

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

New Brunswick.]

[March 25.]

JONES v. MCKEAN.

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

The holder of two insurance policies, one in the Providence Washington Insurance Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to McKean 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 Jones became entitled to the balance of said insurance money after McKean's claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of McKean, and for a defect in the other policy the plaintiff in the action thereon was non-suited.

In 1886 McKean wrote to Jones, informing him that a suit in equity had been instituted against the Delaware Mutual Insurance 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. Jones 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 McKean to employing the trust funds in its prosecution. McKean 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 Jones made no reply. The solicitor of McKean 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 Jones had brought suit against McKean 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 trust funds received by McKean, or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to Jones, and the acceptance thereof, which decree was affirmed by the full court and the Supreme Court of Canada. On the taking of said account McKean 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 McKean with the amount received, but on exceptions by McKean to his report, the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick,