THOMAS R. JONES (PLAINTIFF).....APPELLANT; 1896

AND *Nov. 3, 4,

GEORGE McKEAN (DEFENDANT).....RESPONDENT. 1897

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Mar. 24.

Trustee—Account of trust funds—Abandonment by cestui que trust—Evidence.

The holder of two insurance policies, one in the Providence Washington Ins. Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M's claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon was non-suited.

In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Ins. Co. and its agent for reformation of the policy and payment of the sum insured and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying "as I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit which was eventually compromised by the company paying somewhat less than half the amount of the policy.

Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment and in 1887 more than a year after they were written, a decree was made in said suit referring it to a referee to take an account of

*PRESENT:—Gwynne, Sedgewick, King and Girouard JJ.

1897

JONES
v.
MCKEAN.

trust funds received, by M. or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof, which decree was affirmed by the full court and by the Supreme Court of Canada. On the taking of said account M. contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M. and not of the original holder.

Held further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date had not proceeded upon a wrong principle.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment of the Judge in Equity who allowed defendant's exceptions to a referee's report on taking accounts.

The facts of the case are fully set out in the above head-note and the judgment of the court.

The appeal was, by consent, argued before four judges.

Earle Q.C. and *McLean* for the appellant.

Palmer Q.C. for the respondent.

The judgment of the court was delivered by

GWYNNE J.—One Joseph H. Chapman by a deed duly executed under his hand and seal made upon and bearing date the 28th day of February, 1880, after reciting therein that he was indebted to the above

defendant for various sums advanced by him for Chapman, at the latter's request, and that he was possessed of certain shares of the barque "Pretty Jemima" which was lost at sea on the 6th day of March, 1878, which said shares were at the time of such loss partly insured in the Providence Washington Insurance Company of Providence, and the Deleware Mutual Safety Insurance Company, by policies issued by them to the amount of five thousand dollars each, and that actions were then pending in the Supreme Court of the province of New Brunswick at the suit of him, the said Chapman, against the said respective companies upon the said policies, and further that it was right and proper that the said George McKean should be secured against any loss which he might sustain by reason of his having become or procured bail for the said Chapman in certain suits therein mentioned, or by reason of any advance then already made or thereafter to be made by him for the said Chapman, did in consideration of the premises assign, transfer and set over the said policies of insurance, and all his, the said Chapman's, right, title and interest therein and thereto, and to the moneys thereby secured, and in and to the said suits instituted upon the said policies in the Supreme Court of New Brunswick, unto the above defendant, George McKean, his executors, administrators and assigns, to his and their sole use for ever, and he thereby authorized the said George McKean to continue the said suits in his, the said Chapman's name, to final judgment and execution, and to use his, the said Chapman's, name in any legal proceedings which the said George McKean might be obliged to take in reference to the said policies of insurance, or the moneys insured thereby or for collecting the same or any part thereof, and he, the said Chapman, thereby made, constituted

1897

JONES v. MCKEAN.

Gwynne J.

and appointed the said George McKean and his representatives, his true and lawful attorney and attorneys, irrevocable in his, the said Chapman's, name, to continue the said suits and to sue for and recover the said sums of money insured by the said policies and due acquittances and discharges in his name to give, make, sign and deliver, and the said Chapman did thereby covenant with said George McKean not to release the said suits or either of them, or the said sums of money insured by the said policies or any or either of them. On the 28th April, 1882, the said Chapman in consideration of money due and owing by him to certain persons trading under the name of Belyea and Company, delivered to them an order upon the said George McKean, in the words following:

Please hold to the order of Messrs. Belyea and Company to whom I have assigned it any balance that remains of insurance money per "Pretty Jemima," over and above the amount I owe or may owe to you or to your firm of Carville, McKean & Co., or Francis Carville & Son, without making any further advances to me or on my account.

(Signed) J. H. CHAPMAN.

