INDEX

New Jersey Court of Errors and Appeals

NEW JERSEY SUPREME COURT

JAMES E. CROSSLEY,
Appellee-Plaintiff,
vs.
WILLIAM H. CONNOLLY COMPANY, a corporation,
Appellant-Defendant.

Notice of Appeal

To Gaetano M. Belfatto, Esquire, Attorney of Appellee-Plaintiff:

Take notice that the defendant-appellant, William H. Connolly Company, appeals to the Court of Errors and Appeals from the judgment of the New Jersey Supreme Court, entered in this cause on the following grounds:

1. Because the said New Jersey Supreme Court refused to hold that the plaintiff should have been non-suited upon the motion of the defendant.

2. Because the New Jersey Supreme Court erred in sustaining the judgment of the District Court of the City of East Orange, when the said Court on the adjourned trial day, and over the

objection of the defendant, proceeded to hear the evidence and to try the cause in the absence of a jury, although the defendant had duly demanded a jury and which had upon the first trial day been duly impaneled and sworn and improperly discharged upon the adjournment of the cause.

Respectfully,
NEWTON P. KINSEY,
Attorney of Appellant.

Opinion

NEW JERSEY SUPREME COURT

FEBRUARY TERM, 1916

JAMES E. CROSSLEY,
Plaintiff and Appellee,

vs.

WILLIAM H. CONNOLLY COMPANY, a corporation,
Defendant and Appellant.

Submitted March 16, 1916; Decided June 28, 1916.

SYLLABUS

1. On appeal from the District Court, the Supreme Court will not reverse a judgment because of the action of the trial judge in dismissing the jury and granting a continuance after the com-

mencement of the trial, unless such action is plainly erroneous and is a clear abuse of the Trial Court's discretion.

2. When a jury in the District Court, summoned on the demand of the defendant, has for a good cause been discharged by the Court and the trial continued for one week, the defendant is not entitled to a jury at the trial on the adjourned day unless he pays or tenders the costs of a new venire.

On appeal from the District Court of the City of East Orange.

Before Justices Garrison, Trenchard and Black.

For the appellant, Newton P. Kinsey.

For the appellee, G. M. Belfatto.

The opinion of the Court was delivered by Trenchard, J.

This is a defendant's appeal from a judgment in favor of the plaintiff rendered by the judge of the District Court sitting without a jury, in an action to recover upon a contract between the parties.

The first reason assigned for reversal is that the judge erred in dismissing the jury and granting a continuance of the case after the commencement of the trial.

We think the contention is without merit. The action was taken when it was discovered that the president of the defendant company, a witness essential to the plaintiff's case, was absent when called, although he was present when the case was moved. The rule is well settled that we will not reverse a judgment because of the action of the trial judge in dismissing the jury and granting a

continuance after the commencement of the trial, unless such action is plainly erroneous and is a clear abuse of the Trial Court's discretion. *Haines vs. Roebuck,* 47 N. J. L., 227; *McConvery vs. Doremus,* 10 N. J. L., 245. See also cases collected in note in 4 C. J., 809. Tested by that rule the action of the trial judge was unobjectionable.

The only other reason for reversal argued is that upon the day to which the trial had been continued, it proceeded without a jury against the objection of the defendant.

We think there is no merit in this contention.

True, the defendant had demanded a jury at least one day before the return day of the summons pursuant to the requirement of par. 4 of P. L., 1905, p. 494, C. S., p. 1891, par. 117 d, *(Home Coupon Exchange Co. vs. Goldfarb,* 78 N. J. L., 146; *Phoenix Pottery Co. vs. Perkins Co.,* 79 N. J. L., 78; *Haythorn vs. VanKeuren,* 79 N. J. L., 101; *Kearns vs. Simpson,* 83 N. J. L., 221; *Walnut vs. Newton,* 82 N. J. L., 290); and had paid the cost of the venire as required by P. L., 1903, p. 505 (C. S., p. 1999, par. 149); and a jury had been summoned accordingly. But the jury thus summoned had, for good cause, been discharged and the trial continued by the judge for one week. In this situation in order for the defendant to obtain a jury for the trial upon the day to which the cause had been continued it was necessary to pay or tender the cost of the venire. Since this was not done the defendant cannot be heard to complain that the trial proceeded without a jury.

