

were to release and discharge the company from all claims and to authorize the defendant Bull to deliver and convey to A. E. Hersee all the assets and property of the company.

Following these provisions was a stipulation that the agreement should take effect and become operative only when executed by all the creditors, but not before. It never was executed by all the creditors, and so never became operative to bind the creditors to accept 40 cents on the dollar of their claims against the company.

On the 2nd October, 1899, another transaction took place between the defendant Bull and the defendant Hersee, the result of which was that the defendant Bull, with the assent of A. E. Hersee, executed an instrument whereby, after reciting the assignment by the company to Bull, the offer made by A. E. Hersee to the creditors of a composition of 40 cents in the dollar, and that the creditors had accepted the offer and that the defendant Hersee had agreed to take upon himself the payment of the said composition to the said creditors, the defendant Bull granted, assigned, and transferred all the estate and assets of the company to the defendant Hersee upon and for certain trusts and purposes set out in the instrument. These were expressed to be as follows, viz., that the defendant Hersee should pay the aforesaid composition of 40 cents in the dollar on the claims of such of the creditors as had agreed to accept the same, and pay in full or make such settlement as he might be able of the claims of such of the creditors as had not agreed to accept such composition, together with preference and privileged claims and the costs incurred by the parties in respect of the assignment by the company to Bull. Subject to these payments, the defendant Hersee was to hold the transferred estate and assets to and for his own sole and only use forever. And the defendant Hersee covenanted with the defendant Bull to pay "such composition and claims and from time to time and at all times well and truly save and keep harmless and fully indemnify" the defendant Bull.

The defendant Hersee received the estate and assets from defendant Bull, and proceeded to pay the creditors. The plaintiffs refused to accept the 40 cents in the dollar tendered to them, alleging that before the execution of the instrument of the 2nd October, 1899, they had repudiated their acceptance of the offer of composition, and had notified the company of their withdrawal from the agreement. Subsequently they brought action against the company for the recovery of