MARTIN I. WILKINS.....APPELLANT; 1879

AND

THOMAS O. GEDDES.....RESPONDENT.

*Jan'y 20.
*April 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

37 *Vic.*, c. 13—*Interest on deposit in Court—Officer of Court not entitled to interest, if received by him—Summary jurisdiction of Court over its officers—Order of Court upon its own officer, when obtained by a third party, is a final order appealable under sec.* 11 *of* 38 *Vic.*, c. 11.

Under 31 *Vic.*, c. 12, and 37 *Vic.*, c. 13, the Minister of Public Works of the Dominion of *Canada* appropriated to the use of the Dominion certain lands in *Yarmouth* County, known as "*Bunker Island.*" In accordance with said Acts, on the 2nd April, A. D. 1875, he paid into the hands of *W.*, prothonotary at *Halifax*, the sum of $6,180 as compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of *Nova Scotia*, to one *A.*, as owner, to one *G.*, as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of *W.*, the prothonotary of the Court, for some time, *H.*, attorney for *G.*, applied to the Supreme Court for an order of the Court calling upon *W.*, the prothonotary, to pay over the interest upon *G.*'s proportion of the moneys, which interest (*H.* was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. *W.* resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the Court, for interest, but did not deny that interest had been received by him. A rule *nisi* was granted by the Court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held: 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, J. J.

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the Court. That, in ordering the prothonotary to pay over the interest received by him, the Court was simply exercising the summary jurisdiction which each of the Superior Courts has over all its immediate officers. (*Fournier* and *Henry*, J.J., dissenting.)

2. That the order appealed from, being a decision on an application by a third party to the Court, was appealable under the 11th sec. of 38 *Vic.*, c. 11. (*Fournier* J., dissenting, and *Taschereau*, J., *dubitante.*)

THIS was an appeal at the instance of *Martin I. Wilkins*, Prothonotary of the Supreme Court of *Nova Scotia*, at *Halifax*, from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule *nisi* of that Court as follows:—

"IN THE SUPREME COURT, 1878.

"*Halifax, SS.*

"IN RE BUNKER'S ISLAND.

"On argument of the rule *nisi* herein, calling upon *Martin I. Wilkins*, the prothonotary of this honorable Court, at *Halifax*, to pay over to *Thomas O. Geddes* the interest upon money of the said *Geddes*, paid into the hands of the said prothonotary, under and by virtue of Chapter 13 of the Acts of the Dominion, A. D. 1874, and on motion of counsel:—

"It is hereby ordered that said *Martin I. Wilkins* do forthwith, upon being served with a copy of this order, pay to said *Thomas O. Geddes*, or his attorney, the sum of two hundred and sixty dollars and twenty-eight cents, being the amount of said interest at four per centum per annum during the period said moneys were in his hands and invested in the banks.

"And that said *Thomas O. Geddes* do thereupon pay the said prothonotary the sum of twenty-six dollars and two cents, being ten per centum upon said interest accruing upon the principal sum, the latter sum being payable to said prothonotary as a commission for handling the principal sum, and in full for such service.

"Dated at *Halifax* this 15th day of May, A.D. 1878.

"On motion of Mr. *C. S. Harrington* of counsel with *Geddes*.

"By the Court,

"(Sgd.) "M. I. WILKINS,

"*Prothonotary*."

The facts as agreed upon by the parties are shortly as follows:—

In the year 1875 the Minister of Public Works for the Dominion of *Canada* appropriated certain lands in the County of *Yarmouth* for public purposes, under the provisions of the Dominion Satutes, 31 *Vic.*, c. 12, and 37 *Vic.*, c. 13, in amendment thereof, and paid to the said prothonotary of the said Supreme Court of *Nova Scotia*, at *Halifax*, on the second day of April, A.D. 1875, as required by the said Acts, the sum of six thousand one hundred and eighty dollars.

This sum was paid at several times by order of the Supreme Court of *Nova Scotia* to the parties entitled, less the sum of ten dollars, now in the hands of the said prothonotary, for disposition as the Court might order.

In consequence of some dispute between the claimants of the funds deposited, the money was not withdrawn immediately, but remained in the custody and under the control of the prothonotary for the time set out in the following affidavit:—

"I, *Charles Harrington*, of the City and County of *Halifax*, Esquire, do make oath, and say as follows:

"1st. I say that under and by virtue of an Act of the Parliament of *Canada*, passed in the year 1874, the Minister of Public Works of the Dominion of *Canada* appropriated to the uses of this Dominion certain lands in the County of *Yarmouth*, known as *Bunker's Island*. That by virtue of the authority vested in him by said Act, he did, on the thirteenth day of April, A.D. 1875,

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pay into the hands of *Martin I. Wilkins*, Esq., prothonotary of this honorable Court, the sum of six thousand one hundred and eighty dollars as compensation money, and interest, to be thereafter appropriated according to law among the several owners of the said island, and an order or notice, in compliance with sec. 2 of said Act, was then published, calling upon all parties interested to appear and prove their title to the money aforesaid.

"2nd. I say that proceedings were thereupon taken by *Ebenezer E. Archibald*, the owner of the land, and *Thomas O. Geddes*, a mortgagee, to procure payment out of the fund in Court, but no money was actually paid out of said fund by said prothonotary until on or about the twenty-seventh day of March, A.D. 1876, on which date the sum of five thousand five hundred and fifty-five dollars was paid as follows:

For Thos. O. Geddes.....	$3,451.78
For E. E. Archibald.....	2,103.22
	$5,555.00

the above being the amount due said *Archibald* for his fee simple, and the undisputed amount due said *Geddes* upon his mortgage.