The judgment below will be affirmed, with costs.

Filed, June 28, 1916.

WM. C. GEBHARDT,
Clerk.

Rule for Judgment

NEW JERSEY SUPREME COURT

FEB. TERM, 1916

JAMES E. CROSSLEY, Plaintiff-Appellee, vs. WILLIAM H. CONNOLLY COMPANY, a corporation, Defendant-Appellant.	On Appeal to Supreme Court. Order on Affirmance of Judgment.

This cause having been duly submitted on briefs at the February Term of the Supreme Court by Newton P. Kinsey, of counsel for the defendant-appellant and G. M. Belfatto, of counsel for the plaintiff-appellee, and the Court having considered the same and finding no error in the record or proceedings in the District Court of the City of East Orange, it is thereupon ordered and adjudged that the judgment of the East Orange District, aforesaid, removed by appeal in this cause be armed with costs.

On motion of

G. M. BELFATTO,
Atty. of plaintiff-appellee.

Notice of Appeal to Supreme Court

(Filed, Aug. 27, 1915)

DISTRICT COURT OF THE CITY OF EAST ORANGE

JAMES E. CROSSLEY, Plaintiff, vs. WILLIAM H. CONNOLLY COMPANY, a corporation, Defendant.	On Contract

To Gaetano M. Belfatto, Esq., Attorney of Plaintiff:

Take notice that the defendant, William H. Connolly Company, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of East Orange rendered in the above action on the seventeenth day of August, Nineteen hundred and fifteen.

NEWTON P. KINSEY,
Attorney of Defendant.

Specifications

NEW JERSEY SUPREME COURT

JAMES E. CROSSLEY, Appellee-Plaintiff, vs. WILLIAM H. CONNOLLY COMPANY, a corporation, Appellant-Defendant.	On Contract. On Appeal from District Court of the City of East Orange.

Specification of determinations and discretions appealed from:

The William H. Connolly Company, defendant-appellee, in the above stated cause, by Newton P. Kinsey, its attorney, hereby files with the Clerk of the Supreme Court of the State of New Jersey, the following specification of the determinations and directions of the District Court of the City of East Orange with respect to which the said defendant is dissatisfied in point of law, and upon the admission and rejection of evidence therein against the objections of said defendant.

1. That the Court on the first trial day adjourned the trial of the cause and dismissed the jury over the objection of the defendant.

2. That the Court on said day refused to enter a non-suit upon the motion of the defendant.

3. That "on the adjourned trial day and over the objection of the defendant, the Court proceeded to hear the evidence and to try the cause in the absence of a jury, although the defendant had duly demanded a jury and which had upon the

first trial day been duly impaneled and sworn and improperly discharged upon the adjournment of the cause."

4. That the Court, over the objection of the defendant received the evidence of the plaintiff, who testified to conversation with a William H. Connolly, whom it appeared upon the record had died prior to the trial of the cause.

5. That the Court refused to non-suit on the ground that the ownership of the plaintiff in the propertly in question was not proven.

6. That the Court refused to non-suit on the ground that the contract as proven was indefinite; that no term was mentioned for the use of the land; that the contract was not a lease but a license, being an incorporal right which lies in grant and must be in writing and under seal.

7. That the Court refused to non-suit on the ground that the authority of the agent must be in writing and under seal.

8. That the Court refused to non-suit on the ground that no proof of occupancy of the land by the company.

9. That the Court refused to non-suit on the ground that all proof submitted was that the agreement was a personal promise of William H. Connolly and no proof of his acting for the company.

