

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, December, 1885.

Coram LORD MONKSWELL, LORD HOBHOUSE,
SIR BARNES PEACOCK and SIR RICHARD
COUCH.

THE COLONIAL BANK V. THE EXCHANGE BANK OF
YARMOUTH, NOVA SCOTIA.

Money paid by Mistake.—Privity of Contract.

This was an appeal from an order of the Supreme Court of Nova Scotia of the 31st of March, 1884, made in an action in which the Colonial Bank were the plaintiffs and the Exchange Bank, of Yarmouth, were the defendants, setting aside a verdict which had been entered therein for the plaintiffs, with costs, and ordering a new trial.

Mr. Arthur Cohen, Q.C., and Mr. R. G. Arbuthnot were counsel for the appellants; Mr. Grantham, Q.C., and Mr. Bray for the respondents.

The action was brought in October, 1879, to recover a sum of \$3000 which the appellants alleged had been paid by mistake to the respondents. On the 21st of April, 1879, Messrs. B. Rogers & Son, merchants, of Yarmouth, Nova Scotia, having consigned a cargo of fish to Antigua by a vessel called the Pronto, sent a telegram to their agents there, Messrs. McDonald & Co., in these words: "When Pronto arrives, cable funds Bank British North America, Halifax." On the ship's arrival, Messrs. McDonald, through a clerk, made an application to the Colonial Bank of Antigua for a cable draft on New York for \$3,000 in favor of the Bank of British North America (without specifying the Halifax branch) to the credit of Rogers, Yarmouth. The Colonial Bank, who received the money from Messrs. McDonald & Co., telegraphed to their agents in New York to pay the amount to the Bank of British North America to the credit of Messrs. Rogers & Son, Yarmouth, but the agents, finding that the Bank of British North America had no branch or agency at Yarmouth, consented that the money should be sent to the Exchange Bank at Yarmouth, and it was so sent in mistake. If it had been left in the bank at New York, the Halifax branch could have drawn it. In consequence, however,

of the mistake, it went into the hands of the Exchange Bank, which happened then to hold an overdue obligation of Messrs. Rogers & Son, to meet which they applied it, informing Messrs. Rogers that they had done so. The latter objected, and the Bank of British North America subsequently informed the Exchange Bank that the \$3,000 intended for their branch at Halifax had been sent to them by mistake, and requested payment to be stopped. The Exchange Bank replied that the money had been applied to the credit of Messrs. Rogers & Son, and they could not recall it. The present proceedings were then instituted by the Colonial Bank against the Exchange Bank to recover the money so paid in mistake. The trial took place before a judge without a jury, when, by consent, the verdict passed for the appellants for \$3,000 and interest, with leave to the respondents to move the court. A rule *nisi* was accordingly granted to set aside the verdict and for a new trial, but, on argument before a division of the Supreme Court, it was discharged with costs on the 23rd December, 1882, by a majority of two judges to one. The respondents had the rule re-argued before the full court *in banc*, on the 31st of March, 1884, when the Court, by a majority of three judges to one, set aside the verdict and ordered a new trial. From that decision the present appeal was instituted.

For the appellants it was argued that the Exchange Bank were not justified in retaining the money without advice from or the consent of the Colonial Bank, and that they had notice of such facts as disentitled them to retain it. The money was intended to be sent to the Halifax branch of the Bank of British North America to meet two bills discounted by the appellants, and the respondents were bound to refund money paid to them by accident or mistake.

For the respondents it was contended that the money paid to the respondents was not the money of the Colonial Bank, but was paid to them by an agent of Messrs. Rogers & Son, to be transmitted to that firm. The appellants therefore ceased to be responsible to Rogers & Son after they had transmitted the money. The respondents, as Rogers' bankers, had a right to deal with the money as they