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upon property used in the exercise of its franchises, but upon lands which it had mortgaged and was holding for sale. The distinction and the consequences have been considered. We need say nothing further upon the subject.

We think the demurrer was necessarily sustained, and the bill properly dismissed.

DECREE AFFIRMED.

ROSS, ADMINISTRATOR, *v.* JONES.

1. The late civil war was flagrant in Arkansas from April, 1861, till April, 1866, and the statutes of limitation did not run during that term. This principle applies to suits between persons in different States of the late so-called Confederate States of America, as much as to suits between citizens of States of the North, which remained loyal, and citizens of the said so-called Confederate States, with which they were at war.
2. An indorser of a promissory note, though an indorser for accommodation only, is not a "person bound as security" within the meaning of the statute of Arkansas which enacts that any person bound as "security" for another, on any bond, bill, or *note*, may at any time after action has accrued thereon require the person having such right of action forthwith to commence suit against the principal debtor, on penalty of such security being exonerated.

ERROR to the Circuit Court for the Eastern District of Arkansas; the case being thus:

On the 11th of June, 1864,* Congress enacted that:

"Whenever, during the existence of the present rebellion, any action . . . shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process; OR whenever after such action . . . shall have accrued such person cannot, &c.

"The time during which such person shall so be beyond the reach of legal process, shall not be deemed or taken as any part

* 13 Stat. at Large, 123.

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of the time limited by law for the commencement of such action."

In addition to this, this court has repeatedly decided that during the civil war, the courts of the United States in the insurrectionary States were closed, and that statutes of limitation did not run against suitors having a right to sue in the Federal courts.*

It has also decided that in Arkansas the war was flagrant from April, 1861, till April, 1866.†

In the State just named, actions of assumpsit are barred by the statute of limitations in five years.

Another statute of the State‡ thus enacts:

"SECTION 1. Any person bound as security for another in any bond, bill, or *note*, for the payment of money, or the delivery of property, may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"SECTION 2. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, *such security* shall be exonerated from liability to the person notified."

In this condition of the law, on the 31st of January, 1860, Rives gave to Bull—both persons being citizens of Arkansas—a promissory note, payable on the 1st of November, 1861. Bull indorsed it to Jones, of Memphis, Tennessee; both the States of Tennessee and Arkansas having, in the late civil war, been members of the so-called Confederate States of America. The note was not paid at its maturity, and it having been protested, notice of the dishonor, &c., was given to Bull.

Bull died in November, 1869, and letters of administration on his estate were granted to one Ross.

* Hanger *v.* Abbott, 6 Wallace, 539; Brown *v.* Hiatts, 15 Id. 177, and other cases.

† Batesville Institute *v.* Kauffman, 18 Id. 151.

‡ Gould's Digest, 1015.

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Jones, now, October 13th, 1871, brought assumpsit on the note against the administrator, Ross, on the indorsement of Bull, his intestate.

The defendant pleaded two pleas.

1. The first plea was the statute of limitations of five years.

The plaintiff replied to this plea:

"That from the 1st of June, 1861, to the 2d of April, 1866, a war existed between the United States and the Confederate States, including the State of Arkansas, where during all that period the said Bull resided, and that during all that period the courts of the United States in and for the State of Arkansas were, by reason of the said war, closed, and no process could be issued therefrom or served on the said Bull, the authority of the United States therein being resisted, &c. That the said Bull died in said State on the 15th November, 1869, and that letters testamentary were granted, &c.; and that, counting out the period of the said war, the plaintiff's cause of action did accrue within five years next before the said grant of letters on the estate of Bull."

The defendant rejoined:

"That during the said rebellion, and on account thereof, the said courts were so closed that legal process could not be issued against this defendant from the month of May, 1861, until the month of March, 1865, and not longer; without this, that said courts were so closed from the 1st day of June, 1861, to the 6th of August, 1865."

The plaintiffs demurred to the rejoinder:

"Because it puts in issue a matter of public law pleaded in the said replication."

The court sustained this demurrer.

2. The second plea (which was founded on the above-quoted statute about persons bound as security for another in any bill, note, &c.) was thus:

"That Bull was only an indorser on the note, and, as such, only security; that Rives was the principal, and had ample property and effects out of which to make the debt, and that after the note had become due and payable and been protested

for non-payment, to wit, on the 1st day of January, 1861, Bull had given notice to Jones to bring suit upon the note immediately, and that in default of then doing so he, Bull, would hold himself free from all liability on the same. But that Jones had not brought suit on the note for more than the space of thirty days, nor indeed until the bringing of the present suit, October, 1871."

The plaintiffs demurred to this plea because:

"1. The indorsement of Bull made him primarily liable to the plaintiffs on his contract of indorsement. His contract was separate and distinct from that of Rives, the maker of the note. There was no unity or privity of contract between Rives and Bull; and Bull was in no sense the surety of Rives on his contract.

"2. The liability of Bull on his contract as indorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the statute of Arkansas."

The court sustained this demurrer. Both demurrers being thus sustained, judgment was given for the plaintiff; and the administrator brought the case here, assigning for errors—

1. That the court erred in sustaining the plaintiff's demurrer to defendant's rejoinder to his replication to plea of statute of limitation.

2. That the court erred in sustaining the demurrer to defendant's third plea.

Messrs. S. F. Clark and S. W. Williams, for Bull's administrator, the plaintiff in error:

I. *In regard to the first error assigned.*

The replication is founded upon the act of Congress of June 11th, 1864.

The gist of the replication is the fact that the courts were closed, and that no legal proceedings could be had for a certain length of time during the war, under this act of Congress. And the real issue, if it raises any at all, is whether the courts were so closed a sufficient length of time to take the case out of the operation of the statute. The act does

not provide any particular length of time during which the statute of limitation should cease to run, but only during such time as the courts were closed, and thus left it a matter of fact to be determined by evidence. It being a matter of fact, the rejoinder is a special traverse.*

The demurrer admits the truth of the rejoinder, *i. e.*, that the courts were not closed from June 1st, 1861, to April 2d, 1866, but only from the month of May, 1861, to the month of March, 1865, which would not be a sufficient length of time to take the case out of the operation of the statute. Now, it is plain that if the gist of the replication is the time during which, under the act of Congress, the courts were closed, then the rejoinder sets up a matter of fact, and the rejoinder is well pleaded. But no matter what is the substance of the replication if the rejoinder pleads only matters of law, then the replication is obnoxious to the same objection. A bad rejoinder is good enough for a bad replication. The effect of demurrer, in such case, is to reach back to the replication.

In such cases judgment must be given against the party committing the first fault in pleading, which is here the plaintiff's. And if the demurrer be sustained, the judgment should be against the replication, and the court erred in not so deciding. If the judgment on the demurrer is right, then the plea of the statute of limitations is unanswered, and as the plea is a good bar, the final judgment should have been for the defendant.

The replication plainly sets up the war and the closing of the courts thereby, as jointly operating under the act of Congress referred to, to intercept the running of the statute. The allegation of neither one of these facts alone would have been an answer to the plea. The act does not contemplate a case where the war might have existed, but where the courts were nevertheless open, and the parties were at liberty to prosecute their actions. Yet that was the fact here, and in all or most cases where both parties to the suit resided in the States in insurrection. The case, therefore,

* 1 Chitty's Pleadings, 620.

