papers of the city of St. Paul, in the Chicago Tribune, the New York Evening Post, the Boston Journal, and the local newspaper published at the home office of the corporation, at Stillwater, in Minnesota. On September 20, 1888, all the property of Seymour, Sabin & Co. was sold at public auction, by order of the same court, and that sale was subsequently confirmed. Complaint is made that the court below admitted these orders of sale, the reports of these sales made to the court by the officers appointed to conduct them, and the orders confirming them. The objection urged is that these sales were too remote from February 23, 1885, when the stock was exchanged, to be any evidence of the value of that stock at that time. If it were not for the fact already adverted to, that the assets of these corporations were in custodia legis at the time of the exchange of the stock, and that these sales were made by the court in accordance with the provisions of the statutes under which these corporations were organized, this objection might well be sustained. Property that is not in the custody of the law, and property that may, at the option of a party, be taken from its custody, may ordinarily be freely sold by its owner at public or private sale immediately or within a very short period of time. In an action for the conversion of such property, opinions of its value or sales of it at a period remote from the time of its conversion are incompetent evidence of its value. This is the general rule, because the great bulk of property is of this character. It is subject to public or private sale at any time at the option of its owner. But the assets of these corporations were not in this situation when this stock was exchanged. They were in the custody of the court, and no stockholder or creditor could reach or sell any of them without its order. They were subject to an unusual restriction as to their sale or disposition. They could be sold only under the orders of the court, and in accordance with the provisions of the statutes relative to the winding up of the insolvent corporations; and the owners of this stock could obtain nothing from these assets except through the proceeds of such a sale. The actual value of the stock did not then depend upon the value of the assets of these corporations to sell at private sale in the open market at that time, but it depended entirely upon the amounts that could be realized from these assets by the court through the administration of the trust imposed upon it by the statutes. To say that the amounts which the court did realize from this property are no evidence of the amounts which it should or could have realized is to fly in the face of the presumption of sound judgment, wise discretion, and reasonable diligence, raised by the fact that the administration of the affairs of these corporations was conducted, and these sales were made, under the orders of a court of general equity jurisdiction. It was within the discretion of that court to direct a sale of all this property immediately after the receivers were appointed, or to postpone the sales of some of it to times when, in its opinion, larger sums could be realized. That court undoubtedly pursued the course which in its opinion would be most beneficial to the creditors and stockholders of these corporations, and the result was that the sale of the last of these assets was made three years and seven months after the ex-

change of this stock. But the vital question here was, what were these assets worth on February 23, 1885, to sell under the orders of this court, in whose custody they were, under the provisions of the statutes of Minnesota. The testimony of witnesses familiar with the property and its value was properly offered and admitted to prove this fact. Competent witnesses were properly permitted to testify to their opinion as to the value of the stock at the time of its exchange. Evidence of the amounts which the assets of this corporation actually did sell for was also admitted in evidence; and, after the most patient and careful consideration, we are unable to persuade ourselves that the amount which the property actually brought under the orders of the court was not some evidence of the amount which this property was worth on February 23, 1885, to sell under those orders.

The court below permitted a number of competent witnesses called by the plaintiff in error to testify what the guarantied stock of Seymour, Sabin & Co. was worth in their opinion at the time the bank parted with it, but it refused to allow one witness to give his opinion on this subject on the ground that he had not shown himself competent to do so. This ruling is assigned as error. The witness was the cashier of the First National Bank of Stillwater in 1884 and 1885, and that bank held some special preferred stock of Seymour, Sabin & Co., as collateral to a debt due to it. The car company had kept an account with this bank prior to its failure in May, 1884. The bank held a claim against the car company at the time of its failure, and some of its bills receivable passed through the bank for collection. The witness knew all these facts, and that the car company was in high credit before it was declared insolvent; but he had never examined its assets, and knew nothing of their value except from the statements of the officers of the corporation or of the officers of the court, and nothing of the liabilities of the corporation except that claims to the amount of more than $3,000,000 were made against it. He knew of sales of the stock made before the failure in 1884, but he knew of but one transaction concerning the stock after the receivers took the assets of the corporations into their possession, and that transaction was that the bank held some of it as collateral. There was no evidence that the stock had any market value, that this witness knew of any market value for it, or that he had formed any opinion of its value after the corporations were adjudged insolvent and the receivers were appointed; and in this state of the proof the court below held that he was not competent to enlighten the jury by his opinion of its value in February, 1885. A witness ought not to be permitted to give in evidence his opinion of the value of an article unless it appears that he has an opinion, and that he has had and has used advantages superior to those of the jurymen for acquiring correct information on which to base his opinion. In this instance it did not appear that the witness had acquired any correct information from which to form an opinion, or that he had formed any opinion whatever upon this subject. Moreover, an appellate court ought not to reverse a judgment on account of the ruling of a trial court upon the competency of a witness to testify, unless the

ruling is prejudicial and clearly erroneous, because the bearing and action of the witness on the stand may sometimes properly influence the trial court upon a doubtful question of this character, and these cannot be printed and presented to the appellate court. For these reasons we are satisfied that this case ought not to be reversed on account of this ruling.