10. That the Court on motion refused to give a verdict for the defendant on the ground that the ownership of the plaintiff in the property in question was not proven.

Specifications

11. That the Court on motion refused to give a verdict for the defendant on the ground that the contract as proven was indefinite; that no term was mentioned for the use of the land; that the contract was not a lease but a license, being an incorporal right which lies in grant and must be in writing and under seal.

12. That the Court on motion refused to give a verdict for the defendant on the ground that the authority of the agent must be in writing and under seal.

13. That the Court on motion refused to give a verdict for the defendant on the ground that no proof of occupancy of the land by the company.

14. That the Court on motion refused to give a verdict for the defendant on the ground that all the proof submitted was that the agreement was a personal promise of William H. Connolly and no proof of his acting for the company.

15. That the Court on motion refused to give a verdict for the defendant on the ground the use of the property was never had in accordance with the agreement; they had no knowledge thereof, and that the land was used without permission only since March, nineteen hundred and fifteen.

16. By the records and proceedings in said cause it appears that judgment was given for the plaintiff, James E. Crossley, against the defendant, William H. Connolly Company, whereas judgment ought to have been for the defendant and against the plaintiff.

NEWTON P. KINSEY,
Attorney of Appellant.

State of Case

EAST ORANGE DISTRICT COURT

Case No. 9872.

JAMES E. CROSSLEY, Plaintiff, vs. W. H. CONNOLLY Co., a corporation, Defendant.	In Contract. On Appeal.

Gaetano M. Belfatto, attorney of plaintiff-appellee.

Newton P. Kinsey, attorney of defendant-appellants.

The parties hereto, or their attorneys, having been unable to agree upon a state of the case for appeal, and having applied to me, Judge of said Court, within the time limited by law, and as extended by order made herein, I do hereby settle the case as follows:

This was an action to recover the amount due on a certain contract alleged to have been entered into on or about the Eighth day of June, Nineteen Hundred and Fourteen, by and between the plaintiff and defendant corporation, through William H. Connolly who was at that time the president thereof, whereby the plaintiff agreed to permit the defendant to pass over certain land of the plaintiff for which privilege the defendant was to pay the sum of Five Hundred Dollars.

State of Case

The defendants demanded a trial by jury on August Third, Nineteen Hundred and Fifteen. The jury was duly summoned and sworn to try this cause. The plaintiff and another witness attempted to prove that William H. Connolly, who it is alleged made the contract, was at the time of making said contract the president of said Company, the said William H. Connolly having died since the time when said contract is alleged to have been made. Both plaintiff and another witness were unable to prove this case and Sylvester J. Connolly was called by the plaintiff to prove the relationship of William H. Connolly to the corporation.

Sylvester J. Connolly, who was in Court up to that time, departed, and upon being called as a witness, his attorney explained that he did not know where Mr. Connolly was. Counsel for the plaintiff moved for an adjournment for one week. Counsel for the defendant moved for a nonsuit on the ground of failure of proof. The Court granted an adjournment for one week, and dismissed the jury. Case carried over until August Tenth, Nineteen Hundred and Fifteen. No jury summoned. Case not having been reached on August Tenth, it was carried over until August Twelfth, Nineteen Hundred and Fifteen, at which time it was reached. Before proceeding with the trial, counsel for the defendant asked that an objection be noted on the records to the proceeding with the trial in the absence of the jury. Said objection was noted and the case came on for trial.

Sylvester J. Connolly being called by the plaintiff, testified that William H. Connolly Company was incorporated in August, Nineteen Hundred

and Ten, and that William H. Connolly was the president of the corporation and remained so until the time of his death; that witness is president of company at present time.

Plaintiff testified that on or about the Eighth day of June, William H. Connolly, president of the defendant company, called at his office and in the presence of George A. Hill made arrangements for the use of certain ground belonging to plaintiff, which ground extended from Camfield Street to the new theatre being erected and to be known as Proctor's Theatre, for which the defendant company had the mason contract. That plaintiff agreed to permit defendant company to use this ground for a period not exceeding one year for the sum of Five Hundred Dollars, and that after some discussion, William H. Connolly, on behalf of the defendant company, agreed to pay same. That shortly afterwards, Mr. Connolly died and the work on the building was stopped temporarily; that subsequently plaintiff sent for Sylvester J. Connolly, who is now the president of the defendant company. and asked him what he intended to do about the payment of this money and was informed by him that he knew nothing about this contract but that he would see him again. Although plaintiff sent for the said Sylvester J. Connolly on a number of occasions he had never seen him again until suit had been begun. That the defendant company constantly used the land in question and is still using same. Plaintiff was corroborated by George A. Hill who testified that he was present and heard the conversation whereby plaintiff made the contract above recited with William H. Connolly, acting for the defend-

ant company. Another witness was produced who testified that he saw the wagons of the defendant company using this land.

Counsel for the defendant moved for a nonsuit on the following grounds:

1. Ownership of land was not proved.

2. Contract as proved indefinite; no term alleged; not a lease but a license, an incorporeal right; lies in grant and must be in writing under seal.

3. Authority of agent must be in writing under seal.

4. No proof of occupancy of land by company.

5. All proof that agent was personal promise of William H. Connolly. No proof of his acting for company.

Motion denied.

For the first reason on the ground that the plaintiff having testified that he was the owner of the property has made out a *prima facie* case of ownership.

On the second ground that the contract was in the nature of a license and that a license did not have to be in writing but that a parol license might be made.

On the third ground that the authority of the agent need not be in writing inasmuch as the contract itself need not be in writing.

On the fourth ground that there was proof that the company used this land.

On the fifth ground that the evidence was to the effect that William H. Connolly had made the contract for the use of this ground because he was

interested in the mason contract, that the W. H. Connolly Company had the contract for the mason work on the building in connection with which the land was to be used, and therefore was acting for the company and not for himself personally.

Sylvester J. Connolly being called as a witness for the defense testified that he had no knowledge of the contract alleged to have been made between the plaintiff and his father, William H. Connolly; that the company did not use any of the land belonging to the plaintiff until about March First, Nineteen Hundred and Fifteen; that prior to that time the plaintiff had sent for witness, who had called at his office and stated in answer to plaintiff's question as to when he intended to pay for the use of the land, that he had no knowledge of the contract and would see him again; that he did not see him again but the defendant company started to use this land on or about March First, Nineteen Hundred and Fifteen without making any arrangements with plaintiff.

Another witness produced by the defense testified that no land belonging to the plaintiff was used until on or after March First, Nineteen Hundred and Fifteen.

Defendant moved for a verdict for the same reasons for which a nonsuit was asked, and on the further ground that the proof of the defendant's witnesses that they never heard of agreement and used the land without permission only since March First, Nineteen Hundred and Fifteen.

I held that it was quite possible that the witnesses for the defendant company had never heard of the agreement but that that did not make any difference, if the contract had in fact been made and

the land used; and further that the fact that there was testimony to show that the land was used only since March First, Nineteen Hundred and Fifteen, if true, did not make any difference as the contract upon which suit is brought was for the use of the land from June Eighth, Nineteen Hundred and Fourteen for one year or less, and if defendant company did not use the land until March First, Nineteen Hundred and Fifteen, that fact in itself would not change or alter the terms of the contract, but if the company was liable at all it would be liable whether it started to use the land immediately after the making of the contract, or whether it had waited until March First, Nineteen Hundred and Fifteen to use the land in question.

I found that the contract as alleged by Mr. Crossley to have been made with Mr. William H. Connolly, acting for the W. H. Connolly Company, a corporation, was in fact made and was made on behalf of the company, and that the defendant company had used the land and was therefore liable for the payment of the amount due under the contract, and gave judgment in favor of the plaintiff for the sum of Five Hundred Dollars.

