tisfactory endorsers as aforesaid, and had had therefore abandoned the arrangement and composition in the said paper-writing of June 1860, referred to, and had resorted to the new arrangement contained in the said indenture of the 7th of August, 1860, and requesting the said Benedict & Vann to execute the said indenture and procure other creditors of defendant, resident at New York, to execute the same."

The bill further alleged, that after the abandonment of the arrangement of June, 1860, and before receipt of the deed of the 7th of August, Benedict & Vann, considering the paper of the 7th of September, 1859, a promissory note, sold and delivered the same to the plaintiff Hill, for the sum of twenty-five per cent. on the amount thereof paid by Hill to them, and therefore they declined to execute the deed of the 7th of August, and returned the same to defendant, at the same time informing him of the sale and transfer of the claim; that Hill being afterwards advised that this writing did not constitute in law a promissory note, and therefore could not be sued in his name, Benedict & Vann, authorised him to bring an action at law in their names, in which action the defendant in bad faith pleaded the release of the debt by the paper of June, 1860, and put the same in evidence, when, by consent of parties, a verdict was entered for defendant, with liberty to move to enter a verdict for the plaintiff, if the court should be of opinion, that, upon the facts stated, they were entitled to recover: but the court afterwards, upon argument of a rule obtained for that purpose, refused to disturb the verdict so entered for defendant. The case at law is reported in 11 U. C. C. P. 218.

The prayer was for an injunction to restrain defendant setting up the writing of June, 1860, as a valid document; its delivery up to be cancelled, so far as plaintiff was concerned; an account and payment of amount found due.

The defendant answered the bill at length, setting up, amongst other things, that by the deed of August, 1860, he was allowed two years to pay the compromise therein stated; but that such deed was not intended, neither did it, replace or in any manner do away with the release of June, 1860, except as to creditors who should be willing to give him the additional time and advantage allowed by the deed of August, and who should become parties thereto; that subsequently, and about the 18th of October, 1860, a letter was written to Hill, offering the security stipulated and agreed to be given, and submitted that plaintiffs by suing at law had precluded themselves from resorting to this court for relief, and that under all the circumstances, this court had no jurisdiction in the premises. The cause having been put at issue, the defendant and one of the trustees under the deed, were examined on behalf of the plaintiffs, but the evidence did not materially vary the statements in the pleadings.

The cause was originally heard before his Honour V. C. Esten.

McDonald, for plaintiffs.

Fitzgerald, for defendant.

Esten, V. C.—The evidence shews that the plaintiffs were assenting parties to the deed of January, which operated against them as a release in equity. Then the plaintiffs join in and execute the deed of June, which cannot stand with the deed of January, but supersedes it, with regard to such of the creditors as execute it.

The plaintiffs are therefore bound by the deed of June. This deed cannot be considered as abandoned, by the making of the deed of August, or otherwise, as to creditors not executing the deed of August.

Prima facie, therefore, the plaintiffs must claim under the deed of June, but they retained the note until the security should be given, or composition paid. It must be intended that the note was so retained, in order that if the security was not given or composition with punctuality paid, the original debt might be enforced. The plaintiffs are, therefore, remitted to the deed of January, but Rutherford having put an end to that deed, by the one of August, they are remitted to their personal remedy for their whole debt against Rutherford. This, however, is the operation only in a court of equity, and a bill is, therefore, the proper course.

The decree will, therefore, be, that Rutherford must pay the amount of the note, and costs. Rutherford never was in a position to pay, having stripped himself of all his property. It would now be a breach of trust in Moore to pay.

Rutherford renounced the deed of January by the deed of August, and the plaintiffs choose to adopt such renunciation. In this view their action was premature, but this did not dispense with the payment or tender of composition.

What was done was not equivalent to either, for Rutherford never was ready with money, and the action under such circumstances was no refusal to accept payment of the composition.

(The defendant feeling himself aggrieved by the decree thus pronounced, petitioned for a re-hearing of the cause before the full court: on the re-hearing,)

Proudfoot, for the plaintiffs, contended that the decision of the Court of Common Pleas in the case of *Benedict* v. *Rutherford* did not affect in any degree the questions raised in this suit. From the statements in the pleadings and evidence it is evident that Benedict and Vann never contemplated abandoning any rights they were entitled to under their original claim, unless and until the stipulations in reference to the agreement of June, 1860, were entirely fulfilled. By the deed of June no property whatever was conveyed, and there is nothing contained in it which should prevent it subsisting with the one of January previous; while on the other hand the deed of August cannot be taken to agree with that of June, but must be considered to have superseded it; and Benedict and Vann never having executed or agreed to execute the deed of August, and default having been made in payment of the amount agreed upon by the terms of the compromise, they are remitted to their original rights under the note signed by defendant.

The release being in the hands of the defendants and pleadable at law, this court has clearly jurisdiction to restrain him such use of it being against good faith.

Simpson v. *Lord Howden*, 3 M. & C. 97; *Flower* v. *Marten*, 2 M. & C. 459; *Gudgeon* v. *Bessett*, 8 E. & B. 986; *Hudson* v. *Revett*, 5 Bing. 368.

McMichael and *Fitzgerald* for the defendant.

The general rule in equity is that the court will relieve against a forfeiture which is caused by non-payment of money. Here the defendant is ready to pay the full amount agreed to be paid as a composition, and it is established that before suit commenced he offered either to pay or deliver the notes endorsed as agreed upon. Here, then, the court will be lending its aid to work a forfeiture, for the defendant is not seeking its protection against the effects of his default in payment, as at law he has been declared not liable. This court no doubt would restrain the defendant from setting up the release unless he pays the 5s. in the pound, but, under the circumstances of the case, that is unnecessary, as the defendant is willing and always has been to pay that. The original debt was absolutely released by the instrument of June, and the fact that the original note was allowed to remain in their hands was only to enable Benedict and Vann to enforce payment in the event of the composition not being paid. If the fact of failure to pay the composition had the effect of reviving the debt which had been released, such must be the effect at law as well as in this court, and in that view the plaintiff had no right to complain of the defendant setting up the release.

The fact that the defendant had executed the deed of August cannot possibly affect the rights of the original creditors; they might have chosen to come in under it, or they might have elected, as they did, not to come in under it, and remain under the instrument of June.

Hill, by his proceeding at law, declared his determination not to accept the notes or the stipulated composition, a tender was therefore unnecessary, and the fact that no tender was made cannot now give the plaintiff any additional right to relief. They referred to *Hockster* v. *De Latour*, 17 Jur. 972; *The Danube and B. Sea Co.* v. *Enos*, 8 Jur. N. S. 434; *Black* v. *Smith*, Peake's Rep. 88; *Harding* v. *Davis*, 2 C. & P. 77; *Wallis* v. *Glynn*, 19 Ves. 383; *Davis* v. *Thomas*, 1 R. & M. 506; *Leake* v. *Young*, 5 E. & B. 955.

Vankoughnet, C.—In this case the plaintiff Hill sues as assignee of his co-plaintiffs of an agreement by the defendant with them to pay them the sum of $979·76, on the 16th of March, 1860. The facts of the case appear in the judgment of V. C. Esten, which comes before us on this re-hearing.

I think the deed of the 18th January, 1869, may be left out of consideration, and that the right of the plaintiffs to recover depends upon the deeds of June and August, and the circumstances con-