Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Colonial Bank v. *The Exchange Bank of Yarmouth, Nova Scotia, from the Supreme Court of Nova Scotia ; delivered December 10th,* 1885.

Present :

LORD MONKSWELL.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE question in this case is whether the sum of three thousand dollars in dispute was received by the Defendants under such circumstances that they are to be held to have received it to the use of the Plaintiffs, the Plaintiffs being the Appellants and the Defendants the Respondents in this Appeal. The Plaintiffs have to show that the money was not received by the Defendants to their own use ; that there was privity between them ; and that the Plaintiffs occupied such a relation to the Defendants that they are entitled to recall the money out of the Defendants' hands into their own.

That the money was received by the Defendants, not to their own use, but by mistake, is a matter not now disputed. For the decision of the other questions it is necessary to state at some little length the material facts of the case.

The firm of B. Rogers and Son were doing business at Yarmouth, in Nova Scotia. One of the partners, Mr. Joseph Rogers, did the financial part of the business, and for the purpose of the present case the acts of Joseph Rogers alone may be considered. On the 21st

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April 1879 Rogers wished to remit some money to the branch of the Bank of British North America at Halifax, and he had goods on board a ship which was then making its way to the Island of Antigua. He desired to make those goods the means of his remittance to Halifax, and he telegraphed to McDonald and Company, his agents in Antigua, in the following terms:—"When 'Pronto'"—that is the name of the ship—"arrives, cable funds Bank British North America (Halifax)." McDonald and Company had dealings with the Plaintiffs' bank in Antigua, and had a credit there. When the "Pronto" did arrive and Rogers's goods were sold and the funds realised, Mr. McDonald found that there was available three thousand dollars for remission to Halifax. He repaired to the Plaintiffs' bank, and on the 6th May 1879 instructed them to make the remittance. But his instructions were in these terms:—"Draft on New York in favour "of Bank British North America. Draft for "Rogers credit Yarmouth." Unfortunately McDonald omitted the direction to transmit to the branch bank at Halifax. That proved to be a very serious omission. Instead of that, he gives the rather ambiguous instructions contained in the words:—"Draft for Rogers credit Yarmouth." He put the Plaintiffs' bank in funds to the extent of three thousand dollars, and left them to carry out those instructions.

It may be mentioned that at that time there were current certain bills drawn by an Antigua firm, Messrs. Perot, on Rogers, accepted by Rogers, and discounted by the Plaintiffs' bank. The Plaintiffs had sent the bills to the Halifax branch of the Bank of British North America for collection. Rogers states that the remittance made by him to the Halifax branch was for the purpose of taking up those bills, and that he so informed Mr. Murray the manager of the Defendants'

bank. But the Plaintiffs did not rely in any way upon that, and their Lordships are disposed to concur with the arguments presented to them by Mr. Grantham and Mr. Bray to the effect that the Plaintiffs' case is not in any way strengthened by the circumstances that those bills were current, and that Rogers may have had intentions in his own mind of applying the three thousand dollars, or whatever were the proceeds of the "Pronto" cargo, to the taking up of those bills.

The Plaintiffs proceeded to act upon McDonald's orders. Their agents in New York were the firm of Maitland Phelps and Company, and the Plaintiffs possessed funds in the hands of that firm. On the same 6th May they telegraphed to Maitland Phelps and Company in the following terms:—"Pay against receipts to the Bank of "British North America Rogers credit Yar-"mouth three thousand dollars. Advise them "of the credit." Those are precisely the terms of the instructions which McDonald gave to the Plaintiffs, and so far the Plaintiffs are acting within their instructions.

But on the 8th May Maitland Phelps and Company proceed to carry into effect the Plaintiffs' instructions to them, and here again a serious mistake occurs. They put the New York branch of the Bank of British North America in funds by giving them a cheque for three thousand dollars, but they instruct them wrongly. The instructions appear in the form of receipts, but nevertheless they are instructions from Maitland Phelps and Company to the Bank of British North America. First they frame a receipt by which the Bank of British North America are made to say that they have received from Maitland Phelps and Company—"Agents Colonial Bank of Antigua, "the sum of three thousand dollars for account "Yarmouth bank, credit of Rogers." Now there Maitland Phelps and Company take upon them-

selves to introduce a Yarmouth bank of which McDonald and the Plaintiffs had said nothing.