This order shortly after the making of the same and the delivery thereof to the said Belyea and Company was, by or on behalf of the said company communicated and presented to the above defendant, and to one James Straton who was then acting by the authority of the said George McKean as attorney on the record for the plaintiff in the said suits upon the said policies instituted by the said Chapman, and so as aforesaid assigned by him to the said George McKean, the plaintiff's attorney on the records in said suits when the same were first instituted being then dead, and the said George McKean upon the said order being communicated and presented to him wrote his name across the same, by way of acceptance thereof. Afterwards the said firm of Belyea and Company indorsed and delivered the said order so accepted by the above

defendant to the above plaintiff with the intention of transferring the same and the moneys therein mentioned to the plaintiff, and subsequently upon the 3rd. October, 1882, gave to the plaintiff the assignment or transfer addressed to him in the words following:

29 RED CROSS STREET, LIVERPOOL, 3rd October, 1882.
HON. THOS. R. JONES.

DEAR SIR,—Having indorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by indorsement, not being a bill of exchange, and therefore in order to protect your title and to enable you to obtain the amount that may be in Mr. McKean's hands we hereby assign and transfer our interest therein both legal and equitable, and appoint you our attorney in our names, for your own use and benefit to collect the same.

We are, dear sir, yours truly,
(Sgd.) BELYEA & CO.

Copies of the assignment from Chapman to Belyea & Co., and by the latter to the plaintiff, were served upon the defendant McKean and his attorney the said James Straton, but both the said defendant and his said attorney refused to recognize the plaintiff's right to, and to give him, any account of the moneys that had came to their hands from the said policies, or any statement of what amount the defendant claimed to be payable out of the funds assigned to him, prior to any amount being paid to the plaintiff, in consequence whereof the latter commenced an action against the defendant in the Supreme Court of New Brunswick alleging therein his claim upon the said funds in virtue of the said assignment by Chapman to Belyea & Co., and by the latter to the plaintiff, and praying that an account might be taken of the said trust funds and of the charges thereon prior to the plaintiff, and that such amount as might be found in the hands of the defendant after payment of such prior claims might

1897

JONES v. MCKEAN.

Gwynne J.

be ordered to be paid to the plaintiff and for further relief.

In his answer to this suit the defendant answered among divers other things by way of defence, as follows:

I say further that I have been notified by said Joseph H. Chapman that said order which has been so transferred to said plaintiff was not an absolute assignment, but merely given to secure a sum of money at that time due or to become due from him to said Belyea & Co. That since that time such claim of Belyea & Co., has been satisfied, and that there is now nothing due by him in respect of said order, or any debt to secure which said order was given, but that on the contrary a large sum of money is due by the said Belyea & Co. to the said Joseph H. Chapman and said Joseph H. Chapman has repeatedly told me not to pay any money to the plaintiff, and that he wishes to be made a party to this suit, in order that he may contest the plaintiff's claim, and I say further that being only a trustee for certain purposes, with the notices I have received from the said Joseph H. Chapman I cannot pay over any money on account to said plaintiff except under the order of this honourable court, and I am desirous that the said Joseph H. Chapman may be made a party to this suit in order that he and the plaintiff may between themselves settle what rights the plaintiff has under the said order, and who is entitled to any residue which may remain after the trusts under the said assignment to me have been fulfilled.

It thus appears that the defendant was resisting the plaintiff's claim to have an account taken, or to have any interest in the trust funds assigned to the defendant in the absence of Chapman as a party to the suit. While the defendant was thus resisting the plaintiff's claim in the interest of, and upon the allegations of, Chapman as to the nature of his assignment to Belyea & Co., it does not appear that Chapman himself has ever taken any steps to establish against the plaintiff and Belyea & Co., the contestation so set up by the defendant on his behalf.

Now, whether this contestation of the defendant in the suit instituted against him by the plaintiff was well or ill founded we are not now concerned, for in so far

1897

JONES
v.
MCKEAN.

Gwynne J.

at least as this suit is concerned it has been absolutely concluded in the negative by the decree which was made in this suit on the 21st., November, 1887, which was appealed to this court and affirmed by the judgment of this court in November, 1891, this court holding that the assignment from Chapman to Belyea & Co. was an absolute assignment, as was also that from Belyea & Co. to the plaintiff, and that Chapman was not a necessary party to the suit.

