INDEX

NOTICE OF APPEAL.

Filed April 3, 1934.

In Chancery of New Jersey

97/613.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Notice of Appeal.

To Maurice J. McKeown, Esquire, solicitor of defendants, Indemnity Insurance Company of North America and Commissioners of Palisades Interstate Park.

SIR:

TAKE NOTICE that the defendant, Fred W. Bickford, hereby appeals from so much of the final decree of the Chancellor made in the above-

entitled cause on the 26th day of March, 1934, on the advice of the Honorable John O. Bigelow, Vice-Chancellor, as decrees that out of the monies, to wit, the sum of $3,701.47 paid into this court by complainant, Consolidated Indemnity and Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America, the sum of $2,765.66 which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford, less one-half of the fee allowed to complainant and also from so much of said final decree as requires the Clerk of the Court of Chancery to make payment of the said sum to the Indemnity Insurance Company of North America, to the Court of Errors and Appeals in the last resort in all causes.

Dated: March 31, 1934.

LELAND F. FERRY,
Solicitor for and of Counsel with
Fred W. Bickford, Defendant.

I conceive there is good cause for appeal in the above-entitled cause.

GEORGE F. LOSCHE,
Of Counsel with Fred W. Bickford,
Defendant.

Service acknowledged April 3, 1934.

MAURICE J. McKEOWN,
Solicitor of Indemnity Insurance Company of North America and Commissioners of Palisades Interstate Park.

PETITION OF APPEAL.

Filed April 5, 1934.

New Jersey Court of Errors and Appeals

Between	
SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York, *Complainants,*	*On Appeal from the Court of Chancery.*
and	
FRED W. BICKFORD, *Defendant-Appellant,*	*Petition of Appeal.*
COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, *Defendants-Respondents.*	

To the Honorable, the Court of Errors and Appeals, in the last resort in all cases:

The petition of Fred W. Bickford, the appellant in the above-entitled cause respectfully shows that:

Petitioner finds himself aggrieved by a final decree, bearing date March 26, 1934, made in the Court of Chancery by his Honor Luther A.

Campbell, Chancellor of the State of New Jersey, upon the advice of Honorable John O. Bigelow, Vice-Chancellor, in a certain cause in the said Court of Chancery wherein Scheno Trucking Company, Inc., a corporation of the State of New York, John Britt and Paul Scheno, Frank Kline and Consolidated Indemnity and Insurance Company, a corporation of the State of New York, were complainants, and Fred W. Bickford, Commissioners of Palisades Interstate Park, and Indemnity Insurance Company of North America, were defendants, in this respect, to wit, that said decree:

1. Adjudges that out of the monies, to wit, the sum of $3,701.47 paid into this court by Consolidated Indemnity and Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America, the sum of $2,765.66 which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford, less one-half of the fee allowed to complainant and which requires that the Clerk of the Court of Chancery make payment of the said sum to the Indemnity Insurance Company of North America.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid on the ground that the same is erroneous in that:

1. There were no facts contained in the stipulation signed by the solicitors for the defendants, Indemnity Insurance Company of North America and Fred W. Bickford, on which to base the decree from which appeal is herein taken.

2. The Court of Chancery should have decreed that the defendant, Fred W. Bickford

was entitled to all of the said sum of $3,701.47 less proper deductions for complainants' counsel fee and clerk's fees.

3. Said decree is in other respects illegal, unlawful and inequitable.

Petitioner, therefore, prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden insofar as it decrees that out of the monies, to wit, the sum of $3,701.47 paid into this court by complainant, Consolidated Indemnity and Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America the sum of $2,765.66 which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford, less one-half of the fee allowed to complainant and insofar as it requires that the Clerk of the Court of Chancery make payment of the said sum to the Indemnity Insurance Company of North America and that petitioner may have such other relief in the premises as this Honorable Court shall deem advisable.

Dated: April 4th, 1934.

LELAND F. FERRY,
Solicitor for Appellant.

GEORGE F. LOSCHE,
Of Counsel.

Service of a copy of the within instrument is acknowledged this 9th day of April, 1934.

MAURICE J. McKEOWN,
Attorney for Defendants,
Ind. Ins. Co. of N. A. and
Comm. Pal. Int. Park.

AMENDED PETITION OF APPEAL.

Filed April 13th, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD,

Defendant-Appellant,

COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Respondents.

On Appeal from the Court of Chancery.

Amended Petition of Appeal.

To the Honorable, the Court of Errors and Appeals, in the last resort in all cases:

The amended petition of Fred W. Bickford, the appellant in the above-entitled cause respectfully shows that:

Petitioner finds himself aggrieved by a final decree, bearing date March 26, 1934, made in the Court of Chancery by his Honor Luther A.

Campbell, Chancellor of the State of New Jersey, upon the advice of Honorable John O. Bigelow, Vice-Chancellor, in a certain cause in the said Court of Chancery wherein Scheno Trucking Company, Inc., a corporation of the State of New York, John Britt and Paul Scheno, Frank Kline and Consolidated Indemnity and Insurance Company, a corporation of the State of New York, were complainants, and Fred W. Bickford, Commissioners of Palisades Interstate Park, and Indemnity Insurance Company of North America, were defendants, in this respect, to wit, that said decree:

1. Adjudges that out of the monies, to wit, the sum of $3,701.47 paid into this court by Consolidated Indemnity and Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America, the sum of $2,765.66 which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford, less one-half of the fee allowed to complainant and which requires that the Clerk of the Court of Chancery make payment of the said sum to the Indemnity Insurance Company of North America.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid on the ground that the same is erroneous in that:

1. There were no facts contained in the stipulation signed by the solicitors for the defendants, Indemnity Insurance Company of North America and Fred W. Bickford, on which to base the decree from which appeal is herein taken.

New Jersey State Library

2. The Court of Chancery should have decreed that the defendant, Fred W. Bickford, was entitled to all of the said sum of $3,701.47 less proper deductions for complainants' counsel fee and clerk's fees.

3. There is nothing in the amendment, P. L. 1931, p. 704, to section 23 (f) of the Workmen's Compensation act (1911-1924 Cum. Supp. Comp. Stat. p. 3868), to justify the application thereof to the facts as stipulated in this case.

4. The amendment, P. L. 1931, p. 704, to section 23 (f) of the Workmen's Compensation act (1911-1924 Cum. Supp. Comp. Stat. p. 3868), if applicable to the facts as stipulated in this case is unconstitutional in that it deprives the defendant, Fred W. Bickford, of his property without due process of law.

5. Said decree is in other respects illegal, unlawful and inequitable.

Petitioner, therefore, prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden insofar as it decrees that out of the monies, to wit, the sum of $3,701.47 paid into this Court by complainant, Consolidated Indemnity and Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America the sum of $2,765.66 which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford, less one-half of the fee allowed to complainant and insofar as it requires that the Clerk of the Court of Chancery make payment of the said sum to the Indemnity Insurance Company of North America and that petitioner may have such other relief in the

premises as this Honorable Court shall deem advisable.

Dated: April 12th, 1934.

LELAND F. FERRY,
Solicitor for Appellant.

GEORGE F. LOSCHE,
Of Counsel.

Service of a copy of the within instrument is acknowledged this 13th day of April, 1934.

MAURICE J. McKEOWN,
Attorney for Defendants-Respondents.

BILL OF COMPLAINT.

Filed August 22, 1933.

IN CHANCERY OF NEW JERSEY.

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The complainants, Scheno Trucking Company, Inc., a corporation of the State of New York, and John Britt and Paul Scheno, of Nyack, in the State of New York, and Frank Kline of Haverstraw, in the State of New York, and Consolidated Indemnity and Insurance Company, a corporation of the State of New York, respectfully show that:

1. On June 30, 1931 one Fred W. Bickford, residing at Fort Lee, in the State of New Jersey, was employed by Commissioners of the Palisades Interstate Park in the Palisades Interstate Park, at or near the City of Englewood, County of Bergen and State of New Jersey.

2. Said Fred W. Bickford, while employed in his occupation as laborer, in said Palisades Interstate Park, was, as is alleged in a certain complaint served with a summons described in paragraph 3 hereof; injured by an automobile truck owned and operated by some of the complainants herein, hereinafter mentioned.

3. Complainants, Scheno Trucking Company, Inc., John Britt, Paul Scheno and Frank Kline were served with summons and complaint in a certain suit, instituted in the New Jersey Supreme Court, venue in Bergen County, wherein said Fred W. Bickford is plaintiff and the defendants therein are designated and named re-

spectively: Scheno Trucking Company, Inc.; John Britt (first name being fictitious), John Scheno (first name being fictitious) individually and trading as a co-partnership known as Britt & Scheno Trucking Co., and Frank Kline, which summons is tested October 6, 1931, and which suit is brought to recover damages resulting from injuries sustained through the alleged negligent act of the defendants in said summons named, their agents, servants and employees.

4. Complainant, Consolidated Indemnity and Insurance Company, at the time of the alleged injury, covered the defendants named in said suit by its policy of insurance against certain liabilities for damages resulting from negligent operation of motor vehicles operated by its assured, particularly classified and named in said issued policy of insurance.

5. On or about June 23, 1933 negotiations having been theretofore entered into between Consolidated Indemnity and Insurance Company, in behalf of the other complainants herein and the said Fred W. Bickford, for the settlement of said suit against the defendants named therein, for the sum of Eight thousand ($8,000) Dollars, the said Fred W. Bickford agreed to accept from complainants said sum, without prejudice in the event of future litigation or continued litigation, in full settlement of any liability, and to that end the said Fred W. Bickford executed and delivered to Pomerehne, Laible & Kautz, of Newark, New Jersey, as attorneys for complainants herein and for their benefit and behalf, a General Release, the consideration for which was the payment to the said Fred W. Bickford of the sum of Eight thousand ($8,000) Dollars. A copy of said

release and letter accompanying same are hereto attached and made part hereof and marked Schedule A and B respectively.

6. On June 28, 1933, a letter was received by Pomerehne, Laible & Kautz, attorneys for Consolidated Indemnity and Insurance Company, and the other complainants herein, from Maurice J. McKeown, counsellor-at-law of Newark, New Jersey, wherein said Maurice J. McKeown, on behalf of Indemnity Insurance Company of North America, demanded the sum of $3,701.47 out of the said settlement amount of $8,000, the said amount demanded and claimed representing money paid out by way of compensation to the said Fred W. Bickford, by said Indemnity Insurance Company of North America, as insurance carrier for Commissioners of the Palisades Interstate Park, in accordance with an informal award made by the New Jersey Workmen's Compensation Commissioner. A copy of said letter is attached hereto and made part hereof and marked Schedule "C."

7. A letter dated July 27, 1931, addressed to Messrs. Britt & Scheno, Main street, Nyack, New York, was received by said Britt & Scheno Trucking Co., a copy of which letter is attached hereto and made part hereof and marked Schedule "D."

8. A letter dated June 29, 1933 addressed to Pomerehne, Laible & Kautz, Newark, New Jersey, was received by said Pomerehne, Laible & Kautz, attorneys for Consolidated Indemnity and Insurance Company, insurance carrier for the other complainants herein. A copy of said letter is attached hereto and made part hereof and marked Schedule "E."

9. The pertinent portion of the Workmen's Compensation Act of New Jersey is known as Section 23-F as amended by Chapter 279 of the Pamphlet Laws of 1931, page 705, and reads as follows:

"(F) Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. However, in event that the employee or his dependents shall recover from the said third person or corporation, a sum equivalent to or greater than the total compensation payments for which the employer is liable under this statute, the employer shall be released thereby from the obligation of compensation. If, however, the sum so recovered from the third person or corporation is less than the total of compensation payments, the employer shall be liable only for the difference. The obligation of the employer under this statute to make compensation shall continue until the payment, if any, by such third person or corporation is made. Such employer shall file with the third person or corporation so liable, at any time prior to payment, a statement of the compensation agreement or award between himself and his employee, or the dependents of the employee, and the employer shall thereafter be entitled to receive from such third person or corporation, upon the payment of any amount in release or in judgment by the third person or corpora-

tion on account of his or its liability to the injured employee or his dependents, a sum equivalent to the medical expenses incurred and the amount of compensation payments which the employer has heretofore paid to the injured employee or his dependents, which payments shall be deducted by the third persons or corporation from the sum paid in release or judgment to the injured employee or his dependents.

When an injured employee or his dependent fails within six months of the accident, to take legal action against a third party responsible for the injury, or accepts settlement for less than the compensation obligation of the employer, the employer or his insurance carrier is hereby authorized to proceed legally against such third party; provided, however, if the amount secured by the employer or carrier is in excess of the employer's obligation and the expense of suit, the balance shall be paid to the employee or the dependent.''

10. The said Fred W. Bickford, still claims to be entitled to the full sum of $8,000.00 to be paid by the said Consolidated Indemnity and Insurance Company on behalf of the complainants in full settlement of all claims which he may have against it by virtue of the alleged damages sustained by him, because he denies that the defendant, Commissioners of the Palisades Interstate Park, is entitled to any portion of the said sum of $8,000.00 because they as his employers did not fulfill the conditions laid down in said Section 23-F as amended, of the New Jersey Workmen's Compensation Act.

11. The said Commissioners of the Palisades Interstate Park and their insurance carrier, the Indemnity Insurance Company of North America, claim under the aforesaid Section 23-F as amended, of the New Jersey Workmen's Compensation Act, that they are rightfully entitled to moneys that they have been obliged by law to pay to the said Fred W. Bickford, amounting to $3,701.47, out of the moneys complainants have agreed to pay in settlement of the alleged claim of Fred W. Bickford against it.

12. The complainants have been and are unable to determine to which of the aforesaid defendants that portion of the said sum of $8,000.00 claimed by Commissioners of the Palisades Interstate Park and Indemnity Insurance Company of North America, under the Workmen's Compensation Act of New Jersey, rightfully belongs.

13. Complainants have always been willing, and are willing, to pay the said sum in dispute to such person or persons as is or are lawfully entitled to receive the same and to whom it can pay said sum with safety, and hereby offer to pay the sum of $3,701.47 into this Court.

14. Complainants have not in any way colluded, and do not in anywise collude, with the said Fred W. Bickford, Commissioners of the Palisades Interstate Park and Indemnity Insurance Company of North America, or with either him or them, regarding the aforesaid matters and they have not been indemnified by the said Fred W. Bickford, Commissioners of the Palisades Interstate Park or Indemnity Insurance Company of North America, or either of them, but bring this suit of their own free will and to avoid being molested or injured touching the matters contained in this bill of complaint.

15. Complainants are without adequate remedy in the courts of law and therefore pray:

1. That Fred W. Bickford, Commissioners of the Palisades Interstate Park and Indemnity Insurance Company of North America, who are defendants to this suit, may answer this bill of complaint and each statement therein made and may interplead and determine their rights to the said sum of $3,701.47 or any portion thereof.

2. That complainants may be permitted to pay the said sum of $3,701.47 into this court, to be disbursed by such order or decree as this Court may determine.

3. That the said Fred W. Bickford may be enjoined and restrained from proceeding further in any action at law heretofore commenced by him in the New Jersey Supreme Court against the complainants as aforesaid, and that the defendants, Fred W. Bickford, Commissioners of the Palisades Interstate Park and Indemnity Insurance Company of North America and each of them may be enjoined and restrained from commencing or instituting any action or actions, suit or suits, or other proceeding against complainants to recover the said sum of $3,701.47 or any part thereof as is claimed by the three defendants.

4. That complainants, upon payment into this court of the said sum of $3,701.47, and that upon the payment to Fred W. Bickford, or his attorney of the sum of $4,298.53, and upon procuring said defendants to interplead and settle their rights to the said sum of $3,701.47 according to law and the practice of this Court, may be ordered, adjudged and decreed to be discharged from all liability to said defendants, or either of

them arising out of the transactions in this bill of complaint set forth.

5. That the complainants may be paid out of said fund of $3,701.47 the costs of these proceedings.

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

POMEREHNE, LAIBLE & KAUTZ,
Solicitors for and of Counsel
with Complainants.

"SCHEDULE A."

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, that I, Fred W. Bickford, for and in consideration of the sum of EIGHT THOUSAND DOLLARS ($8,000.00) lawful money of the United States of America, to me in hand paid by SCHENO TRUCKING COMPANY, INC., "JOHN" BRITT, first name being fictitious, and "JOHN" SCHENO, first name being fictitious, individually, and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, have remised, released and forever discharged, and by these presents do, for myself, my heirs, executors and administrators, remise, release and forever discharge the said SCHENO TRUCKING COMPANY, INC., "JOHN" BRITT, first name being fictitious and "JOHN" SCHENO, first name being fictitious, individually and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, their

heirs, executors and administrators of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against SCHENO TRUCKING COMPANY, INC., "JOHN" BRITT, first name being fictitious, and "JOHN" SCHENO, first name being fictitious, individually, and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, ever had, now have or which I, the said, Fred W. Bickford, my heirs, executors, or administrators, hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

In Witness Whereof, I have hereunto set my hand and seal the Twelfth day of June, in the year of Our Lord One Thousand Nine Hundred and Thirty-three.

FRED W. BICKFORD (L. S.)

Signed, sealed and delivered
in the presence of:

Katherine E. Christie.

Bill of Complaint—Schedule B.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } SS.:

BE IT REMEMBERED, that on this Twelfth day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-three, before me, the subscriber, a Notary Public of New Jersey, personally appeared FRED W. BICKFORD, who, I am satisfied, is the grantor in the within Release named; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

KATHERINE E. CHRISTIE,
(Notary's Seal) A Notary Public of New Jersey.

"SCHEDULE B."

LELAND F. FERRY
COUNSELLOR AT LAW
32 North Van Brunt Street,
Englewood, N. J.

June 23rd, 1933.

Pomerehne, Laible & Kautz, Esqs.,
1172 Raymond Boulevard,
Newark, New Jersey.

Attention: Mr. Laible.

Re: Bickford vs. Britt and Scheno Trucking Co.

Dear Mr. Laible:

I enclose herewith General Release duly executed by Fred W. Bickford, plaintiff in the above-entitled action, I am forwarding this to you in accordance with our agreement that the

above case is settled for the sum of $8,000.00, which sum is to be paid by Consolidated Indemnity Company whom you represent. I also wish to make it clear that I place this in your hands as trustee to be held until such time as you receive a check from the insurance company to the order of Maurice McKeown, Fred W. Bickford and Leland F. Ferry, in the sum of $8,000.00.

This afternoon Mr. McKeown assured me that he would forward a discontinuance to you immediately.

In view of your statement to me over the telephone, this check should be forwarded to Mr. McKeown, attorney of record for the plaintiff, on or before June 30th.

Very truly yours,

LELAND F. BERRY,

F/M.
Enc. 1.

P. S. Kindly acknowledge receipt.

"SCHEDULE C."

MAURICE J. McKEOWN
Counsellor-at-Law
Union Building,
Newark, N. J.

June 28, 1933.

Pomerehne, Laible & Kautz,
Attorneys for Consolidated Indemnity Ins. Co.,
Lefcourt Building,
Newark, N. J.

Re: Bickford vs. Britt & Scheno, et al.

Attention Mr. Laible.

Dear Sir:

On behalf of the Indemnity Insurance Company of North America, I herewith demand that from the settlement which has been effected in the above entitled matter, the compensation which has been paid and which will become due to Mr. Bickford from the Indemnity Insurance Company of North America, be with-held by you and paid directly to the Indemnity Insurance Company of North America.

The Indemnity Insurance Company of North America has paid compensation up to and including June 13, 1933, and have paid on account of temporary disability the total of 25-1/7 weeks at $18.00 a week, amounting to $452.57 and 76-6/7 weeks at $18.00 a week, amounting to $1,383.43 on account of permanent disability, making a total of 102 weeks at $18.00 a week, amounting to $1,836.00. In addition to this sum we have paid the sum of $998.90 on account of hospital and medical bills.

The above sums were paid by the Indemnity Insurance Company of North America to Mr. Bickford under an informal award made on April 8, 1932 for 25-1/7 weeks temporary and 125 weeks permanent, or a total of 150 1/7 weeks at the rate of $18.00 per week.

I would appreciate receipt of your draft for this sum at your earliest convenience.

Very truly yours,

MAURICE J. McKEOWN.

MJM:JWP

"SCHEDULE D."

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA
Philadelphia

Newark, N. J. July 27, 1931.

Re: C-274418

Comm. of the Palisades Int. Park
F. W. Bickford—6/20/31.

Messrs. Britt & Scheno
Main Street
Nyack, N. Y.

Gentlemen:—

This is to advise you that on the 30th day of June, 1931, we were the employers of one Fred W. Bickford who sustained an injury resulting from an automobile accident occurring in the Palisades Interstate Park in the City of Englewood, which accident we believe was due to your negligence. In accordance with the Workmen's Compensation Act of the State of New

Jersey we may be obliged to make payments of compensation to the aforesaid employee, and further, to pay other hospital and medical expenses incurred by him.

In accordance with the rights conferred upon us by the aforesaid Workmen's Compensation Act, we will look to you for reimbursement of any money which we may be compelled to expend in payment of compensation or otherwise under said Act, in behalf of the aforesaid employee.

Yours very truly,

COMMISSIONERS OF PALISADES
INTERSTATE PARK
BY INDEMNITY INSURANCE CO. OF
N. A. ITS AGENT

C. W. Schwabe.

Copd: AW.

"SCHEDULE E."

LELAND F. FERRY
COUNSELLOR AT LAW
32 North Van Brunt Street,
Englewood, N. J.

June 29th, 1933.

Pomerehne, Laible & Kautz, Esqs.,
1172 Raymond Boulevard,
Newark, New Jersey.

Attention: Mr. Laible.
Re: Bickford vs. Scheno, et als.

Gentlemen:

I am advised that the Indemnity Insurance Company of North America and the Palisades

Interstate Park Commission have made demand upon your company for payment of the sum of $3,701.47, as representing the medical expenses and the award made by the compensation court on behalf of my client, Fred Bickford.

I wish to definitely state at this time that I object to your company making any such payment to either the Commission of Palisades Interstate Park or the Indemnity Insurance Company of North America, who carried the compensation insurance for Mr. Bickford's employer, the Commission of Palisades Interstate Park, above mentioned.

An examination of the statutes and the cases decided thereunder pertaining to this particular question indicates very clearly that the insurance carrier, who happens to be the Indemnity Insurance Company of North America, is not entitled to any part of the amount agreed upon in settlement of this case, nor is the employer, by reason of its not having made any payments to the employee.

You are hereby notified that the $8,000.00, the agreed amount of settlement, should be paid to Fred Bickford, the within named plaintiff, and that any payment you may make otherwise is done at your own peril.

Very truly yours,

Leland F. Ferry.

F/M

Bill of Complaint—Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

HARRY I. JACOBS, of full age, being duly sworn according to law on his oath deposes and says that he is one of the vice-presidents of the complainant, Consolidated Indemnity & Insurance Company, and that the complainants have exhibited their bill of interpleader against the defendants in the above stated cause without any fraud or collusion between them and the said defendants, but merely of their own accord for relief in this court; and that the said bill is not exhibited at the request of the said defendants, or of any or either of them; and that the complainants are not indemnified by the said defendants, or by either of them; and he further says that the complainants have exhibited said bill with no other intent but to avoid being sued or molested by the said defendants touching the matters contained in said bill.

HARRY I. JACOBS.

Sworn and subscribed before me
this 22nd day of August, A. D.
1933.

ELIZABETH C. CASHIN,
Notary Public of N. J.

Restraining Order.

RESTRAINING ORDER.

Filed August 22, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FREDERICK W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Restraining Order.

Upon reading and filing the bill of complaint in the above-entitled cause, and the affidavit thereto annexed, and it appearing that the complainant, Consolidated Indemnity & Insurance Company, has paid to the Clerk of this Court the sum of $3,701.47 mentioned in complainants' bill of complaint:

IT IS, on this 22nd day of August, 1933, on motion of Pomerehne, Laible & Kautz, solicitors of the complainants,

Restraining Order.

ORDERED that the defendant, Frederick W. Bickford, be and he is hereby enjoined and restrained from proceeding further in the action at law heretofore commenced by him in the New Jersey Supreme Court, described in said bill of complaint, and that the defendants, Frederick W. Bickford, Commissioners of the Palisades Interstate Park, and Indemnity Insurance Company of North America, and each of them be and they are hereby enjoined and restrained from commencing or instituting any action, suit or suits, or other proceedings at law against the complainants to recover the said sum of $3,701.47, mentioned in the bill of complaint, or any part thereof, until the further order of this Court.

And it is further ORDERED that a true copy of this order, which may be certified by the solicitors of the complainants, may be served either upon the said defendants or their solicitors within three days from the date hereof.

Respectfully advised,

ROBERT F. GROSMAN,

A. M.

Interlocutory Decree.

INTERLOCUTORY DECREE.

Filed October 3, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FREDERICK W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Interlocutory Decree.

This cause coming on to be heard on notice to all defendants named in the bill, in the presence of Pomerehne, Laible & Kautz, of counsel with the complainants, no person appearing for any defendant, and it appearing that none of the defendants have answered the bill of complaint and that the time limited for the filing of answers having expired, and it appearing to the Court that the defendants, Frederick W. Bickford and Indemnity Insurance Company of North America, respectively, have filed their statements

of claim, and it appearing to the Court upon consideration thereof that the complainant, Consolidated Indemnity & Insurance Company hold the funds in their bill mentioned for the true owner without having or claiming any right of interest therein; and that the said funds have been deposited in this Court to be delivered over to whomsoever may have the right thereto;

It is, thereupon, on this third day of October, 1933, by His Honor, Luther A. Campbell, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED, and the said Chancellor does, by virtue of the power and authority of this Court, hereby order, adjudge and decree, that the said bill of interpleader is properly brought by the complainants in this cause, and they are entitled to relief in this court.

And it is FURTHER ORDERED, ADJUDGED and DECREED, that the said complainants be dismissed from the further prosecution of this suit, and their costs to be taxed, and a counsel fee of One Hundred Dollars, and paid by the Clerk of this Court out of the fund, and that they be released, acquitted and discharged from all claims or liability to any of the defendants in this suit, for, upon or by reason of said fund.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

MALCOLM G. BUCHANAN,

V.-C.

ORDER AMENDING INTERLOCUTORY DECREE.

Filed October 17, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FREDERICK W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Order Amending Interlocutory Decree.

It appearing that from the interlocutory decree entered in this cause, directions to the defendants to interplead have been inadvertently omitted, therefore, on motion of Pomerehne, Laible & Kautz, solicitors for complainants, on this 17th day of October, 1933, it is

ORDERED, that said interlocutory decree be supplemented by including therein, the following:

Order Amending Interlocutory Decree.