does not come within the principle involved in *Hanger* v. *Abbott*,* a case between a debtor and creditor, citizens of two opposing belligerents at war. The parties here were at all times citizens of Arkansas and Tennessee, respectively—both States being States of the Southern Confederacy and same belligerent in the war. Intercourse between these States was not at any time interdicted, either by proclamation of the President or as an effect of the war. A payment of the debt at any time would have been legal. At any time the plaintiffs were at liberty to sue on the claim, provided any court had been open having jurisdiction of the cause. And it is judicially known that the court which tried this case below was open and doing business as early as April, 1864. From that time, at least, there was no impediment, either in law or fact, in the way of the plaintiff's recovering his debt. It has never been held in England that civil war and commotion in any manner arrested or suspended the laws, except between communities as to whom belligerent rights had attached, and non-intercourse had been declared. By one unbroken chain of decisions, from Henry the Eighth's time to the present, it has been held that insurrection and civil war did not interfere with the running of their various laws of limitation.†

Had the statute of limitations ceased to run by operation of our civil war, there would not have been the act of Congress of the 11th June, 1864.

II. *As to the second error assigned, that the court below erred in sustaining the plaintiff's demurrer to defendant's second plea.*

The action of the court below assumed that an indorser of a note is not a "security" within the statute of Arkansas, which authorizes securities to insist upon the obligee to use diligence in pursuing the principal; that it is the duty of the indorser to take up the note, and thus pursue his remedy over against the maker or other party. This no doubt is

* 6 Wallace, 532.

† Stowel *v.* Zouch, 1 Plowden, 353; Prideaux *v.* Webber, 1 Levinz, 31; Hall *v.* Wybourn, 2 Salkeld, 420; Aubry *v.* Fortescue, 10 Modern, 206; Miller *v.* Predeaux, 1 Keble, 157.

true with reference to indorsers in due course of business under the law merchant. But the statute of Arkansas gives a specific right to this remedy to "any person bound as security for another in any *bond*, *bill*, *or note*," &c. And the facts alleged in the plea, which are admitted by the demurrer, make him a security within that statute. The statute certainly contemplates that a party *can* become connected in some way as "security" in a note. But how can he become so more fitly than in the way here resorted to? His being a security is a matter of fact, and does not at all depend upon the form of his relation to the note. He may be security in many ways, as indorser or as maker.

It will not do to say that a party *cannot*, as an indorser, be a security. The utmost that the law, independent of the statute, declares, is that he is not such by virtue of the relationship. And it has been always held that he might prove himself so in fact, in order to entitle himself to the rights of a security as against the principal.

In *Bradford* v. *Corey*,* the court say:

"But although an indorser stands in the relation of a security to the drawer, in consequence of an indorsement of *an accommodation* note, or of a special promise of the latter to save him harmless, he does not lose his character as indorser, as respects the holder of the note, and he cannot be made liable on the note without a demand and notice. *He continues indorser*, with all *the privileges of a surety*."

Mr. A. H. Garland, *contra*:

I. *As to the first error assigned.*

The replication does not rest on the act of Congress so much as it rests on what this court has adjudged in several cases since the war broke out, and especially what it adjudged in *Batesville Institute* v. *Kauffman*,† and where it held that the war was flagrant in Arkansas from April, 1861, to

* 5 Barbour, 461; and see Bank *v.* Klingensmith, 7 Watts, 523; Grew *v.* Burditt, 9 Pickering, 265.

† 18 Wallace, 151.

April, 1866, and that the courts of the United States, in contemplation of law, were closed during that time, and that hence the statutes of limitation did not run during it. That is all matter of law.

Counting out this period, the action was not barred.

The replication to the plea of limitation set up, in effect, that the courts were closed during that period.

The rejoinder to the replication alleged, in effect, that the courts were closed for a shorter period, which presented a matter of law merely, and the demurrer was properly sustained to it.

The counsel for the plaintiff in error insists that inasmuch as both parties resided within the States in rebellion, the limitation was not suspended during the legal period of the war in Arkansas. But whatever countenance such a doctrine may find in the cases referred to in Plowden, Levinz, Keble, and other reporters of cases during the different civil wars in England, it has no countenance in the decisions of this court.