"That from the date last above mentioned until on or about the 22nd day of August, A.D. 1877, the balance of six hundred and twenty dollars remained in the hands of the said *Martin I. Wilkins*, and on that date the further sum of four hundred and ninety dollars was paid to said *Thomas O. Geddes* by order of His Lordship the Chief Justice. I crave leave to refer to the original papers on file herein, from which the facts above set out will more fully appear.

"3rd. Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank upon deposit receipt by the prothonotary afore-

said, and I pray an order of this Honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him."

The prothonotary resisted the application, and the question raised on this appeal was whether, for the period during which this money was deposited with the prothonotary, he was liable to pay interest on the amount at the rate of four per cent. per annum.

Mr. *Cockburn*, Q.C., for Appellant:

On the question of jurisdiction see *Kent's* Commen. (1); *Osborn* v. *U. S. Bank* (2); *Citizens' Bank of Steubenville* v. *Wright* (3); *Weston* v. *The City Council of Charleston* (4).

On the merits, I contend that if the fact that any interest on the money deposited by the Minister had been received by the prothonotary, were established by legal evidence, which it was not, such interest would not be held by him to the use of Respondent, but to the use of the Minister, who alone could demand an account of it, and the Supreme Court of *Nova Scotia* had no power or authority to decide that the officer held such interest, to the use of Respondent, nor had they any power to order him to pay it to the Respondent, who was a mortgagee who had been paid off.

All we know is, that the Appellant is called upon to pay a sum of money to the Respondent, with whom he had no privity.

If the Respondent had any legal or equitable claim against the prothonotary, for interest on the moneys deposited, or money had and received in any other manner to his use, he should have enforced his demand

(1) Vol. 1, pp. 316, 317 & 326, note b.
(2) 9 Wheaton 819.
(3) 6 Ohio 338; 5 Wheaton appendix p. 16.
(4) 2 Peters 463.

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by an action at law or in equity, and the Supreme Court and its Judges have no power, under the Statute, to determine on a summary application, whether he has such claim or not.

Moreover, there are facts alleged upon which the judgment proceeds which do not exist at all. There is no evidence where the money was deposited and what interest was received. This case, on principle, should have been treated as a suit at law between the Respondent and the Appellant, and it was the duty of the Respondent to establish his case by evidence. The burden was upon him, and the prothonotary was under no obligation to deny facts that had not been so established, and the Court had no right to assume, in the absence of such denial, that the facts were as set forth in the judgment. See *Brown* v. *Southwise* (1).

Appellant also contends, that the Court has no power to order any further interest to be paid than the Statute directs; and by virtue of the Statute the parties are entitled to no more than six months' interest under any circumstances, except only in the case of the delay of the order beyond that term, being occasioned by the default of the minister.

When moneys are paid in under these Statutes, the officer with whom it is deposited is not required to invest them at interest, and he has no right to lend them, but is bound to keep and pay them out when ordered to do so under the Statutes. *Attorney General* v. *Lind* (2).

Mr. *Haliburton*, Q. C., for Respondent :—

This was not a " final judgment " in " a case," which, under the Supreme Court Act, can be a subject of appeal to this Court. The application is only an interlocutory proceeding, and it is an order of the Court to its

(1) 3 Bro. Ch. C. 107. (2) 6 Price 287.

own officer *in re Bunker's Island.* Reference was made to *In re Freeman et al* (1), and *Conkling's* Treatise on *U. S.* Courts (2). In this case, if the prothonotary had any reason to object to the compensation awarded him, he should have filed a petition of right. *Crawford et al* v. *Attorney General* (3). Now, the rule ordered that whatever money he had received, he was to account for it; and what does he do, he answers that he was not bound to pay interest. I submit that even in the case of a trustee, if he is charged with interest, the *onus* of proving he has not received it, remains upon him. But there is a distinction to be drawn between a public officer and an ordinary party. No official can retain as a perquisite any interest received by him on public monies in his hands. This is conclusively established by *Lonsdale* v. *Church* (4); see also *Attorney General* v. *Hoseason* (5); *DeBolt* v. *Trustees of Cincinnati Township* (6).

Mr. *Cockburn*, Q. C., in reply:—

The case of *Lonsdale* v. *Church* is a case in which the officer had not the money forthcoming. Here the money was paid promptly. If the Respondent is entitled to interest, it should be paid by the Crown, and not by the officer who has had the risk of safely keeping the money.

The Appellant does not come here in conflict with the Court, but only says that the Respondent has failed utterly to prove anything against him.

THE CHIEF JUSTICE:—

(After stating the facts as agreed upon by the parties.)

By 31 *Vic.* c. 12, sec. 2, and sub-sec. 2 of sec. 2, 37 *Vic.*, c. 18, the Minister of Public Works is authorized to pay

(1) 2 Grant E. & A. 109.
(2) Pp. 30 & 34.
(3) 7 Price 79.
(4) 3 Bro. Ch. C. 43.
(5) 6 Price 312.
(6) 7 Ohio R. 239.

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compensation money, or award, into the office of one of the Superior Courts for the Province, in which the lands are situate (with interest thereon for six months), subject to the claims of all persons seeking compensation, all which claims are to be received and adjudged upon by the Court, and the Court shall make such order for the distribution, payment, or investment of the compensation, and for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of the Act and to law shall appertain.