"And it is further ORDERED, ADJUDGED and DECREED that the defendants do interplead, settle and adjust their several claims and matters in controversy in this suit between themselves."

Respectfully advised,

MALCOLM G. BUCHANAN,
V.-C.

STATEMENT OF CLAIM OF FRED W. BICKFORD.

Filed September 7, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill, etc.

Statement of Claim of Non-Answering Defendant, Fred W. Bickford.

Statement of claim of the defendant, Fred W. Bickford, of the Borough of Fort Lee, County of Bergen, and State of New Jersey.

1. This defendant on or about June 23, 1933 entered into an agreement with the complainant, Consolidated Indemnity and Insurance Company whereby the said complainant agreed in behalf of the other complainants to pay to this defendant the sum of Eight Thousand Dollars ($8,000.00) in settlement of a suit brought by said

defendant in the New Jersey Supreme Court against Scheno Trucking Company, Inc., John Britt (first name being fictitious), and John Scheno (first name being fictitious), individually and trading as a co-partnership known as Britt & Scheno Trucking Co., and Frank Kline, as a result of injuries sustained by said Fred W. Bickford while in the employ of the Palisades Interstate Park Commission, the said accident having been caused by the negligence of the said Scheno Trucking Company, Inc., its servants, agents or employees.

2. The complainants, nor any of them, have ever paid to this defendant nor has any person in their behalf paid to this defendant the sum of Eight Thousand Dollars ($8,000.00) so due to him, or any part thereof, except that the complainant, Consolidated Indemnity and Insurance Company has paid to defendant the sum of Four Thousand Two Hundred Ninety-eight Dollars and Fifty-three cents ($4,298.53).

LELAND F. FERRY,
Solicitor of the Defendant,
Fred W. Bickford.

Statement of Claim of Indemnity Insurance Company of North America.

STATEMENT OF CLAIM OF INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

Filed September 7, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill, &c.

Statement of Claim.

Statement of claim of Indemnity Insurance Company of North America, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania.

1. On or about June 30, 1931, Frederick W. Bickford was an employee of the defendant, Commissioners of Palisades Interstate Park.

2. On or about the said date, the said Frederick W. Bickford received personal injuries

when he was struck by an automoble owned and operated by Scheno Trucking Company, Inc., a corporation of the State of New York, and John Britt, Paul Scheno and Frank Kline.

3. Said Frederick W. Bickford received his injuries in the course of his employment.

4. By virtue of the foregoing, the defendant, Commissioners of Palisades Interstate Park, under the Workmen's Compensation Act, P. L. 1911, Ch. 95, together with its supplements and amendments, became obligated to pay stated compensation and medical expenses to the said Frederick W. Bickford, its injured employee.

5. Prior to the time of the aforesaid injury, the Indemnity Insurance Company of North America had issued to the Commissioners of Palisades Interstate Park a policy of insurance, whereby it agreed to pay to any person entitled thereto, under the Workmen's Compensation Law, the entire amount of any sum due to such person, because of the obligation for compensation for any such injuries imposed upon or accepted by said Commissioners of Palisades Interstate Park under such of certain statutes as may be applicable thereto, each of which statutes is herein referred to as the Workmen's Compensation Law, and for the benefit of such person, the proper costs whatever of medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, as are required by the provision of such Workmen's Compensation Law. Said policy was in full force and effect at all times mentioned herein.

6. On April 8, 1932, informal award was made in the Workmen's Compensation Court, by

virtue of which the Indemnity Insurance Company of North America agreed to pay to Frederick W. Bickford compensation for temporary disability for a period of 25 1/7 weeks and to pay Frederick W. Bickford compensation for permanent disability for a period of 125 weeks, both at the rate of $18.00 per week, and to pay medical expenses in the sum of $998.90. A true copy of said agreement is attached hereto, made a part hereof and marked "Schedule A."

7. Said Frederick W. Bickford, notwithstanding the above agreement, to pay compensation, started a suit at common law against Scheno Trucking Company, John Britt, Paul Scheno and Frank Kline, in which action he sought compensation for the said injuries which he received aforesaid.

8. At the time of the alleged injury, the Consolidated Indemnity & Insurance Company covered the defendants named in the said action at law by its policy of insurance against certain liabilities for damages resulting from negligent operation of motor vehicles operated by its assured, particularly classified and named in said issued policy of insurance, of which the automobile causing the alleged injury to Frederick W. Bickford was one.

9. On or about June 12, 1933, negotiations were entered into between Consolidated Indemnity & Insurance Company and said Frederick W. Bickford, for the settlement of the aforesaid common law action and on that date a general release was given by Frederick W. Bickford to Pomerehne, Laible & Kautz of Newark, New Jersey, as attorneys for the Consolidated Indemnity & Insurance Company, for the sum of

$8,000 in full settlement of any liability on the part of the assured of the Consolidated Indemnity & Insurance Company. A true copy of said release is attached hereto, made a part hereof and marked "Schedule B."

10. The Indemnity Insurance Company of North America, pursuant to its agreement to pay compensation to Frederick W. Bickford had paid to Frederick W. Bickford up to and including June 13, 1933, $1,836.00 as compensation and had paid medical expenses amounting to $998.90, making a total amount of $2,834.90. The total obligation in accordance with the award aforesaid amounts to $3,701.41.

11. The Consolidated Indemnity & Insurance Company has admitted its liability in this case to pay the sum of $3,701.41 to one of the defendants herein and has prayed to deposit the aforesaid sum of $3,701.41 into this court. (See Bill of Interpleader filed in this case.)

12. On or about July 27, 1931, this defendant served upon the Scheno Trucking Company, Inc., Paul Scheno, John Britt, and Frank Kline, a notice in its own name and in the names of the Commissioners of Palisades Interstate Park, requiring said Scheno Trucking Company, John Britt, Paul Scheno and Frank Kline to deduct from any payment which they might make by release or in judgment to said Frederick W. Bickford, a sum equivalent to the amount of compensation payments which the Commissioners of Palisades Interstate Park, or the Indemnity Insurance Company of North America, had paid or would pay the said Frederick W. Bickford, the injured employee, and any medical disbursements relative to effecting a cure of the afore-

said injured employee, Frederick W. Bickford, as provided in the statute in such case made and provided. A true copy of this notice is annexed hereto, made a part hereof and marked "Schedule C."

13. The policy of insurance in effect between Indemnity Insurance Company of North America and the defendant Commissioners of Palisades Interstate Park, hereinabove referred to, contained a provision as follows:

"K. The company shall be subrogated in case of any payment under this policy to the extent of such payment to all right of recovery therefor vested by law, either in this employer or any employee or his dependents claiming hereunder against persons, corporations, associations or estates."

14. By reason of said provision K, the policy of insurance as aforesaid and by reason of the statutes in such case made and provided, this defendant is entitled in equity to stand in the place of and be subrogated to all the rights of the defendant, Commissioners of Palisades Interstate Park.

15. On June 28, 1933, Maurice J. McKeown, attorney for Indemnity Insurance Company of North America, demanded from Pomerehne, Laible & Kautz, attorneys for the Consolidated Indemnity & Insurance Company, that the Consolidated Indemnity & Insurance Company should retain from the aforesaid settlement of $8,000.00 a sum sufficient to compensate the Indemnity Insurance Company of North America for all moneys it had paid to Frederick W. Bickford by way of compensation pursuant to the agreement mentioned aforesaid and for the

medical expenses which said Indemnity Insurance Company had paid pursuant to the aforesaid agreement. True copy of said demand is attached hereto, made a part hereof and marked "Schedule D."

Wherefore, this defendant says it is entitled to possession of the sum of $2,834.90,

(a) By virtue of the statute in such case made and provided,

(b) By virtue of the rights of the defendant, Commissioners of Palisades Interstate Park, and the subrogation of this defendant thereto.

MAURICE J. McKEOWN,
Solicitor for Indemnity Insurance Company of North America.

"SCHEDULE A."

C-274418

Comm. of the Palisades Int. Park
(Name of employer.)

Fred W. Bickford
(Name of injured employee.)

Date of Accident
Number of Month 6
Day of Month 30 Leave this blank.....
Year 31

Date of preparing this blank 4/22/32.

Date disability began 6/30/31.

Date injured was able to resume work 12/23/31.

30. Did injury result in death? No.

31. State cost of medical aid rendered by you or your insurance carrier.....

Statement of Claim of Indemnity Insurance Company of North America.

32. Did any permanent injury result from this accident, such as amputation or loss or impairment of any member or function. Yes.
33. State fully the nature of such permanent injury. 100% of right foot.
(Fuller statement may be placed on other side of blank.)
34. For how long a time was this employee unable to work because of the injury? 25-1/7 weeks.
(State weeks and fraction thereof.)
35. For how many weeks was compensation paid for temporary disability? 25-1/7 weeks.
36. Give total compensation of temporary disability. $452.57.
37. For how many weeks will compensation be paid for amputation?.....
38. For how many weeks will compensation be paid for other permanent injury? 125 weeks.
39. The weekly compensation will be $18.00.
40. Give total compensation for permanent injury. $2,250.00.

The undersigned hereby affirms the correctness of the statements given, and guarantees the paying of compensation according to law, for the permanent injury stated herein.

INDEMNITY INSURANCE CO. OF N. A.
(Signature of employer or insurance carrier.)

The undersigned does hereby acknowledge the correctness of the statements on this blank, and agrees to accept compensation as herein set forth.

Refused to sign .....
(Signature of employee.) (His mark.)

Statement of Claim of Indemnity Insurance Company of North America.

If signed by mark, same must be witnessed.

.....

(Signature of witness or guardian.)

"SCHEDULE B."

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, that I, Fred W. Bickford, for and in consideration of the sum of EIGHT THOUSAND DOLLARS ($8,000.00) lawful money of the United States of America, to me in hand paid by SCHENO TRUCKING COMPANY INC., "JOHN" BRITT, first name being fictitious, and "JOHN" SCHENO, first name being fictitious, individually, and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, have remised, released and forever discharged, and by these presents do, for myself, my heirs, executors and administrators, remise, release and forever discharge the said SCHENO TRUCKING COMPANY INC., "JOHN" BRITT, first name being fictitious and "JOHN" SCHENO, first name being fictitious, individually and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, their heirs, executors and administrators of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against SCHENO TRUCKING COM-

PANY INC., "JOHN" BRITT, first name being fictitious, and "JOHN" SCHENO, first name being fictitious, individually and trading as a co-partnership known as BRITT & SCHENO TRUCKING CO. and FRANK KLEIN, ever had, now have or which I, the said, Fred W. Bickford, my heirs, executors, or administrators, hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the Twelfth day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

FRED W. BICKFORD, (L. S.)

Signed, sealed and delivered
in the presence of:
KATHERINE E. CHRISTIE.

"SCHEDULE C."

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA.
Philadelphia.

Newark, N. J. July 27, 1931.

Re: C-274418.
Comm. of the Palisades Int. Park
F. W. Bickford 6/20/31.

Messrs. Britt & Scheno,
Main Street,
Nyack, N. Y.

Gentlemen:—

This is to advise you that on the 30th day of June, 1931, we were the employers of one Fred

Statement of Claim of Indemnity Insurance Company of North America.

W. Bickford who sustained an injury resulting from an automobile accident occurring in the Palisades Interstate Park in the City of Englewood, which accident we believe was due to your negligence. In accordance with the Workmen's Compensation Act of the State of New Jersey, we may be obliged to make payments of compensation to the aforesaid employee, and further, to pay other hospital and medical expenses incurred by him.

In accordance with the rights conferred upon us by the aforesaid Workmen's Compensation Act, we will look to you for reimbursement of any money which we may be compelled to expend in payment of compensation or otherwise under said Act, in behalf of the aforesaid employee.

Yours very truly,

COMMISSIONERS OF PALISADES INTERSTATE PARK,

By Indemnity Insurance Co. of N. A.
Its Agent C. W. Schwabe.

Copd:AW

"EXHIBIT D."

Pomerehne, Laible & Kautz,
Attorneys for Consolidated Indemnity Ins. Co.
Lefcourt Bldg.,
Newark, N. J.

Re: Bickford vs. Britt & Scheno, et al.

Attention Mr. George Laible.

Dear Sir:—

On behalf of the Indemnity Insurance Company of North America, I herewith demand that

from the settlement which has been effected in the above entitled matter, the compensation which has been paid and which will become due to Mr. Bickford from the Indemnity Insurance Company of North America, be withheld by you and paid directly to the Indemnity Insurance Company of North America.

The Indemnity Insurance Company of North America has paid compensation up to and including June 13, 1933, and have paid on account of temporary disability a total of 25-1/7 weeks at $18.00 a week, amounting to $452.57, and 76-6/7 weeks at $18.00 a week, amounting to $1383.43 on account of permanent disability, making a total of 102 weeks at $18.00 a week, amounting to $1836.00. In addition to this sum we have paid the sum of $998.90 on account of hospital and medical bills.

The above sums were paid by the Indemnity Insurance Company of North America to Mr. Bickford under an informal award made on April 8, 1932 for 25-1/7 weeks temporary and 125 weeks permanent, or a total of 150-1/7 weeks at the rate of $18.00 per week.

I would appreciate receipt of your draft for this sum at your earliest convenience.

Very truly yours,

MAURICE J. McKEOWN.

MJM:UWP

ORDER OF REFERENCE.

Filed December 18, 1933.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Order of Reference.

