SELECTIONS.

IRREGULAR INDORSEMENT BY THIRD PERSON—CHARACTER OF THE LIABILITY ASSUMED.

IF a person who is neither the maker nor payee of a negotiable promissory note, payable on time or on demand, indorses it in blank, before its delivery to the payee, and for the purpose of lending faith and credit to the instrument and making it acceptable to the payee, what is the character of the liability which he assumes? The conflict of the authorities upon this point is too wide and too deeply settled to make any reconciliation possible, except through the intervention of statutes. No less than four distinct views have been presented, and each has been urged with able and forcible reasoning. It is impossible to say where the truth lies; and as each State manifests a fixed intention to abide by the rule established by its own courts, it is vain to hope for any ultimate harmony of the decisions. The different theories can merely be placed side by side and contrasted.

The first view—and this prevails in more than half the States—is that the person so indorsing becomes liable as a joint-maker of the note, exactly the same as if his signature appeared below that of the maker at the foot of the paper, and, consequently, that he is not entitled to notice or protest, and should be sued in a joint action with the maker. This theory proceeds upon the following reasoning: he certainly means to pledge his responsibility in some way, and to the payee; he cannot be considered a first indorser of the note, because no one but the payee can occupy that position; neither can he be regarded as the second indorser, because, to bring about that effect, he must appear on the face of the paper to stand in the relation of an assignor, and to have given currency to the paper by his transfer of it for a valuable consideration. Nor is it possible to treat him as a guarantor of the note, for that would import a separate consideration which is not assumed in the case. We are thus brought, by the exclusion of every other hypothesis, to the necessity of holding him as an original promisor jointly with the maker of the note. But it is generally held, in those States which adopt this doctrine, that parol evidence is admissible to show that it was the contemporaneous and mutual understanding of all the parties to the transaction that he should be held liable only as an indorser and not as an original promisor, and in that case he would be entitled to notice and protest. It is stated, however, that this permission will be accorded only as between parties who are entitled to look into the original transaction; that such proof cannot be admitted against one who took the note before it was due, in the usual course of business, for value, and without notice. In Massachusetts and Minnesota, however, it is held that no evidence can be received to change the character of his liability as a joint-maker, and that neither parol proof, nor a mortgage, given with the note to secure its payment, is admissible to show that he was to be bound only as an indorser. And the fact that he agrees with the maker to be simply surety for the latter will not alter his attitude toward the payee. But it appears that he will not be liable as a joint-maker if the payee afterwards indorses his own name above the stranger's, before the note is delivered; in that case he merely becomes a second indorser. In Massachusetts, it is now provided by statute that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers"; which will take that State hereafter out of the category of those holding this doctrine.

The view just presented is also definitely established as the rule of the federal courts. In the language of Mr. Justice Clifford: "Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but if he desire to do so he must employ proper