Devereux & Burt, Printers, Asbury Park.

New Jersey Court of Errors and Appeals.

Amelia White,

vs.

John C. Hathaway.

Deft's Brief

The facts appear in the opinion of Justice Knapp.

Printed case, p. 3.

The rule of interpretation of a statute is: the Considerat
First: The old law.
Second: The mischief.
Third: The remedy.

This case involves the construction of *Sec. 41. Rev., p. 547*, title *Justice Court.*

First: Under the old law, a disagreement of a jury and its discharge by the Justice put an end to the jurisdiction of the Justice to try the cause except by consent.

Second: The mischief against which this law was directed was the expense and delay of a new trial.

The evil to be remedied was that a disagreement of the jury turned the plaintiff out of Court and drove him to a new suit, with its expense and delay.

Third: It is a remedial statute and should be construed liberally in view of the evil to be remedied.

C. & A. R. R. Co. vs. *Briggs, 2 Zab., 623-676.*

Danforth vs. *Paterson, 5 Vroom, 163.*

The great fundamental principle is that the clear reason and spirit of a law should govern in its construction.

Murphy Case, 3 Zab., 180-193.

The Court will search for the intention of the Legislature and apply an equitable construction to bring it within such intent.

Hoquet vs. *Wallace, 4 Dutch., 523.*

Bac. Ab. Title, 1 Stat., 1-6.

The opinion of the Court is on a line with these principles and should not be disturbed.

See opinion printed case, p. 3.

It will appear from the transcript that the defendant applied for and was granted an adjournment between the first trial and the rendering of judgment. As to effect of: See

Steward vs. *Sears*, 7 *Vroom*, 173.

O'Hagan vs. *Crossman*, *Central Rep.*, *Vol.* 13, *No.* 3.

It is respectfully insisted that the judgment of the Court below should be affirmed.

Paul Hallerson
Atty of Deft in Err

Henry G. Clogston
of Counsel

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE—
AMELIA WHITE,
Plaintiff in Error,
vs.
JOHN C. HATHAWAY,
Defendant in Error,
} On Error.

BRIEF OF PLAINTIFF'S COUNSEL.

HAWKINS & DURAND,
For Plaintiff in Error.

This cause was first tried before Eugene Britton, one of the Justices of the Peace of the County of Monmouth, and a jury of twelve men.

The jury was unable to agree upon a verdict, and was discharged. Afterwards the cause was set down for trial by the Justice and the plaintiff and defendant both appeared.

The defendant's counsel insisted that the Justice could not legally assume jurisdiction in the case again, a jury having once disagreed; and protested in writing against the Justice moving in the case until a new jury was first summoned.

The Justice held that he had jurisdiction to try the case again without issuing a new venire, and calling a new jury, and stated that unless the plaintiff or de-

fendant demanded a jury he would proceed to hear the cause himself.

The plaintiff refused to call a jury, insisting that he was willing to try the case before the Justice, the defendant declined to call a jury contending that the plaintiff should do so to entitle the Justice to retain jurisdiction.

The Justice heard the cause himself without a jury. The defendant put in no defense having withdrawn from the room when the Justice assumed to try the case without a jury, All these facts appear in the record of the Justice.

The question therefore is this, had the Justice jurisdiction to try the cause again without issuing a new venire, and calling a new jury after a disagreement of a former jury in the same cause?

The law on this subject as it stood many years is to be found in *Gulick vs. Van Tilburgh* 1 *Harr.*, 417; and in *Waddell vs. Physick* 2 *Harr.*, 231.

In the former case Chief Justice Hornblower said, "When a cause has once been brought to trial before a Justice, and the case submitted to a jury, the Justice cannot afterwards grant another trial in the same cause. If the jury cannot agree upon a verdict they may after a proper time be dismissed by the Justice; but there ends his jurisdiction; leaving the plaintiff at liberty to commence *de novo*."

The 41st section of The Justice Court Act, was afterwards passed, which reads as follows: "If the jury

disagree other writs of venire may issue in the same cause until a verdict be obtained." Before this section became a law, the Justice lost jurisdiction of the cause when the jury disagreed, as we have seen, and whatever additional rights he now has must be found in the section referred to.

The only additional right this section confers on the Justice, is to empower him in case of disagreement of a jury to issue a new venire, the doing of which act restores to him jurisdiction of the cause.

To hold that authority to *issue a venire is authority to try a cause without the issuing of a venire,* seems an act of pure legislation, instead of judicial interpretation.

It is true that the issuing of a venire confers of necessity jurisdiction on the Justice in that case, but in that case alone.

The section when intrepreted should be read as though it were other writs of venire shall issue, &c., instead of "may" issue, &c. The word "may" being used, because it is optional with the parties, whether they move their case again, or not, and if the word "shall" were used, the Justice would in his judicial capacity be obliged to issue a new venire without the request of either party, and perhaps against the wishes of both, which would be a very unique procedure.