When they tender those instructions to the Bank of British North America they are told that there is no Yarmouth branch of the Bank of British North America, and the Bank of British North America in New York desire more specific instructions for the purpose of transmitting the funds to Yarmouth. Those they get in the form of an amended receipt, which runs thus:—"Received from "Messrs. Maitland Phelps and Company, Agents "Colonial Bank of Antigua, the sum of three "thousand dollars for account of Exchange "Bank of Yarmouth credit of Rogers." It seems the Bank of British North America had correspondence with the Exchange Bank of Yarmouth, and they conceived that was the proper way of remitting the funds to Yarmouth; but by reason of that departure from the instructions which McDonald gave to the Plaintiffs, and the Plaintiffs gave to Maitland Phelps and Company, the three thousand dollars found their way, not by any cash payment but by means of credits, into the hands of the Exchange Bank of Yarmouth.

On the same 8th May a letter was written by the New York bank to the Defendants' bank at Yarmouth, which was in these terms:—"Your "account is credited three thousand dollars pay-"ment by Maitland Phelps and Company, advised "from Colonial Bank Antigua account Rogers." That letter arrived on the 13th May, and was the first intimation that the Defendants' bank had that this money was placed to their credit at all.

Now comes the question what they did with it. Rogers was a customer of theirs and was considerably in their debt at this time, so they put the amount to the credit of Rogers, and to the debit of the Bank of British North America; and in the then state of their knowledge that

was a perfectly right thing for them to do. But nothing more was done than that. There is some mention of a dishonoured acceptance, to the payment of which they say they appropriated the fund; but nothing was done except by private entries made by the Defendants in their own books. The same day on which they received the notice of this credit they learnt from Rogers that a mistake had been made—in fact, that the money ought not to have come to their hands; and all he tells them then is that he will see to it. There is some discrepancy between Murray and himself as to how much he told them, but it is sufficient to say that they then had notice that a mistake had been made.

On the next day, the 14th May, the Bank of British North America in New York, having been advised through Rogers of the mistake, telegraphed to the Defendants as follows:—"Pay by telegraph "to Bank of British North America Halifax for "account B. Rogers and Son the three thousand "dollars advised in my letter 8th May." Therefore on the 14th May the Defendants know that the money ought to have gone to the Bank of British North America, Halifax, instead of coming to themselves. But all they do is to telegraph back "3,000 credit B. Rogers and Son used cannot recall."

Simultaneously with the telegram the Bank of British North America write a letter which reaches the Defendants' hands on the 19th May. That letter tells them the whole story; it is as follows:—"At 1.30 p.m. to-day"—(the 14th)—"we telegraphed you my advice, three thousand "dollars for credit of B. Rogers and Son, "8th May, should have been to Bank of B. N. A., "Halifax. Stop payment and telegraph us "that you have done so. And at 4 p.m. "we received your reply:—'Three thousand "'dollars credit, B. Rogers and Son are used,

" 'cannot recall.' Our telegram was sent at the " request of Messrs. Maitland Phelps and Com- " pany, who were in receipt of the telegram from " B. Rogers and Son, stating that the amount " should have been remitted to our Halifax " branch, which we now presume they have " done from Yarmouth." In answer to that letter the Defendants write :—" B. Rogers and " Son are in difficulty. The amount three " thousand dollars advised in yours 8th instant " was used to retire their draft six hundred " dollars, being under protest. Will you be so " good as to send me the exact instructions " received by you from Maitland Phelps and " Company, under which you acted in your " advice of the 8th instant?" The Bank of British North America sent for answer—" Mait- " land's instructions were :—' Pay Bank of British " 'North America Yarmouth account Rogers.' " This version of the instructions was not verbally correct; but so far as concerned the Defendants, it showed them correctly enough that Maitlands received no instructions in their favour. At that time therefore, when that letter reached, probably on the 26th May, the Defendants knew the whole story. They knew exactly how the mistake arose, and what was necessary to put it right. But all the answer they return is :— " The matter stands as stated in my telegram of the 14th ultimo;" which means that the sum paid in has been used, and it cannot be recalled.