In *Adger* v. *Alston*,* the plaintiff below was a citizen of South Carolina, and the defendant's intestate a citizen of Louisiana, and the court applied the principle settled in *Hanger* v. *Abbott*.†

In *Batesville Institute* v. *Kauffman*,‡ the plaintiff resided in Louisiana and the defendant was domiciled in Arkansas, and the court held that the statutes of limitation were suspended during the period above stated.

The demurrer to the rejoinder was, therefore, still properly sustained.

II. *As to the second error assigned.*

The statute of Arkansas enacts that a *surety* in any bond, bill, or note, may give the holder notice to sue the principal in writing, and if he fails to do so within thirty days the surety shall be discharged.

This plea was demurred to, on the grounds: 1. That the

* 15 Wallace, 560. † 6 Id. 532. ‡ 18 Id. 153.

indorsement of Bull made him primarily liable to plaintiffs on his contract of indorsement. That his contract was separate and distinct from that of Rives, the maker of the note. That there was no unity or privity of contract between Rives and Bull, and Bull was in no sense the surety of Rives on his contract. 2. That the liability of Bull on his contract as indorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the Arkansas statute.

The Supreme Court of Arkansas has never decided that an indorser of a bill or note was a *surety* under the above statute.

The indorser of a note or bill is not a *surety* within the meaning of this statute.

The note was dated and payable in Tennessee, and the contract of the maker governed by the laws of Tennessee. The indorsee lived in Tennessee, and could in no event be affected by an Arkansas statute.

The contract of an indorser renders him primarily liable to the holder. He stands in the attitude of the drawer of a new bill. This is text-book law.*

The indorser cannot, like a *surety*, call upon the holder of the note to proceed and collect it of the maker; for the indorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the note when dishonored. An accommodation indorser stands in the relation of a surety towards the party for whose accommodation the indorsement is made, and may recover against him the costs to which he has been subjected; but he does not thereby lose the character of an indorser, as respects the holder of the note.†

Mere indulgence or delay by the holder to sue the maker, will not discharge the indorser. There is no obligation to

* 2 Parsons on Bills and Notes, 25.

† Edwards on Bills and Promissory Notes, p. 292, 293; citing Pain *v.* Packard, 13 Johnson, 174; Trimble *v.* Thorne, 16 Id. 152; Warner *v.* Beardsley, 8 Wendell, 194; Bradford *v.* Corey, 5 Barbour, 461—the indorser in this case added to his signature the word "*surety.*"

use the diligence, as is generally the case against a principal, in order to hold a surety liable, at least where the surety calls upon the creditor to act.*

If the holder of a promissory note be called upon by the indorser, after the note has become due, to prosecute the maker, of whom the amount might then be collected, but who afterwards becomes insolvent, and he neglects so to do, this will not discharge the indorser.†

The case, therefore, on both points, is one entirely clear.

Mr. Justice CLIFFORD delivered the opinion of the court.

Two errors are assigned, as follows:

1st. That the court erred in sustaining the demurrer of the plaintiffs to the rejoinder filed by the defendant to the plaintiffs' replication to the first special plea of the defendant.

2d. That the court erred in sustaining the demurrer of the plaintiffs to the third plea of the defendant.

I. Unsealed written contracts are barred by the statute of limitations of that State in five years from maturity, and it appears that the note described in the declaration matured on the first of November next after its date, but the record shows that the indorser deceased on the fifteenth of November, 1869, leaving the note unpaid and outstanding. Under the laws of the State the general statute of limitations runs from the maturity of the contract to the granting of administration upon the estate of the decedent, when the general statute ceases to run and the statute of limitations applicable to the estates of deceased persons begins to run.‡

* Byles on Bills, margin, p. 193—Sharswood's notes; Bank *v.* Myers, 1 Bailey, 412; Powell *v.* Waters, 17 Johnson, 176; Worsham *v.* Goar, 4 Porter, 441; Stafford *v.* Yates, 18 Johnson, 327; Sterling *v.* Marietta Co., 11 Sergeant & Rawle, 179; State Bank *v.* Wilson, 1 Devereux, 484; Foreman's Bank *v.* Rollins, 1 Shepley, 202; Page *v.* Webster, 3 Id. 244; Pierce *v.* Whitney, 1 Id. 113; Bank of Utica *v.* Ives, 17 Wendell, 501.

