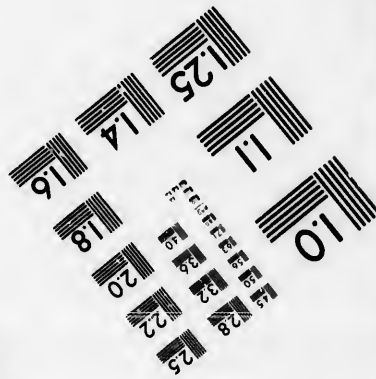
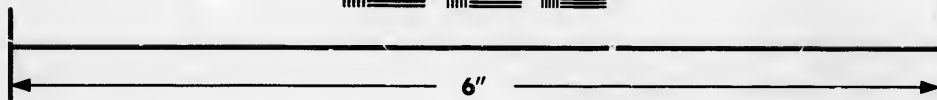
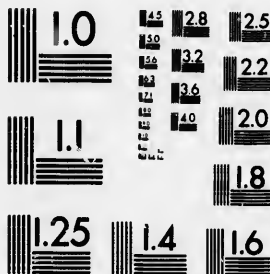


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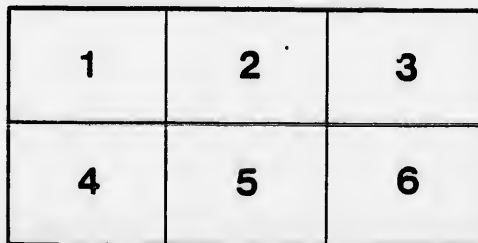
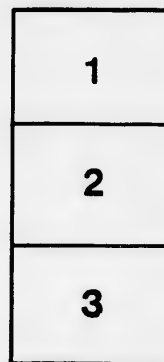
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SUPREME COURT IN EQUITY.

COMMERCIAL BANK vs. WILMOT AND OTHERS.

J U D G M E N T

OF

HIS HONOR CHIEF JUSTICE RITCHIE,

DELIVERED 9TH MARCH, 1866,

OVERRULING EXCEPTIONS OF THE PLAINTIFFS

TO THE

REPORT OF JOHN M. ROBINSON, ESQUIRE, BARRISTER,

UNDER REFERENCE IN THE ABOVE CAUSE,

BY DECRETAL ORDER, DATED 30TH SEPTEMBER, 1862,

AND CONFIRMING SUCH REPORT.

ST. JOHN, N. B.

PRINTED BY BARNES AND COMPANY.

1866.

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COMMERCIAL BANK *vs.* WILMOT AND OTHERS.

9th March, 1866.

RITCHIE, C. J.

By decretal order, dated 30th September, 1862, it was referred to John M. Robinson, Esq., a Barrister, to inquire and take an account of the amount due the plaintiffs on the mortgages in their Bill set forth, and of monies paid by them for premiums of insurance, taxes, and other expenses, payable by mortgagee in possession of the premises, and what monies have been paid by them for interest due on the mortgage to Thomas Merritt, in plaintiffs' Bill mentioned, and also to take an account of the rents and profits of the mortgaged premises which have come to hands of plaintiffs or others, by their order, or for their use, or which, without their wilful default, they might have received, and in what manner the same have been or should be applied. And the Barrister was also to inquire and report, if defendants should desire the same, but not otherwise, whether J. M. Wilmot and R. D. Wilmot, or either of them, at any time transferred to the plaintiffs any shares of the capital stock of the Commercial Bank of New Brunswick, and upon what account, and whether the same have been credited by plaintiffs to J. M. Wilmot, deceased, and if so, at what time and upon what account, and at what rate, and whether the same were credited at the proper value, or how otherwise; and if not so credited, what is or are the proper value of such shares respectively, and what dividends have been received by the plaintiffs therefrom, and whether there was any and what debt due by the said J. M. Wilmot to the plaintiffs, upon which the same ought to be credited, and whether there is any and what sum due thereon. And for the better taking the said account and discovery, all parties are to produce, &c. And the said Barrister was also to inquire whether it was advisable that a sale of the mortgaged premises should take place, &c.