In Witness Whereof, I have hereunto set my hand this Thirtieth day of October, Nineteen Hundred and Fifteen.

(Seal)

CHAS. B. CLANCY,
Judge East Orange District Court.

Attest:
Noah M. Baldwin,
Clerk.

Docket Entries

9872.

DISTRICT COURT

EAST ORANGE, N. J.

JAMES E. CROSSLEY,
Plaintiff,

and

WILLIAM .H. CONNOLLY COMPANY, INCORPORATED,
Defendant.

G. M. Belfatto,
Plaintiff's attorney.
495 12th Ave. Street, Newark.

Plaintiff's costs.
Defendant's costs.

Summons	2.10
Mileage	.24
Listing fee	1.50
Witness fee	1.10
Attorney's fee	25.00
Total costs	
Execution	
Statement.	

A summons in the above stated cause was issued on the sixteenth day of July, 1915, returnable on the twenty-second day of July, 1915, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

Docket Entries

The plaintiff filed his state of demand July 16, 1915.

The summons was served and returned as foldows:

I served the within summons July 17, 1915, on Catherine T. Brown, she being the Mgr. in charge of said W. H. Connolly Co., by reading it to her and giving her a copy thereof.

A. S. OVERMILLER,
Sergeant at Arms,
East Orange District Court.

July 20, 1915—Demand for jury and fees paid.

July 22, 1915—This cause was adjourned July 29, Aug. 3-10-12.

Aug. 3, 1915—The plaintiff and defendant appearing the cause was tried and determined at this time the following jury was sworn: 1. J. C. Lyon; 2. Geo. A. Garfield; 3. Stanley E. Bradley; 4. Henry A. Wagner; 5. R. T. Bennett; 6. Judson Rowe; 7. W. C Althouse; 8. Hedley Fry; 9. A. W. Squier; 10. H. C. Smith; 11. Mich. Byrne; 12 W. C. Griesner.

R. S. OVERMILLER,
Sargeant at Arms.

Aug. 3, 1915—Jas. E. Crossley; Geo. H. Hill, sworn for pltff. The jury was discharged. This cause was adjourned to Aug. 10-12.

Aug. 12, 1915—Sylvester J. Connolly for pltff. re-called for deft. Minute book of W. H. C. Co. mked P-1.

Jas. E. Crossley, Geo. H. Hill, Jacob B. Wandling, for plfft.

Frank J. Briscoe sworn for deft.

The evidence being closed the Court reserved decision.

Aug. 17, 1915—The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of Five Hundred Dollars damages and costs, wherefore judgment is entered in favor of the plaintiff and against the defendant in the sum of Five Hundred Dollars damages with costs.

Aug. 27, 1915—Notice of Appeal and Bond filed.

Sept. 3, 1915—Order extending time filed.

I, Noah M. Baldwin, Clerk, do hereby certify that the above is a true copy of the docket entries in the above entitled cause.

NOAH M. BALDWIN.

State of Demand

(Filed, July 16, 1915)

EAST ORANGE DISTRICT COURT

JAMES E. CROSSLEY, Plaintiff, vs. WILLIAM H. CONNOLLY CO., INC., Defendant.	On Contract.

Plaintiff demands of the defendant the sum of five hundred dollars for that the plaintiff on or about the eighth day of June, nineteen hundred and fourteen, was and still is the owner of a tract

of land situated on the northerly side of Branford Place in the City of Newark, County of Essex and State of New Jersey, about three hundred feet front on Branford Place and about one hundred feet in depth.

That on the day and year aforesaid, the defendant agreed to pay the plaintiff within a week or ten days thereafter the sum of five hundred dollars, for the use of a part of said land, to put mason materials thereon, and go through to the Proctor Theatre building, which was being erected by the defendant, from the said eighth day of June, nineteen hundred and fourteen until the eighth day of June, nineteen hundred and fifteen.