Now, by the decree of the 21st November, 1887, so affirmed by this court in November, 1891, it was finally adjudged and determined that the plaintiff, Jones, is entitled to an account of the claims and charges on the trust funds received by the defendant prior to the claim of the plaintiff, and the court declared and did order and decree that such amount of the said fund as might be found in the hands of the defendant *after payment of such prior claims* be paid by the defendant to the plaintiff, and it was decreed further that it be referred to the referee in equity to inquire and take an account of the following matters.

First. When the trust funds, if received, were received, and if not, or any part thereof not received, when the same were due and payable and might have been received by the defendant, had he used reasonable diligence in collecting the same.

Second. The amount of the said trust funds received by the defendant, or which but for his neglect or default ought to have been received by him under the trust deed of the 28th., February, 1880.

Third. If the defendant had received any trust funds, where the same have been deposited, and what interest has been received for the same, or if used by the defendant, or with his consent, what interest should be allowed for the same.

Fourth. An account of the claims and charges on the said trust funds prior to the claim of the plaintiff arising at the date of the acceptance by the defendant, some time in May, 1882, of the order of the 28th of February, 1882, set out in the second paragraph of the plaintiff's bill, and for the better taking of the said account, and discovery, all parties are to produce before the said referee on oath all deeds, papers and writings in their or either of their custody and

1897

JONES v. MCKEAN.

Gwynne J.

power relating thereto, and are to be examined on oath as the said referee shall direct, who in taking the said account is to make to all parties all just allowances.

And the court reserved the consideration of all further directions and the question of costs until after the referee should have made his report.

Now upon the rendering of the judgment of this court in November, 1891, affirming the decree of the Supreme Court of New Brunswick of November, 1887, that decree became a conclusive adjudication in the suit between the plaintiff and the defendant that the plaintiff was entitled to an account from the defendant of all monies received by him, or which but for his wilful default and neglect might have been received by him, from or in respect of both of the policies of insurance assigned by Chapman to the defendant, and to be paid the balance of all monies accruing from the said policies in excess of the prior amounts mentioned in the assignment of the 28th April, 1882, from Chapman to Belyea, whether upon the taking of the account the sums so received should appear to have been received, or the wilful default and neglect by which, if any, any of such should be lost should appear to have been committed, before or after the date of the decree. Both the referee and the defendant were conclusively bound by the decree and the defendant could not be permitted upon the taking of the account directed, to question the plaintiff's right to the full account directed by the decree and to be paid the sums to which he was thereby declared to be entitled. Yet upon the taking of the account the persistent effort of the defendant, or of his solicitor to whom, as the defendant admits, he had wholly confided both the conduct of the suit in which the decree was made, the rendering of the account thereby directed, and the management of the trust funds, was to establish the contention that the plaintiff

1897

JONES v. MCKEAN.

Gwynne J.

so far back as in the month of August, 1886, upwards of 12 months before the decree was made in the suit, had by his conduct surrendered, released or abandoned all interest in the said Delaware policy, and that whatever had subsequently taken place in respect of that policy had been conducted by the defendant's solicitor in the interest of Chapman and for Chapman, who by the judgment of this court in 1891 was held to have no interest in the moneys secured by either of the policies. It was, in fact, with the utmost difficulty that any account could be extracted from the defendant's solicitor, and what was extracted does not appear to be complete, in relation to his and the defendant's dealings with that Delaware policy and the moneys thereby secured. As already observed such contention urged on the defendant's behalf was not open upon the decree under which the referee was acting, and no evidence in support of such contention should have been received by him, but having been received he does not appear to have acted upon it, in which we think he acted quite rightly. If the matter relied upon for the purpose of establishing that the plaintiff had surrendered, released or abandoned, as was contended, all interest in the Delaware policy and the moneys secured thereby was sufficient to establish the truth of the contention, it was matter which, if it had been established in the suit, would have affected the decree and should have been so urged. It was competent for the defendant, as the alleged abandonment took place after the defendant's answer had been filed, to have applied to the court for leave to set up this additional matter by way of defence and to give evidence upon it, and having omitted to do so, whether from neglect or design, and having rested his defence upon the matter set up in his answer and having suffered the decree to be made as it has been made and

1897

JONES
v.
MCKEAN.

Gwynne J.

having upon the grounds alleged in his answer contested the plaintiff's right to the benefit of that decree by appeal to this court he must abide by the decree, and render to the plaintiff the full benefit of the rights to which he is thereby declared to be entitled.

The material which the defendant's solicitor relied upon in support of his contention before the referee was of this nature; in the spring of 1885 final judgment was upon appeal pronounced in this court in favour of the plaintiff in the action of *Chapman* v. *The Providence Insurance Co.* for the full amount secured by the policy, and in the case of *Chapman* v. *The Delaware Mutual Insurance Co.* judgment of non-suit was ordered to be entered upon the grounds that the policy on its face required that to be valid it should have been, but was not, countersigned by one Ranney, the company's agent in New Brunswick who, however, had delivered the policy to Chapman as valid. At this time Mr. Straton, the defendant's solicitor in the present suit, was conducting the suits of Chapman against The Insurance Companies as attorney for the plaintiff on the records, but upon behalf of, and in the interest of, and as the solicitor of McKean, the now defendant. In the month of August, 1886, McKean, through Straton as his solicitor, commenced a suit in equity in the Supreme Court of New Brunswick, in the name of Chapman as plaintiff against the Delaware Insurance Company, and their agent Ranney, to compel the latter to countersign the policy, and for consequential relief. Chapman, the nominal plaintiff on the records, having left the province of New Brunswick the Insurance Company applied for and obtained an order for security for costs in that suit, and thereupon McKean, while the suit of the present plaintiff against him was still pending, wherein he was resisting the plaintiff's claim and denying his right to the account claimed by him

or to any interest in the said policies and the moneys secured thereby upon the grounds already stated, signed his name to a letter prepared by his solicitor Straton for his signature, addressed to the plaintiff in the words following:

ST. JOHN, 16th August, 1886.

To HON. T. R. JONES:

SIR,—As assignee and attorney of J. H. Chapman, I have commenced proceedings in equity to compel Henry R. Ranney, as agent of the Delaware Mutual Safety Insurance Company to countersign the policy on the "Pretty Jemima," in the suit in which at law the plaintiff was nonsuited, and for a decree that the company shall pay the amount. In this suit the defendants have appeared and applied for security for costs, and I enclose copy of order of Judge King, which has been served on me, by which proceedings are stayed. As you claim an interest in the subject matter of the suit I deem it my duty to send you the notice, and to apply to you to give the security.

Your truly,

(Sgd.) GEORGE McKEAN.

Now, it is to be borne in mind that at this time the plaintiff had not only asserted a claim to and an interest in the moneys secured by the Delaware policy, as well as in the moneys secured by the Providence Washington insurance policy, which claim and interest the defendant, acting as now appears wholly upon the advice of his solicitor, Mr. Straton, to whom he had confided the whole management of the trust funds, and of the suits instituted for the purpose of recovering the moneys secured by the policies, refused to recognize, but that he, the plaintiff, to enforce his claim so refused to be recognized by the defendant, had commenced a suit in equity against the defendant which was then still pending, and not brought to a hearing until four months later, in which suit the defendant was persisting in resisting the plaintiff's claim to an interest in the said trust funds; it is not therefore at all surprising that the plaintiff should consider the application so made to him to give security for costs in

1897

JONES v. McKEAN.

Gwynne J.

the suit in equity commenced by the defendant as a very singular proceeding, or that he should express his surprise in the terms contained in the letter following which he sent to the defendant in reply to his:

ST. JOHN, 25th August, 1886.

