

C. L. Cham.]

MARTEN V. BRUMELL AND RICHARDSON.—RE BARTON.

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son was surety, on getting 6s. 8d. in the £. And that he (Richardson) was expressly held bound to the plaintiff for the remaining 13s. 4d. in the £.

Then Richardson knew also that he himself released Brumell from all liability, reserving any security he had, and his rights also against any surety there was; but he has no security, and certainly none that was of any value to him, after Brumell himself was released—there was no mortgage, or lien, or collateral documents which he held. He had nothing whatever but the instrument, on which Brumell was liable, for this particular debt; and he could never hold that against him. At that time too, he did not hold this bond, for he did not pay it till a long time afterward. How had he any surety for this defendant, who was not to be released?

So far as the bond was concerned, the plaintiff was expressly discharging Brumell from it; and Richardson knew it, and concurred in it. But whether he concurred or not, would have made no difference, for whatever the proper majority in numbers and value of the creditors chose to do would have bound Richardson and the plaintiff too, even against their will.

I think here that Richardson must have known the plaintiff could not after this release, and have prosecuted the suit against Brumell's consent, for the purpose of obtaining satisfaction against him. And that he must have known further that the plaintiff was prosecuting the suit solely for the purpose of obtaining a recovery against himself as surety for the remaining 13s. 14d. in the £, under the express reservation, which was contained in the deed, of his rights against sureties. And that after such recovery was had against himself he could not enforce any remedy against Brumell, whom he also had expressly released.

Neither the plaintiff nor Richardson should therefore be allowed to enforce this judgment against Brumell, his delay in applying for protection being satisfactorily explained, certainly as against the plaintiff, and, in my opinion, as against Richardson too.

Even if it appeared that Richardson had no kind of knowledge of Brumell's position in the suit after the execution of the deed, and had no knowledge either of the bargain between him and the plaintiff as to the way in which it was to be carried on, I should doubt exceedingly his right to enforce a judgment by assignment which the plaintiff himself could not enforce, for he must take that only which the plaintiff has a right to transmit. Suppose the plaintiff had recovered or received payment in full from Brumell, unknown to Richardson, it could scarcely be argued that, on Richardson afterwards paying the plaintiff a second time, he could enforce payment over again from Brumell.

He must take the plaintiff's rights or nothing, and he must deal with the plaintiff, as well after as before the judgment, at his peril.

It is not necessary I should decide this point, nor the further point that was adverted to, namely, that Richardson could not take an assignment as he had not paid the whole judgment but two thirds of it, or 13s. 4d. in the £, only. It may be true a defendant who does not pay the whole judgment debt cannot compel the plaintiff under the Statute to assign the judgment to him,

but if the plaintiff chose to do so, I do not see why a surety should not enforce against the principal any amount the surety has been compelled to pay and could justly recover from the surety in an action at law, by execution issued upon the judgment.

There is another reason why this judgment should not be used against Brumell for the full amount for which the execution has issued, even if it could be acted on at all, and it is that the whole costs were incurred but to a trifling amount in trying the special defence of Richardson applicable to his own position, and not in any way affecting the liability of Brumell, the principal—and these costs should not be recovered from Brumell under any circumstances, for he could not demand them in an action at law.

In every view of the case it appears to me Brumell should be relieved from this judgment and execution. I must therefore order the execution and all proceedings under it to be set aside, and satisfaction to be entered on the roll in such form that Brumell shall be discharged from it, with costs to be paid by Richardson to Brumell. And I further order that no action shall be brought in respect of the issuing of the execution, or of any proceedings that may have been taken under it against Richardson or against any other person.

See *Bartlett v. Stinton*, 12 Jur. N. S. 242; L. R., 1 C. B., 483.

RE BARTON.

Summons to show cause not referring to the papers filed upon which it was founded.

[Chambers, February 20, 1868].

A motion being made to make absolute a summons calling upon an attorney to deliver his bill of costs.

Curran objected, that as the summons did not refer to any affidavits or papers as having been filed, they could not be read in support of the summons, which must therefore be discharged.

W. S. Smith, contra, argued that the summons was sufficient, but if not, he asked that he might be allowed to amend it.

ADAM WILSON, J.—I do not feel inclined to give any weight to this objection, and unless some authority to the contrary is produced I shall allow the summons to be amended at once.

CORRIGAN V. DOYLE.

Interlocutory judgment on default of plea—Notice to plead—C. L. P. Act, sec. 56.

Sec. 56 of C. L. P. Act, taken in connection with secs. 91, 92, and Rule 132, is to be read thus, "the plaintiff may file and serve a declaration endorsed with notice to plead, &c."

Held therefore, that it was not a valid objection to an interlocutory judgment, that the copy of declaration filed was not endorsed with a notice to plead.

[Chambers, March 20, 1868.]

The defendant obtained a summons, calling on the plaintiff to show cause why the interlocutory judgment signed herein for want of a plea, and the issue book and notice of assessment, and all other proceedings had therein, should not be set aside on such terms as to the judge in Chambers might direct, for irregularity, on the following grounds: