day of the term. The service was on the 12th of January, and the first day of the term was the 6th of February.

E. J. Lee, contrà, contended, that it was to be inferred from the case of *Lloyd* v. *Alexander*, 1 Cr. 365, that if the defendant appears within the thirty days, the court will hear the case; or they will hear the case, after the expiration of the thirty days, even if the party does not appear.

Youngs.—The 22d section of the judiciary act (1 U. S. Stat. 84), requires that the defendant in error should have thirty days' notice by the service of the citation. The citation is to appear on the first day of the term, consequently, thirty days' notice must be by service of the citation thirty days before the first day of the court.

THE COURT refused to take up the case, without consent, although thirty days had then (March 9th, when the cause was called for hearing) elapsed since the service of the citation; and observed, that the case of *Lloyd* v. *Alexander* only decided that the court will not take up the case, until thirty days have expired since the service of the citation; but it did not decide, that the court would then take it up without consent.

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*RIDDLE & CO. *v.* MANDEVILLE & JAMESSON. [*322

Suit against indorser.

The indorsee of a promissory note, in Virginia, may recover the amount from a remote indorser, in equity, though not at law.

Equity will make that party immediately liable, who is ultimately liable at law.

The remote indorser has the same defence in equity against the remote indorsee, as against his immediate indorsee.

The defendant has a right to insist, that the other indorsers be made parties.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in a suit in chancery, brought by Riddle & Co., against Mandeville & Jamesson, remote indorsers of a promissory note, dated March 2d, 1798, at sixty days, for $1500, made by Vincent Gray, payable to the defendants or order, and by them indorsed in blank. Upon its face, it was declared to be negotiable in the bank of Alexandria.

The note, so made and indorsed, was, by Gray, put into the hands of a broker, who passed it to D. W. Scott, for flour, which he sold for $1200 in cash, and paid the money to Gray. Scott passed it, without his own indorsement, to McClenachan, in the purchase of flour, and McClenachan indorsed it to Riddle & Co., the complainants, in payment of a precedent debt; Gray failed to pay the note, and was discharged under the insolvent act of Virginia, upon an execution issued upon a judgment in favor of the complainants upon the same note. The complainants then brought a suit at law against the defendants, upon their indorsement, and obtained judgment in the court below, which was reversed in this court, upon the principle, that an indorsee cannot maintain a suit at law against a remote indorser of a promissory note. 1 Cranch 290. Whereupon, the complainants brought the present bill in equity, which was decreed to be dismissed in the court below; that court being of opinion, that there was no equity in the bill. From that decree, the complainants appealed to this court.

The only facts stated in the bill were, that Gray made the note, payable to the order of Mandeville & Jamesson, who put it in circulation. That it was afterwards delivered and transferred, for a valuable consideration, to *323] McClenachan, who, for a *valuable consideration, indorsed and transferred it to the complainants. That Gray failed to pay it, and was discharged from execution under the insolvent act, whereby the complainants were unable to recover from him any part thereof; in consequence of which, the defendants became liable in equity to pay the same, but had refused so to do.

Among the interrogatories contained in the bill, it was asked "with what view was the note made and indorsed?" and whether one of the defendants did not, upon inquiry, declare that the note was good, and would be punctually paid?

The defendants pleaded the judgment at law in their favor, in a suit brought upon the same note, in bar of the relief in equity. To this plea, the complainants demurred, and the court sustained the demurrer, and ruled the defendants to answer.

The answer stated, that the note was indorsed by them for the purpose of being discounted at bank, for the use of the collector's office, in which Gray was the chief clerk or deputy, and had the whole management of the business. That the defendants refused to indorse it, until Gray promised to deliver to the defendants, as security, their bond to the United States, given for duties, to the amount of $1168, which he never did, and they had to pay it. That they never received any value from any person for their indorsement; that they never gave circulation to the note, otherwise than by indorsing it and delivering it to Gray to be discounted at bank, for which purpose only they indorsed it. They denied that they ever made any contract with any person touching the note, and said they had no recollection of any conversation with any person respecting the note, before it became due.