By virtue of which order, the Barrister, having been attended by the parties, by their respective Solicitors and Counsel, proceeded to inquire into the matters to him so referred; and reported that having taken the account and

made the allowances and charges in the manner therein mentioned, he found and certified that the plaintiffs' mortgage debt was overpaid by the rent received by them for the quarter ending the first day of February, A. D. 1862, and that, after the receipt of that quarter's rent, the plaintiffs owed the defendants a balance of £47 17s., and that on receipt of the quarter's rent due the first of February, then last past (1865), the plaintiffs were indebted to the defendants in the sum of £607 17s.; that defendants having been permitted to receive the rents subsequent to the said first day of February, he had nothing further to charge on that account.

To this report the plaintiffs excepted, 1st, That the Barrister has charged the plaintiffs with three several quarterly payments of rent of £100 each, due on the first days of August and November, 1842, and the first day of February, 1843, against the monies expressed to be payable in and by the mortgages B and C, instead of against the debt due the plaintiffs, and proposed to be secured by the Letters C d e and C d, and the mortgage P.

2ndly. That the Barrister has certified that a certain promissory note for £610 11s. 3d., with the interest accrued thereon, was included in the mortgage C, and represented by certain other notes mentioned in that mortgage, and that he had deducted the amount of one of the said notes from a certain amount of Bank Stock dividends and interest, and had charged the plaintiffs with the balance or sum of two hundred and fifty-seven pounds eight shillings and eightpence (£257 8s. 8d.), according to the statement made in his said report; whereas the said Barrister was not authorized by the said order to make any such inquiry, charge, or appropriation, and if he was so authorized, there was no evidence before the said Barrister to justify his finding that the notes mentioned in the mortgages, or any of them, were a renewal of the note for £610 11s. 3d., nor of any valid subsisting agreement with reference to the Bank Stock, such agreement, if it ever existed, having been cancelled and put an end to by the parties thereto, nor of any other facts or circumstances to warrant the Barrister in making any such inference, statement, appropriation, or charge. But if the said note for £610 11s. 3d., was paid or satisfied by any other notes or securities given in lieu thereof, then, according to the Barrister's report of the circumstances, the said R. D.

Wilnot might be entitled, by a proper suit to be brought for such purpose, to have the Bank Stock, which he had transferred to the plaintiffs, re-transferred to him; but no sum of money, matter or thing arising out of the transfer of such stock could be made a charge against the plaintiffs in respect of their mortgage, or the matters referred to the Barrister in this suit; and the Barrister having reported that on the 20th day of April, 1843, certain Bank Stock, amounting at the par value thereof to £1750, with the several sums of £37 10s. and £15 18s. were placed to the credit of John M. Wilnot, upon a certain account mentioned in the Schedules, annexed to the report, the Barrister was not authorized or empowered under the order of reference to apply the said Bank Stock, or any part thereof, in any other manner, or for any other purpose than the same had been applied by the plaintiffs.

3rdly. That the Barrister has credited as a payment on the mortgage on the 30th day of April, 1843—balance of Bank Stock per statement in his report £257 8s. 8d., with interest thereon—whereas no credit should have been allowed therefor.

And 4thly. That the Barrister has found and certified that there is a balance due to the defendants upon the accounts and dealings between the plaintiffs and defendants in respect of such mortgage, whereas he ought to have certified a balance due to the plaintiffs.

These exceptions were argued before me by counsel for the parties respectively, on the 5th, 6th, and 8th August. I have, as soon as other judicial engagements would permit, referred to the evidence before, and Judgment delivered by me in this cause, in September, 1862, carefully perused the evidence before the Barrister, and considered his report, and the exceptions taken thereto.

I will now proceed to deal with such exceptions in their order. As to the first, the objection is simply that the three first quarters' rent, received by plaintiffs from the mortgaged premises, ought not to be credited to defendants on the mortgages set forth in the Bill, and for convenience designated "B" and "C," but that when received they should have been and were by plaintiffs credited against a debt or debts due plaintiffs, and, as alleged in the exception, proposed to be secured by Letters marked "C d e," and "C d," and the mortgage marked "P."

