

C. L. Cham.]

MARTEN V. BRUMELL AND RICHARDSON.

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annexed letter from Mr. Cameron, by which it appears, as my belief is, that his recollection is at fault with respect to what took place." Of this letter the only material part is the following:—"The only circumstance with you on the subject, which I recollect, took place before the time for appearance expired, when, I think, the composition had been proposed and assented to by some creditors, but not by all. You then spoke of the necessity for your appearing for Brumell, and said that if the composition arrangement was completed, you supposed your client would not be prejudiced by the judgment against him in the suit and that if it were not completed and he went into Insolvency it would not matter in which opinion I concurred."

Mr. Scott then stated that final judgment was assigned against the defendants on the 10th of February last for \$430 04 damages and \$125 89 costs; that all but about \$13 50 were costs occasioned by Richardson's defence: that he believed the amount of \$564 was paid by Richardson, before judgment was entered, to the plaintiff's attorney, and that Mr. Whitley (acting for Richardson) informed Mr. Scott that the judgment had been assigned by the plaintiff to Richardson. Mr. Scott then set out a letter he wrote on 26th February, informing Mr. Whitley, that Brumell had been discharged by the deed before mentioned, and requesting him to consent that Brumell's name should be struck out of the judgment—otherwise he would apply for relief; that this letter had not been answered, and that a *fi. fa.* against Brumell's goods had been sued out.

James Watson, the attorney of the creditors, made affidavit, that when he paid Mr. Cameron the composition for the plaintiff he said "he would proceed against Richardson for the balance, but that nothing should be done by the plaintiff against said Brumell."

Brumell stated that before Richardson took an assignment of the judgment and immediately after the execution of the deed of composition he was aware the plaintiff had accepted the composition and had executed the deed and relieved Brumell from all claims in respect of the pleadings mentioned.

The defendant Richardson, though not called on by the summons, filed certain documents:—The assignment of the judgment to himself, dated the 13th of February, 1868; the original bond signed by Brumell to the plaintiff, upon which Richardson was surety, and an undertaking by the plaintiff's attorney to assign the judgment to him and to allow him to enter it up.

Mr. Whitley made affidavit "that except so far as Richardson has been informed by me, I believe he has no knowledge of any of the circumstances which have taken place with reference to this action since the commencement thereof, that until the last few days, I had no knowledge of any agreement between Mr. Scott and Mr. Cameron, but such as is alleged on the affidavits filed in support of this application.

Whitley, for Richardson, shewed cause; no one appearing for the plaintiff. He referred to 26 Vic., ch. 45; *Sharp v. D'Almaine*, 8 Dowd, 664; *Gresy v. Gibson*, 12 Jur. N. S., 319; *Brooke v. Jennings*, 12 Jur. N. S., 341; *Evans v. Gill*, 1 B. & P., 52; Ch. Arch. Prac., 11 ed. 907-978.

Dalton supported the summons, referring to *Lister v. Mundell*, 1 B. & P., 427; *Shaw v. Shaw*, 6 O. S. 458; *Schofield v. Bull*, 3 U.C. L.J., 204; *Turner v. Davies*, 2 Saunders, 187 n.

ADAM WILSON, J.—I must first consider this case as if it were between the plaintiff and Brumell alone. And so considered I should decide, on the affidavits of Mr. Scott and Mr. Watson, that the plaintiff was not to prosecute the suit against Brumell, in consequence of his protection under the deed of composition and discharge, to which the plaintiff is an express, assenting and executing party, and by which, for the composition agreed upon, he has absolutely discharged Brumell. Any proceedings taken after the deed in question would be set aside, if the application were made within a reasonable time after knowledge of proceedings being carried on.

In this case, proceedings were still continued by the plaintiff to the knowledge of Brumell, for two trials were had after the making of the deed, and Brumell would certainly be excluded from all relief, if he were now applying for the first time.

But the continuation of these proceedings is explained by the fact, that there was another defendant to the suit, against whom the plaintiff desired to obtain judgment; and therefore when Brumell saw this suit still going on, he believed, as he had reason to believe, it was going on not against himself, excepting formally, but against Richardson his co-defendant, who was still liable to the defendant.

If the agreement set up by Brumell, that the suit was not to be prosecuted against him for the purpose of enforcing payment or satisfaction, but formally only, for the purpose of reaching Richardson be established, he is not too late now in claiming relief as against the plaintiff. And I think this agreement is proved by Mr. Scott and Mr. Watson, whose statements are not opposed by what Mr. Cameron states in his letter.

But it is said although Brumell may be entitled to be relieved as against the plaintiff, it is different when he applies against Richardson, because he was no party to the agreement with the plaintiff, and he had no notice of it.

The deed shows that Richardson was a party to it, and that he thereby released Brumell "from all liabilities in respect to any claim, cause of action, judgment or suit, which he might have against Brumell, on account of any matter or thing whatsoever, whether such claim is direct or indirect, exigible, or accruing, reserving nevertheless to each of the creditors any security they may respectively hold for the remaining 13s. 4d. in the £, of their claims, and not hereby releasing any surety therefor." And although he signed the deed before the plaintiff did, and may therefore not have seen the reservation by the plaintiff of his rights, "against any surety for any debt," he must be taken to have had notice of what he signed himself; and of what he knew the plaintiff also signed, namely, that Brumell, as just stated, was released by the payment of 6s. 8d. in the £, but "not hereby releasing any surety therefor."

Richardson therefore knew that the plaintiff released Brumell from the debt, for which Richard.