

On 18th October, 1859, Mr. Boulton filed an affidavit made by one Manasset Leeson, that he Leeson had a demand against Francis, due on a mortgage, that Francis gave him an order on Mr. Boulton for money collected on the notes mentioned in a receipt (produced) 20th December, 1856, note of Thomas Fallow and Joseph Fallow, for £31 5s. but to sue one Wm. Johnston for a horse, this note having been given on representation that it was good; also Wm. Watson's note for £21 10s. for collection; also Andrew McQuenalan's note for £26 5s. for collection. That Leeson gave the order to Mr. Boulton, who accepted the same, and agreed to pay him the balance after deducting certain costs due him by Francis, that he (Leeson) found there was only a balance of some \$60 due on the whole transaction, which sum he (Leeson) arranged with Mr. Boulton, in fulfilment of the order and agreement with Francis, that Francis seems desirous of getting the money into his own hands to his (Leeson's) injury, and that the present proceeding is to his injury, and contrary to the agreement with Francis.

On 21st October, 1859, affidavit of John Cool, that Francis is indebted to him and therefore gave him a power of attorney dated 25th August, 1859, to receive all moneys due to him by Mr. Boulton, for collection by him on Francis' account.

On 28th October, 1859, affidavit by Charles Durand, of Mr. Boulton's admission of liability to pay the balance of the money collected from Watson, to Francis, deducting the costs due in *Francis v. Johnston*, the admission being made after the making of the order of 29th September last, and no allusion being then made to any liability to pay Leeson, and explaining that Francis residence in the Township of Normanby, in the County of Grey, renders it difficult to have communication with him.

On 29th October, 1859, there was an order that Mr. Boulton should pay to Francis £26 16s. collected from Watson, and the costs of the application subject to any deduction for the bill of costs ordered by the order of 28th September last, to be taxed provided Mr. Boulton within three days from the date (29th Oct.) rendered and tax his bill.

On 1st November, 1859, affidavit of Mr. Boulton, that when Durand first applied to him in this matter, he told him Francis had given Leeson an order for the balance due him. That at the time of the first application he did not recollect that he (Mr. Boulton) had accepted that order. That on seeing Leeson he (Mr. Boulton) arranged the amount due to Francis, as sworn to by Leeson. That he was engaged at the assizes, when the case came on and the order of 29th October, was made.

On the application of Mr. Boulton, Mr. Justice Burns rescinded the order of 29th October, leaving both parties to procure further affidavits.

On 14th November, 1858, affidavit of Alexander F. Scott, that George Wright, holds a mortgage on a lot of land in Brampton, given by Alexander A. Anderson *et al* to secure £93 9s. 10d with interest. That Anderson had bought the lot of one Elliott, and gave a mortgage to him, and then Francis bought of Anderson, subject to the said mortgages that he (Scott) was not aware that Manasset Leeson, has or had any claim on the lot or the mortgage. That on the 22nd April, 1858, £53 4s. 8d. was paid on the mortgage to Wright, to Mr. Scott by Francis, and was endorsed thereon, and that no other payment was made.

On 17th November, 1859, affidavit of Manasset Leeson, that he was paid the balance due Francis, by Mr. Boulton, being \$60 by the transfer of a note of one Thomas Donaldson, for that sum, which he knew to be good for the amount, and has given credit to Francis for the amount on a bill due by Francis, on mortgage which he was to pay on a lot of land, which he had agreed to discharge from incumbrances, and which he had sold to Leeson. That he gave the writing from Francis to Mr. Boulton, as well as the original receipt of Mr. Boulton, when he settled the same with him.*

On 19th Nov. 1859, affidavit of Mr. Boulton, that this order was an open letter from Francis, and handed to him by Leeson, when he produced "my receipt to said Francis last spring, as I think,"

that this open letter was lost having been treated as unimportant when Leeson delivered up Mr. Boulton's receipt.

DAVID, C. J.—In the absence of any affidavit from Francis to the contrary, I must presume that he did give Leeson such an order or open letter.

It would have been much more satisfactory if it had been distinctly stated when this order was delivered to Mr. Boulton; Leeson says nothing as to the time, Mr. Boulton only says it was last spring, *as he thinks*. It would also have been satisfactory to know when the arrangement between Leeson and Mr. Boulton, and the transfer of Donaldson's note took place. It might have been stated whether it was before or after the 21st September last. Any such arrangement after that summons, would be open to a very different construction, as to motives from what it might receive it made before. But the balance between £26 16s. collected as debt from Watson, with subsequent interest from the date of the endorsement on the execution, and the payment to the Sheriff; and the sum due Mr. Boulton, for costs in the suit against Johnston, has not yet been ascertained.

I gather from the affidavit of Leeson, and Mr. Boulton, that it is intended to be urged that Leeson settled the balance at \$60. And therefore Francis is concluded. I see no authority for Leeson to do more than obtain from Mr. Boulton the sum due by him to Francis, but not to compromise or give up any part of Francis's claim whatever it might be. Therefore this payment to Leeson, if good in other respects, does not conclude Francis.

I therefore, 1st. Order that Mr. Boulton render his bill in pursuance of the order of 27th September last, giving credit for the full sum of debt and interest, received by him in the suit of *Francis v. Watson*, within a week, and that as he is in default in not having obeyed that order he pay the costs thereof.

2nd I order that such bill be taxed, and that if there is a balance after allowing to Mr. Boulton, the amount of that bill and the \$60 paid to Leeson, that he do within a week after such taxation and demand of such balance, pay the same and the costs of this application to Francis or his lawful attorney.

3rd. That Mr. Boulton do within one week produce an affidavit showing whether the arrangement with Leeson, and transfer of Donaldson's note was before or after the summons of 24th September, 1859. If before,—and if there be no balance due Francis as stated in the preceding paragraph then the summons to be discharged with costs.

COMMERCIAL BANK OF CANADA V. LEE AND McCULLOCH.

Issue Book—Notice of trial—Irregularity—Setting aside.

A defendant who files one plea, and by mistake serves a different one, cannot be heard to object to the issue book, on the ground that it does not contain a true copy of the plea filed.

Notice of trial in and "for the County of York" and not "United Counties of York and Peel," is a mere irregularity which may be waived.

DRAPER, C. J.—This is an application to set aside the notice of trial, for irregularity.

The defendant, by a mistake which was explained (though not on affidavit), filed a plea at London, and served a different plea on the agent of the plaintiff's attorney at Toronto. The defendants' attorney resides at Stratford. He employed an agent at London to file appearance there, as the writ was issued from the office there, but instructed (in order to throw the plaintiffs over the Winter Assizes) that agent not to accept service of any papers.

In consequence, the plaintiffs' attorney sent a message specially to Stratford, and served his declaration. In the same spirit, the defendants' attorney employed the same agent to file a plea in London, but instructed that agent not to serve a copy on the plaintiffs' attorney, who resides in London, and whose clerk was present when the plea was filed. He sends a copy to serve on the agent of the plaintiffs' attorney in Toronto. The plaintiffs' attorney, without waiting to be served, makes up his issue book, and from the declaration, and from the plea already filed, and immediately sends to Stratford to have the joinder of the issue, issue book, and the notice of trial, served on defendants' attorney, all which was done. It is now objected that the issue book is irregular, because it was served before a copy of the plea was served. On examining the papers, it appears that a copy of the plea filed, never was served at all. As I understood the explanation offered

* This order or writing by Francis on Mr. Boulton, in favor of Leeson, was not produced.