† Byles on Bills, margin, p. 193, top, p. 312, note by Sharswood, citing: Trimble *v.* Thorne, 16 Johnson, 152; Beebe *v.* West Branch Bank, 7 Watts & Sergeant, 375

‡ Brown *v.* Merrick, 16 Arkansas, 612; Biscoe *v.* Madden, 17 Id. 533.

Hence the defendant pleaded that the cause of action did not accrue to the plaintiffs at any time within five years next before the grant of letters of administration upon the estate of the deceased indorser.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects or citizens of all commercial intercourse and all correspondence with citizens or persons domiciled in the enemy country. Total inability, therefore, on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent, exists by the law of nations during the continuance of the war, but the restoration of peace removes the disability and opens the doors of the courts.

Unquestioned right to sue is the *status* of the creditor if the contract was made during peace, but the effect of war is to suspend the right, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable to the contract at its date, but which comes into operation in consequence of an event over which he has no control.*

Peace, it is said, restores the right and the remedy, but as that cannot be if the statute of limitations continues to run during the period the creditor is rendered incapable of suing, it necessarily follows that the operation of the statute is also suspended during the same period.

Attempt is made to distinguish the case before the court from the case in which that rule of decision was first promulgated by this court, but it is clear that the attempt must be unsuccessful, as the same doctrines have since been applied in a case where a mortgagee, who was a citizen and resident of one of the Confederate States, brought a suit after the close of the war upon a bond and mortgage executed prior to the war by citizens of one of the loyal States, and the court held that the period from the proclama-

* Hanger *v.* Abbott, 6 Wallace, 539.

tion of the blockade to the proclamation that the war was closed, must be deducted in the computation of the time which the statute of limitations of the loyal State had run against the right of action.*

Extended discussion of that topic is quite unnecessary, as the oft-repeated decisions of this court have established the rule that the statute of limitations was suspended in the rebellious States during the existence of the late rebellion, and the express decision of this court is that the war was flagrant in that State for the whole period specified in the replication filed by the plaintiffs.†

Viewed in the light of that decision it is clear that the rejoinder filed by the defendant is insufficient and that the ruling of the Circuit Court adjudging it bad was correct.‡

II. Due demand of the maker, protest, and notice to the indorser of non-payment are admitted, and it is alleged that the indorser *subsequently*, by a certain notice in writing, required the plaintiffs, as holders of the note, to sue the maker and the indorser at a time when the maker was solvent and able to pay the same, and that the plaintiffs omitted for more than thirty days to comply with the terms of the notice, during which time the maker became insolvent.

Based on these facts the second defence set up is that the indorser was discharged by the neglect of the holders of the note to comply with the terms of that notice, which must depend in a great measure upon the nature of the obligation that the indorser assumed by his contract of indorsement. If the holder of a negotiable promissory note does anything, the effect of which is to suspend, impair, or destroy the right of the prior parties to indemnity from those otherwise liable over to them, he cannot resort to the parties affected by his conduct to make good the default of the maker of the instrument.§

* Brown *v.* Hiatts, 15 Wallace, 177.

† Batesville Institute *v.* Kauffman, 18 Id. 155.

‡ The Protector, 12 Wallace, 700; Adger *v.* Alston, 15 Id. 555; Semmes *v.* Insurance Company 13 Id. 158; Levy *v.* Stewart, 11 Id. 253.