The Letter "C d e" would seem to have been the origin

of the mortgage transaction: it was a simple proposition, in no way binding the property, and we find by the records of the Bank, as reported by the Barrister, that "At a special meeting of Directors, 6th November, 1841, present, the President, Mr. McLaughlin, Mr. Wishart, Mr. Wiggins, Mr. Smith, Mr. Ray, Mr. Hazen, Mr. Ward, Mr. Perkins. Read a letter from John M. Wilmot, Esq., proposing to pay the Bank the amounts of his notes of hand, in three equal payments, say in twelve, eighteen, and twenty-four months; and, on taking the question, it was carried unanimously. After which a Committee was appointed to take security from J. M. Wilmot for the amount of notes &c. in possession of the Bank, on which he is liable, when the following gentlemen were appointed to form said Committee—D. J. McLaughlin, and A. S. Perkins, Esqrs." And so on the same date the mortgage "P." was given on the premises in question. As to this mortgage, I quote from my former Judgment. "It appears that the late J. M. Wilmot had extensive dealings with the Commercial Bank, and on 6th Nov., 1841, being indebted to the Bank in large sums on promissory notes and bills of exchange, drawn and endorsed by him, and discounted by the Bank, and being desirous, as the mortgage recites, of having the notes renewed, and not being able to pay them off as the notes became due, without great loss and inconvenience, the Bank agreed to grant an extension of time, on J. M. Wilmot giving additional security to the amount of £3,500, which he did by a bond and mortgage, dated on that day, containing a proviso for payment of £1164, with interest on the whole amount on the 6th Nov., 1842, £1163—with interest on the whole remaining due on the 6th May, 1843, and £1163, with all interest then due, on the 6th Nov., 1843. This mortgage would seem to have been intended to be a standing collateral security for J. M. Wilmot's indebtedness to the Bank: it was never paid, and has not been discharged on the records; but the mortgages now sought to be foreclosed were, the evidence shows, taken in substitution for this security, and for specific amounts." This conclusion is fully corroborated and sustained by the additional evidence before the Master, from which I may quote, first a copy of the Minutes of the Board of Directors:—"At a meeting of Directors, 16th May, 1842, present, the President, Mr.

“ McLaughlin, Mr. Dole, Mr. Ward, Mr. Hammond, Mr.
 “ Perkins, Mr. Simonds, Mr. Bedell, Mr. Travis, Mr. Hazen.
 “ The Board proceeded with the discount sheet. The
 “ subject of Mr. Wilmot’s mortgage (query, letter) being
 “ brought up by Mr. Hazen, who stated that the mortgage
 “ not being in accordance with Mr. Wilmot’s letter, doubts
 “ may arise as to its validity. Resolved therefore, that
 “ Mr. Hazen draw up a new mortgage, agreeable to Mr.
 “ Wilmot’s letter, and have the same executed as early as
 “ possible.” Then the words of Mr. D. J. McLaughlin,
 at that period a Director of the Bank, and at the time of
 his examination its President, and, as such, Director, ap-
 parently actively connected with these transactions, “ I
 “ understood there was another mortgage made, but I
 “ recollect Mr. Hazen stated that another mortgage was
 “ to be made out instead of the previous defective one. I
 “ take it, as a matter of course, the new mortgage was to
 “ supersede the other.” And again, from the examination
 of Mr. Saneton, the Cashier of the Bank, who, looking at
 the pencil memorandum on the back of mortgage “ P.”
 and below the signatures to that mortgage, says, “ The
 “ words on the back and figures are as follows: ‘ This
 “ mortgage cancelled by mortgage of 1st June, 1842, and
 “ 14th July, 1842.’ These words and figures are in the
 “ handwriting of Robert L. Hazen; the words inside that
 “ mortgage, written in pencil immediately below the sig-
 “ natures thereto, ‘ cancelled by other mortgages taken in
 “ its stead,’ are also in the same handwriting.” The wit-
 ness then proceeds, “ I may have seen this mortgage
 “ (P), before, if at all, it would have been among the
 “ Wilmot papers. I did not, to my knowledge, give that
 “ document to Mr. Hazen, or to Mr. Jack, or receive it
 “ from either of them. I have often seen the other two
 “ mortgages marked ‘ C and D,’ ” evidently meaning “ B
 “ and C.” “ I believe they were in the Commercial Bank
 “ when I first was there. I handed all the Wilmot papers
 “ to Mr. Hazen or Mr. Jack; I think the latter. Those
 “ two mortgages were among them; the other marked ‘ P’
 “ I cannot say I did not think anything about it. *I did*
 “ *not consider it a mortgage, or anything of the kind.*”
 The mortgages given in substitution of mortgage “ P” are
 as follows—“ B,” dated 1st June, 1842, for £1035; proviso
 for payment for that sum and interest, as follows: £345,
 with interest on the principal sum on the 6th November,