By virtue of these Acts the Minister of Public Works appropriated to the use of the Dominion certain lands in *Yarmouth* County, known as *Bunker's Island*, and, in accordance with the Acts, paid, on the 2nd April, 1875, into the office of the prothonotary, at *Halifax*, the now Appellant, $6,180, as compensation and interest to be thereafter appropriated among the owners of this island. On the 27th March, 1876, $3,451.78 was paid to *T. O. Geddes*, mortgagee of the island, and $2,103.22 to *Archibald*, the owner. From 27th March, 1876, to 22nd August, 1877, the balance of $670 remained in the hands of the prothonotary, when the further sum of $490 was paid *Geddes*, by the order of the Chief Justice, to whom the master's report had been referred for a final decision, and a further sum of $106.50, as interest over and above the amount already paid in, was ordered to be paid by the Minister of Public Works to the prothonotary, and by which order, after appropriating certain sums to parties interested in said island, the prothonotary was directed to pay balance then in his hands to *Geddes*.

The legal custodian of this money was the Court. The money was by the Statute paid into "the office of one of the Superior Courts for the Province in which the lands are situate," to be distributed by order of the Court, after receiving and adjudicating on all claims

thereto, and they were also bound, not only to make such order for the distribution, payment, or investment of the compensation, but also "for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of this Act and to law, shall appertain." The prothonotary of the Court, as the officer of the Court in charge of the office of the Court, was, no doubt, the person to receive it, but he had no personal interest in the money, and no right to use the money for his own personal gain or benefit, nor in or to any money that money produced had he any right or title, nor had he any legal control over it, beyond taking charge of it as an officer of the Court, as he would have of any paper, document, or record deposited or fyled in the office of the Court; and had he allowed the money to remain in the office of the Court, and kept it in the office with the same care that he was bound to keep the valuable records and other deposits of the Court, he would have discharged his duty, and no other or greater obligation was imposed on him. The applicant's contention in this case is, that the money being thus in his hands, as the mere ministerial custodian of the Court, he, instead of allowing the money to remain in the office, deposited it, no doubt for greater safety, in a bank where interest was allowed on deposits, and he now claims from the Court that so much of such interest as accrued from his portion of the amount deposited belongs to him, on the ground that the income belongs to the *corpus*, and must go with it to the proprietor; that it does not belong to the Court, in whose custody the law placed the principal, still less to the ministerial officer of the Court, who had simply legally the physical custody as the officer of the Court, subject to the order of the Court. I think it appertains to right and justice and to law, that to whomsoever the money deposited in

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the bank belongs, to him belongs the interest that money earned.

The applicant, by affidavit, applied to the Court in these words:

Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank, upon deposit receipt, by the prothonotary aforesaid, and I pray an order of this honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him.

Whereupon the Court granted in these terms the rule *nisi*, on which the rule absolute now appealed from was based:

On reading the affidavit of *C. S. Harrington*, sworn on the second day of March, A.D., 1878, the papers on file herein, and on motion of counsel, it is hereby ordered—

That *Martin I. Wilkins*, the prothonotary at *Halifax*, do pay to *Thomas O. Geddes*, or his attorney, interest upon the money of said *Thomas O. Geddes* paid into the hands of said *Martin I. Wilkins*, as prothonotary, aforesaid, in the above matter, at the rate of four per centum per annum, or whatever other rate of interest the said prothonotary may have received upon the said money from the time said money was paid into his hands until the time at which the same was paid out to *Thomas O. Geddes*, aforesaid, deducting from said interest whatever allowance, if any, the Court shall award said *Martin I. Wilkins* (as a commission for receiving and paying out the same) from money of said *Geddes*, unless cause to the contrary be shewn before this honorable Court on Friday, 29th day of March, A. D. 1878, at eleven o'clock in the forenoon.

Halifax, March 25, A. D. 1878.

This was no more nor less than the Court practically calling upon its officer to inform the Court, whether the information the applicant had received was correct, and intimating that any interest received belonged, not to the Court or its officer, but to the owner of the fund, and assuming the rate of interest to be four per cent., intimating to him that rate as the amount to be paid, or, if not the correct amount, "whatever other rate of

interest the said prothonotary may have received upon the said money from the time the said money was paid into his hands until the time at which the same was paid out" to *Geddes*, deducting from said interest whatever allowance the Court should award as a commission to the prothonotary. On service of this rule, I think it was the duty of the prothonotary, clearly and unequivocally, to have informed the Court what he, as the officer, had done with the money deposited in the Court; that the burthen of such a disclosure rested entirely with him; what had been done with the money might, or might not, be within the knowledge of the Court, but it certainly was most peculiarly within the knowledge of the prothonotary. If the amount had remained in the office as it was deposited, he should have said so; if it had not, he should have said so, and should have minutely detailed to the Court every particular connected with the money from the time it came into the office till the time it passed into the hands of the respective proprietors. All information in respect thereof being property of the Court, and not the private property of the officer to be given the Court, or withheld, as he might think would best serve his private interests. Instead, however, of so dealing with the Court, he resists the application on an affidavit, in which, after in section 1 stating the amount deposited, and the amount paid out under order of the Court, and in sec. 2 stating what he gathers from the papers on file as to this deposit, the prothonotary concludes that the parties must have been paid the price of their land and interest, and, therefore, he says, it is to be presumed that Mr. *Geddes* and his attorney have not alleged that he has not received the full amount of his claim.

It is very clear that the applicant does not complain that he has not received the full amount of his claim, but his complaint is that he has not received the interest

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which the amount of his claim produced. In sec. 3 the prothonotary puts forward what he considers his duty to be in these words:—

3rd. I do not receive money deposited on any condition, express or implied, that I am to pay interest for the use of the same, as it is not paid to me for my benefit or advantage, but for the convenience of the depositor, and my duty requires me to keep and pay it to those who are legally entitled to take it out of Court. I am neither bound to pay interest on money deposited with me, nor am I bound to invest it at interest for the depositor.

And in section 4 he complains of the injustice of a Provincial Statute not making proper compensation to persons keeping money for other persons in two cases, and claims it, by implication, authorizes compensation in other cases. In section 5 he says, his commission on money deposited is still open for arrangement; and, in sections 6, 7 and 8 he says:

6th. Money so deposited is not paid to me at my request, nor am I a voluntary bailee or depository in respect of it, but I am compelled to accept and take the risk of keeping it until it is called for, and know of no principle, legal or equitable, on which I can be called upon either to pay interest, invest at interest, or account for interest on money so forced upon me.

7th. Mr. *Geddes* has no legal claim on me that I am aware of for any money received by me to his use, and if he supposes that he has such claim the courts of justice are open to him and he can there enforce his rights.

8th. I do not think that Mr. *Geddes*, or any other person, can legally call on me to state how I deal with money deposited with me. My duty requires me to keep it and pay it out to those who are legally entitled to demand it. I have so kept and disposed of the money in question, and Mr. *Geddes* has no right to enquire how I employed, or whether I employed the money, or simply kept it locked up in my money box, which are entirely at my own discretion.

And closes his affidavit with section 9 in these words:

9th. I do not believe that Mr. *Geddes* has a claim for any amount from any person in respect of his land, and I consider this motion a mere speculation to try and obtain money to which he has no just or legal claim.

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And this is the only cause he shows against this rule *nisi*. I do not think it can be denied that the case was brought forward and dealt with in a somewhat loose and not altogether satisfactory manner. There are, no doubt, facts put forward in the judgment of the Court which are not to be found in the affidavits, but reading the affidavits before the Court, and especially that of the Defendants, I think we are bound to assume, that no point was raised, or controversy had, as to the fact of the money having been in the bank at interest, or that the rate claimed was too high, but that the whole controversy was as to the prothonotary's right to retain the interest, and as to the right of the Court to interfere in the matter. And the reason is very obvious ; for, if the money had never been in the bank, then the report to the Court of that fact by the prothonotary would have instantly answered the application ; so, again, if the prothonotary had raised the question that that fact was not sufficiently before the Court, all the Court would have had to do would be to allow the officer to state whether the money had remained in the office, or had been deposited, and, if the latter, on what terms. Nobody, I think, can doubt that the Court had sufficient jurisdiction and power over its officer to compel this. But the substantial and only material question raised was, that the applicant's money had, while subject to the control of the Court, produced interest, which he claims, and the way in which the prothonotary met the case relieves it from difficulty. Mr. *Wilkins* appears to think that, as the money was deposited in the office of the Court, and he was the officer in charge, he could do with it as he pleased, and was not liable to account to anyone for what he did with it, so long as he had the exact amount deposited forthcoming to answer any order the Court might make in reference to it ; in other words, for the time being, it was, as it were, his own

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private business, and for his conduct in reference to which he was accountable, neither to the owner of the money, nor to the Court. In this mode of putting the case, the officer lost sight of his position, and assumed the functions of the Court. Instead of dictating to the Court in an affidavit what his duties and rights were, he should, I think, have frankly put forward the facts, and then, upon those facts, have asked the Court to decide.

If he had never received any interest, all he had to do was to say so, and there the matter must have ended. If 4 per cent. was more than he actually received, all he had to do was to say how much he received, and the applicant could get no more. He raises no issue of fact, he does not deny that the money was deposited in the bank on interest, nor that that interest was as much as 4 per cent. per annum. Can anybody read this affidavit in any other light than as admitting, by irresistible implication, or inference, that he did deposit the money in the bank at a rate of interest not less than 4 per cent., and that he considered and believed (I have no doubt honestly, though, I think, very erroneously,) that what he so received, he was entitled to retain, either by way of compensation, or because, so long as he had the money forthcoming to respond to any order of the Court made in reference thereto, no one had any right to inquire what he did with the money, and if he invested or deposited, whereby gain or interest accrued from it, such increase was his private emolument, as to which he was not accountable to any person. In all which contentions, I humbly think, he was most unequivocally wrong. The question of compensation cannot in any way affect this case. If he is entitled to more than the Court have awarded him, he must make an application in the proper form and to the proper quarter, he cannot take charge of the deposits in the

Court, and, in defiance of the Court, hold the same till what he may consider his just claims are satisfied.

Nor can he treat the money deposited in the Court in any way as his private property, or make out of it on his own account any personal gain, profit, or emolument; if deposited for convenience or safe-keeping in a bank, whether by order of the Court, or by act of the officer, and interest is thereby earned, such interest goes with the principal, and must be accounted for to the owner as his property, as much as the principal from which it was derived; it being, so much fruit, so much increase on the money, and must follow the ownership of the money and go to the proprietor.

Under ordinary circumstances between party and party, when a person, not expressly a trustee, has dealt with another's money, the law raises a trust by implication, and, though he invests the money without the assent of the owner, he is held a trustee for the owner's benefit (1).

The law is too clear to be disputed that any interest made by an agent by the use of the principal's money belongs to the latter, and it is laid down in a general rule by *Story* on Agency adopted by the Court of Queen's Bench in *Morison* v. *Thompson* (2), that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, are to be for the benefit of his employers. And in *Paley* "On Principal and Agent" (3), it is said:—

> And not only interest, but every other sort of profit or advantage clandestinely derived by an agent from dealing or speculating with his principals' effects, is the property of the latter, and must be accounted for. So that if an agent who has purchased goods according to order, sell them again to advantage, with a view of appropriating

(1) See *Docker* v. *Soames* 2 M. & K. 664. (2) L. R. 9 Q. B. 480.
(3) P. 51.