This matter being opened to the Court by Leland F. Ferry, solicitor of the defendant, Fred W. Bickford, and it appearing that by an interlocutory decree made in the above entitled cause on the 3rd day of October, 1933, and amended by an Order of this Court on the 17th day of October, 1933, it was ordered that the defendants interplead;

And it further appearing that the defendants, Fred W. Bickford and Indemnity Insurance Company of North America have duly filed with the

Order of Reference.

Clerk of this Court statements in writing of their several claims to the fund deposited with the Clerk of this Court in this cause, and it appearing that the defendants above named have duly consented to the making of this Order.

It is on the 18th day of December, 1933, ORDERED that the above entitled cause be referred to the Honorable J. O. Bigelow, one of the Vice-Chancellors of this Court to hear the same for the Chancellor and to report to him and advise what order or decree should be made therein.

LUTHER A. CAMPBELL,
C.

I hereby consent to the entry of the foregoing Order of Reference.

MAURICE J. McKEOWN,
Solicitor for the Defendant,
Indemnity Insurance Company
of North America.

ORDER OF DESIGNATION.

Filed December 28, 1933.

IN CHANCERY OF NEW JERSEY.

S/M-4.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill of Interpleader.

Order of Designation.

This matter being opened to the Court by Leland F. Ferry, solicitor of the defendant, Fred W. Bickford, and it appearing that Maurice J. McKeown, solicitor of the defendant, Indemnity Insurance Company of North America, has consented hereto;

It is on this 27th day of December, 1933, ORDERED, That the 24th day of January, 1934, at the hour of Ten o'clock in the forenoon, at the

Order of Designation.

Chancery Chambers in the City of Jersey City be designated as the time and place for the hearing of the above entitled cause.

J. O. BIGELOW,
V.-C.

I hereby consent to the entry of the foregoing Order.

MAURICE J. McKEOWN,
Solicitor of the Defendant.
Indemnity Insurance Company,
of North America.

STIPULATION OF FACTS.

Filed January 24, 1934.

IN CHANCERY OF NEW JERSEY.

F/C-3.
Prep.
1/15/34.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York, JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD, COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

On Bill, etc.

Stipulation of Facts.

By agreement between Maurice J. McKeown, Esq., solicitor for the defendant, Indemnity Insurance Company of North America, and Leland F. Ferry, Esq., solicitor for the defendant, Fred W. Bickford, IT IS HEREBY STIPULATED AND AGREED that this matter be submitted on an agreed state of facts as follows:

Stipulation of Facts.

1. On June 30, 1931 one Fred W. Bickford, while employed by the defendant, Commissioners of Palisades Interstate Park, received an injury to his right foot.

2. Subsequent thereto the said Fred W. Bickford applied to the Compensation Bureau for compensation for the injuries received as aforesaid. At an informal hearing on the 8th day of April, 1932, an award of compensation was made in his favor and against the defendant, Commissioners of Palisades Interstate Park, as follows: temporary disability, 25 1/7 weeks at the rate of $18.00 a week, amounting to $452.57 for temporary disability; 125 weeks compensation at the rate of $18.00 a week, amounting to $2,250.00 for permanent disability; and medical expenses amounting to $998.90.

3. At the time of the recovery of the award there was in effect between the Commissioners of Palisades Interstate Park and the Indemnity Insurance Company of North America, a policy of Workmen's Compensation Insurance, and the Indemnity Insurance Company of North America, in accordance with the provisions of its policy, paid 25 1/7 weeks at the rate of $18.00 a week, amounting to $452.57, and compensation for 76 6/7 weeks at the rate of $18.00 a week amounting to $1,383.43, also medical expenses of $998.90.

4. On October 6th, 1931, the defendant, Fred W. Bickford, through Maurice J. McKeown, instituted suit against Scheno Trucking Company, Inc., John Britt, (first name being fictitious) and John Scheno, (first name being fictitious) individually and trading as a co-partnership known as Britt & Scheno Trucking Co., and Frank Kline, to recover money damages for the injuries

sustained by him. On June 23rd, 1933 said suit aforementioned, was settled for the sum of $8,000.00, which was paid by the Consolidated Indemnity and Insurance Company.

5. On July 27th, 1931, while the aforementioned suit was pending, a notice was mailed to Messrs. Britt & Scheno, Main street, Nyack, New York, by Commissioners of Palisades Interstate Park by Indemnity Insurance Company of North America, its agent, demanding reimbursement for any moneys which Commissioners of Palisades Interstate Park might be compelled to expend in behalf of compensation or otherwise under the Workmen's Compensation Act of the State of New Jersey in behalf of the said Fred W. Bickford. A copy of said notice is attached to the bill of interpleader and marked "Schedule D."

6. On June 28th, 1933, Maurice J. McKeown, Esq., attorney for Indemnity Insurance Company of North America, forwarded to Messrs. Pomerehne, Laible and Kautz, attorneys for Consolidated Indemnity Insurance Company, the insurance carrier for Messrs. Britt & Scheno, a demand that an amount equivalent to the moneys paid by the said Indemnity Insurance Company of North America to Fred W. Bickford under the terms of the insurance policy with Commissioners of Palisades Interstate Park be withheld by the said Consolidated Indemnity Insurance Company and paid directly to the Indemnity Insurance Company of North America, which notice is attached to the bill of interpleader and marked "Schedule C." No moneys have at any time either by way of compensation or medical expenses, or otherwise, ever been paid to Fred W.

Bickford or to anyone on his behalf by the employers, Commissioners of Palisades Interstate Park.

7. The contention of the defendant, Indemnity Insurance Company of North America, is that Indemnity Insurance Company of North America is entitled to reimbursement out of the sum of $3,701.47 paid into court for the moneys paid by it to Fred W. Bickford as compensation for temporary disability and permanent disability and medical expenses as provided for under Section 23 (f) of the provisions of the New Jersey Workmen's Compensation Act which is as follows:

"Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. However, in event that the employee or his dependents shall recover from the said third person or corporation, a sum equivalent to or greater than the total compensation payments for which the employer is liable under this statute, the employer shall be released thereby from the obligation of compensation. If, however, the sum so recovered from the third person or corporation is less than the total of compensation payments, the employer shall be liable only for the difference. The obligation of the employer under this statute to make compensation shall continue until the payment, if any, by such third person or corporation is made. Such employer shall file with the third person or corporation so liable, at any time prior to payment, a statement of the compensation

agreement or award between himself and his employee, or the dependents of the employee, and the employer shall thereafter be entitled to receive from such third person or corporation, upon the payment of any amount in release or in judgment by the third person or corporation on account of his or its liability to the injured employee or his dependents, a sum equivalent to the medical expenses incurred and the amount of compensation payments which the employer has heretofore paid to the injured employee or his dependents, which payments shall be deducted by the third persons or corporation from the sum paid in release or judgment to the injured employee or his dependents.

When an injured employee or his dependent fails within six months of the accident, to take legal action against a third party responsible for the injury, or accepts a settlement for less than the compensation obligation of the employer, the employer or his insurance carrier is hereby authorized to proceed legally against such third party; provided, however, if the amount secured by the employer or carrier is in excess of the employer's obligation and the expense of suit, the balance shall be paid to the employee or the dependent.''

8. The contention of the defendant, Fred W. Bickford, is that he is entitled to the full sum of $3,701.47 for the reason that under the provisions of the New Jersey Workmen's Compensation Act, the employer is the only one entitled to be reimbursed out of any settlement for the compensation paid and then only the amount actually paid by such employer and that that right is not extended to an insurance company who pays

compensation because of a contract of insurance it has with the employer.

Dated: January 4, 1934.

MAURICE J. McKEOWN,
Solicitor for Indemnity Insurance
Company of North America.

LELAND F. FERRY,
Solicitor for the Defendant,
Fred W. Bickford.

The Vice-Chancellor, in the consideration of this case, had before him the following section of the Standard Workmen's Compensation and Employer's Liability Policy, issued by the respondent, Indemnity Insurance Company of North America to the respondent employer, Commissioners of Palisades Interstate Park:

> "K. The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer, or in any employe or his dependent claiming hereunder, against persons, corporations, associations or estates."

OPINION OF BIGELOW, V.-C.

Filed February 21, 1934.

IN CHANCERY OF NEW JERSEY.

Between

SCHENO TRUCKING COMPANY, INC., and others,
Complainants,

and

FRED W. BICKFORD, and others,
Defendants,

On Bill, etc.

February 20, 1934.

1. Employer's insurance carrier who paid compensation to an injured employee is entitled to reimbursement out of damages recovered by employee from tort-feasor. Workmen's Compensation Act, sec. 23(f) as amended by P. L. 1931, p. 704.

2. Since the recovery by the workman from the third party releases the employer from the obligation of compensation, neither employer nor insurer has an interest in the amount recovered above the compensation actually paid to the workman.

MR. LELAND F. FERRY, for defendant Fred W. Bickford.

MR. MAURICE J. MCKEOWN, for defendants Commissioners of Palisades Interstate Park and Indemnity Insurance Company of North America.

OPINION.

BIGELOW, *V.-C.*

On bill of interpleader.

Defendant Bickford, while employed by the defendants, Commissioners of Palisades Interstate Park, was accidentally injured by an automobile owned and operated by complainants. Bickford applied to the Workmen's Compensation Bureau and obtained an award of compensation against the Commissioners. $2,835 has been paid to him on account, and compensation for 48 weeks at $18 a week remains to be paid. Bickford, within six months of the day of the accident, brought suit against complainants to recover damages for the injuries sustained by him and later agreed with complainants upon a settlement for $8,000. Complainants have paid into court an amount equal to the compensation already paid to Bickford and the compensation still remaining payable on his award. This sum is claimed by Bickford on the one hand and by his employers and their insurer, the Indemnity Company of North America, on the other.

It is stipulated between the parties that none of the compensation has been paid by the employers and that all such payments have been made by the insurer. Unless the amendment P. L. 1931, p. 704, to section 23(f) of the Workmen's Compensation Act, Sup. C. S. 3868, has changed the rule, the decree must go to the employee Bickford. *Erie R. R.* v. *Michaelson,* 111 N. J. Eq. 541, 162 A. 764; *N. Y. S. & W. R. R.* v. *Huebschmann,* 109 N. J. Eq. 40, 156 A. 330, 111 N. J. Eq. 547, 162 A. 767; *Fidelity & Casualty Co.* v. *Sisters of St. Joseph,* 112 N. J. Eq. 579, 165 A. 430; *Degler* v. *Domejka,* 112 N. J. Eq. 588, 165 A. 583.

A brief review of the development of the statute and the decisions must precede a consideration of the 1931 amendment. In *Newark Paving Co.* v. *Klotz,* 85 N. J. L. 432, 91 A. 91, 86 N. J. L. 690, 92 A. 1086, it was held in an opinion by Justice Swayze that the employer had no right by way of subrogation, to the claim of the workman against the tort-feasor. The employer in that case relied on decisions holding that a fire insurer is subrogated to the insured's cause of action against a third person whose tort had caused the loss; the employer offered himself in the aspect of an insurer of his employee against accidents happening in the course of employment. The legislature, P. L. 1913, p. 302, 312, changed the rule enunciated by Justice Swayze by inserting in the statute the following provision:

"Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. However, in event that the employee or his dependents shall recover from the said third person or corporation, a sum equivalent to or greater than the total compensation payments for which the employer is liable under this statute, the employer shall be released thereby from the obligation of compensation. If, however, the sum so recovered from the third person or corporation is less than the total of compensation payments, the employer shall be liable only for the difference. The obligation of the employer under this statute to make compensation shall continue until the payment, if any, by such third person

or corporation is made. Such employer shall file with the third person or corporation so liable, at any time prior to payment, a statement of the compensation agreement or award between himself and his employee, or the dependents of the employee, and the employer shall thereafter be entitled to receive from such third person or corporation, upon the payment of any amount in release or in judgment by the third person or corporation on account of his or its liability to the injured employee or his dependents, a sum equivalent to the amount of compensation payments which the employer has theretofore paid to the injured employee or his dependents, which payments shall be deducted by the third person or corporation from the sum paid in release or judgment to the injured employee or his dependents."

Then comes P. L. 1917, p. 522, the Workmen's Compensation Insurance Act, requiring every employer who could not satisfy the Commissioner of Banking and Insurance as to the permanence and financial standing of his business to carry workmen's compensation insurance. The employer must post in his place of business the name of the insurer (sec. 6); the insurer is made directly liable to the employee in certain cases (sec. 8) and the insurance contract must provide "that it is made for the benefit of the several employees of the insured employer and their dependents, and that such contract may be enforced by any of such employees or their dependents, suing thereon in his or their names as though distinctly made party thereto" (sec. 9). The employee is given the right to join the insurer with the employer in his petition for compensation or for enforcement of compensation payments (sec. 10)

and it is enacted "that the insurance carrier shall, in all things, be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation" (sec. 11).

Hartford Accident & Indemnity Co. v. *Englander,* 93 N. J. Eq. 188, 118 A. 628, was a bill in equity by the insurer against the employee to recover out of a sum paid to the employee by the wrong-doer whose negligence caused the injury, an amount equal to the compensation paid by complainant. The court said that admittedly there was no privity of contract or otherwise between insurer and defendant employee and that nothing in the act or any principle of equity, in the absence of privity between the parties, would sustain the insurer's claim to subrogation. In weighing the effect on our law of this case, it should be noted that the employer himself could not have recovered, since the rule of the *Klotz* case denied him the position of subrogee and since he did not come within the terms of the statute of 1913 above quoted. So the insurer apparently was impelled to advance a theory that it was directly subrogated to the rights of the employee instead of the usual theory that it stood in the shoes of the insured, the employer.

In *Henry Steers, Inc.* v. *Turner Construction Co.,* 104 N. J. L. 189, 139 A. 42, it was said that the amendment of 1913 (re-enacted and numbered sec. 23(f) by P. L. 1919, pp. 201, 212), "must be liberally construed to effectuate the purpose of its enactment which was, as already indicated, to reimburse the employer for payments which the act required of him regardless of the question of his negligence from the person who was the

wrong-doer." *Brenner* v. *Mount,* 143 A. 868, an action by the employer against the tort-feasor, mentions that the insurance carrier had paid the compensation, but no importance appears to have been given to that fact. *Warner-Quinlan Co.* v. *Byram,* 150 A. 212, was an interpleader by the tort-feasor against the employer, the insurer and the workman. Vice-Chancellor Fallon decided that the insurer was not entitled, citing the Englander case, and that the employer was, but he added, "A payment by an employer's insurance carrier is tantamount to a payment by the employer. Ch. 149, P. L. 1918, p. 431, sec. 5." While it has since been pointed out that this statute was not applicable, the statement that payment by the insurer is tantamount to payment by the employer, is supported by the general rule that insured and insurer are regarded as one person. *Weber* v. *Railroad Co.,* 35 N. J. L. 409.

Then follow the four cases first above cited in which it is laid down that the insurer is not subrogated to the employer's rights under sec. 23(f), and further that a payment of compensation by the insurer pursuant to the terms of its policy, is not, in the absence of further proof, to be considered payment by or on behalf of the employer and hence that the employer cannot recover. These cases are founded on an interpretation of sec. 23(f), that the legislature intended to grant relief to the employer only and not to his insurer. They were all decided after the amendment of 1931, but the amendment is not mentioned in any of the opinions, except in the Huebschmann case and then only to note that it is not pertinent for the reason that it was not passed until after the rights of the parties had

become fixed. The amendment added to sec. 23(f) the following paragraph:

"When an injured employee or his dependent fails within six months of the accident, to take legal action against a third party responsible for the injury, or accepts a settlement for less than the compensation obligation of the employer, the employer or his insurance carrier is hereby authorized to proceed legally against such third party; provided, however, if the amount secured by the employer or carrier is in excess of the employer's obligation and the expense of suit, the balance shall be paid to the employee or the dependent."

The insurance carrier lays much stress on *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530, 53 S. C. 231. This was an action by an insurer against a third party under a federal compensation law. Justice Stone wrote, "We do not doubt, although other courts have, *Henderson Tel. & Tel. Co.* v. *Owensboro Home Tel. & Tel. Co.,* 192 Ky. 322, 233 S. W. 743; *Hartford Accident & Indemnity Co.* v. *Englander,* 93 N. J. Eq. 188, 118 A. 628, that the insurer is subrogated to the rights of the employer to the extent that it has discharged his duties, though whether its rights extend to compensation which it is liable to pay, as well as to that which it has paid, we need not decide. Notwithstanding, the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensaton should be secured by insurance, and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is

a normal incident of indemnity insurance. *Hall & Long* v. *The Railroad Companies,* 13 Wall. 367, 20 L. Ed. 594; *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.,* 129 U. S. 397, 462, 9 S. Ct. 469, 32 L. Ed. 788; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Commercial Union Insurance Co.,* 139 U. S. 223, 235, 11 S. Ct. 554, 35 L. Ed. 154; *Traveler's Insurance Co.* v. *Great Lakes Engineering Co.* (C. C. A.), 184 F. 426, 36 L. R. A. (N. S.) 60; *Workmen's Compensation Exchange* v. *Chicago, M., St. P. & P. R. Co.* (D. C.) 45 F. (2d) 885."

The weight which must be given to an opinion of the U. S. Supreme Court and the fact that in most jurisdictions the courts have differed from the rule laid down in New Jersey, suggest that the question of the proper construction of sec. 23(f) when first presented to the Court of Errors and Appeals, was a close one and that slight changes in the statute by the legislature might well lead to an opposite result. The amendment of 1931, authorizing the employer *or his insurance carrier* to proceed legally against the third party, obviously gives to the insurer a cause of action. Now, if the contention of the defendant employee Bickford is correct, the situation is this: The workman began suit within six months of the accident, and settled for an amount greater than the compensation obligation of the employer. Therefore, the insurer is not entitled to any part of the sum agreed upon in settlement or to an action against the third party, although the employer would have been so entitled if he had been the conduit of the compensation payments. But if the employee had delayed bringing suit or had accepted too small a settlement, then the insurer equally with the employer could have

recovered from the third party, the complainant, the amount of the compensation obligation of the employer. Such a construction of the statute seems to be unreasonable. The legislature, by its last enactment, clearly recognizes the interest of the insurer in the cause of action against the third party whose tort has caused a loss for which the insurer is liable. It puts the insurer on a par with the employer in ability to proceed against the third party when no judgment has been recovered or settlement agreed upon by the employee and I think it must follow that the insurer is subrogated to the employer's interest in a judgment obtained or agreed settlement. The statute must be construed in the light of prevailing business customs. Most employers are required to carry workmen's compensation insurance. The policies, in accordance with the statute, expressly state that they are made for the benefit of the employees severally. It is generally more convenient for insurer, employer and employee alike, that compensation payments should be made directly by the insurer to the injured workman and this is not only the practice, but is required by the usual terms of the policy. I conclude that the money in court to the extent of compensation actually paid, belongs to the Indemnity Insurance Company of North America.

The Insurance Company also claims the balance of the fund, which equals the compensation obligation still unpaid. It points to the proviso at the end of the amendment, "If the amount secured by the employer or carrier is in excess of the employer's obligation and the expense of suit, the balance shall be paid to the employee or the dependent." Whatever the exact effect of

this clause upon a suit by insurer or employer against a third party, the earlier provision of the section remains in force that the recovery by the workman from a third party releases the employer from the obligation of compensation. Since employer and insurer are not liable for further payments to Bickford, they have no interest in the balance of the fund and it will be awarded to the employee. As both contestants win in part, they will bear their own costs.

Final Decree.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Filed April 4, 1934.

Between	
SCHENO TRUCKING COMPANY, INC., and others, *Complainants,*	*On Bill, &c.*
and	*Final Decree.*
FRED W. BICKFORD, and others, *Defendants.*	

This matter being opened to the Court by Maurice J. McKeown, solicitor for and of counsel with the defendant, Indemnity Insurance Company of North America, and in the presence of Leland F. Ferry, solicitor for and of counsel with the defendant, Fred W. Bickford, and it appearing to the Court that a bill of complaint was filed herein by the Consolidated Indemnity & Insurance Company, a corporation, complainant, that it paid into the Clerk of this court the sum of $3,701.47, and out of which was allowed to Pomerehne, Laible & Kautz, solicitors for and of counsel with complainants, the sum of $138.49, and that statements of claims were filed by the defendants, Fred W. Bickford, and Indemnity Insurance Company of North America, each claiming the said fund, that the said defendants submitted the issues joined between them to this Court upon an agreed State of Facts; that the Court having considered the pleadings and the

said agreed State of Facts, from which it appears that the defendant, Indemnity Insurance Company of North America is entitled to receive out of said moneys the compensation actually paid by it, and that the defendant, Fred W. Bickford, is entitled to receive the balance thereof, all in accordance with the opinion filed herein, and Notice of Motion to settle the terms of this decree having been duly served upon solicitor for the defendant, Fred W. Bickford, proof of the service thereof having been filed herein:

It is, thereupon, on this 26th day of March, 1934, DECREED that out of the moneys, to-wit; the sum of $3,701.47, paid into this court by complainant, Consolidated Indemnity & Insurance Company, a corporation, there be paid to the Indemnity Insurance Company of North America, the sum of $2,765.66, which represents the amount of compensation actually paid by it to the defendant, Fred W. Bickford less one-half of fee allowed to complainant; and

It is further DECREED that the balance of the said fund, after deducting $69.25 one-half of fee allowed to complainant, amounting to $797.32, be paid to the defendant, Fred W. Bickford; and

It is further DECREED that the Clerk of this Court make payment of the aforesaid sums in accordance with the terms of this decree.

It is further DECREED that no costs be allowed to either the defendant, Indemnity Insurance Company of North America, or the defendant, Fred W. Bickford, as against the other.

LUTHER A. CAMPBELL,

C.

Respectfully Advised,

J. O. BIGELOW,

V.-C.

Service of a copy of the within instrument is acknowledged this 17th day of March, 1934.

LELAND F. FERRY,
Attorney for Fred W. Bickford.

106MAY.T.1934

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

May Term, 1934.

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York; JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD,

Defendant-Appellant,

COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Respondents.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF FRED W. BICKFORD, DEFENDANT-APPELLANT.

Statement of the Case.

This is an appeal by defendant-appellant, Fred W. Bickford, from so much of the final decree of the Court of Chancery advised by Vice-Chancellor Bigelow on March 26, 1934, as awarded to the defendant-respondent, Indemnity Insurance Company of North America, hereinafter referred to as the "North America

Company," the sum of $2,765.66 (State of Case p. 2, l. 10 and p. 66, l. 20).

Bickford was injured on June 30, 1931 while employed by the defendant-respondent, Commissioners of Palisade Interstate Park, hereinafter referred to as the "Palisades Commissioners" (State of Case p. 50, l. 5). On April 8, 1932 he was awarded compensation against the "Palisades Commissioners" in the sum of $452.57 for temporary disability, $2,250.00 for permanent disability and $998.90 for medical expenses (State of Case p. 50, ll. 12-20). This totals $3,701.47.

At the time of this award there was in effect between the "Palisades Commissioners" and the "North America Company" a policy of Workmen's Compensation insurance. The "North America Company", in accordance with the provisions of said policy, paid to Bickford $452.57 for temporary disability, $1,383.43 on account of permanent disability, and $998.90 for medical expenses (State of Case p. 50, ll. 22-32). This totals $2,834.90.

An explanation of the various figures employed in the State of Case and in this Brief is hereto appended as Appendix A.

On October 6, 1931 Bickford instituted suit against the complainants, Scheno Trucking Company, Inc., John Britt and Paul Scheno, individually and trading as a co-partnership, known as Britt & Scheno Trucking Company, and Frank Kline, to recover damages for the injury sustained by him (State of Case p. 50, ll. 33-40). This suit was settled for the sum of $8,000., on June 23, 1933, payment being made by the complainant, Consolidated Indemnity and Insurance

Company (State of Case p. 51, ll. 4-7): $4,298.53 going to Bickford (State of Case p. 33, l. 20) and the balance of $3,701.47 to the Clerk in Chancery (State of Case p. 65, l. 30).

"No monies have at any time either by way of compensation or medical expenses, or otherwise, ever been paid to Fred W. Bickford or to anyone on his behalf by the employers, Commissioners of Palisades Interstate Park" (State of Case p. 51, l. 38 to p. 52, l. 5).

The complainants filed their bill of interpleader in the Court of Chancery on August 22, 1933 (State of Case p. 10) praying that they be permitted to pay the sum of $3,701.47 into the Court of Chancery to be disbursed as that Court might determine (State of Case p. 16, ll. 14-17). By an interlocutory decree made October 3, 1933 (State of Case p. 29, l. 12) and amended October 17, 1933 (State of Case p. 31, l. 35) the relief sought by the complainants was granted. Bickford (State of Case p. 32) and the "North America Company" (State of Case p. 34) filed claims to the fund. The "Palisades Commissioners" filed no claim to the fund, the Vice-Chancellor's statement (State of Case p. 56, l. 26) to the contrary notwithstanding.

The matter was referred to Vice-Chancellor Bigelow (State of Case p. 45) for hearing. The facts of the case were stipulated by Maurice J. McKeown, solicitor for the "North America Company" and Leland F. Ferry, solicitor for Bickford (State of Case p. 49). The Vice-Chancellor filed his opinion on February 21, 1934 (State of Case p. 55) and advised the final decree on March 26, 1934, as heretofore stated (State of Case p. 65).

BRIEF OF THE ARGUMENT.

POINT I.

The "North America Company" could not have recovered before the re-enactment and amendment of Section 23 (f) of the Workmen's Compensation Act by Chapter 279 of the Laws of 1931.

The fact that none of the compensation was paid by the employer, "Palisades Commissioners", and that all such payments of compensation were made by the insurance carrier, "North America Company", (State of Case p. 51, l. 37) places this case definitely within the category of such cases as:

Erie R. R. v. *Michelson,* 111 N. J. Eq. 541;

N. Y. S. & W. R. R. v. *Huebschmann,* 109 N. J. Eq. 40, affirmed 111 N. J. Eq. 547;

Fidelity & Casualty Co. v. *Sisters of St. Joseph,* 112 N. J. Eq. 579;

Degler v. *Domejka,* 112 N. J. Eq. 588.

In *Erie R. R.* v. *Michelson,* 111 N. J. Eq. 541, this Court, in adopting Vice-Chancellor Fielder's opinion, said (at p. 545):

> "Thus since the enactment of the Workmen's Compensation Act that law has disregarded such rights as the insurance carrier claims here and the legislature has provided only that the employer shall be entitled to receive from the third person wrong-doer the amount of compensation payments which the employer has paid, when the judgment against the wrong-doer is in excess of the compensation award. In the instant case the employer paid nothing to its employe's dependents, all weekly compensation payments having been paid by the

> insurance company directly to said dependents and therefore Frederick Snare Corporation, employer, was not entitled to have Erie Railroad Company retain for its benefit any part of the judgment recovered against the railroad company. The statute in question extends no relief to the insurance company, either by way of subrogation or reimbursement."