The deposition of D. W. Scott stated, that he gave 200 barrels of flour *324] for the note, but before he *concluded the bargain, he asked Jamesson, one of the defendants, if the note was good, and whether there was any objection to it, and informed him it was offered to him for flour. Jamesson told him, it was a good note, and observed, that whenever he saw the name of Mandeville & Jamesson on any paper, he might be sure it was good. That Scott sold the note to McClenachan for 207 barrels of flour, but did not indorse it, and it was expressly agreed, that he should not be answerable for it, in any event.

The deposition of McClenachan stated, that before he would take the note of Scott, he informed Jamesson, that he intended to deal for it, and inquired whether it was an accommodation note, or a note given upon a real transaction. Jamesson told him it was a real transaction note, and not an accommodation note, and that it would be punctually paid. The deponent further stated, that the complainants had released to him all claim on account of the note, and of the debt intended to be paid by the note; and that he had also been discharged under the bankrupt act.

These witnesses were objected to by the defendants, as interested.

E. J. Lee, for the plaintiffs in error.—1. The court below did right in overruling the plea in bar.

Where, by the principles of law, a party has a right, but the forms of law do not give a remedy, a court of equity will grant relief. Mitf. 103. And in some cases, it has a concurrent jurisdiction with the courts of law. Mitf. 108, 109; 3 Atk. 215; 1 Fonbl. 204.

2. The court below erred in dismissing the bill. The plaintiffs are entitled to recover in equity against the defendants. It was the intention of the *defendants to make themselves responsible to any person who should be the holder of the paper. They intended it to be a negotiable instrument. This appears from the note itself, which is expressly made negotiable in the bank of Alexandria, and from the answer of the defendants, who state that they indorsed it for the purpose of being discounted at the bank. Their indorsement was intended to give credit to the note. If they did not intend to become responsible, they were guilty of a fraud. The complainants, upon the credit of the note, granted indulgence to McClenachan. The defendants were undoubtedly answerable at law to McClenachan. That liability was a *chose in action* which he had a right in equity to assign, although this court has decided, that it was not assignable at law. 1 Atk. 124; 1 Fonbl. 201, 204; 1 T. R. 622. In the case of *Violet* v. *Patton*, at this term (*ante*, p. 142), this court has decided that a person who indorses merely to give credit to the note, is liable at law to his immediate indorsee. If the complainants had brought a suit in the name of McClenachan for their use against the defendants, a court of law would have protected the equity of the complainants. 2 Skin. 6, 7; *Winch* v. *Keely*, 1 T. R. 622; 4 Ibid. 341. And if, in such a suit, the defendants had a set-off against the complainants, Riddle & Co., a court of law would have allowed it. *Bottomly* v. *Brooke*, 2 H. Black. 1271; 1 T. R. 621. If a court of law will recognise and protect an equitable assignment, *à fortiori*, will a court of equity. In the case of *Harris* v. *Johnston* (3 Cr. 319), this court said, that "the holder of a note may incontestably sue a remote indorser in chancery, and compel payment of it." [*325

Youngs, contrà, contended, 1. That the plea in bar ought to have been sustained. A judgment at law against a party in an equitable action of *assumpsit*, when all the facts are susceptible of proof at law, is conclusive against the jurisdiction of a court of chancery, if it ever had any. If a court of chancery and a court of law *have a concurrent jurisdiction, an election to proceed in one concludes the party from going into the other. If a person is under no legal obligation to pay money, a court of chancery cannot compel him. It can only enforce the performance of legal contracts, and where there is no contract at law, a court of chancery cannot make one. As no privity exists at law between the holder and a remote indorser, that privity cannot be created by a court of equity. [*326

2. That the court below was correct in dismissing the bill. The contract was usurious. A note for $1500 having only sixty days to run, was sold for $1200 worth of flour. There was no valuable consideration flowing to the defendants; and such a consideration alone can make an indorser liable even to his immediate indorsee.

The liability of the indorser is not a complete *chose in action*. A *chose in action* is a right of action. No right of action exists against an indorser of a promissory note, in Virginia, until it is ascertained that the money can

not be recovered from the maker. Until that time, it is a mere possibility, which is not the subject of assignment, even in equity. The liability of the indorser is not assignable, under the statute, and cannot be made so by a court of equity.

In the case of a joint obligation by principal and surety, if the surety be discharged at law, he can never be made liable in equity, for his equity is equal to that of the obligee. *Harrison* v. *Field*, 2 Wash. 136.

The note was indorsed by the defendants, to be discounted at bank. Gray committed a breach of good faith, an act of fraud, in sending it into the market.

