

ELIZABETH ANN BRADSHAW, AD- MINISTRATRIX OF THE ESTATE OF JACOB BRADSHAW, DECEASED (PLAIN- TIF)	}	APPELLANT;	1895 *Feb. 20. *May 6.
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AND

THE FOREIGN MISSION BOARD OF THE BAPTIST CONVENTION OF THE MARITIME PROVINCES (DE- FENDANT)	}	RESPONDENT.
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ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.*Practice—Equity suit—New trial—Construction of statute as to—Persona
designata—54 V. c. 4, s. 85 (N.B.)*

53 V. c. 4, s. 85 (N.B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was held."

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau J. dissenting, that such application need not be made before the individual before whom the trial was had but could be made to a judge exercising the same jurisdiction. Therefore, where the judge in equity who had tried a case resigned his office an application for a new trial could be made to his successor. *Footner v. Figes* (2 Sim. 319) followed.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the ruling of the Judge in Equity who held that he had no jurisdiction to grant a new trial in the case.

The sole question for decision on this appeal was whether or not the present Judge in Equity, Mr. Justice Barker, could hear an application for a new trial, the former trial having been had before his predecessor Mr. Justice Palmer. The decision of this question depended on the construction to be placed on 53 Vic. ch. 4, sec. 85, which provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was had."

PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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Mr. Justice Barker refused to hear the application holding that the statute authorized it to be made before no judge but Mr. Justice Palmer. His decision was affirmed by the full court. The plaintiff then appealed to this court.

*C. A. Stockton* for the appellant referred to *Footner v. Figs* (1); *Pemberton v. Pemberton* (2).

*Palmer Q.C.* for the respondent. The court will not interfere on a mere matter of procedure. *Gladwin v. Cummings* (3).

As to the merits see *Armstrong v. Armstrong* (4); *Hodge v. Reid* (5).

THE CHIEF JUSTICE.—This suit was brought in the Supreme Court in Equity of the province of New Brunswick, and on the cause coming on for hearing before Mr. Justice Palmer, then the Judge in Equity, certain issues were directed by that learned judge to be tried by a jury. The jury by a majority verdict found the issues in favour of the respondent. The appellant moved for a new trial before Mr. Justice Palmer. Afterwards and before the hearing of the motion, Mr. Justice Palmer resigned his office as a judge of the Supreme Court of New Brunswick. By Act of the legislature of New Brunswick, 57 Vic., chap. 7, it was enacted :

That from and after the going into effect of this Act the Supreme Court shall be composed of a Chief Justice and five puisne judges.

And it was further enacted :

That it shall be the duty of the judges of the Supreme Court, by order to be made from time to time, to assign one of their number to attend specially to business upon the equity side of the court.

Under the authority of this Act the judges of the Supreme Court, by order duly made, assigned one of

(1) 2 Sim. 319.

(3) Cass. Dig. 2 ed. 426.

(2) 11 Ves. 50.

(4) 3 Mylne & K. 45.

(5) 1 Han. 89.

their number, Mr. Justice Barker, to attend specially to business on the equity side of the court. After the passing of this Act and after the making of the order assigning Mr. Justice Barker to act as equity judge, a motion was made to him for a new trial in this case. This motion was opposed by the counsel for the respondent on the ground that, under the 85th section, cap. 4, Acts 1890, relating to practice and proceedings in the Supreme Court in Equity, which enacts that

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either party may apply for a new trial to the judge before whom the trial was held,

a motion for a new trial could only be made to the judge before whom the trial was had and that Mr. Justice Barker could not hear the application for that reason.

The learned judge gave effect to the objection, determined that he had no jurisdiction, and refused to entertain the application for a new trial. From this order the appellant appealed to the Supreme Court of New Brunswick, which court (Mr. Justice Hanington dissenting) dismissed the appeal. From this judgment the present appeal is brought.

It is argued for the respondent that the decision of the Supreme Court was right inasmuch as the statute means that the application for a new trial should be made to the judge who tried the cause personally, and that it is not sufficient that it should be made to his successor in the event of the former having vacated the office. I am unable to agree in this conclusion; on the contrary I entirely concur with Mr. Justice Hanington both in the conclusions at which he arrived and the reasons he has given therefor.

Without authority I should have thought that such a very inconvenient construction as that adopted by the learned judges of the Supreme Court could hardly have been sustained. The result of the decision of the

1895. Supreme Court would of course be that in every case  
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 where a trial of issues in an equity suit had taken place, and the judge who tried them had either died or resigned before a new trial was moved for, there could be no new trial. An intention to enact a law leading to such a failure of justice ought not to be attributed to the legislature except on the strongest expressions and only in the absence of a possibility of giving any other meaning to the language used. I see no difficulty in giving to the words used a sensible meaning which would prevent any such inconvenient and unjust consequence as would follow in the present case if the order now appealed against should stand. In my opinion the judge referred to in the statute before whom the new trial is to be moved for does not mean the same natural person as the judge before whom the trial took place, but the person filling the same office and exercising the same jurisdiction. No reason can be suggested why the motion should be necessarily made to the person who presided at the trial, whilst there was a good reason why the jurisdiction should be assigned to the judge in equity whoever he might be, namely, that the motion should be made to that judge and not to the Supreme Court in *banc*. I think this was the intention of the legislature and I should have come to that conclusion even in the absence of authority. The case of *Footner v. Figes* (1), cited by Mr. Justice Hanington is however a conclusive authority in support of his view. A motion was made before Vice Chancellor Sir Lancelot Shadwell for a new trial of an issue which had been directed by Sir John Leach, when Vice Chancellor. Sir John Leach had been afterwards and before the motion was made, promoted to the office of Master of the Rolls. There was a general order of the court which directed that every application for a new trial

should be made to the judge who directed the issue, and the question was raised whether the motion ought not to be made before the Master of the Rolls. But the Vice Chancellor said that "the meaning of the order was that the motion should be made before the same jurisdiction though the judge might have been removed. This case seems to me directly in point, for I cannot adopt the suggestion that any distinction between it and the present case is to be made because we are here construing a section of a statute whilst in *Footner v. Figes* the question depended on the interpretation of a general order. Such orders are always construed on the same principle as statutes.

The appeal must be allowed with costs and the cause remitted with a declaration that the present learned judge in equity has jurisdiction to hear the motion for a new trial.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. This statute may be absurd but fortunately we have not to remedy all the absurdities to be found in the statute-book. I am against judicial legislation. Then this is a question of practice and procedure, and, as we held lately again in *Arpin v. Merchants Bank* (1), one we should not interfere with.

GWYNNE J.—I concur in the construction put upon the statute by Mr. Justice Hanington in the court below, and so am of opinion that the learned judge in equity had jurisdiction in the matter. The appeal must therefore be allowed with costs and the case remitted to him to exercise such jurisdiction.

SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *C. A. Stockton.*

Solicitor for the respondent: *Mont. McDonald.*

(1) 24 Can. S. C. R. 142.

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