Neither the stipulation of facts nor the pertinent legal principles appear to sustain the contention that the compensation was paid on behalf of the "Palisades Commissioners" by the "North America Company" as agent of the "Palisades Commissioners". The Vice-Chancellor suffered no misapprehension on this phase of the case for he said (State of Case p. 56, l. 28):

> "It is stipulated between the parties that none of the compensation has been paid by the employers and that all such payments have been made by the insurer. Unless the amendment P. L. 1931, p. 704, to section 23 (f) of the Workmen's Compensation Act, Sup. C. S. 3868, has changed the rule, the decree must go to the employee Bickford."

The "North America Company" certainly could not have succeeded prior to the enactment of Chapter 279 of the Laws of 1931.

POINT II.

Chapter 279 of the Laws of 1931 did not change the application of Section 23 (f) of the Workmen's Compensation Act to the instant case.

For the better understanding of Court and counsel that part of Chapter 279 of the Laws of 1931 which has been made relevant to this discussion is here printed at length indicating

therein, by brackets, new matter added by the re-enactment.

"3. Paragraph twenty-three (f) is hereby amended to read as follows:

(f) Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. However, in event that the employee or his dependents shall recover from the said third person or corporation, a sum equivalent to or greater than the total compensation payments for which the employer is liable under this statute, the employer shall be released thereby from the obligation of compensation. If, however, the sum so recovered from the third person or corporation is less than the total of compensation payments, the employer shall be liable only for the difference. The obligation of the employer under this statute to make compensation shall continue until the payment, if any, by such third person or corporation is made. Such employer shall file with the third person or corporation so liable, at any time prior to payment, a statement of the compensation agreement or award between himself and his employee, or the dependents of the employee, and the employer shall thereafter be entitled to receive from such third person or corporation, upon the payment of any amount in release or in judgment by the third person or corporation on account of his or its liability to the injured employee or his dependents, a sum equivalent to [the medical expenses incurred and] the amount of compensation payments which the employer has heretofore paid to the injured employee or his dependents, which payments shall be deducted by the third persons or corporation from the sum paid in release or

judgment to the injured employee or his dependents.

[When an injured employee or his dependent fails within six months of the accident, to take legal action against a third party responsible for the injury, or accepts a settlement for less than the compensation obligation of the employer, the employer or his insurance carrier is hereby authorized to proceed legally against such third party; *provided, however,* if the amount secured by the employer or carrier is in excess of the employer's obligation and the expense of suit, the balance shall be paid to the employee or the dependent.]''

A.

The wording of the first paragraph of Section 23 (f) of the Workmen's Compensation Act was for all practical purposes unchanged by Chapter 279 of the Laws of 1931.

It seems hardly necessary to point out that Chapter 279 of the Laws of 1931 alters the first paragraph of section 23 (f) of the Workmen's Compensation Act only by adding the words ''the medical expenses incurred and'' and by changing the word ''theretofore'' to ''heretofore''. Insofar as this case is concerned, therefore, for all practical purposes the first paragraph was re-enacted without change. It would seem that, since the first paragraph is practically the same as it was when the *Michelson* and *Huebschmann* cases were decided, that its application to the instant case should be the same. In a case where the legislature had, as in this instance, amended a statute by adding certain matter to an existing statute, Justice Dixon said:

> ''On April 27th, 1886, the section of which the above-quoted clause is part was amended, but this clause was not altered. *P. L.* of 1886, p. 297. Under the constitution

then in force an amended section must be recited at length in the amending act, but by observing this constitutional form of amending a section, the legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. *McLaughlin* v. *Newark,* 28 Vr. 298; S. C. on error, 29 Vr. 202. A like principle is applied in the interpretation of a revision of laws. 'The laws so adjusted,' said Chief-Justice Beasley, in *Knight* v. *Freeholders of Ocean,* 20 Vr. 485, 'are not to be deemed to have acquired any different efficacy from that possessed by them in their original condition.' "

Schwarzwaelder v. *German Mutual Fire Insurance Co.,* 59 N. J. Eq. 589 (at p. 593).

B.

The new paragraph included in Section 23 (f) of the Workmen's Compensation Act by Chapter 279 of the Laws of 1931 does not apply to the instant case.

The new paragraph, included in section 23 (f), by Chapter 279 of the Laws of 1931, by its very terms, applies only to two specific instances. They are: *first,* when an injured employee, or his dependent, fails within six months of the accident to take legal action against a third party responsible for the injury and, *second,* when an injured employee, or his dependent, accepts a settlement for less than the compensation obligation of the employer.

Bickford came within neither of these instances. He was injured June 30, 1931 (State of Case p. 50, l. 3), took legal action on October 6, 1931 (State of Case p. 50, l. 33) and accepted a settlement of $8,000. (State of Case p. 51, l. 4), whereas, the "Palisades Commissioners" total compensation obligation was $3,701.47 (State of Case p. 50, ll. 15-20, p. 15, l. 10).

The Vice-Chancellor had no question concerning the non-application of the new paragraph to the instant case, for, he said (State of Case p. 62, l. 30):

> "The workman began suit within six months of the accident, and settled for an amount greater than the compensation obligation of the employer."

It is unnecessary, therefore, to further point out that the new paragraph included in section 23 (f) by Chapter 279 of the Laws of 1931, by its terms, does not affect the instant case. No change having been made in that first paragraph and the second paragraph having no application to this case, it would seem to follow, without more, that the Vice-Chancellor was in error.

POINT III.

The language of Section 23 (f) of the Workmen's Compensation Act is clear, unambiguous and reasonable.

A.

Section 23 (f) of the Workmen's Compensation Act as re-enacted and amended by Chapter 279 of the Laws of 1931 is not ambiguous.

When this Court decided the *Michelson* and *Huebschmann* cases, it implied, as clearly as if it had expressly said, that there was no ambiguity in the language of the first paragraph of section 23 (f). Its decision that the insurance carrier could not recover was definite, evidencing the fact that it had no difficulty in understanding the language of the legislature.

It was, of course, held that the second paragraph of section 23 (f) could have no application to, or consideration in, the *Huebschmann*

case because of the time of its enactment. Likewise, the second paragraph can have no application to, or consideration in, this case because, by its very terms, it cannot apply to Bickford. Insofar as the *Huebschmann* and the instant cases are concerned, both are governed by the same clear wording of the first paragraph. The second paragraph is as to both mere surplusage.

It cannot be reasonably argued that there is anything ambiguous about the expressed words of section 23 (f). The entire argument for the proposition necessary to support the Vice-Chancellor's conclusion is based upon the fact that the use of the words "insurance carrier" in the second paragraph of section 23 (f) evinces a legislative intention to include the words "insurance carrier" in the first paragraph of the section.

Assuming that the Court might inquire beyond the clear language of the statute, a limited inquiry might be made into the reason why the legislative intent appears otherwise than the Vice-Chancellor concluded.

In the first place may we repeat that the first paragraph of section 23 (f) was, of course, reenacted in its entirety. There was not merely an amendment by the addition of the second paragraph. Accordingly, when the legislature reenacted the first paragraph and, in such re-enactment, omitted reference to "insurance carrier" such omission is strong and, in fact, conclusive evidence of its intention to omit those words. In 25 *R. C. L.* Sec. 225 (at p. 974) it is said:

> "The courts have frequently adverted to the fact that if the legislature had intended to accomplish a particular end it would have been a very simple matter for it to have employed appropriate language to express

> its intention; 'it would,' it has sometimes been said, 'have been easy to say so.' "

In *Ford* v. *Potts,* 6 N. J. L. 388 (at p. 394), Chief Justice Kinsey said:

> "The legislature have not declared, that the omission to take the oath should invalidate the award, and we cannot suppose that this was their meaning. If such was their intention, it might easily have been expressed, but as it is omitted, we can only judge of their intentions by what they have done."

CF. Hale v. *Lawrence,* 21 N. J. L. 714 (middle of p. 735).

It would be unreasonable to assume that the legislature would twice have omitted words which it intended to include. With much more reason can it be said that such repeated omission means exclusion.

However, it not only re-enacted the first paragraph, omitting the words "insurance carrier", but, in the same section, namely, in the second paragraph thereof, it included the words "insurance carrier". Therefore, if the repeated omission of the words "insurance carrier" from the first paragraph evidenced an intention to exclude them, certainly their inclusion in the immediately succeeding paragraph adds emphasis to the intention which was realized in such exclusion. It also demonstrates that the legislature was cognizant of the claims of the insurance carrier, clearly excluding it from participation in the first paragraph and expressly including it in the second. It intended that only in the situations provided for in the second paragraph was the insurance carrier to play any part.

Under these circumstances since the Court, in construing a statute, must ascertain and give effect to the legislative intent as expressed in the language of the statute, the Court cannot, under its powers of construction, supply omissions in a statute, especially when it appears, as it does in this case, that the words "insurance carrier" have been intentionally omitted. *In Re Barnet's Estate,* 275 P. 453; (at foot of 2nd col. on p. 455) 97 Cal. App. 138; *Commonwealth* v. *Lipginski,* 279 S. W. 339 (near foot of 2nd col. on p. 340); 212 Ky. 366.

The conclusion is unavoidable that this Court having once, without difficulty, read and understood the first paragraph, can read and understand that paragraph again without the aid of the second paragraph, particularly since that paragraph admittedly does not apply to Bickford.

B.

The first and second paragraphs of Section 23 (f) of the Workmen's Compensation Act are not inconsistent.

The first paragraph of section 23 (f) of the Workmen's Compensation Act deals with a right of action by an employee against a third party who is liable to such employee for an injury or death and provides that where the employee or his dependents shall recover from such third party a sum equivalent to, or greater than, the total compensation payments for which the employer is liable, the employer shall be released from such obligation. It also provides for partial recovery by the employee from such third party. It also provides that when the employer pays the compensation obligation to the employee, the employer shall be entitled to receive payment therefor from the third party.

Throughout the first paragraph there is no reference to insurance carrier and, as this Court held in the *Michelson* and *Huebschmann* cases, there was no intention to refer to the insurance carrier. Nor is there a reference to a limitation of any period in which the employee must take legal action against the third party, after which the employer or any other might take such legal action. Nor is there any right expressly given to employer or insurance carrier to proceed legally against such third party in the event the employee accepts a settlement for less than the compensation obligation of the employer.

The second paragraph, therefore, which deals with these two latter situations incorporates into the workmen's Compensation Act a statement of two rights which were not theretofore included, namely, *first,* that if the injured employee did not take legal action against a third party within six months after the accident then, and only then, not only the employer but his insurance carrier might take such legal action and, *second,* in the event that the employee accepted a settlement of less than the compensation obligation then, and only then, the employer or his insurance carrier might take legal action. It will be noticed that the employer's and insurance carrier's rights under this paragraph are not dependent upon any payments having been made by them.

There is, therefore, no inconsistency between the two paragraphs of section 23 (f).

C.

The provisions of Section 23 (f) of the Workmen's Compensation Act are not unreasonable.

The Vice-Chancellor (State of Case p. 62, l. 30) reasons that because the workman, if he began suit within six months of the accident and settled for an amount greater than the compensation obligation, had the control in his hands and that, in that situation, the insurer was not entitled to any part of the recovery, although the employer would be if he had been the conduit of the compensation payments, but, if the employee delayed beginning suit or accepted too small a settlement, then the insurer and the employer could have recovered from the third party. The Vice-Chancellor concludes that such a construction of the statute seems to be unreasonable.

On the contrary, it seems quite reasonable that the employee should have control of the cause of action arising out of injury to his person, provided, he proceeds with his legal action expeditiously and, for that purpose, the legislature has given him control if he does proceed within six months. The legislature has also left the control with the workman in the matter of settlement, provided, he does not settle for an amount less than the compensation obligation.

It is only when the workman fails to act expeditiously or when he settles for an amount less than the compensation obligation that there is an express provision allowing the employer to sue and any provision at all allowing the insurance carrier to sue. This clearly evidences a legislative plan to give to the workman an opportunity to properly care for his own recovery, failing to do which, the legislature gives to both

the employer and his insurance carrier the right to see to it that the employee's laches shall not result in the third party's escape. The concern for the employee is emphasized in the provision that if more than the compensation obligation is recovered by employer or insurance carrier such surplus belongs to the employee.

As a matter of fact, that the provisions of section 23 (f) might be unreasonable, or even absurd, is not to be considered so long as the language of the section is clear. *Douglass* v. *Chosen Freeholders of Essex Co.*, 38 N. J. L. 214 (at foot of p. 216). However, this aspect of the matter will be considered under the next point of this Brief.

POINT IV.

Since the language of Section 23 (f) of the Workmen's Compensation Act is plain and unambiguous, there is no occasion for construction.

In 59 *C. J.* at p. 953 it is said:

> "Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority."

The Supreme Court in *In Re City of Passaic*, 94 N. J. L. 384 said (at middle of p. 386):

> "Where an act is plain and unambiguous in its terms the rule is fundamental that

there is no room for judicial construction, since the language employed is presumed to evince the legislative intent."

In *Hamilton* v. *Rathbone,* 175 U. S. 414 (at p. 421), it is said:

"The cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Nor should the Court overlook the danger of encroaching upon a legislative function. The caution is well sounded in *Johnson* v. *Barham,* 99 Va. 305 (at p. 310), 38 S. E. 136 (foot of 2nd col. on p. 137):

"It is safer in a case which admits of doubt, where the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation than that courts should too readily yield to a supposed necessity, and exercise a power so delicate and so easily abused as that of adding to or taking from the words of the statute."

Furthermore in *Lane* v. *Schomp,* 20 N. J. Eq. 82 (at page 86), Chancellor Zabriskie said:

"Words should never be supplied or changed unless to effect a meaning clearly shown by the other parts of the statute, to carry out an intent somewhere expressed."

Our courts have very definitely frowned upon any unauthorized attempt at judicial legislation. In *Guest* v. *Opdyke,* 31 N. J. L. 552, an attempt similar to that made in this case was soundly rebuffed by Chief Justice Beasley saying (at foot of p. 556):

"It is clear then that this language, the words being understood in their usual sense,

> will comprehend the grain in dispute. But this court is asked to limit, by construction, the actual force of the phraseology, and to declare that the expression 'all grain' means, in the connection in which it is used, the 'grain of the tenant only.' It is urged that a legislative purpose, inconsistent with the literal signification of the terms, of this third clause, can be gathered from the purview of the section. But such purpose is, at best, but faintly to be seen, and is, therefore, dubious, while the language of the third clause is clear and explicit."

Perhaps the most outstanding declaration is found in *Douglass* v. *Chosen Freeholders of Essex Co.*, 38 N. J. L. 214 (at foot of p. 216), where it is said:

> "Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result, is out of place. It is no province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense, so that even if in this case it could be demonstrated that the regulation in question was incommodious, or even hurtful, an appeal for relief to the judicial power would be utterly in vain."

This language has been endorsed time and time again. The most recent endorsement is to be found in *In Re Freeholders of Hudson County,* 105 N. J. L. 57 (at p. 64); and in *Passaic &c. Water Co.* v. *McCutcheon,* 105 N. J. L. 437 (at p. 444).

CONCLUSION.

It remains to be noted that the Vice-Chancellor called attention to *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530, and reasoned that because the United States Supreme Court apparently decided differently than our Court of Errors and Appeals that, therefore, there should be a reversal of the holding of our Court. In the first place, the statute under construction in the *Aetna* case bears very little resemblance to our statute and, in the second place, the substance of the argument in the *Aetna* case, which was very forcibly reflected in Mr. Edward A. Markley's Brief in the *Huebschmann* case, was rejected by this Court.

It is, therefore, respectfully submitted that the decree of the Court of Chancery be reversed insofar as it awarded to the defendant-respondent, "North America Company" the sum of $2,765.66.

Respectfully submitted,

GEORGE F. LOSCHE
LOUIS A. MOUNIER, JR.,
Of Counsel.

LELAND F. FERRY,
Solicitor of Defendant-appellant:
FRED W. BICKFORD.

APPENDIX A.

Total compensation award to Bickford by the Workmen's Compensation Bureau (State of Case p. 50, ll. 15-20) and the amount paid into the Court of Chancery by complainants (State of Case, p. 66, l. 17).....	$3,701.47
Total compensation paid to Bickford by the "North America Company" (State of Case p. 50, ll. 20-32).....	2,834.90
Compensation remaining unpaid.....	886.57
½ fee of $138.49 allowed complainants (State of Case p. 66, l. 26).....	69.25
Sum awarded Bickford by final decree (State of Case p. 66, l. 27).....	797.32

Total compensation paid to Bickford by the "North America Company" (State of Case p. 50, ll. 20-32).....	$2,834.90
½ fee of $138.49 allowed complainants (State of Case p. 66, l. 26).....	69.24
Sum awarded "North America Company" by final decree (State of Case p. 66, l. 21)	2,765.66

106MAY.T.1934

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York; JOHN BRITT and PAUL SCHENO, FRANK KLINE, and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD,

Defendant-Appellant,

COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Respondents.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendant-Respondent.

Preliminary Statement.

This case was submitted to the lower court upon an agreed set of facts (State of Case pp. 49-54). Appellant's brief contains a statement of the facts which are substantially identical to the facts contained in the stipulation, and we will not reiterate them here.

The sole issue involved in this appeal is the conclusion of the lower court in awarding to this

respondent the sum of $2,834.90 to reimburse it for a similar sum it had paid to Bickford under its compensation policy. This sum had been placed in the Court of Chancery by the Consolidated Indemnity and Insurance Company who had settled the third party action for $8,000.00. The balance of this sum, after deducting the amount decreed by the court to be awarded to this defendant, has all been paid to appellant.

The question for determination brought up by this appeal is the construction to be placed upon the Workmen's Compensation Act (Section 23 (f)) as amended by Chapter 279 of the Laws of 1931.

POINT I.

It is a sufficient answer to the argument of appellant under Point I of his brief, to state that respondent has never contended as to what his rights may have been prior to the amendment of 1931. That question is not in issue here. All of the cases quoted by appellant under this point were decided under the Act as it existed prior to this amendment, and it is, therefore, difficult to see their pertinency on this appeal. The Vice-Chancellor conceded in his opinion that the conclusion reached by him would have been different had he been deciding the case under the Act as it existed prior to the amendment. (See opinion of Vice-Chancellor Bigelow, S. of C. p. 56, ll. 33-40).

It is significant to observe, however, that in *N. Y. S. & W. R. R. Co.* v. *Huebschmann,* 111 N. J. E. 547, this court in affirming a decree of the Court of Chancery denying the insurance carrier and the employer, its assured, recovery, decided the issue on the Act as it was prior to

1931, and specifically left open the effect of the amendment of that year, stating it was not pertinent to the issue then before it. The court below recognized this and based his ruling squarely upon the amendment of 1931.

POINTS II, III and IV.

The court below properly decided that respondent is entitled to be reimbursed for payments made by it to appellant.

Appellant, in his brief has divided his argument into three main parts, with a number of sub-divisions. The whole argument, however, has to do with the effect to be given to the amendment of 1931, and respondent will, therefore, consider them as one.

The Workmen's Compensation Act has always been held to be a remedial statute. *Fisher* v. *Tidewater Building Co.,* 96 N. J. L. 103 (Supreme Court 1921), Aff. 97 N. J. L. 324 (E. and A. 1922); *Combination Rubber Mfg. Co.* v. *Obser,* 95 N. J. L. 43 (Supreme Court 1920), Aff. 96 N. J. L. 544 (E. and A. 1921); *Henry Steers, Inc.* v. *Turner Construction Co.,* 104 N. J. L. 189 (E. and A. 1927).

In construing remedial statutes our courts have repeatedly stated that three things must be considered; The old law, the mischief and the remedy to be effectuated. *Horner* v. *Webster,* 33 N. J. L. 387 (E and A. 1867); *Board of Conservation and Development* v. *Veeder,* 89 N. J. L. 561 (E. and A. 1916); *Harcum* v. *Greene,* 111 N. J. L. 129 (Supreme Court 1933).

Applying the principles enunciated in the foregoing cases, it is pertinent to inquire into the state of the law as it existed at the time of the

enactment of the amendment in 1931. No doubt can be entertained as to the purpose of the amendment of 1931 when we consider the situation as it existed prior to that enactment. As the law then stood the employer alone could recover back the money paid to an injured employee who was injured as a result of the negligent or wrongful acts of a third party, but only if he had actually paid the compensation to the employee out of his own funds. *Erie R. R.* v. *Michelson,* 111 N. J. E. 541 (E. and A. 1932); *N. Y. S. & W. R. R.* v. *Huebschmann,* 111 N. J. E. 547 (E. and A. 1932), and see Section 23 (f) of the Workmen's Compensation Act before the 1931 amendment.

In view of the fact that practically all employers were insured and substantially all compensation payments were made direct by the insurance carrier to the injured employee, the remedy provided by Section 23 (f) prior to the 1931 amendment was of no practical value, as the insurance carrier *who had paid* the compensation could not be reimbursed. *Cf. N. Y. S. & W. R. R.* v. *Huebschmann, supra.* Obviously the situation thus resulting was not a desirable one. The injured employee could collect twice; once from the workmen's compensation insurance carrier, and again from the third party. It requires no argument to demonstrate that this situation was not only undesirable but highly inequitable. That this was the mischief which the legislature sought to remedy is not open to question. The sole reason for the amendment was to provide that the various insurance carriers doing business in this state, which companies since the enactment of the compulsory insurance law actually pay practically all of the compensation being paid to injured employees,

might be reimbursed where the employee was injured by a third party.

Appellant argues, however, that the amendment confers no rights upon the insurance carrier unless the employee does not proceed against the third party within six months, or in the event the employee settles with such third party for a sum less than the *employer's obligation.* If this construction contended for by appellant were adopted, it requires no argument to demonstrate that the amendment would in no way remedy the mischief. All an employee would have to do to defeat the rights of the insurance carrier would be by starting a suit before the six months' period elapsed. Such action on his part would effectually nullify the will of the Legislature. Needless to say, that result would be absurd.

On the other hand, if the employee succeeds in effecting a settlement with the third party, the insurance carrier, who had paid compensation, has a right to such reimbursement, argues appellant, only if the settlement is less than the employer's obligation to the employee. If he succeeds in obtaining more by way of settlement from the third party than he is compensated under the compensation law, he may keep both and completely prevent the insurance carrier from obtaining reimbursement. But, if he only succeeds in obtaining a smaller sum in settlement from the third party then and only then has the insurance carrier a right to reimbursement. That would be the result if appellant's argument were adopted. This result would be even more absurd than the prior one just discussed. In substance appellant's argument would reduce the amendment to a meaningless absurdity without any practical utility.

That appellant's contention is untenable seems hardly to require further discussion. The courts of this State have repeatedly held that they will construe a statute so as to prevent an absurd result. Appellant's contention could only derive any plausibility by adopting a very literal construction of the amendment. But such a literal construction would produce an incongruous situation not in keeping with the spirit of the Act, and in no manner remedying the mischief existing at the time of its passage.

The construction placed upon the amendment by Vice-Chancellor Bigelow gives vitality and force to the statute, and prevents it from being unreasonable and absurd. Certainly the statute as thus construed remedies the mischief existing at the time of its passage. Furthermore, the method of construction employed by him does not stretch or strain the Act and is in complete accord with an unbroken line of decisions of the courts of this State that the intention, rather than the letter, of a statute should prevail. *Smith's Executors* v. *Tucker*, 17 N. J. L. 82 (Sup. Ct. 1839); *Associates of the Jersey Company* v. *Davison*, 29 N. J. L. 415 (E. and A. 1860); *McGregor* v. *Home Insurance Co. of Newark*, 33 N. J. E. 181 (Chan. 1880); *Mendles* v. *Danish*, 74 N. J. L. 333 (Sup. Ct. 1907); *Jensen* v. *Woolworth Co.*, 92 N. J. L. 529 (E. and A. 1918); *Bourne* v. *Levine*, 100 N. J. E. 141 (Chan. 1930); *Etz* v. *Weinmann*, 106 N. J. E. 209 (Chan. 1930); *Henry Steers, Inc.* v. *Turner Construction Co.*, 104 N. J. E. 189 (E. and A. 1927).

In *Mendles* v. *Danish, supra,* the Supreme Court in construing the statute then before it stated that (p. 336):

> "Where ambiguity exists or literal interpretation may lead to absurd results, resort

> may be had to the principle that the spirit of the law controls the letter."

In our case there is no ambiguity; on the contrary, the intent of the Act is transparently clear, so that the first part of the foregoing principle has no application. The remaining part of the principle, however, is directly in point. Unquestionably the literal interpretation urged by appellant would lead to an absurd result. It follows, therefore, that the principle that the spirit of the law controls, which principle was applied by the lower court, is applicable.

Again in *Jensen* v. *Woolworth Co., supra,* the late Chancellor Walker speaking for this court, in construing another section of the Workmen's Compensation Act then in issue said (p. 534):

> "The rules of construction prevent any of the words of this section from defeating the obvious intent of the legislature. In construing a statute where literal interpretation may lead to absurd results resort may be had to the principle that the spirit of the law controls the letter."

Appellant argues in his brief (pp. 9 to 12-15 to 17), however, that the Act is unambiguous and there is, therefore, no room for construction. Respondent agrees with appellant that the Act is unambiguous. In fact respondent submits that the meaning of the statute is clear. But it does not follow that there is no room for construction. All statutes must be construed when the effect or meaning of a statute is up for judicial consideration. The only issue here is which of two permissible constructions should the court place upon the Act. Should the literal construction, contended for by appellant, which would prevent the statute from having any practical utility, be adopted or should such a construction be em-

ployed as would prevent inequity, advance the remedy and further the obvious intent of the legislature in enacting it. Following the principle enunciated in the cases previously cited, it is clear that the latter construction, that adopted by the lower court, and which is criticised by appellant, should be utilized. The practical result of this construction would be that the employee, appellant here, would always receive full compensation and the insurance carrier, who pays the compensation, would be reimbursed if the employee's injuries were occasioned through the negligence of a third party. If the amount obtained from the third party exceeds the compensation the employee gets the excess. That result is unquestionably desirable, and gives effect to the intention of the legislature.