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the gain to himself, although he should have answered the loss if any, yet his employer is entitled to the profits.

And Lord *Cockburn*, in *Morison* v. *Thompson*, after citing these authorities, adds:

> In our judgment, the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment, or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profit so made has reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer.

If this is so between individuals, it is scarcely necessary to say what must be the duty of an officer of the Court to the Court, and of the officer and of the Court to the party. The duty of the prothonotary was clear to account to the court for all profits made out of this money, or which the money earned for itself on deposit in the bank, and which came to his hands as prothonotary. The duty of the Court was clear to order the payment of such earnings or profits to the applicant, and the duty of the prothonotary was to pay over the amount as absolutely belonging to the applicant.

While the officer of the Court can never be permitted to make any profit to himself, by using or investing the funds deposited in Court to be disposed of by the Court, he would clearly be exempt from any loss occurring to those funds while in his charge as an officer of the Court, unless, indeed, he has been guilty of negligence, malversation or fraud. If he performs his duty, he may claim indemnity from all personal loss. This is no new doctrine; it is equally applicable to trustees, agents, guardians and wards, and such like relations.

This is not to be treated in any way as a suit between party and party; there is no suit about it. It is simply

the exercise of the summary jurisdiction which each of the Superior Courts has over all its own immediate officers. It has nothing to do directly with the distribution of compensation money deposited under the Statute. It is an application to the Court outside, and independent of the distribution, though, it is true, growing out of the amount apportioned. It is an application by a party, to whom a portion of the amount deposited has been awarded, for the payment to him out of Court of money which the amount awarded him earned, while under the control of the Court, as interest from the bank, where it had been deposited for safe keeping, which interest so earned, the applicant claims, belongs to the principal, and so inured to his benefit as owner of the *corpus* from whence the interest proceeded; and, therefore, the applicant seeks an order from the Court to its officer to pay over to him the amount. In principle, the application is precisely similar to an application to the Court for an order for the payment of interest, supposing the money had been deposited in the bank on interest by order of the Court. If this money had been deposited in the bank of deposit of the Court, as it would have been in accordance with the practice in *New Brunswick*, to the credit of the cause or matter in which it was paid in, subject to the order of the Court, no difficulty would ever have arisen. Though not done by order of the Court, it was done by the officer of the Court. Surely this cannot legally take from the owner of the money the produce of the money and give it to an officer of the Court, who can pretend to no interest in the money, nor any control over it beyond what the Court may authorize him to exercise.

STRONG, J.:—

I am of opinion, that we have jurisdiction to entertain

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this appeal, as an appeal from a final rule or order (1), though I have had some doubt on this point. There are many cases reported in the Privy Council reports, and referred to in Mr. *Macpherson's* book on the practice of the Judicial Committee, which show that an appeal does not lie from rules or orders made by Colonial and East Indian Courts—from which the Privy Council possesses an appellate jurisdiction defined by the charters establishing such Courts, in the same terms as that possessed by this Court—where such rules and orders are made upon their own officers.

The rule or order is regarded, in such cases, rather as a command or direction by the Court to its own ministerial officer, than a judicial determination or decision. I find, however, in all these cases, that the Court acted of its own motion, and there was no third party invoking the exercise of its jurisdiction; and this distinction, in my judgment, makes the principle I have referred to inapplicable in the present case; for there being here a party making a claim upon the prothonotary, the order of the Court was strictly a judicial decision or determination, whilst in the cases I have referred to, the Court, *ex mero motu* making an order upon its own officer, was acting rather as a party exercising superior authority over its subordinate, than as a judicial tribunal deciding between adverse and contesting parties. For these reasons we are, I think, bound to entertain the appeal, as being "a decision, rule, or order" coming within the express words of section 11 of the Supreme Court Act.

The objection raised by the Appellant, to the jurisdiction of the Supreme Court of *Nova Scotia* to make the order, is entirely unfounded. The Appellant says, that the order is not authorized by the Statute (2) under which the money was paid into

(1) Supreme and Exchequer Court Act, sec. 11.

(2) 37 Vic., cap. 13.

Court. The answer is, that the order is not made in exercise of any jurisdiction conferred by the Statute, but in exercise of that large and most salutary summary jurisdiction which all courts of justice possess over their own officers.

The prothonotary of the Supreme Court was, in contemplation of equity, a trustee of the money paid into Court, and any profit made by him by the use of the money belonged to the persons who should prove to be entitled to it, who could, without any doubt, have compelled the Appellant to account for the interest in the usual manner in which parties are made to account in Courts of Equity. This, however, did not interfere with the summary jurisdiction of the Court over the Appellant, as its officer, and if he did, in fact, receive interest, the Court, in ordering him to account for it, most properly exercised a jurisdiction upon the existence of which this Court ought not to cast a shadow of doubt.

Then, it is contended, that the evidence was insufficient to show that any interest was, in fact, received by the Appellant. The evidence might, perhaps, have been made stronger, but I agree with the Chief Justice, that it was at least sufficient to warrant the Court in calling upon the prothonotary to answer it, and, upon his refusal to admit or deny the fact of interest having been received by him, to make the presumption against him upon which the Court acted. Mr. *Harrington*, who, it appears, from the consent paper filed and printed in the case, was the attorney for *Archibald* and *Geddes*, the owner and mortgagee of the land, swears, that, to his information and belief, the money paid into Court was placed in the bank by the Appellant "upon deposit receipt;" and he prays for an order for the payment of a proportion of the interest to *Geddes*. I think this necessarily implied that the money had been deposited on interest, and, when the Court were

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put at arms length by their own officer, who thought fit to place himself in an attitude of defiance towards them, they acted neither erroneously nor rigorously in treating the money as having been deposited at 4 per cent., and the time of deposit as being co-extensive with the period during which the money remained in Court. Strictly speaking, the more regular and satisfactory course would have been for the Court to have made a preliminary rule or order upon the prothonotary to answer specially as to the fact of his having received any, and what amount of interest. But, as the Appellant has chosen to dispute the power of the Court to order him to pay interest, and has chosen to withhold all information as to the fact of his having received any interest, he cannot have been prejudiced by the course which the Court pursued in making an order against him upon the statement contained in Mr. *Harrington's* affidavit.

Upon one other point I had some doubt. I think *Geddes*, the Repondent, was not entitled to be paid anything more than the amount which was strictly due to him upon his mortgage for principal and interest, together with his costs. The claim of a mortgagee is always so limited. The fund in Court represented the land, and as the mortgagee would not, in any event, have been entitled to any of the fruits or profits of the land, as he would have been held accountable if he had gone into possession, so neither is he entitled to the fruits or profits produced or gained by the investment or employment of the fund into which the land has been converted by the paramount authority of the law. The Statute expressly provides that the fund paid into Court "shall stand in the stead of such lands or property" (1).

Any interest received by the Appellant, beyond the

(1) 37 *Vic.*, c. 13 sec. 1.

amount due to *Geddes* on his mortgage, would, therefore, have been properly payable to *Archibald*, the owner of the equity of redemption.

I cannot, however, satisfactorily ascertain that *Geddes* received more than was due to him in respect of his mortgage debt, interest and costs, although some of the figures would lead one to suppose that he has received something more. The amount of principal secured by the mortgage, as distinguished from interest, is not, however, anywhere distinctly stated in the case, and, as it is the duty of an Appellate Court to assume the decision of the Court below to be right, in so far as it is not demonstrated to be erroneous, more especially as regards a point not comprised in the Appellant's objections to the judgment appealed from, I cannot say that the order appealed from was in this respect wrong.

I am of opinion that the appeal should be dismissed with costs.

HENRY, J.:—

The appeal in this case was taken from a rule of the Supreme Court of *Nova Scotia*, founded on an affidavit made by *Charles Sydney Harrington*, of *Halifax*, Esquire, setting forth that under the *Dominion Act*, 1874, cap. 13, the sum of $6,180 was, on the 13th day of April, 1875, paid by the Minister to the Appellant, prothonotary of that Court, for certain lands in the County of *Yarmouth*, known as *Bunker's Island*, appropriated for the uses of the Dominion; that delay took place in the decision of the Court as to the parties entitled to a distribution of that sum; and that no money was paid out until the 27th March, 1876, when the sum of $5,555.00 was paid to the Respondent for an amount then due on the mortgage he held of the lands in question, and to one *E. E. Archibald*, as owner; and that a further sum of four hundred and ninety

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dollars was, on the 22nd of August, paid to the said Respondent, thus leaving $140 still remaining of the $6,180 in the hands of the Appellant. The affidavit craves leave to refer to the original papers on file and concludes thus: "Lastly, I say that I am informed, and verily believe, that the said sum of $6,180 was placed in the bank upon deposit by the prothonotary aforesaid, and I pray an order of this honorable Court for the payment due to *Thomas O. Geddes* of the interest upon the proportion of the moneys aforesaid belonging to him."

Upon this affidavit the following rule *nisi* was granted *In re Bunker's Island*:—[His Lordship read the rule *nisi* (1).]

This is not a rule calling upon the officer to account to the Court, but an independent procedure to recover money from him in the same way as would have been adopted against one not the officer It is not for the Court to control its officer, but to control money under the terms of the Act, and so we should treat it. The affidavit does not state that there was any balance of the $6,180 remaining in the Appellant's hands, nor is the rule to pay any such balance, but interest, which it is alleged accrued upon it for an indefinite term, and to be subsequently ascertained as the result of some future enquiry, as to the fact of his ever having received any interest, and to what amount, and to deduct from the amount so ascertained whatever allowance the Court should award him as a commission. The Respondent showed cause against the rule, and, by his affidavit, shows conclusively that he paid out, under the order of the Court, all he received, except $10, subject to the order of the Court. I need not refer further to it than to say that it contains no acknowledgment *that he ever deposited the money in any bank*, or *received interest on any part of the sum deposited with him.*

(1) See p. 212.

He is, however, adjudged to pay interest at the rate of four per cent. for every day the money remained in his possession, awaiting the orders of the Court. The Court, I admit, has power over its own officers, and may, by summary process, order the payment of any sum actually in such officer's hands, in any case wherein money is paid into Court, and over which the Court has control, but that is far from this case, as, I think, I shall hereafter show.

Under the provisions of the Acts the Court has a prescribed and limited control. By sec. 2 of c. 13 of 37 *Vic.*, under which Act the money for the lands in question and interest is required to be paid to the prothonotary, and over the amount so paid in, the Court has control. By the concluding clause of that section, it is enacted that—

> The Court shall make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested as to right and justice, and according to the provisions of this Act and to law shall appertain.