then next; £345, with interest on principal then due, 6th May, then next; £345 residue, with all interest, 6th Nov., 1843, acknowledged 14th July, and registered 22nd July, 1842. The evidence at the hearing I thought satisfactorily shewed that it was given to secure the notes mentioned in exhibit No. 1, and produced on the examination of Mr. Hazen, and I have discovered nothing since to alter that opinion. On the 4th July, 1842, Mr. R. D. Wilmot wrote the letter C d, in the words following—

Sr. Jons, July 4th, 1842.

“ To the President and Directors of the Commercial Bank :

“ Gentlemen—I beg to propose that I will become accountable for the payment of £60 per annum to Mr. Thomas Merritt, being the interest on £1000 secured to him by mortgage on my father's property in the Market Square, rented to Messrs. J. & H. Fotherby, under lease secured by the late firm of Holdsworth & Daniel, for seven years from the 1st May, 1841, at the rent of £400 per annum, and I further agree to pay the premium on £1500 insurance on the buildings, provided the Bank will agree to hold the said property until the expiration of five years from the lease, they receiving an assignment of the same; the rents and interest accruing on the same to go in liquidation of the debt proposed to be secured on the buildings by the letter addressed by my father to the Board on the 6th November last, being the amount of his promissory notes at the Bank, including those at the Woodstock Agency.

“ I am, Gentlemen, your obedient servant,

“ ROBERT D. WILMOT.”

No letter of 6th Nov. has been produced, nor any evidence given of its contents. On the following day, 5th July, 1842; it appears from the minutes of the Board, a copy of which was produced before me, as follows—“ At a special meeting of Directors, held 5th July, 1842, present—the President, Dole, Wishart, Ward, Hazen, McLaughlin, Bedell, Whipple, Hammond, Simonds, Burns. The President states that the object of calling the meeting was to take into consideration the substance of a letter addressed to the Board from R. D. Wilmot, dated 4th July, 1842, and upon which letter being read, it was resolved that Messrs. Hazen and Whipple, along with the President, be a Committee to make arrangements with Mr. Wilmot.” On the 7th, from the same source, we find that “ At a meeting of Directors, held 7th July, 1842, the Board proceeded with the discount sheet, after which the President, on behalf of the Committee appointed to make arrangements with R. D. Wilmot, reported that they had attended to that duty, and read a minute of the agreement entered into with Mr. Wilmot,

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" and which agreement was unanimously concurred in by
" the Board, and resolved that the same be carried into
" effect with all convenient despatch." The result of this,
no doubt, was the "C" mortgage, which was dated the
14th of the same month, and was given with a proviso for
payment of twelve notes, bearing even date therewith,
amounting in all to £2,807, which notes were particularly
set out in the mortgage, but which, it would seem, were
never actually given. On the hearing, there were notes
put in evidence with reference to which I find in my last
Judgment as follows:—" The amount of these notes, with
" the interest added to the times when the same are made
" payable respectively, would seem to correspond with the
" notes mentioned in this mortgage, as being endorsed by
" these payees respectively, and so may afford a probable
" conjecture that these were the notes intended to be se-
" cured by this mortgage. That this is accurate, with respect
" to the note in favor of Mr. R. D. Wilmot, for £610 11s.
" 3d., his evidence makes apparent; for he says, after sta-
" ting his belief that the notes mentioned in the mortgage
" were never given, 'I remember that these notes,
" 'stated to have been given by myself, represent an
" 'amount of £604 8s. 2d., which was the amount of J. M.
" 'Wilmot's note in my favor, for which a new note for
" '£610 11s. 3d., was given, signed by me, as agent for J.
" 'M. Wilmot, and endorsed by myself, in my own name,
" 'to the Commercial Bank, previous to the execution of
" 'that mortgage, and I think that the amounts stated in
" 'that mortgage, with interest, would be the amount of
" 'said original note for £604 8s. 2d., and interest to the
" 'time of payment named in the mortgage; either that or
" 'the note substituted for it for £610 11s. 3d.'" The Bar-
rister having been satisfied that these were the debts in-
tended to be secured by this mortgage, allowed plaintiffs,
and I think rightly, the several amounts as mentioned in
the mortgage. Thus we see the securing a general indebt-
edness, as contemplated by mortgage "P," was corrected,
and the security on the mortgaged premises confined to
certain specific liabilities. On the 25th July, the plaintiffs
gave Fotherbys, the tenants in possession of the mortgaged
premises, notice of the mortgage of the 6th November,
1841, and required Fotherbys to pay the rents to them, and
not to J. M. Wilmot. In my last Judgment this is ob-
served on as follows—"This proceeding is not explained.

" and Mr. Hazen says he cannot say why this notice was
 " issued after the second mortgage was given, and it is the
 " more singular, as at the time it was given the first pay-
 " ment, under the mortgage of 6th November, 1841, had
 " not become due, and but three days previously the Bank
 " had recorded the substituted mortgage of the 1st June,
 " 1842, unless it might possibly have been under some
 " such arrangement as that proposed by Mr. R. D. Wil-
 " mot, in his letter of July 4th, 1842, (C d)." Be this as
 it may, it is abundantly clear the plaintiffs went into receipt of the rents and profits as mortgagees, and in no other character, and from that time received the rents accruing due, and continued in receipt of the rents and profits of the mortgaged premises to the 1st February, 1865. Having thus placed themselves in the position of mortgagees in possession, by virtue of their mortgage interest, they controlled the tenants, and required them to account to plaintiffs for the rents. What then was it their duty to do with the rents when received? clearly to discharge the mortgage debt, and so relieve the property from the burthen of the mortgage, and restore it when so discharged to the mortgagors. This the Barrister has done; but the exception says the three first quarters' rent should have gone against the debt due plaintiffs, and proposed to be secured by letter "C e d;" in fact, so they have. Mortgage "P" was obviously taken to secure the proposition in that letter, or the final arrangement to which that letter led. The Solicitor advises that the security so taken would not effect the object intended; he is required to draw up a new mortgage, which will, and have the same executed as early as possible: it is done, and mortgage "B" is taken; but the exception again says, these three quarters should go against the debt due plaintiffs, and proposed to be secured by letter "C d"—so in fact they have. That letter was considered at a meeting of the Board, 5th July. A committee was appointed on 7th July. That Committee reported. They read a minute of the agreement entered into with Mr. Wilmot—either that letter, or the final arrangement induced by it; and the Board resolved that the same be carried into effect with all convenient despatch. And it is done, and on the 14th July, mortgage "C" is given, though not acknowledged until 4th August, or recorded until 6th September, which, however in my opinion, does not affect the case, as when acknowledged and recorded it