Finally, appellant argues (Brief p. 10) that in order to agree with the construction placed upon the statute by Vice-Chancellor Bigelow, it is necessary to read into the first paragraph of 23 (f) the words "insurance carrier." This is obviously not so. The intent of the legislature to give to the insurance carrier the right of reimbursement for the compensation payments actually paid by said carrier is clearly apparent from the second paragraph of that section which is the paragraph added by the 1931 amendment. By granting to the carrier the right to institute suit against the third party if the employee has either (1) failed to start suit on his own behalf within six months, or (2) has settled with the third party for an amount less than the compensation obligation of the employer, clearly implies that if he starts suit within six months or obtains a settlement, with or without suit, for an amount in excess of the compensation due him under the Compensation Act the insurance carrier is en-

titled to be reimbursed for the moneys paid by it. If the amount obtained in settlement is greater than the compensation obligation of the employer there is no need to give the employer or carrier a right of action against such third party. The legislature recognized this and for that reason granted to the carrier the right only when the amount so obtained by the employee is less than the employer's liability to the employee. Clearly this arrangement is solely in recognition of the carrier's right to be reimbursed. Any other construction would require a holding that the legislature intended to accomplish nothing by the amendment.

It is submitted that the language of the second paragraph is clear, that the intention of the legislature to confer a right of reimbursement on the insurance carrier is apparent, and it is not necessary, as contended by appellant, to read into the first paragraph the words "insurance carrier" to ascertain the intention of the legislature and support the conclusion of the lower court.

Moreover in *Henry Steers, Inc.* v. *Turner Construction Co.*, 104 N. J. L. 189 (E. and A. 1927), this court in affirming the lower court adopted in full the opinion of Judge Ackerson wherein he construed Section 23 (f) as it was prior to the 1931 amendment. In this opinion Judge Ackerson in holding that Section 23 (f) gave to the employer the right to be reimbursed for medical expenses, even though it was not specifically mentioned, said (104 N. J. L., p. 196):

> "The reimbursement from the wrongdoer to the employer which was intended by section 23 (f) is completely set forth in section 14 (a) of the act, which provides:
>
> " 'Compensation for all classes of injuries shall run consecutively, and not concurrently,

except as provided in paragraph 14, as follows: First four weeks, medical and hospital services and medicines as provided in paragraph 14. After the waiting period, compensation during temporary disability. Following both, either or none of the above, compensation, consecutively for each permanent injury. Following any or all or none of the above, if death results from the accident, expenses of last sickness and burial. Following which compensation to dependents, if any.'

"It will be noted that this paragraph covers everything which is to be paid by the employer to the employee, and it seems clear that, when the Legislature later put section 23 (f) into the act, it was intended to include medical expenses in the reimbursement which was to be made by a third party to the employer of the person injured by such third party's negligence."

Even though it were necessary to read into the first paragraph of 23 (f) the words "insurance carrier," which it is not, the foregoing case is a sufficient authority for so doing in order to effectuate the obvious intention of the legislature to grant the right of reimbursement to the insurance carrier.

Finally, on page 18 of his brief, appellant states that the lower court was persuaded in his conclusion by the opinion of the United States Supreme Court in *Aetna Life Insurance Co.* v. *Moses*, 287 U. S. 30, and that it is apparent that the Vice-Chancellor thought there should be a reversal of the previous decisions of this court. Apparently appellant refers to the "Huebschmann" and "Michelson" cases. That this is a highly unfair characterization of the opinion of the Vice-Chancellor is evident by the opening statement in his opinion, that if the case were controlled by the Act as it existed prior to the

amendment of 1931, the decree would have to go to the employee (appellant) under the "Huebschmann" and "Michelson" cases.

Furthermore, an examination of Mr. Markley's brief in the "Huebschmann" case fails to disclose any reference to the decision of the United States Supreme Court case of *Aetna Life Insurance Co.* v. *Moses, supra,* the substance of the argument in which, appellant asserts, was rejected by this court. In fact the "Moses" case was not argued before the United States Supreme Court until the October, 1932 term of that court, more than five months after the "Huebschmann" case was submitted to this court. The decision in the "Moses" case was not handed down by the United States Supreme Court until January, 1933, more than seven months after the "Huebschmann" case was submitted to this court, and over two months after this court decided it.

On the merits it is sufficient to say that the Federal Supreme Court reached a different result from that reached by this court in construing a statute similar to our statute, as it existed prior to 1931. This was recognized by the court below and it seems so clear as to require no further discussion that the opinion of the Vice-Chancellor is based entirely upon a construction of the amendment in question.

It is, therefore, respectfully submitted, for the reasons herein urged, that the decree of the Court of Chancery should be affirmed and this appeal should be dismissed.

Respectfully submitted,

MAURICE J. McKEOWN,
Solicitor for and of Counsel with Defendant-Respondent, Indemnity Insurance Company of North America.

106MAY.T.1934

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

No. 106 **May Term, 1934.**

Between

SCHENO TRUCKING COMPANY, INC., a corporation of the State of New York; JOHN BRITT and PAUL SCHENO, FRANK KLINE and CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation of the State of New York,

Complainants,

and

FRED W. BICKFORD,

Defendant-Appellant,

COMMISSIONERS OF PALISADES INTERSTATE PARK, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Respondents.

REPLY BRIEF ON BEHALF OF FRED W. BICKFORD, Defendant-Appellant.

A.

The words "Insurance Carrier" may not be supplied.

On page 3 of the brief on behalf of Indemnity Insurance Company of North America, counsel makes much of his contention that the 2nd paragraph of section 23 (f) of the Workmen's Compensation Act is remedial legislation and, therefore, should receive a liberal construction.

It is, of course, true that the Workmen's Compensation Act, as a whole, has been held to be a remedial statute and, as a whole, should, therefore, receive a liberal construction, provided, of course, that ambiguity exists and construction, as distinguished from interpretation (*Lieber's Legal and Political Hermeneutics,* pp. 11, 44 and 49), is necessary. A liberal construction, however, is not such a construction as will ride rough shod over the expressed words of a statute and should not force words out of their natural meaning. *Lawrence* v. *McCalmott,* 2 How. (U. S.) 426 (at p. 449). Our Supreme Court in *West Jersey and Seashore R. R. Co.* v. *Public Utilities Commission,* 8 N. J. Mis. Rep. 899 (at p. 901) said, in speaking of remedial legislation:

> "However, such liberality cannot be extended to a point of reading into a statute powers which its plain language does not give."

When taken at its face value, counsel's argument is really that the Court should supply the words "insurance carrier" despite the fact that he concedes the act to be not ambiguous. That this violates the clear rule appears in *Lewis' Sutherland Statutory Construction* (2nd Ed.) Vol. II, Sec. 606 (at p. 1110):

> " 'While the courts may interpret doubtful or obscure phrases and imperfect language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, they cannot, by construction, cure a *casus omissus,* however just and desirable it may be to supply the omitted provision.' " (Quoting from *McKuskie* v. *Hendrickson,* 128 N. Y. 555; 28 N. E. 650.)

See also *Lewis' Sutherland Statutory Construction, supra,* Sec. 605 (at p. 1108).

B.

Section 23 (f) of the Workmen's Compensation Act prescribes a new right and therefore should be strictly construed.

However, the situation here under consideration really would not require a liberal construction even if it were ambiguous. The second paragraph of section 23 (f) is an amendment, by addition, to a section of a remedial statute and prescribes a new right and a particular remedy for the insurance carrier. In such a situation the amending statute must be strictly construed. In *Page* v. *New York Realty Co.* (Supreme Court of Montana), 196 Pac. 871, a case involving the construction of a Workmen's Compensation Act, clearly a remedial statute, the Court said (at p. 874):

> "Under the doctrine of expressio unius est exclusio alterius, a statute prescribing a new right and a particular remedy must be strictly construed and followed. Lewis' Sutherland on Statutory Construction (2d Ed.), par. 491. The Legislature had the undoubted power to prescribe by its enactment what occupations are extra hazardous, as it specifically did by the enumerations in sections 4 (b), 4 (c), 4 (d) and 4 (e) of the act; and not having specifically named the operation of passenger elevators, which were then in common use, they must be held to have been excluded from legislative determination as employment considered hazardous."

Likewise here the insurance carrier must be excluded from the benefits of the first paragraph of section 23 (f) since it is not mentioned.

The conditions provided in the statute under which the right may be invoked must be strictly followed. *Commonwealth* v. *Glover* (Court of Appeals, Kentucky), 116 S. W. 769 (at foot of

1st col. on p. 773). As a matter of fact, the courts have held that one seeking the benefit of such new right must bring himself clearly within the terms of the statute in order to obtain its protection and benefit. *Town of Windfall City* v. *State, ex rel. Wood* (Supreme Court of Indiana), 88 N. E. 505 (near foot of 2nd col. on p. 506).

C.

The Michelson and the Huebschmann cases were not the impetus for the 1931 amendment.

Counsel seemingly wishes to convey the impression that the legislature enacted the second paragraph of section 23 (f) to overcome the effect of this Court's decisions in *Erie R. R.* v. *Michelson*, 111 N. J. Eq. 541, and *N. Y. S. & W. R. R.* v. *Huebschmann*, 111 N. J. Eq. 547 (see Respondent's Brief, p. 4, near top of page), apparently overlooking the fact that these cases were decided almost a year after the enactment of the 1931 amendment and, therefore, could not have been the impetus for the amendment.

If it be argued that the decisions of the lower courts were the moving cause for the amendment, it will be found that Vice-Chancellor Fallon decided the *Huebschmann* case on October 3, 1931 (109 N. J. Eq. 40), and Vice-Chancellor Fielder decided the *Michelson* case on November 4, 1931 (see Michelson, State of Case). Chapter 279 of the Laws of 1931 was approved April 27, 1931 to take effect immediately.

D.

Since the statute is unambiguous no presumption may be indulged as to the intention of the legislature.

Counsel concedes that there is no ambiguity in section 23 (f), in fact, he says at the top of page 7 of his Brief:

> "In our case there is no ambiguity; on the contrary, the intent of the Act is transparently clear."

And, also, further on in page 7, he says:

> "Respondent agrees with appellant that the Act is unambiguous. In fact respondent submits that the meaning of the statute is clear."

In this situation the rule enunciated in *In Re City of Passaic,* 94 N. J. L. 384, cited on page 15 of appellant's brief, would seem to apply and, therefore, there is no room for judicial construction.

Counsel, throughout his Brief, refers to "the mischief" of section 23 (f). In Bouvier's Dictionary (unabridged), Rawles 3rd Edition, at page 2222, mischief is defined: "a term used in the law of statutory construction to designate the evil or danger intended to be cured or avoided by the statute."

Counsel, representing an insurance carrier, perceives an evil in the first paragraph of section 23 (f) that the employee may have a double recovery. He, apparently, recognizes no evil in the fact that under his construction the insurance carrier will recover twice: first, in the form of the general premiums collected, with which it builds up its fund, and second, in the recovery which counsel would give the insurance carrier. On the other hand, there is justice in allowing the employer, as distinguished from the insur-

ance carrier, to recover, as the legislature does, because he is the one who must, in any event, bear the burden either by the payment of premiums to his insurance carrier or by the payment of compensation, if he has no insurance carrier. Counsel's statement, therefore, concerning "the mischief" seems colored somewhat by his interest in the matter.

The fact is that he indulges in convenient presumption as to the policy of the legislature. The U. S. Supreme Court said in *St. Paul, M. & M. R. Co.* v. *Phelps*, 137 U. S. 528 (at p. 536 ~~near top of 1st col.~~):

> "* * * but where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government * * *."

Cf. *Hadden* v. *Barney*, 72 U. S. 107 (at p. 111).

E.

Respondent's Authorities Are Not Apposite.

However, counsel urges that in *Mendles* v. *Danish*, 74 N. J. L. 333 (at p. 336), the Supreme Court said:

> "Where ambiguity exists or literal interpretation may lead to absurd results, resort may be had to the principle that the spirit of the law controls the letter. *26 Am. and Eng. Encycl. L., 601.*"

From this quotation counsel argues that in the absence of ambiguity where literal interpretation might lead to absurd results the Court might judicially construe the language employed. A thorough reading of *Mendles* v. *Danish* demonstrates that the Court did not depart from the

rule that only in the case of ambiguity may there be judicial construction, for, on page 335 of that case, the Court said:

> "The compensation for the services of such a broker are spoken of in the case just mentioned and in general treatises on the subject, also as commission or compensation; and *we think, therefore, that the use of the word 'commission,' in this statute, presents a case of ambiguity,* in resolving which, we are at liberty to call to our aid the rules of construction usually applied in such cases. Resort may be had in such case to the reason and spirit of the law." (Italics ours.)

In fact the citation *26 Am. and Eng. Encycl. L., 601* specifically constitutes ambiguity the basis of the need for judicial construction.

In *Jensen* v. *Woolworth Co.*, 92 N. J. L. 529, from which counsel quotes on page 7 of his Brief, the entire discussion of Chancellor Walker arose out of the fact that the provisions of the Workmen's Compensation Act commuting the award in that case was ambiguous and he, too, referred to *Mendles* v. *Danish* as the authority for judicial construction. Obviously, he recognized the fact that only where there is ambiguity can there be judicial construction. In fact, with counsel's concession that there is no ambiguity whatever in the statute, we are impelled, at the risk of repetition, to quote the rule as enunciated in *25 R. C. L.*, Sec. 255, page 1017:

> "When a statute is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it."

Counsel cites *Henry Steers, Inc.* v. *Turner Construction Co.*, 104 N. J. L. 189, as authority for interpolating the words "insurance carrier" in

the first paragraph of section 23 (f). Judge Ackerson did not interpolate anything in the section in that case. It was not necessary. He was concerned with what "compensation payment" included and, in ascertaining what was included, he referred to section 14 (a) which defined it.

It is, therefore, respectfully submitted that the decree of the Court of Chancery be reversed.

Respectfully submitted,

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INDEX