As soon as it appeared to the Court necessary, it might have, therefore, ordered the whole amount to be invested, or when, by its judgment, a party became entitled to any portion of it, the Court could have ordered it to be invested, and if the investment became a bad one through the failure of a bank or otherwise, the prothonotary would be held harmless in having obeyed the order of the Court under the provision, but without that the prothonotary would have invested at his peril, and would, in case of failure, be liable to make good the loss. Besides, the prothonotary was required to have the amount always ready to be paid at any moment the Court ordered him to pay it out. No order for the investment was made, and the prothonotary had, therefore, to keep the money safely under his immediate control. He was under no obligation to invest it, but might, for safe keeping, at his own risk, either

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keep it locked up in his safe, or deposit, *on call*, in a bank. If there had been, under the circumstances, a legal obligation on the prothonotary to invest, as is sometimes the case with executors, trustees and others, and he did not do so, he would have failed in his duty, and might properly be charged with the loss of interest occasioned thereby. The case, however, of a public officer who receives money that the Court may, at any moment, call upon him to pay over, is very, and essentially different. The money is not under his control, but that of the Court, and, therefore, he is under no legal obligation to invest. If he did so in this case and a loss was incurred, it would be his, and not the Respondent's. In the case of an executor or trustee it would be very different, for, if the latter made a reasonably good investment in the interest of heirs, legatees, or *cestui que* trusts, the loss would be theirs, not his. In the one case, the prothonotary would guarantee the investment, but, in the other, the executor or trustee would not. In the one case, the profits arising from the investment would go to those whose risk they were at; but, in this case, the Respondent claims profits when running no risk from the party at whose risk the investment undoubtedly would be.

Before remarking on other parts of the case, it is proper to test the mode of procedure in it.

There was, previously to the proceedings herein, a matter before the Court, but was that matter still open to the jurisdiction of the Court? As I before stated, and as section 2 provides, the Court had summary jurisdiction only over the amount actually shown to have been paid to the Prothonotary under that Act. The case agreed upon has this statement:—

> The contention on the part of the Respondent, and sustained by the Court, is, that for the period during which this money was deposited with the Prothonotary, he is liable to pay interest on the amount at the rate of four per cent. per annum.

And

The question was raised by the said rule *nisi* granted on the 25th March, A. D. 1878, which was made absolute on the 1st day of April, 1878, and from that judgment this appeal is taken by the said *Martin I. Wilkins* the Prothonotary.

It is, therefore, patent that the application is not, either for any part of the money paid into the hands of the Prothonotary, or for the proceeds of any investment ordered by the Court. How, then, or by what authority could the Court, by such a procedure, make any such order? It is true the Appellant is an officer of the Court, but could it by such procedure investigate a tailor's or shoemaker's bill against him, and order him to make payment? There is not the scintilla of evidence, as I shall show, that he ever received any interest on the money, or ever invested it, and if there was, it was not money paid into his hands, under the Act, and, therefore, not under the summary control of the Court, and heading the affidavits and rules "*In re Bunker's Island*" could not give it jurisdiction.

Section 13 of cap. 94, *R. S. of Nova Scotia*, 4th series, under title 23 "of Procedure in Civil Cases," and which chapter is entitled "of Pleadings and Practice in the Supreme Court," and under the heading "Pleadings," it is enacted that "all personal actions shall be commenced by Writ of Summons or Replevin." If, therefore, the Appellant had in his hands any money to the use of the Respondent, that question could only be legitimately tried by an action for money had and received, and the Respondent could only recover if he proved money in the Appellant's hands. In that case it would not be sufficient to get some one to swear that he was *informed and verily believed* "that the sum was placed in the bank upon deposit receipt." No Judge, worthy of his position, would permit such evidence at all, for it is mere hearsay. Besides, it proves nothing, if the statement were true, for it contains no allegation that it

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was on interest. The mere statement that it was "upon deposit receipt" does not necessarily prove that it was on interest, for, if a deposit is made on call, as the money in this case would likely be, if at all, it does not necessarily follow that the bank would pay any interest. But the rule *nisi* asks for interest for *the whole period* at *four per cent.*, and the rule absolute appealed from gives it without the deduction of even one day.

I can see no evidence to sustain such a case, and the Plaintiff in it should, under evidence on a trial, and would, no doubt, be non-suited by any Judge in *Nova Scotia*. The affidavit says he was informed and believes the money to have been placed in the bank. There are in *Halifax* several banks—to which of them does "the bank" point. There was no evidence before the Court what any bank paid on deposits, and I know of no legislation by which the rate should be fixed by that of the Bank of *Nova Scotia*, as by the judgment appealed from appears to have been done; nor am I aware of any rule of evidence, or any other, by which a Court can, or is required to, take judicial notice of the rates paid by the banks from time to time, or any of them; and what evidence is there to show that the bank rate in April, 1875, referred to as the proper rate in the judgment, was the proper rate in March, 1876, or August, 1877, when the several payments were made by the Appellant.

If, again, it was the duty of the prothonotary to have invested the money on interest, and he failed to do it, he could be made answerable by a proper suit. The judgment, too, mistates the statement in the affidavit of *C. S. Harrington*, which alleges that he, in that affidavit, stated "that the amount was placed in the bank upon deposit receipt," when the affidavit states only "*that he was informed and verily believed*" that such was the case. I am at a loss how the Court

got the information as to the particular usage of the banks, unless from personal enquiry, and that would be but hearsay evidence, and not receivable. I feel bound in this case, as well as in any other, to uphold the rules of evidence which the wisdom of centuries has approved for the safety of every civil right, and, independent of the question of jurisdiction, arising from the incorrect procedure, I feel bound to say the evidence to sustain the rules is totally insufficient. The applicant for a rule *nisi* is bound to make out by statements in his affidavits a *primâ facie* case, and he cannot otherwise succeed, unless his opponent, in answering, supplies any material deficiency in them. That deficiency which I have pointed out is in no way supplied by the Appellant's affidavit. The judgment, then, is not founded on evidence, but on some other ground not known to, or acknowledged by, the law. It, therefore, in my opinion, cannot stand.