GEORGE McKEAN, ESQ:

I am in receipt of yours of the 16th instant, in which you state as assignee and attorney of J. H. Chapman, etc., etc. (copying the letter verbatim). In reply, I beg to state that I have not been consulted as to these proceedings being commenced, or my assent asked thereto, and as I am advised that the success of this suit is highly problematical, I do not consider that you are in a position to call upon me to give security. I further desire you to take notice that I consider your taking these proceedings are at your own risk and expense, and that under the circumstances, *and the course you have adopted* I shall object to any of the trust funds in your hands being appropriated to the prosecution of the suit.

I remain, yours truly,
THOS. R. JONES.

Upon receipt of this letter by the defendant, his solicitor, Mr. Straton, prepared for the defendant to sign, which he did sign and sent to the plaintiff, a letter in the terms following:

27th August 1886.

THE HON. T. R. JONES—

CHAPMAN AGAINST THE DELAWARE CO.:

DEAR SIR,—Yours of the 25th instant received. As I understand it as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings.

Yours truly,
GEORGE McKEAN.

The plaintiff took no notice of this letter, and made no reply to it. What however the defendant's solicitor Mr. Straton, to whom the defendant had confided the whole management of the trust funds, and of the suits instituted to recover them, did was this: he himself and another person procured by him gave the security for costs required in the equity suit instituted against the

Delaware Insurance Company by Straton as the solicitor of McKean in the name of Chapman as the nominal plaintiff, and thereupon he entered into negotiations with the insurance company and their solicitor for a settlement of the suit which terminated in an agreement made in December, 1886, whereby the insurance company agreed to pay $2,250 in full settlement of the suit and of the policy. In the course of the negotiations it appeared that the solicitor of the insurance company had an old claim against Chapman to the amount of $500 arising out of another vessel called the "J. T. Smith," and he insisted that this sum should be paid out of the $2,250, and for this purpose required that Chapman should be sent for to consent to this payment and to be present at the settlement. Accordingly Mr. Straton sent for Chapman, and procured his attendance, when upon the 24th December, 1886, the settlement was concluded by the solicitor of the insurance company handing Straton his draft upon the insurance company for $2,250, which upon its being indorsed was handed back to the solicitor, who gave his two cheques, the one for $750 and the other for $1,000, payable to Straton or his order, which sums Straton received. It thus appears that Mr. Straton, who ever since his first appointment as solicitor of the plaintiff upon the record in the suits of Chapman against the Insurance Companies in the place of the former solicitor, Mr. Thompson, deceased, has had the sole conduct of these suits, and the exclusive administration of the funds thereby secured and assigned to the defendant upon trust, as the latter's solicitor and confidential agent, and who as such is still responsible to the defendant for the manner in which he has administered the trust so confided in him, and who as solicitor of the defendant instituted the suit in equity in the name of Chapman as plaintiff in the record

1897

JONES v. MCKEAN.

Gwynne J.

against the Delaware Insurance Company, which suit was settled as aforesaid in December, 1886, received into his own hands out of the $2,250 paid by the insurance company in settlement of that suit the said sum of $1,750, just as he had received all moneys arising from the Providence Washington Insurance Company's policy; and it appeared further in evidence that he also took from Chapman a release of all claim upon such sum, and under the Delaware policy. This instrument was not received in evidence, as nothing contained in it could have any operation as against the plaintiff's right to have the account taken as directed by the decree, but the fact that such a release was taken remains, and it is significant in view of the contention set up and persistently pressed by the defendant's solicitor, who had on the defendant's behalf exclusive administration of the trust fund assigned to the defendant, namely, that the plaintiff by reason of the terms of his said letter of the 25th August, 1886, and by reason of his not answering the defendant's letter of the 27th August, 1886, must be held to have abandoned, surrendered or released all claim to the moneys secured by the Delaware insurance policy, which claim he was insisting upon in his suit in equity then pending against the defendant, which resulted in the decree in his favour in November, 1887, affirmed by this court on appeal in 1891, under which the account was being taken. Now the referee by his report made on the 31st October, 1894, has found that so far back as the month of March, Mr. Straton, the defendant's solicitor, received on account of the moneys secured by the Providence Washington Insurance Company's policy the sum of $1,765.35, and he has charged the defendant with this sum and with interest thereon, at 6 per cent, from the 1st of April, 1885, until the 1st of November, 1894. He also found that Mr.