We therefore insist that the true interpretation of the section is this: if a jury disagree the parties may demand a retrial, and the Justice *shall* issue another writ of venire and continue to do so at the request of either party until a verdict is obtained.

Mr. Justice Knapp in his opinion rendered in this cause in the Supreme Court said, "The evil to be remedied was that a disagreement turned the plaintiff out of court, and drove him to a new suit with its expense and delay. It was in the knowledge of the lawmaker that loss of jurisdiction was because of inability in the court to find in the law any provision for a new venire. Had that existed it is plain that the court would have adjudged differently in the cases cited."

Chief Justice Hornblower while he saw the objection referred to by Justice Knapp, and mentioned it, did not stop there. In the case of *Waddell vs. Physick* 2 *Harr.*, 233, in speaking of a case like the one under consideration, Hornblower C. J. said, "He (meaning the Justice) cannot issue a venire de novo, nor afterwards try it (the case) himself without the consent of the parties."

It would appear from this exposition of the law, as it then was, that the reason the cause was at an end on the disagreement of a jury, was not wholly because there was no provision for the issuing of a new venire, but for the further reason that no authority was conferred on the Justice to try the case again even if no jury was demanded.

It does not follow that because a jury is once demanded in a case in which they disagree that another jury is therefore to be demanded in the same case.

The cases referred to could have been tried anew before the Justice if new juries were not demanded, according to Justice Knapp's view, but Justice Hornblower the authority on which Justice Knapp relied

took the contrary view, when he said, "nor afterwards try it himself without the consent of the parties."

There was then in Justice Hornblower's time no authority in law given to a Justice of the Peace, to retry a cause either with or without a jury after a disagreement.

The Legislature knew when Section 41 was added to the Justice Court Act that prior to that time the Justice could not retry a cause in which a jury disagreed, and he could not call a new jury.

In amending the law it did it, with a knowledge of its defects, and hence should have fairly covered them.

The Court knows nothing of the intention of an act, except from the words in which it is expressed—the meaning of the law is the law itself.

The 41st section simply gives the Justice authority to issue, on the request of either party a new venire, in case of the disagreement of a jury. That, it seems to us, is the plain and natural significance of the words used, and to hold that they go beyond this and give the Justice jurisdiction without issuing a venire, without following the very statute by which it is claimed he is authorized to try the case, is an unwarranted and strained interpretation.

HAWKINS & DURAND,
Counsel for Plaintiff in Error.

Monmouth Democrat Print, Freehold, N. J.

N. J. Court of Errors and Appeals.

AMELIA WHITE, *Plaintiff in Error,* *vs.* *JOHN C. HATHAWAY,* *Defendant.*	*Writ of Error.*

HAWKINS & DURAND,
Attorneys for Plaintiff in Error.

Filed January 26, 1888.
HENRY C. KELSEY, *Clerk.*

NEW JERSEY, TO WIT: The State of New Jersey to our [L.S.] Justices of our Supreme Court, greeting:

Because in the record and proceedings, and also in the giving of the judgment in a plaint, which was in our said Supreme Court before you, between Amelia White, plaintiff, and John C. Hathaway, defendant, on a certiorari issued out of our said Supreme Court to Eugene Britton, one of the Justices of the Peace in and for the county of Monmouth, directed, as is said, manifest error hath intervened, to the great damage of the said Amelia White, prosecutrix as aforesaid, as by her complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if your judgment be thereupon given, then you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the judges thereof, on the twenty-third day of January next, and this writ; and that the record and proceedings aforesaid being inspected,

we may cause to be further done thereupon, what of right and according to law ought to be done.

Witness our Chancellor and President Judges of our said Court of Errors and Appeals, at Trenton aforesaid, the tenth day of January, in the year eighteen hundred and eighty-eight.

H. C. KELSEY, *Clerk.*

HAWKINS & DURAND, *Atty's.*

The answer of the Justices of the Supreme Court of New Jersey, within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals, in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, *J.* [L.S.]

JUDGMENT.

The court having heard the argument of counsel, and inspected the judgment removed by the writ in the cause, and duly considered the reasons filed.

It is ordered that said judgment be in all things affirmed, with costs to the defendant.

On motion of

SAM'L A. PATTERSON, *Att'y.*

Entered December 13, 1887.

I. Benj. F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of an order made in above stated cause by said court, and entered in the minutes thereof.

In testimony whereof I have hereto set my hand and the seal of said court at Trenton, this twenty-first [L.S.] day of January, A. D. eighteen hundred and eighty-eight.

BENJ. F. LEE, *Clk.*

ASSIGNMENTS OF ERROR.