§ Bank *v.* Hatch, 6 Peters, 258; McLemore *v.* Powell, 12 Wheaton, 556; Wood *v.* Bank, 9 Cowen, 194; Bank *v.* Hanrick, 2 Story, 416; Newcomb *v.*

Simple indulgence, however, or mere delay to enforce payment, without a binding contract to give time, will not, under the general rules of commercial law, have that effect, even in the case of a party occupying strictly the contract relation of a surety.*

Indorsers, it is sometimes said, are sureties, but their contract, which is a new one as compared with the maker of the note, differs in some important respects from that of the surety, who is a joint promisor with the principal, as the holder of such an instrument is under no obligation to use diligence to enforce payment against the maker in order to hold the indorser.†

Even in a case where the holder of a promissory note was, after the note fell due, called upon by the indorser to prosecute the maker, of whom the amount might then have been collected, but who afterwards became insolvent, and the holder neglected to do as requested, still it is held that such neglect will not discharge the indorser.‡

Judicial decisions of high authority deny that the indorser is to be regarded as a surety after his liability is fixed by due presentment, demand, and notice of the dishonor of the note, and insist that when his liability is fixed by those acts of the holder, that he, the indorser, becomes a principal debtor himself, subject only to the condition that the holder shall do no act to suspend, impair, or destroy his remedy over against prior parties to whom he has a right to resort for a remedy; and support to that view is certainly derived from the conceded fact that the indorser is answerable upon an independent contract, which makes it his legal duty to

Raynor, 21 Wendell, 108; Byles on Bills (11th ed.), 247 n. 1; 3 Story on Notes (5th ed.), § 413.

* Philpot *v.* Briant, 4 Bingham, 721; Story on Notes (5th ed.), § 415.

† Bank *v.* Myers, 1 Bailey, 418; Powell *v.* Waters, 17 Johnson, 179; Stafford *v.* Yates, 18 Id. 329; Bank *v.* Rollins, 13 Maine, 205; Page *v.* Webster, 15 Id. 256; Bank *v.* Ives, 17 Wendell, 502; Sterling *v.* Marietta and S. T. Co., 11 Sergeant & Rawle, 182; Kennard *v.* Knott, 4 Manning & Granger, 474.

‡ Trimble *v.* Thorne, 16 Johnson, 159; Beebe *v.* Bank, 7 Watts & Sergeant, 375.

pay the note when duly presented and demanded and due notice is given to him of its dishonor; and also from the fact, which is also conceded, that he has not the same reason as may exist in common cases of suretyship to compel the creditor to active diligence against the maker, as he has in general the complete power, by paying the note, to reinstate himself in the possession and ownership of the same, and thus to entitle himself to a personal remedy against the maker.*

Doubtless the indorser is in some respects a surety, but his principal relation to the instrument is that expressed by the commercial term applied to every party who contracts that obligation. Such a party to such an instrument contracts with the indorsee and every subsequent holder to whom the note is transferred, as follows: (1.) That the instrument and antecedent signatures are genuine. (2.) That he, the indorser, has a good title to the instrument. (3.) That he is competent to bind himself in such a contract. (4.) That the maker is competent to bind himself to the payment, and that he will, upon due presentment of the note, pay it at maturity. (5.) That if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice being given him of the dishonor, pay the same to the indorsee or other holder.†

Confirmation that the indorser is not a surety in the general sense is also derived from the fact that he stands in the attitude of the drawer of a new bill, and that he is not primarily liable to make the payment, but only in case of the default of the maker and proof of due presentment, protest, and notice of dishonor, and that even then he cannot be joined with the maker, as the surety *proper* may be, because the maker and indorser are liable on different contracts.‡

* McLemore *v.* Powell, 12 Wheaton, 556; 2 Parsons on Notes and Bills, 243–245; 3 Kent (12th ed.), 114*.

† Story on Notes (5th ed.), § 135; Story on Bills, § 108; 2 Parsons on Bills and Notes, 23; Ogden *v.* Saunders, 12 Wheaton, 341; 3 Kent (12th ed.), 88; Bateman on Commercial Law, § 319.

‡ 2 Parsons on Bills and Notes, 25

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Suppose that is so, when the theory is tested by the rules of commercial law, still it is insisted by the defendant that the contract of the indorser in this case was made in the State where he resides, and that the indorser, by the law of that State, is discharged, for the reason that the holder of the note omitted to seek his remedy against the maker, as thereto requested by the indorser.

