nected with them. By the deed of June the defendant agreed to secure the payments in composition by his own promissory notes satisfactorily endorsed. This was executed by the plaintiffs Benedict and Vann. The defendant did not, as he subsequently explained, could not procure his notes to be endorsed. Now it cannot be doubted that the stipulation for endorsed notes was a material one; and though it only appears in the recital to the deed, and is not the covenanting or legally operative part of the deed, and could therefore form no defence at law, yet this court would not take so restricted a view of the deed, but would hold the stipulation as part of the agreement of the parties necessary to be observed. This being so, and the defendant finding he could not comply with it, abandons, as far as he can, the deed altogether, and proposes and procures to be executed by most of the parties to the deed of June, the deed of August already referred to. This deed differs in many respects from the other deed; and of course no creditor was obliged to execute it unless he chose. The plaintiffs did not execute it. In the interval between the execution by Benedict and Vann of the deed of June and the execution by the defendant of the deed of August, the assignment to the plaintiff Hill of the debt now in suit was made. Hill then and thereafter stood in no better or worse position in regard to it than his co-plaintiffs, and the question is, were or are they bound by the deed of June after what had occurred? In my opinion clearly not. The defendant did not, and admits he could not, comply with the stipulation for endorsation; he makes an entirely different arrangement for his creditors by the deed of August as a substitution for the deed of June, which he abandons both by his acts and his declarations, and yet he says the plaintiffs must be bound by it.

I think the effect of what has occurred is to leave the plaintiffs in possession of the original right to recover the full amount of the debt. It is of the essence of a composition of an existing debt that every term of the agreement for composition should be strictly observed and performed. Here not only was the stipulation in the deed of June not observed, but the defendant declares he does not intend to observe it. I do not think that the judgment of the Court of Common Pleas on the rights at law of these parties in the case presented to them raises any difficulty to the plaintiffs' right here.

The doubt I have felt is, whether the plaintiffs might not now recover at law; and whether, therefore, this court should in its discretion exercise its jurisdiction in favour of Hill, as the assignee of a chose in action That this court has the jurisdiction, will, I suppose, not be questioned; its exercise is a matter of discretion. In the case for instance of a bond debt and an assignment simply, the court will leave the assignee to sue at law in the name of the assignor, (there being no obstacle to its use,) as in *Hammond* v. *Messenger*, 9 Sim. 327. Here, however, I think we may properly interpose. There is a complication of transactions affecting the debt, arising out of the acts of the defendant himself. The stipulation for endorsation could not be set up at law, and it is doubtful whether the abandonment by the parties of the deed of June, after it had gone into formal operation, would be an answer to it. There is no such difficulty in equity even when the deed may affect, or is intended to affect, the rights of a third party, a stranger to the deed. See the observations of the Master of the Rolls in *Hill* v. *Gomme*, 1 Beav. 544; and of the Lord Chancellor, on appeal, 5 M. & C. 254.

ESTEN, V. C., remained of the same opinion as expressed on the original hearing.

SPRAGGE, V. C.—The same thing was sought in the action at law as is sought in this suit, that is, the recovery of the original debt from Rutherford to Benedict and Vann, which debt it was the object of the several deeds of January, June and August to settle by a composition.

It is *res judicata* by the judgment of the Court of Common Pleas in *Benedict* v. *Rutherford*, 11 U. C. C. P. 213; that the legal right to recover for the original cause of action is gone; that Rutherford's covenant to pay the composition was future; that the release operated as a present discharge of the old debt, and that the giving of the notes was not a condition precedent: none of these points are now open.

The plaintiffs must come into this court upon some equity independent of those points, and I understand their equity to be, that although the release is in terms absolute, unconditional, and immediate, still it was intended to be conditional upon the giving by Rutherford of endorsed notes for the amount of the composition; and that the endorsed notes not having been given, the plaintiffs have an equity to be remitted to their original cause of action, and that the composition deed of June was abandoned. The question is not whether if Benedict and Vann had a legal right to recover the amount of the original debt, this court would have interposed to restrict the creditor to the amount of the composition; but whether this court will interfere actively to give the creditor more than the amount of his composition. This court will ordinarily interfere to relieve from forfeiture, where it occurs from non-payment of money: but the case of composition deeds is in England an admitted exception; still I think there is no instance, certainly no case has been cited, of a court of equity enforcing a forfeiture even upon a composition deed.

It is certainly to enforce a forfeiture that the plaintiffs come to this court. Assuming that they are right in treating the release as conditional under the composition deed of June, Rutherford's right under that deed was to have a composition of twenty-five per cent. accepted by the creditors, parties to it, upon his giving the notes; and the plaintiffs case is, that they forfeited the right to have the composition accepted by not giving the notes; and they come into equity asking for the whole debt by reason of that forfeiture. It is true that the assumed condition was not the payment of money, but the giving of notes.

I find two English cases where notes were to be given upon a composition deed. They are both cases at law, the first, *Boothby* v. *Sowden*, 3 Camp. 75; was a *nisi prius* decision before Lord Ellenborough: the action was upon the original debt; the defence was, that the creditor had agreed to give time, and to take the debtor's notes, payable in London, for the amount. For the plaintiff, it was contended, that the giving of the notes was a condition precedent, but Lord Ellenborough said: "If the plaintiff could shew that the defendant had refused to give the notes according to the terms of the agreement, they might be remitted to their original remedy, but I think that remedy is suspended by the agreement, unless an infraction of the agreement is proved by the plaintiff;" and the plaintiff was nonsuited.

Doubt is thrown upon this ruling by the case of *Crawley* v. *Hilary*, 2 M. & S. 120. In that case also promissory notes were to be given; and the question was, whether it was the business of the creditor to apply for them, or for the debtor to give them. It was proved that the plaintiff might have had them if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff. The action was not brought until after the time at which the composition notes were to be payable; so that there was default in payment of the composition money, as well as in the giving of the notes. The court evidently leaned to the opinion that the debtor was bound to give or tender the notes. But even in that case Lord Ellenborough observed: "If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." Mr. Justice Bayley only observed upon the composition notes being past due. This case shews the reluctance with which the court, Lord Ellenborough especially, gave effect to the forfeiture, intimating the probability of the court exercising equitable jurisdiction if the notes had been tendered even after the time at which they ought to have been given, if not after they were due.

Again, supposing that a court of equity would interfere actively in behalf of the creditor under similar circumstances to those in which it would refuse to interfere with the legal right at the instance of the debtor, which I by no means concede, I doubt whether this is not a case in which the court would properly interfere with the enforcement of the legal right. In the English cases where the court has refused to interpose, there has been an express stipulation that upon default the original debt would revive; or at least a very plain and distinct agreement that payment should be made by a day specified. Now here there is no day specified for the giving of the notes; indeed the giving of notes at all was an after-thought; the whole composition deed is framed without reference to any notes being given, the only reference to notes being written in the margin in these words: "And for which said payments to give his promissory notes, satisfactorily endorsed,