Plaintiff further says that the defendant on the said eighth day of June, nineteen hundred and fourteen, took possession of a part of said land and has used and still uses the same to store mason and other building materials thereon and to go to the said theatre building.

Plaintiff further says that the defendant has not paid the said sum of five hundred dollars, or any part thereof, although often requested so to do, and has refused and still refuses to pay the same.

To the damage of the plaintiff, five hundred dollars.

GAETANO M. BELFATTO,
Attorney of Plaintiff.

New Jersey Court of Errors and Appeals

JAMES E. CROSSLEY, Plaintiff-Appellee, vs. WILLIAM H. CONNOLLY COMPANY, a corporation, Defendant-Appellant.	On Appeal from the judgment of the Supreme Court.

G. M. Belfatto, attorney for plaintiff-appellee.

Newton P. Kinsey, attorney for defendant-appellant.

BRIEF FOR APPELLEE

The defendant appeals from the judgment of the Supreme Court, affirming a judgment of the East Orange District Court in favor of the plaintiff. The president of the defendant company, who was in Court when the trial was commenced before a jury, suddenly disappeared, and although search was made for him, he could not be found. He was an essential witness for the plaintiff's case, and therefore the jury was dismissed and the trial was adjourned for one week. Upon the adjourned day, the case was not reached, and it was carried over, until the next Court day when it was—tried without a jury, the defendant not having paid for a new venire.

Judgment was thereupon rendered for the plaintiff for $500 and costs of suit.

It is respectfully submitted that under Section 148 of the District Court Practice Act, the Court had the power to adjourn the trial of said case, said section reads:

> "Any District Court in which suit or proceedings are instituted by virtue of this act, may to prevent fraud or surprise on either side, or on reasonable cause being assigned by or in behalf of either party, adjourn the trial to such time as may be fixed by the Court."

Granting or refusing an adjournment is in the discretion of the District Court.

Ames v. Roebuck, 47 L., 227.

Under Section 4 of the Supplement to the District Court Act, approved June 2d, 1905, the Court shall try the issue and give judgment in like manner as in case of a verdict by jury, unless a jury be demanded by either party at least one day before the last day of summons.

Haythorn v. Van Keuren & Son, 79 L., 101.

On the return day of the summons, the case could have been tried by the jury, but, by the defendant's own misconduct, the jury was dismissed, and the trial adjourned.

If a party is unlawfully deprived of a trial by jury by the conduct of the justice, or of the adverse party or of the constable, a just ground of reversal is shown, but if by his own misconduct, he has no cause of complaint.

Daniels v. Scott, 12 L., 27.

If either party desires a jury, he must demand it, or failing in that, his right is waived, and the justice may proceed, in due course to trial and judgment.

White v. Hathaway, 50 L., 119.

In the case under consideration, the defendant was present on the day when the case was tried and put in its defense, without having demanded another jury, all of which amounted to a waiver to the right of a jury trial.

Griffin v. Mills, 39 L., 587.

There being no error committed by the Trial Court, the judgment of the Supreme Court should be affirmed.

Respectfully,

G. M. BELFATTO,
Attorney for Plaintiff-Appellee.

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York Office, 220 Broadway

New Jersey Court of Errors and Appeals.

JAMES E. CROSSLEY, *Plaintiff-Appellee,* vs. WILLIAM H. CONNOLLY COMPANY, a Corporation, *Defendant-Appellant.*	*On Appeal from New Jersey Supreme Court.*

Gaetano M. Belfatto, Attorney for Plaintiff-Appellee.

Newton P. Kinsey, Attorney for Defendant-Appellant.

BRIEF FOR APPELLANT.

The above entitled cause is an appeal from the New Jersey Supreme Court sustaining the judgment of the East Orange District Court wherein an action was instituted to recover the sum of $500, upon an alleged contract claimed to have been entered into by the plaintiff with William H. Connolly, an individual, as the agent of the defendant company; the said William H. Connolly having died between the time of the making of the alleged contract and the institution of the suit. Summons was served upon the defend-

ant, who duly demanded a trial by jury, paying the fees therefore, (Section 149, District Court Act, C. S. 1999). Upon the return day of the summons the hearing was adjourned to August 3rd, 1915, when a jury was duly sworn and the trial commenced. The plaintiff offered himself as a witness and attempted to prove William H. Connolly was, at the time of the making of the contract, the authorized agent of the company; being unable to prove the fact, another witness was called, who being unable to prove the fact, the plaintiff called Sylvester J. Connolly, who having been in Court, but departing before that time, did not respond. Plaintiff being unable to prove his case applied for an adjournment and the defendant moved for a non-suit on the ground of failure of proof. The Court granted the adjournment for one week and dismissed the jury. Upon the adjourned day the case not being reached for trial it was carried over to the next court day and was then called for trial. A jury not having been summoned and sworn the defendant objected to proceeding to trial in the absence of the jury; the objection being noted by the Court, (Case p. 11). The Court overruled the objection and proceeded to hear and determine the case without a jury and rendered verdict in favor of plaintiff for $500.

On appeal to the New Jersey Supreme Court the argument was confined to the alleged error of the East Orange District Court in refusing to non-suit the plaintiff on the ground that he had failed to prove his case, and to the action of the Court in proceeding to hear and determine the case in the absence of a jury. An error is alleged in the action of the Supreme Court in sustaining the verdict of the District Court.

I.

The District Court erred in granting an adjournment and refusing to non-suit the plaintiff.

Upon appearance of the parties at the time fixed for trial in any case in the District Court, the Court shall proceed to hear and examine their respective allegations and proof and render judgment in the case unless the judge shall think it proper to adjourn the trial.

District Court Act §147 C. S., p. 1998.

If either of the parties cannot on the day set for its trial safely go to trial for the want of a material witness in the case, whom he shall name and thinks he can produce on a future day, and shall file an affidavit setting forth the facts, the court may adjourn the trial to any future day to be fixed by it on payment of costs by the party who makes the application for case.

District Court Act, § 148 C. S., p. 1998.

It appears after the trial had commenced and witnesses sworn on behalf of the plaintiff, an application was made by the plaintiff for an adjournment (Case, p. 11) on the ground that Sylvester J. Connolly, who had been in court and departed therefrom was called as a witness by the plaintiff and had not responded.

Sylvester J. Connolly had not been subpoenaed as a witness by the plaintiff. It is clear that the plaintiff had not intended to rely upon his testimony, from the fact that he had not called him as a witness until his attempt to prove the relation of William H. Connolly to the defendant by his own and another witness's testimony had failed.

If the testimony of Sylvester J. Connolly was essential to the plaintiff's case he and not the defendant was bound to produce him in court; Sylvester J. Connolly was not the defendant in the case and his appearance in court was voluntary.

At the time of the application for the adjournment, no affidavit was filed with the court setting forth the necessity of Mr. Connolly's testimony, nor that he could be produced upon a future day.

The Court therefore, had no jurisdiction to adjourn the case in the absence of the affidavit required by the statute, and the application of the defendant for a non-suit should have been granted.

II.

The court erred in proceeding to hear and determine the case in the absence of a jury, over the objection of the defendant.

The defendant having demanded a jury, and complied with the terms of the statute, could not over his objection be deprived of a trial by jury. The demand deprives the court of jurisdiction to try the cause otherwise than by a jury; the defendant not waiving his right to a jury by proceeding with the trial.

Clayton vs. *Clark*, 55 N. J. L. (26 Vr.) p. 539.

Raphael vs. *Lane*, 56 N. J. L. (27 Vr.) p. 108.

In the case of Clayton vs. Clark, (Supra) the court states, "with respect to the expenses of the statutory courts it will be observed that the plaintiff and defendant stand in totally different atti-

tudes. The plaintiff chooses the tribunal in which he will bring his suit * * * if with these courts open to him, the plaintiff elects to take the defendant before a statutory tribunal, where either party may demand a jury it is doubtful if he can be heard to complain of any reasonable regulation rendered necessary by the legislative frame of the tribunal selected. With the defendant it is totally different. The legislature has made the right to a jury absolute if demanded at the proper time. The defendant has had no voice in choosing the forum, hence has submitted himself to no implied conditions arising from its construction. He is there in invitum with the right to question the constitutionality of the procedure in all its steps, and to ignore utterly all innovation upon his common law rights for which express legislative authority does not exist." This language is also quoted in the case of Raphael vs. Lane (Supra).

The record shows that a demand for a jury was duly made by defendant and the fees therefor paid. (Case, p. 17).

Section 149 of the District Court Act provides (C. S., p. 1999):

"Either party may demand a trial by jury * * * unless a demand for trial by jury shall be made * * * and unless the party demanding the same shall at the time of making such demand pay the cost of the venire, the demand for trial by jury shall be deemed to be waived * * *"

This section does not make it mandatory upon the party demanding the jury to pay for an additional venire, if the jury originally impaneled be

dismissed, or in limiting the constitutional right to a trial by jury, but simply imposes the condition that the venire be paid by the demandant, the legislature having made the right to a jury absolute if demanded at the proper time and upon a payment of the fees. The District Court could not take away from the defendant the rights to a trial by jury by dismissing the jury, and upon an adjourned day proceeding in the absence of a jury to hear the case.

The plaintiff could have instituted his action in the upper court where a jury would have been had without the payment of a venire fee by the defendant, and in the event of an adjournment or a dismissal of the jury without a verdict, a new jury would be empaneled without the payment of a venire fee. Electing to bring his action in the District Court and the defendant having complied with all the requirements for a trial by jury, the defendant should not now be penalized by being compelled to pay for a new venire where the jury was dismissed through no fault of it.

The defendant in complying with the terms of the statute was entitled to believe his case would be heard and determined by a jury, and upon the adjourned day had no reason to anticipate the jury would not be had in accordance with his demand, or that the court would proceed with the trial of the case in the absence of a jury.

If it became the duty of the defendant to pay for a new venire, the court should upon the defendant's objection have offered at least to award a venire upon the payment of the fees. There is, however, no authority for the awarding of a new venire

after the original venire as provided in Section 149, (Supra), except the provision in Section 160 of the Act, (C. S., p. 2001) which provides that in the event of a disagreement of the jury other writs of venire may issue until a verdict is obtained.

The provisions of the Act do not demand any action upon the part of the defendant in seeking a trial by jury other than the filing of the demand and the payment of the fees (Section 149, Supra), and there is no duty cast upon him to see that the venire is furnished after his demand is filed, or that additional venires issue until his trial by jury be had. He is not chargeable with the knowledge that when a jury is dismissed and the trial adjourned over his objection, and solely because of the neglect of the plaintiff, that the jury would not be impaneled to try the case.

The District Court being a statutory court its jurisdiction is derived solely from the act creating it and is restricted within the terms of the Act; and as is stated in the case of Clayton vs. Clark, (Supra), the Court "had no authority to require of the defendant any condition not prescribed by the statute nor any jurisdiction to inquire into the merits of the case itself." It is true that the section of the Act then under consideration did not provide that the defendant should pay the jury fees, but that language will apply in the present case when the jury fees prescribed by the statute have been paid.

In this case the defendant complied with all the requirements of the statute and without any act or default upon his part has been deprived of his constitutional right to a trial by jury. If the action of the court is upheld, there is no limit to the number

of adjournments that may be granted in the discretion of the court, and the number of venire fees that the defendant would be compelled to pay.

It is therefore respectfully urged that the action of the District Court, and affirmed by the Supreme Court, was erroneous and that the verdict should be set aside and a new trial awarded.

Respectfully,

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Attorney of Defendant-Appellant.