*327] *The complainants can only claim as creditors of McClenachan. But they are no longer his creditors, having released him from the debt, according to his own deposition, which they have produced.

If it should be compared to a letter of credit, it is a letter of credit to a particular person, for a particular purpose. It is not like a general letter of credit.

Swann and *C. Lee*, on the same side.—The suit at law was decided against the complainants, on account of a defect of right, not for want of a remedy at law.

The money in the hands of Gray was like any other property in his hands. If it had been a horse which Mandeville & Jamesson had transferred to McClenachan, with warranty, and McClenachan had sold the horse to the complainants, he could not have transferred to them the warranty of Mandeville & Jamesson. No case can be found in which a suit in chancery has been maintained against a remote warrantor of personal property.

The complainants demand the whole amount of the note; but in equity they can claim only what they paid for it; and how much that was does not appear. The indorsers must sue each other in succession. No case can be found, where a holder has recovered in equity against a remote indorser.

C. Simms, in reply.—In the case of *Violet* v. *Patton*, this court has placed the liability of an indorser upon a much more correct principle than that of privity of contract. It was there decided, that an indorsement was equivalent to a general letter of credit; if so, it enables any one to recover upon it who has parted with his property upon the faith of it. If A. gives a letter

*328] *of credit to C., and B. afterwards also gives a letter of credit to C., A. is not discharged from his liability, because B. is also liable.

What was said by the chief justice in the case of *Harris* v. *Johnston*, cannot be considered as a mere *dictum*, but must be taken to be the deliberate opinion of the court, for it is the only answer given to a strong argument urged by the counsel for Johnston, to show that the outstanding note was no bar to a recovery upon the open account, viz., that the defendant, being a remote indorser, could never be compelled to pay the note. The answer of the court was, "It is supposed, that the holder of a note may incontestably sue a remote indorser in chancery, and compel payment of it." And during the argument of that case, when this idea was suggested by Mr. Jones, the chief justice said, "True, we shall consider that point. I have always been of opinion, that in such cases, a suit in chancery can be supported; though I do not recollect any case in which the point has been decided." When, therefore, the chief justice afterwards, in delivering the opinion of the court,

repeats the same idea in stronger terms, it must be supposed, that the point had been well considered, and that he spoke the opinion of the whole court.

March 13th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit is brought by the holder of a promissory note to recover its amount from a remote indorser. In a suit between the same parties, this court had previously determined that the plaintiff was without remedy at law. It is now to be decided, whether he is entitled to the aid of a court of equity.

If, as was stated by the counsel for the defendants, the question is, whether a court of chancery *would create contracts into which individuals had never entered, and decree the payment of money [*329
from persons who had never undertaken to pay it, the time of this court has been very much misapplied indeed, in attending to the laborious discussion of this cause. The court would, at once, have disclaimed such a power, and have terminated so extraordinary a controversy.

But the real questions in the case are understood to be, whether the plaintiffs, as indorsees of a promissory note, have a right, under the laws of Virginia, to receive its amount from the indorser, on the insolvency of the maker; whether the defendants, as the original indorsers of the note, are ultimately responsible for it; and whether equity will decree the payment to be immediately made, by the person ultimately responsible, to the person who is actually entitled to receive the money.

This note came to the hands of McClenachan, indorsed in blank by Mandeville & Jamesson. McClenachan had a right to fill up the indorsement to himself, and he has done so. The law, as understood in Virginia, immediately implied an *assumpsit* from Mandeville & Jamesson to McClenachan, to pay him the amount of the note, if he should use due diligence, and should be unable to obtain payment from the maker. McClenachan indorsed this note to the plaintiffs, and by so doing, became liable to them in like manner as Mandeville & Jamesson were liable to him.

The maker having proved insolvent, the plaintiffs have a legal right to claim payment from McClenachan, and on making that payment, McClenachan would be re-invested with all his original rights in the note, and would be entitled to demand payment from Mandeville & Jamesson.

If there were twenty successive indorsers of a note, this circuitous course might be pursued, and *by the time the ultimate indorser was reached, [*330
the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor, is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees; the creditor has no action at law against the legatees. Yet it has never been understood, that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. If the executor and his sureties should be insolvent, so that a suit at law must be

unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that court could not be questioned. If doubts of his right to sue in chancery could be entertained, while the executor was solvent, none can exist, after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a court of equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible.