Now it was not true that the sum had been used and could not be recalled. The Defendants had only got to run a pen through some private entries in their own books and the matter then would have stood in precisely the same position as it stood in before the mistake was made. They had not in any way altered their position. They would not, if they had cancelled the entries, have

been in any way damnified by the mistaken payment made to them. Mr. Murray, the agent of the bank, in his evidence endeavours to show that their position would have been altered for the worse by the mistake, but he gives a reason which to their Lordships is wholly unintelligible.

What then was the duty attaching upon the Defendants? Clearly their duty was, directly Rogers informed them of the mistake, to learn the nature of the mistake, and take care that they should be in a position to rectify it. At that moment they would have been quite justified in not paying to the Bank of British North America without seeing that thay had the authority of the persons from whom the money came to them; but within a few days, as we have seen, the authority did come from all the persons whom the Defendants knew in the transaction. They were asked by the New York branch Bank of British North America, in communication with and by the desire of Maitland Phelps and Company who are the agents of the Plaintiffs, and also asked by Rogers to whose credit the fund was to be carried, to pay the fund to the Bank of British North America in the Halifax branch. They therefore had the request of the whole of the parties whom they knew in the transaction to rectify the mistake, and instead of doing it they rest upon what their Lordships find to be the false allegation that the money had been used and that it could not be recalled. On that false allegation they have retained the money up to the time when this suit was instituted.

Now they raise other objections. In the first place it is said there is want of privity, and certain cases have been cited in which, although the Defendants may have been wrongfully possessed of money, yet the Plaintiffs could not recover. But in those cases there was

no payment made direct from the Plaintiffs to the Defendants. In this case there is such a payment. The Defendants had no knowledge of their receipt and possession of the funds, except by the letter which tells them that those funds came from the Colonial Bank through their agents Maitland Phelps and Company. There is therefore the most direct privity between the two parties.

Then it is said that the Plaintiffs have no interest to recover the fund because they were originally set in motion by Rogers who paid them. But if it were only to relieve themselves from all questions about the mistake that their agents made in New York, and to relieve themselves from liability to be sued for the whole consequences proceeding from that mistake, the Plaintiffs would have an interest to recover the money. They were told to convey the money to a certain quarter. They, through their agents, were the authors of the mistake by which it went to another quarter. It seems a perfectly untenable position to say that an agent in that position has not got an interest to recall the money, so that it may be put into the right channel. If the money had been repaid by the Defendants directly they found they were not entitled to it, it would have got into the right channel. Whom it would ultimately have benefited there we do not know. It is foreign to this action, and we are not bound to speculate upon it. The question is whether the Plaintiffs are not entitled to demand that that money should be recalled and put into the channel in which it was originally intended to be put.

The result is this, that on the 13th of May 1879, when the Defendants were told that a mistake was made, an equity was fastened upon them not to alter the position of the fund

until the mistake could be repaired; and on the 19th May 1879, when they knew exactly how the mistake was made, and how in the opinion of all parties to the transaction they could repair it, they were bound to repair it. If the parties having an interest in the fund had differed and quarrelled among themselves, then it might have been the duty of the Defendants to place the fund *in medio* and bring it into Court, or to set it aside and hold it as stakeholders—not to appropriate it to themselves. But in point of fact if they had paid the Bank of British North America at that time all parties would have been satisfied. If they had insisted on restoring it to the persons from whom it came to them—that is the Plaintiffs—all parties would have been satisfied, because then it would have reached the quarter for which it was originally intended. Instead of that, they have got an interest in keeping it, and they choose to keep it for themselves. They cannot do that. The original equity subsists up to the present moment. The Defendants must be tried now by inquiring what was their duty on the 19th May. Their duty then was to pay either to the Plaintiffs or, at the request of the Plaintiffs, to the Bank of British North America. They have not chosen to do that, and therefore they have exposed themselves to this suit by the Plaintiffs.

Their Lordships think that the verdict, and the maintenance of that verdict by the Supreme Court sitting as a Division Court, were perfectly right, and that when the matter came before the Supreme Court on Review, they ought to have dismissed the Defendants' application with costs.

Their Lordships will humbly advise Her Majesty now to make a decree to that effect. The Respondents will pay the costs of this Appeal.