Support to that defence as exhibited in the second assignment of errors is attempted to be drawn from the statute of the State where the indorser resides, which provides in effect that a surety in any bond, bill, or note, may give the holder notice to sue the principal in writing, and if the holder fails to do so within thirty days the surety shall be discharged.*

Founded on that statute the defendant alleges that the indorsement was made in that State, and the allegation also is that the consideration of the note was a debt due from the maker to the plaintiffs, and that it was made payable to the decedent and was by him indorsed merely as a means of procuring his liability for the payment of the said debt due to the plaintiffs.

Grant that the contract of indorsement was actually executed in that State, still it is the better opinion that the case is not governed by the statute of that State already referred to, for the reason that the statute of the State does not include the contract of an indorser.

Sureties in a note who become joint promisors with the maker, it may be conceded, are within the terms of that statute, as they stand in the same relation to the principal as in a bond given for the payment of money or the delivery of property. Authority to give the described notice arises immediately after the bond, bill, or note falls due, which evidently refers to the lapse of time specified in the contract; but the absolute obligation to pay does not arise in the case of an indorser before notice of dishonor, which can never be given to the indorser till after the note is presented to the maker, and he has refused or neglected to

* Gould's Digest of Statutes, 1015.

fulfil his promise to pay, so that the notice in writing requiring the holder to sue the indorser with the maker, would seem to be inapplicable before the liability of the indorser is fixed by demand of payment of the maker and his refusal to comply, and notice is given to the indorser of the dishonor of the note.

Evidently the statute contemplates that the cause of action will accrue against the principal and surety at the same time, which is never the case with the indorser and maker. Such a notice may unquestionably be given by a surety proper, whether his contract is expressed in a bond, bill, or note, as soon as the instrument falls due; but it would be unreasonable to suppose that an indorser would give such a notice before his liability had become fixed, as it may be that such a demand to sue would operate as waiver of the right to notice of the dishonor of the note. Nor is it necessary to extend the operation of the statute so as to include an indorser, in order to satisfy the literal scope of the language employed. "Persons, bound as security for another," are the words of the statute, which undoubtedly includes sureties proper in a bond, bill, or note, but it would be extending the words of the statute beyond their reasonable meaning, to hold that it includes an indorser whose liability is fixed by the required notice of the dishonor of the bill or note.

Beyond all doubt the statute is one passed in derogation of the common law, even if restricted to sureties in the general sense, but it would be even more so, if by a broad construction, it could be extended to include indorsers upon bills of exchange and negotiable promissory notes.

Statutes passed in derogation of the common law, it is everywhere held, should be construed strictly, nor is there any subject-matter to which that rule should be applied with greater intensity than where the attempt is made to change by local legislation the rules of commercial law, applicable to that class of commercial instruments. Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strict-

ness, both as to the methods to be pursued and the cases to which they are to be applied.*

When a statute alters the common law the meaning shall not be strained beyond the meaning of the words, except in cases of public utility, as when the end in view appears to be more comprehensive than the enacting words.†

Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute.‡

Argument to show that the statute in question, if it be construed to include the indorser of a bill or note, is in derogation of the rule of the commercial law, is scarcely necessary, as it appears to be well settled that it is no part of the duty of the holder of a note which has been dishonored and due notice thereof given to the indorser, to sue the maker merely because the indorser requests him so to do. On the contrary the holder has his choice to sue any one of the parties to the note who is in default, and it is the duty of the indorser, if he desires to secure the amount against the maker, to pay the note himself and thus to entitle himself to bring a suit against that party.§

Such a holder, says Judge Story, is perfectly at liberty to sue any or all the parties at his pleasure, and he is not bound to any diligence in seeking his reimbursement. Nor can the indorser insist that the holder should, upon his request, use any such diligence. His remedy is to pay the note and then to seek recourse against the maker or any other party liable over to him.‖

Such an indorser, that is, one whose liability is fixed by due notice of the maker's default, is not entitled to the aid

* Lease *v* Vance, 28 Iowa, 509.