would, as between the parties, take effect from its date. But lastly, the exception says the three quarters' rent should have been credited to mortgage "P." We have seen how conclusive the evidence is that mortgage "P" was a mistake, and did not continue a valid security, therefore instead of its being credited on an erroneous and non-subsisting security, it is credited on the corrected securities substituted in lieu thereof. But apart from all this, conclusive as I think it is, to show that the Barrister placed all the receipts from the mortgaged premises to the credit of the right accounts, viz., the mortgages "B" and "C," what say the Bank about it. Their counsel in this cause says they had the right to appropriate the three quarters' rent outside the mortgages "B" and "C," and having such right, they did so appropriate them. As to the first proposition, the right so to appropriate and turn the rents and profits of the mortgaged premises from the payment of the mortgage debt, could only exist by virtue of a clear agreement between the mortgagor and mortgagee, of which, throughout the case, I can discover not one tittle of evidence. On the contrary, Mr. R. D. Wilmot, before the Barrister, distinctly swears that neither he nor his father ever agreed to the rents of the mortgaged premises being applied in liquidation of any other sum or sums than those included in mortgages "B" and "C," and how does the conduct of the Bank, by its books and officers, correspond with the contention of their counsel on this point, or on the second proposition that the Bank did so appropriate them. We find that no special account, as I think there ought to have been, was opened with these mortgaged premises. All the rents were received and credited to Mr. Wilmot generally. Mr. Sancton says, "I think there was "no separate account of the Market Square mortgage "opened in the books of the Bank. There was no separate account of the £1,750 Commercial Bank Stock kept: "there was but one general account of all transactions "with John M. Wilmot. The entries of the rent are in "the handwriting of T. B. Milledge. All those entries "after May, 1843, were made while I was in the Bank. "No directions were necessary for making those entries: "they were made as a matter of course, as daily transactions of the Bank. I presume the clerk who made those "entries was aware of the existence of the mortgages "B" "and "C." I don't know whether he was or was not.

“ I presume I was aware of the existence of those mortgages as they were there when I first went to the Bank. “ I don't know whether Mr. Wilmot was aware of those “ entries or not.” In other words, all amounts received were entered generally as cash received, on account of J. M. Wilmot, without reference to any particular account or security. But let us see how the Bank acted, by its officers, in response to the application of Mr. J. L. Wilmot and other defendants' solicitation to them for accounts. Three in number are furnished, marked respectively, Q. U. Y. The first (U), in the handwriting of Mr. Hazen, the Solicitor, is certainly only a rough, informal, memorandum of account, furnished to J. L. Wilmot. It is headed “ Memo. of rents received by Commercial Bank—paid quarterly ;” and the first item is—“ One year, to 1st May, 1843, £400.” It then goes on to 1st May, 1853. At bottom—“ Memo. “ of mortgages—1st June, 1842, £1,035. 14th July, 1842, “ £2,807, with interest.” On the other side is headed—“ Charges on Property.” The items are then given.

The first item of rents—one year, to 1st May, 1843—covers the three quarters in dispute. Here then, we have the first appropriation of the rent in question. It was previously to this, in the but one general account of all the transactions with J. M. Wilmot, and certainly it is here credited by one, of all persons, the best qualified to place it to the right account : he having had all to do with preparing the securities ; a Director of the Bank, present at the meeting of 16th May, 1842 ; the Solicitor of the Bank, who, at that meeting was directed to draw up a new mortgage agreeably to Mr. Wilmot's letter ; who was also present as a Director at the meeting of 5th July, 1842, who was then appointed one of a committee, with Mr. Whipple and the President to *make arrangements* with Mr. Wilmot, which committee, on 7th July, 1842, reported to the Board, and who, as Solicitor, subsequently drew the mortgage “ C ;” which we have seen, was obviously the way in which the minute of agreement was carried into effect, in accordance with the resolution of the Board. But Mr. Hazen does not stand alone in giving the mortgaged premises credit for this amount. After defendants had employed counsel, two accounts are rendered, one a strictly formal account, the other, a memorandum of charges and credits, made up by or under the immediate superintendence of Mr. Sancton, the Cashier, both of which give the mortgages B and

C credit for the three quarters' rent. Mr. Sancton says, looking at the mortgages B and C, "I had these mortgages in my hands at the time I made up the accounts—(Y and Q;)—the other mortgage (P), I had no reference to. The first item of the account is 1842, 1st August—One quarter's rent, £100; 1st Nov., do., £100. 1843, 1st February, one quarter's rent, £100."

