

C. L. Cham.]

MARTEN V. BRUMELL AND RICHARDSON.

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sor of his property is obliged to account, not only for the *corpus*, but for the past income, except so far as he may be protected by the Statute of Limitations.—*Solicitor's Journal*.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law,
Reporter in Practice Court and Chambers.)

MARTEN V. BRUMELL AND RICHARDSON.

Composition and discharge—Assignment of judgment to a surety.

On 2nd May, 1867, defendant B. made an assignment under the Insolvent Acts; on 27th May, 1867, a deed of composition and discharge was made and executed by B. and R., (who had been sued as B.'s surety) and other creditors, as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th Feb., 1868, plaintiff obtained judgment. On 13th Feb. R. took an assignment of the judgment for plaintiff, paying part only of the amount of the judgment debt.

On an application by defendant B. to have his name struck out of the proceedings and the judgment stayed as against him, on the ground that the plaintiff was a party to the deed of composition and discharge,

Held, that B. was entitled to this relief as well against the plaintiff as against R., and that he had accounted for his delay by a reasonable supposition that plaintiff was proceeding on the judgment to recover the balance of the debt from defendant R.

Seem, that the assignee of a judgment cannot enforce it, if his assignor could not.

[Chambers, March 11th, 1868.]

A summons was obtained on behalf of defendant, Brumell, calling on the plaintiff to show cause why the judgment signed, and *fi. fa.* issued, and all proceedings subsequent to the judgment should not be set aside and satisfaction entered on the roll, or why the name of the defendant, Brumell, should not be struck out of the judgment and all subsequent proceedings—or why all proceedings on the said writ or against Brumell, should not be stayed, and the plaintiff prohibited from further proceeding upon the judgment as against Brumell, or why proceedings should not be stayed till the fifth day of next term, and why the plaintiff should not pay the costs of the application, upon the grounds that the plaintiff's claim herein was paid and satisfied before the signing of the said judgment, and that he had no right to sign his name, and that proceedings herein are contrary to the agreement between the plaintiff's attorney and the attorney of the defendant, Brumell, and that Brumell had, between the time of the signing of interlocutory judgment against him and the signing of final judgment, been released and discharged by the plaintiff's deed from all claim in respect to the matters in question in the said action, and upon grounds disclosed in affidavits and papers filed.

A deed of composition made 27th of May, 1867, between the defendant Brumell of the first part, and the other persons executing these presents, creditors of Brumell (and being a majority in numbers and representing at least three fourths in value of the liabilities of Brumell, subject to be computed in the execution of a deed of composition and discharge under the Insolvent Acts of the Province of Canada) of the second part, was put in and filed.

It recited that Brumell on the 2nd of May, 1867 executed an assignment of the estate, to James Watson for the benefit of his creditors to be administered according to the Insolvent Acts; and that Brumell had proposed to pay his creditors 6s. 8d. in the £, upon their respective claims in full discharge, and that the creditors had agreed to accept the same.

Brumell then covenanted to pay the said sum upon the execution of the said deed by the majority in number and three fourths in value of his creditors, and the parties of the second part agreed to accept the same, as far as they could, on behalf of all the other creditors or claimants of Brumell or other persons entitled to rank on the estate, and release Brumell from all claim, liability, cause of action, judgment, or suit which any such person or persons, creditor or creditors, may, can or otherwise might have against Brumell or his estate. And the parties of the second part released Brumell in respect of their own claims, &c., &c., reserving nevertheless to each of his creditors any security which they may respectively hold for the remaining 18s. 4d. in the £, and not thereby releasing any surety therefor. And it was declared that the deed was a deed of composition and discharge under the Insolvent Acts, and was intended to operate thereunder, and was also intended to have full effect as to the parties executing the same independently of the said acts. It was executed by the plaintiff as follows: "Henry O. Marten reserving, and without prejudice to my rights and remedies against any surety for my debt," and it was also executed by the defendant and Richardson.

This action was commenced by a summons, specially endorsed, on the 11th of May, 1867, and judgment for want of an appearance by Brumell was signed against him on the 22nd of the same month.

Mr. Scott, the attorney of Brumell, made affidavit that, subsequent to the signing of the interlocutory judgment, the plaintiff agreed to accept and execute the said deed of composition, as he was informed, and afterwards, as he believed, executed the same in the early part of June, 1867. Mr. Scott then stated "I remarked to Mr. Cameron (who was acting for Marten) to the effect that I presumed it would not be necessary to take any steps to have the deed pleaded, and he replied to the effect, that it would not be necessary, as nothing would be done in the action against Brumell, and it was accordingly so understood between myself, acting on behalf of Brumell and said Hector Cameron." That being in February, 1868, informed by Brumell that he feared Richardson intended to enforce the judgment against Brumell, as Brumell had been informed that Richardson had procured an assignment thereof from the plaintiff, "I thereupon called upon Mr. Cameron for an explanation of the matter. He did not seem to be aware previous to my informing him that such judgment had been signed or an assignment executed, and appeared surprised to hear that the same had been done. I requested he would give me a memorandum stating the understanding, but he declined to do so until he had made enquiry from persons in connection with his office as to what had taken place, but promised to write me at once: that on the 27th of February, instant, I received the