Straton upon the 9th of November, 1885, received on account of the same policy the further sum of $5,579.91, and he has charged the defendant with this sum with the like interest thereon from the 9th November, 1885, until the same 1st November, 1894. As against these sums he has allowed by way of credit the sum of $6,905.13 as paid in March, 1885, less the sum of $473.80, making the sum of $6,431.83, together with interest thereon at 6 per cent from the 1st of April, 1885, to the said 1st November, 1894, for the reason following: the $6,905.63 included certain bills of costs of Mr. Thompson, the original solicitor of the plaintiff in the suits of Chapman against The Insurance Companies, in which were included the following items constituting the $473.80, which had already been paid, and were therefore not chargeable against the trust funds, viz.:

Retainer to Mr. Thompson paid by Chapman, in 1878	$ 25 00
Cash also paid to Mr. Thompson by Chapman	100 00
Witnesses' fees	74 40
Costs of the day	74 40
These two sums were paid to Mr. Thompson in his lifetime (as costs of the day) by the insurance companies, or one of them, upon postponement of a trial, Finally cash per Chapman	200 00
	$ 473 80

This latter sum was paid by Chapman as counsel fees on the argument of the case in the Supreme Court, that is to say on the appeal of the companies in the case of Chapman against them; these sums the referee deducted from the $6,905.63, and he allowed the balance with the said interest thereon from 1st April,

1897

JONES
v.
MCKEAN.

Gwynne J.

1885, to 1st November, 1894, making together $10,130.13. He also found that the defendant was not entitled to charge the trust fund as against the plaintiff with the sum of $384.34 claimed as due by Chapman to Carville McKean & Co., and £396 18s. 6d. sterling claimed as having been due by Chapman to Francis Carville & Sons, which sums had not been paid by the defendant, and which it had been proved before the referee had been purchased by and were assigned to certain trustees to whom the plaintiff had made an assignment of his effects for the benefit of his creditors, upon whose behalf also, and for whose benefit, the account in this suit was being taken, and as the above sums were, if due, no longer payable to Carville McKean & Co., or to Francis Carville & Sons, but were now payable to the same parties as were interested in the amount which upon the taking of the account should be found to be coming to the plaintiff, these sums could not now be suffered to remain in the hands of the defendant or his solicitor, to the prejudice of the plaintiff whose trustees are entitled to receive them; and in fine, the referee charged the defendant with the said sums of $7,336.26 with interest thereon, as aforesaid, and with the said sum of $1,750, with interest as aforesaid, amounting in the whole to the sum of.....$13,925 19

Less the said sum of.....$ 6,431 83
With interest as aforesaid.. 3,698 30

Amounting to.....$10,130 13

So charging the defendant with the balance, or $3,795.06.

The defendant filed exceptions to the referee's report, which have been upheld by the Supreme Court of New Brunswick, as regards the items following, that is to say:

1st. For charging the said sum of $1,750 paid to Straton in 1886 as the proceeds of the Delaware Insurance Company's policy.

2nd. As to the interest allowed.

3rd. For the disallowance by the referee of the several items constituting the $473.80, and

4th. For not allowing to the defendant the said sums of $384.34 and £396, 18s. 6d., so as aforesaid assigned to and now vested in the plaintiff's assignees in trust for his creditors.

As to the $1,750, we are of opinion that upon the evidence the referee has acted rightly and in conformity with the decree in charging the defendant with that sum, and that indeed conformably with the decree he could not have done otherwise. We are also of opinion that the solicitor of the defendant, who according to the evidence of the latter had the exclusive administration of the funds assigned to the defendant in trust in the dealing with which the defendant himself never interfered, cannot be regarded as having received that sum in any other character than as the solicitor of the defendant entrusted by the defendant with the duty of recovering and administering the trust funds assigned to him. The setting up by the solicitor of the obstructive objections to the taking of the account which were persistently pressed by him, were, we think, vexatious and inconsistent with his duty as a solicitor to whom the recovery and administration of the trust funds was confided by the defendant, and should not have been entertained. As to the interest allowed upon the sums received by the solicitor, the court has held that it has been allowed upon an incorrect principle; that the interest should have been charged upon the receipts until payments therefrom had been made, and that then the payments as made being deducted, the interest should be charged

1897

JONES v. MCKEAN.

