sit, during term time, in a separate apartment from that in which the regular term is held, for the purpose of hearing and deciding all such matters as, by the rules of the said court are, or may be, denominated common business; whose decisions and judgments shall be as good and effectual as if they

had been rendered at the bar of said court.' A section which was incorporated into the above act in the revision of 1846, from the fourth section of an act, approved March twenty-fourth, 1845; *Pamp. L.* 154.

"In pursuance of the provisions of this section, the Supreme Court have, for the last ten years, *uniformly assigned to a portion of their number* the duty of hearing common business in a separate room during the continuance of the terms; and as *certioraries* from the Court of Common Pleas, on appeal, are designated as belonging to that class of business by rule, such cases have ordinarily been heard by these justices. The act was intended to facilitate the dispatch of business, and it has enabled the court, generally, to dispose of all the cases which were ready to be argued, at each successive term. The justices sitting for the dispatch of common business, have authority, by rule, to order any matters of that description to be set down on the paper, when, in their opinion, the case requires it; and the court have ordered arguments of that class to be heard before all the judges, where the questions involved were difficult or complicated, and the counsel on either side desired it. A very large proportion of the suits brought in the Supreme Court have, in some stage of their progress, been before these justices, and they have disposed of nearly all the matters called common business, which have been before the court during the last ten years, and yet the constitutionality of the law under which they acted has never before been called judicially in question. Whatever sanction, time, usage, and acquiescence can give to a public statute of this description this statute has the benefit of. The constitution, it is true, created but one Supreme Court, to consist of a chief justice and four associate justices; but it left it to the legislature to increase or diminish the number to

not less than two, and to pass all necessary laws regulating the practice and the mode of transacting business in this court. By law, one justice may hold the court, and his decisions are made as binding as if all the justices were present. It may happen that by reason of absence at the circuits, or sickness, or other causes, the number actually sitting may be reduced to one; and the force of the argument against the constitutionality of the law seems to be reduced to this, that when the justices are *present* they must *all* hear and *all* adjudge upon every motion made, and every matter argued, at the same place and time."

It is to be noted that the act under consideration in the *Wood* case merely provides that *it shall be lawful* for the *Justices* of the *Supreme Court* to *designate* in such way as to *them may seem proper* one or more of their number to sit for the purpose of hearing common business, whereas in the 1927 act the Legislature leaves nothing to the discretion of the Supreme Court but boldly provides that writs of mandamus may be allowed by a single Justice of the Supreme Court, thus stripping the Supreme Court of its ancient power to issue the prerogative writ of mandamus.

We respectfully submit that the act of 1927 is unconstitutional and void, and that therefore Justice BODINE had no power to make the order for a peremptory writ of mandamus herein.

V

Conclusion

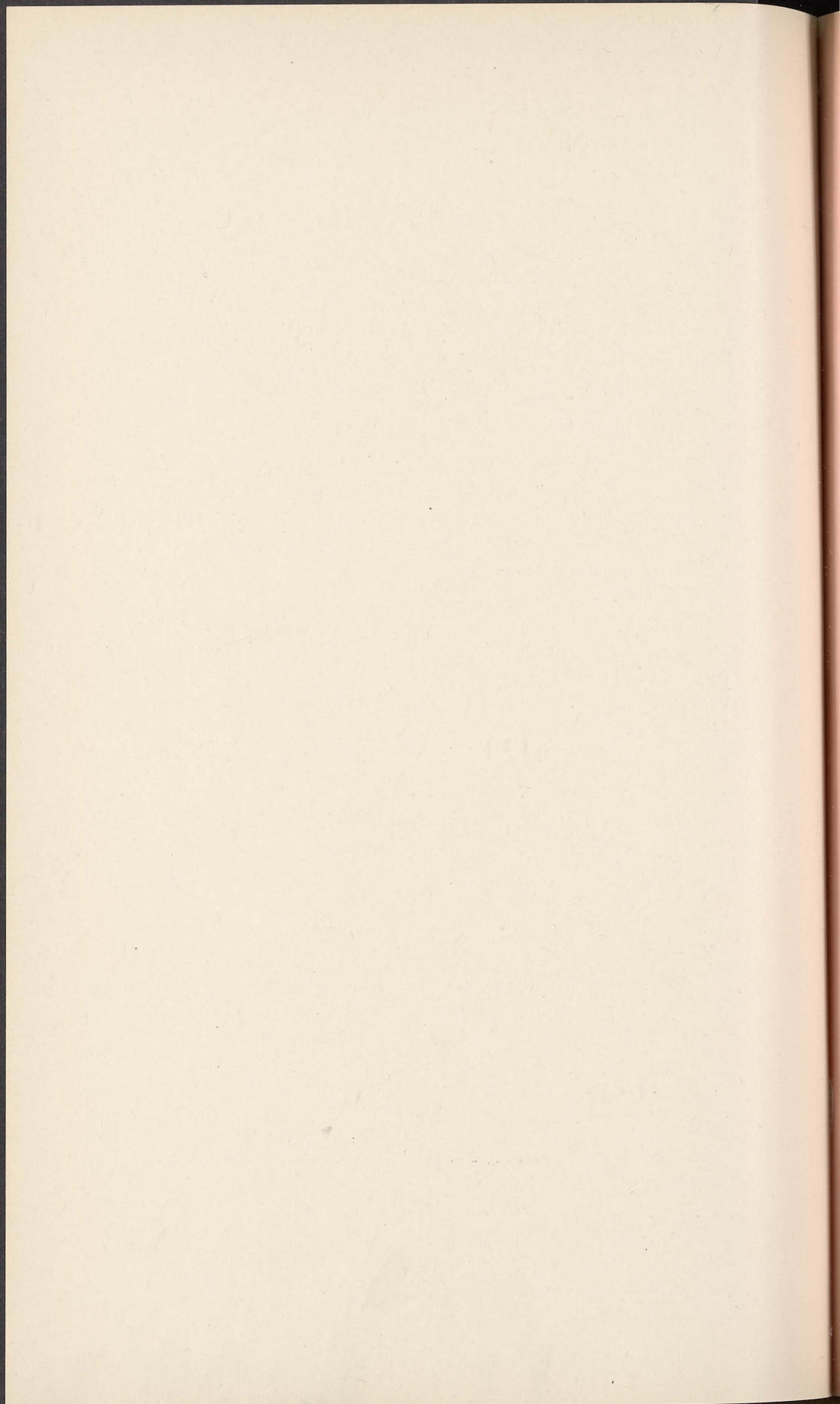
For these reasons we respectfully submit that the judgment below should be reversed and that judgment should be entered in favor of the appellant.

If it should be concluded for any of the reasons advanced in Point I that the relator is not entitled to a pension, then not only should the judgment below be reversed but judgment should be entered in favor of the respondent.

Passaic v. Gross, 99 N. J. L. 409, 413;
State v. Rodgers, 91 N. J. L. 212;
Hoxsey v. Paterson, 39 N. J. L. 489.

Submitted October Term, 1931.

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