The learned Chief Justice of *Nova Scotia*, acting by consent instead of the Court, made, in 1877, the "distribution" of the whole sum, except "$625 to meet *Parr's* demand, if established, and costs." He, however, states his belief that *Parr* had no claim, and the Respondent, in August of that year, received out of that balance $490, and $125 were by order paid to the master who investigated the rival claims, which left, as the Appellant states, but $10 of the sum paid into his hands. He closes his judgment of distribution in these words: "In strict justice, a large share, perhaps, of the costs ought to fall on *Parr*, but I content myself with deciding that he shall pay to *Archibald* forty-five dollars, being about one-third of the master's fees, which *will close the transaction.*" The Court, therefore, by His Lordship the Chief Justice, "closed the transaction," which simply means, made the distribution and did everything the Statute authorized or permitted the Court to do. I

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feel bound, therefore, to hold the power of the Court under the Statute was executed, and, being so, it could not further deal summarily with any matter with respect to, or arising out of it, and that for the settlement of any other claims or demands, the party making them should have done so by an action. There are other objections that might be taken to the judgment, but I have stated sufficient, in my opinion, to set it aside. I, therefore, think the appeal should be allowed, and the judgment of the Court below reversed.

FOURNIER, J., concurred with *Henry*, J.

TASCHEREAU, J.:—

In this case, I have strong doubts as to the jurisdiction of this Court to hear and determine the appeal. It seems to me that an order by a Court of Justice upon one of its officers does not fall under the provisions of sections 11 and 17 of the *Supreme Court Act*, and is not an appealable case. However, the majority of the Court hold that the appeal lies.

By the 37th *Vic.*, ch. 13 D., sections 1, 2 and 3, it is enacted that any compensation money for lands taken or acquired by the Minister of Public Works under the 31st *Vic.*, ch. 12, shall stand in the stead of such lands, and that such money may be deposited by the Minister of Public Works in the office of one of the Superior Courts of the Province in which the lands are situate. The Court, after hearing the parties interested, is empowered "to make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested, as to right and justice, and according to the provisions of this Act and to law shall appertain."

In April, 1875, a sum of $6,180 was deposited in the hands of the Prothonotary of the Supreme Court of

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Nova Scotia in virtue of the said Act. This sum has been distributed by the Court, and the only question now is about the interest on it. Upon a rule obtained by the Respondent, the Prothonotary has been condemned by the Supreme Court of *Nova Scotia* to pay the interest on that sum at the rate of four per cent. per annum, and from this judgment the prothonotary appeals to this Court.

I am of opinion his appeal should be dismissed. One of his contentions is that the Respondent should have proceeded against him by an action at law or in equity, and that the Court could not determine the matter upon a rule. He might as well have pretended the same thing for the whole of the six thousand dollars, and have kept the money till a judgment against him upon a regular action had intervened. Has it ever been pretended that a Sheriff, a prothonotary or any other officer having monies in his hands to be distributed by the Court, must be regularly sued and condemned in an ordinary action before he has to pay it? Such is the contention of the Appellant.

Another of the reasons urged by the Appellant is that the Court below had not the power to order him to pay this interest, and that the Statute does not provide for it. The words of the Statute are to me very clear. It enacts that the Court shall make such order for the distribution, payment, or *investment* of the monies, as to right and justice, and according to law, shall appertain. Does not that give to the Court the most ample powers possible over these monies? How can the Appellant pretend, as he does, that he, alone, was to decide about the investment of this sum; that this was at his sole discretion?

The only question in the case upon which I, at first, had any doubts, is about the amount of the interest, four per cent., to which he has been condemned, and

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how the Court below could come to establish this amount, or any amount, against him without evidence of any kind about it. But a reference to the case has satisfied me that, upon this ground also, Appellant must fail. What was the issue between the parties in the Court below? The Respondent's counsel, upon an affidavit that he was informed and verily believed that the Appellant had received interest from the bank on the said sum of $6,180, obtained a rule *nisi* ordering the Appellant to pay him interest upon his monies, at the rate of four per centum per annum, or whatever rate he, the Appellant, might have received. Upon the return of this rule, what does the Appellant say? He does not deny having received interest upon the monies in his hands, but he merely alleges that he is not bonnd to pay such interest. No issue of facts is raised by him; there is not a word from him denying that he has received such interest. Upon this the Court takes his affidavit as an admission of the facts alleged against him, and rightly so, it seems to me. This was not an ordinary case between party and party, but a Court of Justice dealing with its own officer. I am thoroughly satisfied that, if the Appellant had not received interest at four per centum per annum, he would have said so in his affidavit. He only raised a question of law, and, upon that question of law, the Court properly held that he had no more right to appropriate to himself the interest than the capital. In the absence of evidence of the amount of interest by him received, and upon his refusing to inform the Court what was that amount, a fact within his own knowledge, he might even have been condemned to pay the legal interest, six per cent. per annum.

I am of opinion this appeal should be dismissed with costs. *Appeal dismissed with costs.*

Solicitor for appellant: *Samuel G. Rigby.*

Solicitor for respondent: *C. S. Harrington.*