Gwynne J.

on the balance, but the same result, or one equally beneficial to the defendant, was adopted by the referee, namely, by allowing interest upon the receipts from the time of their having been respectively received unto the fixed date of the 1st November, 1894, and interest at the same rate upon the disbursements from the time of their having been respectively disbursed unto the same 1st November, 1894, and then deducting the disbursements with such interest thereon from the receipts with the interest thereon, thus charging the defendant only with interest upon the balance or excess of the receipts over the disbursements. As therefore no good purpose could be served by the suggested alteration in the mode of calculating the interest we think that this exception should not have been allowed. As to the moneys already paid to Mr. Thompson in his lifetime, we are of opinion that they could not properly have been charged against the trust funds; so charging them could only operate for the benefit of Chapman, who had no interest reserved to him in the trust funds, an account of which was directed by the decree, so neither for the same reason could the money paid by Chapman in payment of counsel fees, on the appeal to this court of the insurance companies in the suits of Chapman against them. The exception to the referee's report in respect of those items should therefore have been disallowed.

For the reasons already given, we are also of opinion that the referee's not charging the trust fund, as against the plaintiff, with the sums of $384.34 and £396, 18s. 6d. now vested in the plaintiff's assignees in trust, for whose benefit also, as appears, the account was being taken, is free from all just objection. It never was suggested that the plaintiff's assignees in trust for the benefit of his creditors to whom the above claims were assigned, hold those claims so assigned to them in any

other right or character than as the plaintiff's assignees in trust for the benefit of his creditors, nor that they are not the parties also who as such assignees are interested in the result of the account. The plaintiff has sworn that they are, and the fact was not disputed. If it had been, the fact could no doubt have been settled by calling the assignees, or one of them, but as no such suggestion was ever made it cannot now be entertained for the purpose of enabling the defendant or rather his solicitor still to retain the money. The assignees as owners of the claims assigned to them are no doubt capable of looking after and protecting their own interests, and it is not suggested that they have made any claim on these moneys adverse to the plaintiff, or that they have ever made any objection to the manner in which they have been dealt with by the referee in his report. In fine we are of opinion that all of the defendant's said exceptions to the referee's report should have been disallowed with costs, and that in so far as those exceptions are concerned the referee's report should have been confirmed.

There remains still one point to be considered.

It was argued before us, first that the referee should have charged the defendant with the whole amount of the Delaware Insurance Company's policy upon the contention that there was no evidence of the reasonableness of the compromise, or second that at least he should have charged the defendant with the $500 paid to the solicitor of the insurance company out of the $2,250 paid by the company in settlement of the suit in equity. As to the $2,750 difference between the $2,250 paid by the company and the $5,000 amount of the policy, it can not be said that this sum was lost by the wilful default or neglect of the defendant, nor indeed can it judicially be now said that the compromise was at all improvident.

1897

JONES
v.
MCKEAN.

Gwynne J.

It appears that the non-countersigning of the policy which occasioned the non-suit in the suit at law was not the only defence offered by the company to that suit; they offered a defence upon the merits which was also open to them in the suit in equity, and if they should have succeeded therein nothing could have been recovered in respect of the policy, and we are not in a position to say that they could not have succeeded in such defence. Moreover the defendants being a foreign insurance company no longer, as appears, doing business in the Province of New Brunswick it is impossible to say what difficulty by dilatory obstruction might have been occasioned to the recovery even if the suit had been decided in the plaintiff's favour in the courts of this country, so that it certainly cannot be said that the compromise was improvident or lost by wilful default and neglect of the now defendant. As to the $500 part of the $2,250 paid by the company it must be admitted that the evidence failed to establish what was the consideration for that payment or why it should have been deducted out of the moneys paid by the company in settlement of the suit. It was suggested certainly that unless it should have been agreed to be paid out of that amount the $1,750 which Mr. Straton received would not have been received by him, but there was no evidence that the company imposed any such condition. The plaintiff could have himself removed all difficulty upon this point by calling the solicitor of the company who received the $500 to explain the consideration of its being paid to him. But the main objection to the contention of the plaintiff in respect of this item being entertained on this appeal is that it appears that the referee's report was made on the 31st October, 1894, that the defendant filed his exceptions on the 3rd December, 1894. The plaintiff filed no exceptions but