The plaintiff in error assigns the following causes of error:

Because the Supreme Court held that the justice before whom the suit was originally brought, had jurisdiction to try the case without issuing a new venire and calling a new jury after a disagreement of a jury in a former trial of the same cause.

Because said court held that the forty-first section of the Justice Court act, restored to the Justice Court the jurisdiction over the cause for all purposes, until final judgment be rendered.

Because said court held that the plaintiff in certiorari having failed to demand a jury, the justice could proceed in due course to trial and judgment.

Because the said judgment of the said court is in divers other respects illegal and void.

Therefore the said Amelia White prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that she may be restored to all things which she has lost by occasion of the said judgment, &c.

HAWKINS & DURAND,

Att'ys for and of Counsel with Plaintiff in Error.

OPINION.

The Opinion of the Court was delivered by Knapp, J.

This writ removes into this court the judgment of a Justice of the Peace of the County of Monmouth against the plaintiff in certiorari in favor of the defendant.

This cause was twice tried before the Justice; first, with a jury summoned on the demand of the plaintiff in certiorari, and the jury failing to agree were discharged. The cause was then continued by adjournments until the 6th day of December, 1886, when the parties appearing, the plaintiff moved his case before the Justice. No new

jury being demanded by either party, the Justice took cognizance of the cause against the defendant's objection to his jurisdiction, heard the testimony of the plaintiff's witnesses, (the defendant offering none), and on their evidence rendered judgment for the plaintiff.

The ground for attacking this judgment, as assigned in the reasons presented by the plaintiff in certiorari, is, that the Justice proceeded below after a disagreement of a jury in a former trial of the same cause, without issuing a new venire and calling a new jury, such Justice having no jurisdiction to hear the cause without a jury, after one had failed to agree.

The only question to be considered is whether, under the state of facts thus set forth, the Justice had jurisdiction to try the cause without a jury.

All causes made cognizable in the court for the trial of small causes may be heard and proceeded in to judgment by the Justice alone, unless a jury shall be demanded of him by one or both of the parties.

The thirty-third section of the Justice's Court act makes it the right of either party in any action after the defendant has appeared or put in his plea to such action, and before the Justice has proceeded to inquire into the merits of the cause, to demand a trial by jury and thereupon, the Justice is required to award his venire for a jury.

The forty-first section enacts that "if the jury disagree, other writs of venire may issue in the same cause, until a verdict be obtained."

Whether or not the position of the plaintiff in certiorari be tenable, depends upon the effect to be given to the forty-first section of the act.

Before its adoption as it stands in the revision, it had been decided in this court that in a trial before a Justice's Court upon a disagreement of a jury and its discharge by the Justice, as no venire *de novo* was authorized by the statute, an end was put to the Justice's jurisdiction to try the cause without consent of the parties.

Gulick v. Van Tilburgh, 1 Harr., 417; Waddell v. Physick, 2 Harr., 331.

The section was directed against this difficulty, and with the design, wholly or in part, to remove it. It does not in terms provide for the unqualified continuance of the cause. It undoubtedly does continue jurisdiction in the Justice to re-try the cause if there be brought to his aid a new jury. But, to limit the newly conferred jurisdiction to this latter condition, and to say that notwithstanding this provision of law the cause still ends unless the parties will ask or accept a jury trial, is to suppose the legislative purpose to grant a partial and almost profitless measure of relief against a plain defect in the law; when conjecture will fail of a reason why, when once undertaken, the remedy should not have been radical and complete.

The evil to be remedied was that a disagreement turned the plaintiff out of court, and drove him to a new suit with its expense and delay. It was in the knowledge of the law-maker that loss of jurisdiction was because of inability in the court to find in the law any provision for a new venire. Had that existed, it is plain that the Court would have adjudged differently in the cases cited. This provision for a new venire the legislature supplied by the enactment of this section. It was the appropriate remedy for the entire mischief, and at that it was, doubtless, aimed.

The design of the section was to restore to the Justice's Court the jurisdiction over the cause for all purposes, until final judgment be rendered. Either party had the right reserved to him to demand and have a jury whenever under the act, a jury is given him. If a party desires a jury to decide on his facts, he must, under the act, demand it; or, failing in that, his right is waived, and the Justice may proceed in due course, to trial and judgment.

In this case the plaintiff in certiorari declined to ask or have a jury for the trial of the cause; she thereby waived her right to that mode of trial, and no course was left to the Justice other than to hear and decide the cause himself, on the evidence presented to him.

The plaintiff presents no valid ground of complaint against the judgment rendered, and it is affirmed with costs.

A true copy,

BENJ. F. LEE, *Clk.*

JOINDER IN ERROR.

And hereupon the said John C. Hathaway, by Samuel A. Patterson, his attorney, comes into court and says that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays here, that the court here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error; and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

SAM'L A. PATTERSON,

Att'y and of Counsel with Defendant in Error.