It is contended that the plaintiff in error was relieved from all liability on the note in suit, and that the court should have so charged the jury, because he stood in the relation of a surety for the maker of the note, and the defendant in error had permitted its claim against the principal to become barred by the statute of limitations before the trial of this action. The facts on which this claim is based are that the bank filed a claim against the maker of the note and the plaintiff in error in this action several years before the statute of limitations ran against either of them, and caused the summons in the action to be served upon the plaintiff in error, but did not cause it to be served upon the maker of the note at all, and its claim against him became barred by the statute before the trial of the action. There was, however, no evidence of any agreement on the part of the bank to extend the time of payment to the maker, or to forbear or delay the prosecution of its action against him. The statutes of the state of Minnesota provided that an action might be brought against two or more persons for the purpose of compelling one of them to satisfy a debt due to the other for which the plaintiff was a surety. Gen. St. Minn. 1878, c. 66, § 130 (Gen. St. 1894, § 5272). The plaintiff in error could have paid the note at any time before the statute ran in favor of the maker, and could then have enforced repayment by the maker, or he could have maintained an action against the maker under the statute we have cited, without first paying the note. Under this state of facts, the plaintiff in error was not released from his liability on the note by the mere failure of the bank to press its action against the maker. Conceding that the plaintiff in error was an accommodation indorser of the note, and that his relation to the maker after he was charged as an indorser was that of a surety, still this relation imposed no obligation of active diligence upon the bank in the prosecution of its suit against the principal. The surety assumes for himself the liability of his principal. The contract of suretyship is not that the creditor will see that the principal pays the debt or performs the obligation, but that the surety will see that the principal pays or performs. It is true that, if the creditor makes a binding agreement with the principal that he will extend the time of payment or forbear to collect the debt, this will release the surety. But the reason of this rule is that such an agreement ties the hands of both creditor and surety, and deprives the surety of his right to pay the debt at any time and enforce repayment from the principal. Mere forbearance or delay in enforcing the obligation of the principal has no such effect, and hence does not release the surety. 2 Brandt, Sur. § 342; Reid v. Flippen, 47 Ga. 273, 276, 277; Whiting v. Clark, 17 Cal. 407, 411; Hunt v. Bridgham, 2 Pick. 581, 584; Mueller v. Dobschuetz, 89

Ill. 176, 182; Hubbell v. Carpenter, 5 N. Y. 171, 177, 178; Rucker v. Robinson, 38 Mo. 154; Morse v. Huntington, 40 Vt. 488.

There are 43 alleged errors assigned in this record. We have carefully considered each one of them. We have reviewed the most important of them,—those upon which counsel for plaintiff in error appeared to place chief reliance,—and we have stated the reasons why they cannot be sustained. No good purpose would be served by an extended discussion of the alleged errors we have not noticed. It is sufficient to say that no exception was taken to the charge of the court, the evidence was sufficient to warrant the verdict, and the court below, in our opinion, committed no material error in the trial of this case. The judgment below must be affirmed, with costs; and it is so ordered.

REYNOLDS v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 548.

1. CONTRIBUTORY NEGLIGENCE.
On a clear winter night plaintiff was driving, at a gentle trot, along a highway, which ran parallel with defendant's railroad track, and about 12 feet therefrom, on an open prairie, across which an approaching train could be seen at a distance of a mile or more. Plaintiff knew that a train was soon to approach from behind him on the railroad, and that his horse, though gentle, would require some care in management when the train passed him; but, though so muffled in a coat to protect him from the cold that he could not hear easily, he did not look for the train, and when it approached him his team collided with it, his horse was killed, and his wagon broken. *Held*, that it was not error to direct a verdict for the defendant on the ground of plaintiff's contributory negligence.

2. RAILROAD COMPANIES — DUTY TO GIVE SIGNALS AT CROSSINGS — NORTH DAKOTA STATUTE.
Held, further, that the defendant railroad company was not required by the North Dakota statute (Comp. Laws 1887, § 3016), requiring a bell to be rung or whistle sounded when any railroad shall cross "any other road or street," to give these signals at a private crossing, built to give access from a slaughterhouse to the highway, but not itself on any highway, though on a section line, which might, under a statute, be opened as a road by the board of supervisors.

3. SAME.
A statute which requires railroad companies to give a warning signal of the approach of trains to their crossings of a road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use, the crossing; and such parties cannot recover of the railroad companies for a failure to give the warning.

4. SAME—FENCING TRACK.
Where there is no statute requiring railroad tracks to be fenced, it is not error, in an action against a railroad company for damages arising from a collision, to exclude evidence that the track was unfenced.

5. EVIDENCE—CROSS-EXAMINATION.
When a witness has testified on direct examination that he knows who put in a railroad crossing, and when it was put in, it is proper, in cross-examination, to ask him how it came to be put in.

In Error to the Circuit Court of the United States for the District of North Dakota.