1897

JONES v. MCKEAN.

Gwynne J.

on the contrary made a motion for confirmation of the referee's report which came on for hearing in the month of March, 1895, together with the defendant's exceptions to the report, and also, as appears, together with the hearing of the cause on the further directions reserved by the decree of 1887. During the argument on this motion the plaintiff asked leave to withdraw his motion to confirm the report and to file exceptions to it. Leave was granted to him to withdraw his motion to confirm the report but the application for leave to except to it was refused, and an order was made to that effect, from which order the plaintiff did not appeal, and we have not before us the material upon which the application so refused was made. The appeal before us is against a decree of the judge in equity made on the 6th May, 1895, which, after reciting the plaintiff's motion to confirm the report, and the defendant's exceptions thereto, and that the plaintiff's counsel had asked and was granted leave to withdraw his motion to confirm the report (saying nothing as to his application to file exceptions) adjudged and decreed that certain of the defendant's exceptions should be allowed, namely those relating to the Delaware policy being those above mentioned, and that others be disallowed, and further in pursuance of the 166th section of the Act passed by the legislature of the Province of New Brunswick, in the 53rd year of Her Majesty's reign entituled "An Act respecting the practice and proceedings of the Supreme Court in equity," that the referee's report be amended as therein stated, whereby it was adjudged as follows, namely:

That the charges on the fund prior to the plaintiff's amount to the sum of $9,677.34, and that the total amount that the defendant received or should have received amounts to the sum of $7,336.25, and that the defendant is not indebted to the plaintiff in any amount

1897

JONES v. MCKEAN.

Gwynne J.

whatever, and that the report as amended be absolutely ratified and confirmed by the order, authority and decree of this court to be observed and performed by all parties according to the tenor, effect and true meaning thereof.

And it is further added that there be no costs to either party on the reference to take accounts before the referee, that the defendant's costs of the objections and exceptions to the referee's report be taxed by the clerk and paid by the plaintiff to the defendant or his solicitor. Provided, however, that the said defendant shall not proceed to demand or collect the said costs so awarded to him or any part thereof until the further order of this court or a judge thereof.

This is the judgment and decree which having been confirmed by the Supreme Court of New Brunswick is now before us, and for the reasons already given we are of opinion that the plaintiff's appeal must be allowed with costs in this court and in the appeal to the Supreme Court of New Brunswick, and that the judgment and decree of the judge in equity in New Brunswick in this cause in May, 1895, be reversed, and in substitution therefor that it be adjudged and decreed that the defendant's exceptions to the referee's report be disallowed and the master's report confirmed with costs to the plaintiff, and (assuming as we do the cause as is alleged by the judgment of the Supreme Court of New Brunswick on appeal to have been before the judge in equity as upon further directions also) that the defendant be adjudged and decreed to pay to the plaintiff all costs of suit the consideration of which was reserved for further directions by the original decree made in this suit in 1887, and also all costs attending the taking of the account under the decree before the referee. There was a cross-appeal but it was for costs only. It is however disposed of by the above disposition of the case. There can not be a doubt we think that, in view of the persistent denial by the defendant of the plaintiff's right to any account and to any interest in the fund assigned to

the defendant in trust, and of the unwarranted obstructions offered to the account being taken as directed by the decree, the plaintiff is entitled to have all these costs adjudged to him.

1897

JONES v. MCKEAN.

Gwynne J.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. McLean.*

Solicitor for the respondent: *C. A. Palmer.*