Here again was Mr. Sancton, the proper responsible officer, to see that the accounts of the Bank are accurately made out, with all the records, vouchers and documents of the Bank before him, making up the accounts and rendering them in precisely the same manner, so far as the appropriation of these sums are concerned, as the Solicitor had previously done; and in answer to a question by Mr. Jack as to what this account was given to John L. Wilnot for, says, "It was given to Mr. Wilnot for the purpose of shewing how the account stood on the books;" that is, that he could see what amounts the Bank had credited his father, and also what amounts the Bank had paid on account of that property for his father or his estate; and as to the materials he had for making up the accounts, he says, "I made that account (Y) from the books and papers in the Bank in connection with that estate," the Wilnot estate; and again, "In making up these accounts I had before me the books of the Bank, the mortgages, and a memorandum accompanying the settlement with Mr. Wilnot at the time he gave the securities;" and to no more legitimate course, as regards the interests of the Bank, could he have referred. It is, however, now contended that he was in error, which error it is alleged the books of the Bank establish. Without stopping to enquire how this could affect defendants, I have looked at the accounts referred to, taken from those books, and have found nothing, in my opinion, to impugn Mr. Sancton's accuracy on this point. I have also looked carefully through the evidence, but have failed to discover one word from Mr. Hazen or Mr. Sancton or Mr. McLaughlin, or from the mouth of any of the witnesses, indicating that such appropriation was incorrect. I think, therefore, had the Barrister not allowed the sums as he did, he would, under the evidence, have done manifest injustice to the defendants. I therefore am constrained to sustain his report on this point, and overrule the exception.

The second exception relates to certain Bank stock trans-

ferred by J. M. Wilmot and R. D. Wilmot on the 1st December, 1841, which the Barrister reports was received by the plaintiffs as collateral security for two several promissory notes, both of the same date as the transfer, drawn by J. M. Wilmot in favor of R. D. Wilmot, and endorsed by him to plaintiffs, payable in three months, one for the sum of £1,427 5s. 6d., and the other for £610 11s. 3d., and both bearing interest from date. He further reports that it is admitted on both sides that on or about the 20th April, 1843, the transfer became absolute, and that the par value of such stock, £1,750, together with £37 10s., and £15 1s. 8d., dividends received thereon, were placed to the credit of J. M. Wilmot on account; and he further reported that no other evidence had been presented to show that any new or specific arrangement with regard to such stock or dividends was made between the parties at the time. He also found and certified that the note for £610 11s. 3d., with the interest accrued thereon, was included in the mortgage C. That the note for £610 11s. 3d. being thus covered by the security of the Bank stock and mortgaged premises, after appropriating the proceeds of stock and dividends to the payment of the note for £1,427 5s. 6d., there remained a balance of £257 8s. 8d., which he adopted as a payment, *pro tanto*, of the note for £610 11s. 3d., leaving the balance to be discharged as a part of the mortgage debt by the rents of the mortgaged premises. To determine whether the Barrister was right in so dealing with the proceeds of the Bank stock, it will be necessary to ascertain first, the purpose for which the stock was transferred; and upon this point, I think, the evidence leaves no room for doubt. We have from the archives of the Bank what I cannot but consider most indisputable testimony—a document under the hand of the proper officer G. C. Partelow, the then cashier. The first side of the sheet contains an account shewing a balance, Nov. 30th, 1841, against J. M. Wilmot of £1,427 5s. 6d., and on the opposite page are the words following: “John M. Wilmot having transferred to a Committee appointed for the purpose, 50 shares, and R. D. Wilmot 20 shares, of the capital stock of this Bank, as collateral security for J. M. Wilmot’s two notes in favor of R. D. Wilmot, dated this day, and payable in three months for £1,426 5s. 6d., and £610 11s. 3d., I do hereby promise and agree, on behalf of this institution, to furnish or return to the said parties respectively, when the said notes