† Potter's Dwarris on Statutes, 186.

‡ 9 Bacon's Abridgment, by Bouvier, 245; Sedgwick on Statutes, 2d ed. 267; 1 Kent, 12th ed. 464; Broom's Legal Maxims, 4th ed. 552.

§ Story on Notes, 5th ed. § 115, a.

‖ Ib. § 419; Beebe *v.* Banks, 7 Watts & Sergeant, 375.

of a court of equity as a surety, as he has the right to pay the amount of the note to the holder, and to be subrogated to all his rights as against the maker.*

None of these suggestions are intended to deny the well-known rule that the maker of the note is in general the principal debtor, nor that all the other parties are in a special sense sureties for him; they, if indorsers, being liable only in case of his default, unless they have waived demand and notice. Though all the other parties are sureties in respect to the maker, still they are not co-sureties, but each prior party is a principal in respect to each subsequent party.

An indorser of a promissory note, though in the nature of a surety, is not for all purposes entitled to the privileges of that character, as he is answerable upon an independent contract, and it is his duty to take up the note when it is dishonored.†

Unquestionably there is in some respects a resemblance between the indorser and a surety, but in others there is none, as he does not in any case lose his character of indorser nor can he be made liable on the note without proof of due demand and notice.‡

Proof of the kind, if the demand and notice are seasonable and in due form, removes every condition from his liability except that the holder will do no act to suspend, impair, or destroy his right to indemnity from such other parties to the instrument as are bound to save him harmless.§

Negotiable promissory notes, like bills of exchange, are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality as for their universal convenience in mercantile transactions. Hence the law encourages their

* Lenox *v.* Prout, 3 Wheaton, 525; Trimble *v.* Thorne, 16 Johnson, 153; Warner *v.* Beardsley, 8 Wendell, 199; Same *v* Same, 6 Id. 610; Frye *v.* Barker, 4 Pickering, 382; Hunt *v.* Bridgham, 2 Id. 581.

† Ellsworth *v.* Brewer, 11 Pickering, 320.

‡ Bradford *v.* Corey, 5 Barbour, 462.

§ Woodman *v.* Eastman, 10 New Hampshire, 359; Warner *v.* Beardsley, 8 Wendell, 2d ed., 195 and note.

use as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to restrain or impede their unembarrassed circulation would be contrary to the soundest principles of public policy.

Mercantile law is a system of jurisprudence recognized by all commercial nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.*

Apply these several suggestions to the case and it follows that the statute, when properly construed, does not include the indorser of a negotiable promissory note whose liability has become absolute by due notice of the dishonor of the note.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* ANDROSCOGGIN MILLS.

The Evansville and Crawfordsville Railroad Company, of Indiana, owning a railroad running from the south line of that State northward to another point in it, and which made a line of road by which cotton was brought from Columbus, Mississippi, to Boston, Massachusetts, established, apparently with the view of procuring freights over its road, an agency in the former place; and there, as it seemed, was in the habit of contracting for the transportation of cotton from Columbus to Boston, its own road providing one link of the chain for transportation.

Planters in Columbus shipped from that place to manufacturers in Boston a quantity of cotton. The bill of lading, dated at Columbus, Mississippi, and signed by the agent, at Columbus, of the railroad company, had in display letters at its top—

"EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.

"Great *through* fast freight route to all points north and east, via Pennsylvania Central, Erie, and New York Central Railroads. Contract for through rate. This reliable *through* line makes the shipment of cotton a specialty, and guarantees quick time and delivery in good order."

The bill, after stating the destination of the cotton to be Boston, Massachusetts, went on to say:

"The Evansville and Crawfordsville Railroad Company hereby agree that

* Goodman *v.* Simonds, 20 Howard, 364.