In the present case, as in that which has been stated, the insolvency of McClenachan furnishes strong additional motives for coming into a court of chancery. Mandeville & Jamesson are ultimately bound for this money, but the remedy at law is defeated by the bankruptcy of an intermediate indorser. It is only a court of equity which can afford a remedy.

*331] *This subject may and ought to be contemplated in still another point of view. It has been repeatedly observed, that the action against the indorser is not given by statute. The contract on which the suit is maintained is not expressed, but is implied from the indorsement itself, unexplained and unaccompanied by any additional testimony. Such a contract must, of necessity, conform to the general understanding of the transaction. General opinion certainly attaches credit to a note, the maker of which is doubtful, in proportion to the credit of the indorsers, and two or more good indorsers are deemed superior to one. But if the last indorser alone can be made responsible to the holder, then the preceding names are of no importance, and would add nothing to the credit of the note. But this general opinion is founded on the general understanding of the nature of the contract. The indorser is understood to pass to the indorsee every right founded on the note which he himself possesses. Among these, is his right against the prior indorser. This right is founded on an implied contract, which is not, by law, assignable. Yet, if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived, why such an interest should not, as well as an interest in any other *chose in action*, be transferable in equity. And if it be so transferable, equity will, of course, afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder, as effectually as he could defend himself against his immediate assignee in a suit at law.

The case put, of the sale and delivery of a personal thing, is not thought to be analogous to this. The purchaser of a personal thing does not, at the time of the contract, look beyond the vendor. He does not trace the title. It passes by delivery. But suppose, the vendor held it by a bill of sale containing a warranty of title, and should assign that bill to his vendee ; is it clear that, on loss of the property for defect of title, no recourse could

*332] *be had to the warrantor of that title ? The court is not prepared to answer this question in the affirmative.

It is contended, that the indorsee of the note holds it subject to every equity to which it was liable in the hands of the indorser. If this be admitted, it is not perceived, that the admission would, in any manner, affect this case.

It is also contended, that the plaintiff can only recover what he actually paid. Without indicating any opinion on this point, the court considers it

as very clear, that the indorsement is *primâ facie* evidence of having indorsed for full value, and it is incumbent on the defendant to show the real consideration, if it was an inadequate one. Usury has been stated in the argument, but it is neither alleged in the pleadings, nor proved by the testimony.

It is urged, that Mandeville & Jamesson are sureties who have received no actual value, and that equity will not charge a surety who is discharged at law. In support of this argument, the case of a joint obligation is cited.

It is true, that, in the case of a joint obligation, the court has refused to set up the bond against the representatives of a surety. But, in that case, the law had absolutely discharged them. In this case, Mandeville & Jamesson are not discharged. They are not released from the implied contract created by the indorsement. It is the legal remedy which is obstructed ; the right is unimpaired, and the original obligation is in full force.

It is, then, the opinion of this court that, without referring to the depositions to which exceptions have been taken, a right exists in the holder of a promissory *note, at least, where he cannot obtain payment at law, [*333 to sue a remote indorser in equity.

Certainly, in such a case, the defendant has a right to insist on the other indorsers being made parties, but he has not done so ; and in this case, the court does not perceive that McClenachan is a party so material in the cause, that a decree may not properly be made without him.

The decree is reversed, and the defendants directed to pay the amount of the note to the plaintiffs.

The decree of the court was as follows :—This cause came on to be heard, on the transcript of the record of the circuit court for the county of Alexandria, and was argued by counsel. On consideration whereof, the court is of opinion, that the decree of the said circuit court, dismissing the bill of the plaintiffs, is erroneous, and ought to be reversed ; and this court doth reverse the same ; and this court, proceeding to give such decree as the said circuit court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of $1500, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due.

Dulany *v.* Hodgkin.

Liability of indorser.

The indorser of a promissory note, who indorses to give credit to the note, and who is counter secured by property pledged, is not liable upon the note, nor in an action for money had and received, unless the plaintiff show that the maker is insolvent, or that he has brought suit which has proved fruitless.[1]

It is not sufficient, to show that the maker of the note is out of the reach of the process of the court.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, by the indorsee of a promissory note against his immediate indorser.

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[1] See Camden *v.* Doremus, 3 How. 515.