"are paid up and retired, the like number of shares, being
 "£1,750 of the said capital stock. Commercial Bank of
 "N. B., Saint John, 1st December, 1841. (Signed), G. C.
 "Partelow, Cashier:" this being subsequent to the letter
 of November 4, 1841, in which the first reference and
 proposal as to the Bank stock appears. Mr. Sancton
 says there was a paper in Bank with reference to the
 transfer of the Bank stock, signed by Mr. Partelow;
 he identifies this as the paper, and says he presumes it
 was a copy of what Partelow gave Mr. Wilmot at the
 time. It is the only record of the terms on which the
 Bank stock was given and received, and it is not im-
 peached by evidence on either side. The document itself
 shows the origin of the note for £1,427 5s. 6d. As to the
 £610 11s. 3d. note, Mr. Sancton, when under examination,
 after looking at notes marked A 16 and A, and at the
 discount book, says, "I believe those two promissory notes
 "are the same notes referred to in the paper and memoran-
 "dum written and signed by Mr. Partelow, and marked
 D 1;" he is then asked, Were the three notes mentioned in
 the mortgage C, made by John M. Wilmot for £213, £219,
 and £226 respectively, renewals of the £610 11s. 3d. note
 mentioned in the memorandum or paper marked D 1; to
 which he replies, "Looking at the papers and books, I be-
 "lieve that the note for £610 11s. 3d., marked A 16, was
 "included in the security marked C, and was represented
 "by the three notes mentioned in that mortgage as made by
 "J. M. Wilmot in favor of R. D. Wilmot." And on re-ex-
 amination by Mr. Jack, he traces back the note of £610
 11s. 3d. to the note of £604 8s. 2d., as follows, "The entry
 "I referred to with reference to the note for £610 11s. 3d.,
 "is in folio 498 of journal or cash book No. 7. The entry
 "is a note of John M. Wilmot in favor of R. D. Wilmot,
 "on demand for £604 8s. 2d., with interest from date,
 "dated about 16th October, 1841. I think that would be
 "about the date, according to the calculation of interest:
 "that £604 8s. 2d. note appears to have been renewed by
 "the note J. M. Wilmot in favor of R. D. Wilmot, marked
 "A 16." Thus we see most conclusively that both the
 Bank stock and mortgage C, covered a portion of the same
 indebtedness, viz., the £610 11s. 3d. note. Now clearly the
 Bank were bound to appropriate the Bank stock and divi-
 dends, when realized, to the discharge of the indebted-
 ness for which they were held as security, so far as the

same would extend, unless some new arrangement had been entered into with respect thereto; of which I quite agree with the Barrister, there is not the slightest evidence. The agreement and the law so appropriated it, therefore on the 28th of April, 1843, when both parties admit the par value of the stock, and £53 8s. of dividends thereon were placed to the credit of J. M. Wilmot, on account. The note for £1,427 5s. 6d., with the interest due on it, was paid, and the balance of £257 8s. 8d., became a payment on account of the note for £610 11s. 3d., being the most favorable appropriation for the Bank. When, therefore, it was made apparent to the Barrister, in taking the account of the amount due on the mortgage C, that a portion of one of the notes secured by it had been discharged by another fund, I think he was acting strictly within the order of reference, and quite right in reducing from the date of such discharge the charge against the mortgaged premises to that amount.

The exception argues that Mr. R. D. Wilmot might be entitled, by a proper suit to be brought for such purpose, to have the Bank stock, or, I presume, the balance, after paying the first note, retransferred to him; but he sets up no such claim, and urges no objection to the view of the Barrister, and he could not, successfully, in my opinion, for the simple reason that it has been appropriated precisely, in accordance with the terms upon which he transferred it.

I therefore am bound to sustain the report on this point also, and overrule the exception. The result of my ruling on the two first exceptions, disposes of the third and fourth exceptions, which must likewise be overruled.

I regret much the delay and expense to which the parties have been put in this tedious and complicated litigation. I cannot but think that much trouble and expense would have been saved to all parties, had the records of the Bank exhibited, in a plain, clear manner, the several agreements entered into with Mr. Wilmot; and had the books of the bank contained accounts, shewing each transaction as it really was: an account of general indebtedness, when there was such, with only credits legitimately entitled to go to reduction of such indebtedness, and a separate account of each special security, with only the credits which belonged to it, and which should go to no other, instead as they appear to have been all carried into one general account, without any reference to their special application.

It appears to me, if they did not intend to keep proper records and proper books of separate and special transactions with Mr. Wilmot, and wished to escape intricacy and confusion, and, as a consequence, trouble and litigation, they should not have had separate and special transactions with him. It is right however for me to say that the present cashier and officers of the Bank cannot justly be held responsible for the difficulties, if any, which may have arisen from the loose manner in which these transactions would seem to have been recorded, and the original accounts opened, and entries made in the books, as these occurrences took place before their connection with the Bank.

I overrule the exceptions, and reserve the question of costs.

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