New Jersey Court of Errors and Appeals

RAY B. HINKLY, *Plaintiff-Appellant,* *vs.* EDWARD G. FREICK, *Defendant-Appellee.*	*On Contract.* *On Appeal from New Jersey Supreme Court.*

Brief for Plaintiff-Appellant.

This case, which is a Supreme Court issue, was tried before former Circuit Judge Vail, sitting in the Hudson Circuit, and a jury.

The plaintiff brought suit upon four promissory notes aggregating $4,320. The parties to the suit lived in the State of Minnesota, and the notes were made there, and were payable there. These notes were admittedly signed by the defendant to the order of the National Fence Machine Company, and by it endorsed. They were discounted by the Rock County Bank, of Luverne, Minnesota, without knowledge of any alleged infirmities in the notes, and thereafter were obtained by the plaintiff from the bank for value, and before maturity.

The case was submitted to the jury, which returned a verdict for the defendant, upon which the judgment appealed from was entered.

The case was begun under the old practice, but was tried since the Practice Act of 1912 went into effect. The various grounds of appeal were brought to the attention of the trial judge by motions and objections, or exception taken in accordance with the former practice (although not signed and sealed by the judge

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in view of the new practice), and the various objections are set forth in the notice of appeal (pp. 1-10).

While there are many objections noted, they group themselves under several well defined heads.

The declaration was the common counts, to which copies of the notes were annexed as a bill of particulars. The defense was the general issue, and a notice of special matter, which notice set up four separate defenses (pp. 15-18).

The notes were admitted to have been signed by the defendant.

The first special defense was that the plaintiff was not a holder for value.

This was practically abandoned, however, as it was conceded that the Rock County Bank was an innocent purchaser for value, and the law was not questioned that the plaintiff as purchaser from the bank, was entitled to all the rights of the bank as a *bona fide* purchaser (p. 43, ll. 1-8; p. 130 and p. 175, l. 19, through p. 176).

The plaintiff, therefore, concededly had the legal standing of a *bona fide* holder for value.

The second defense was that the defendant had received no consideration from the National Fence Machine Co., the payee named in the notes (p. 16, ll. 3-8). The defendant had signed the notes in connection with certain agreements which are in evidence (Exhibit P. 6, P. 7 and P. 8, pp. 326-330), whereby the National Fence Machine Company appointed him its agent of certain territory specified in the contracts to sell its fence machines and moulds, and agreed in consideration of a sum in each contract named, which sum is the exact amount of the note signed by the defendant at the same time, to ship him certain machines and moulds. It was proved as a fact in the case by the admission of the defendant, that a large quantity of these machines and moulds were con-

signed to the defendant, and arrived at the railroad station at Luverne (pp. 106-107). In addition to that the defendant repudiated his contracts and notes shortly after they were signed, so, of course, there was no occasion to ship any more goods to him. But the complete answer is, that the plaintiff is a *bona fide* holder of the notes for value.

The third defense was that there was no such corporation as the National Fence Machine Company, but that was effectually set at rest by the admission in evidence of the certificate of incorporation of the company (p. 45, l. 40, Exhibit P. 5, p. 322, etc.).

The fourth defense in the case rested on certain alleged fraudulent misrepresentations by which the defendant was induced to sign the notes, the defendant claiming the right to make this defense as against the plaintiff, a *bona fide* holder for value, by virtue of a statute of Minnesota relating to instruments obtained by fraud (p. 17, l. 23).

I.

The Trial Judge committed error in ruling that the Minnesota Statute could be set up in defense of the action and in admitting evidence supposed to be material under said Statute.

This Minnesota statute, which is a distinct shock to a New Jersey lawyer's views of the law pertaining to negotiable instruments, reads as follows:

> "No. 2747. INSTRUMENTS OBTAINED BY FRAUD —No person, nor his heirs or personal representatives of any person whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the Law Merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent repre-

sentation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the Law Merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

Objection was made to the introduction of this statute in evidence (p. 49).

Practically all the evidence, which extends from page 50 to 302 of the printed book, was admitted on the theory that it was material under this statute. At the very beginning of this evidence objection was made, and it was definitely understood between counsel and the trial judge that the objection and exception related to all the line of evidence supposed to be material under that statute (pp. 56-57).

The question of the applicability of this statute, and the evidence supposed to be material thereunder to this case, is fundamental. All the other alleged errors flow out of the admission or rejection of evidence supposed to have been material under that statute, and the charge of the court with reference thereto.

It has been settled as a universal principle that in regard to the merits and rights involved in actions, the law of the place where they originated is to govern; but the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted without any regard to the domicile of the parties, the origin of the right, or the country of the act.

The rule is thus stated by Story in his Conflict of Laws, section 558.

It has been adopted repeatedly as the law of this State.

In *Ferguson* vs. *Central Railroad Co.*, 42 Vr., 647, this court applied it in determining the question of the quantum of evidence required to place an accident case, where the accident arose in the State of Pennsylvania, within the province of the jury when the case was tried in this State. The court held that the law of the forum was controlling (p. 651). The court cited the section from Story above quoted, and the following:

> "To this effect, also, see Northern Pacific Railroad Co. *v.* Babcock, 154 U. S., 961, approving Herrick *v.* Minnesota and St. Louis Railroad Co., 31 Minn., 11, and cases there cited; and this has long been the settled doctrine of the courts of this state in actions upon contract. Gulick *v.* Loder, 1 Gr., 68; Wood *v.* Malin, 5 Halst., 208; Garr *v.* Stokes, 1 Harr., 403, 405; Harker *v.* Brink, 4 Zab., 334; Armour *v.* McMichael, 7 Vroom, 92, 94. The same principle applies to actions of tort. See cases cited."

The only question here can be as to the application of this rule.

In *Pritchard* vs. *Norton*, 106 U. S., 124, Justice Matthews, speaking for the Supreme Court of the United States, laid down the rule that the operation of the *lex fori* extends beyond the process and remedy so as to embrace the whole of that residuum which cannot refer to other laws such as the *lex loci contractus*, &c. He said (p. 130):

> "The rule deduced by Mr. Wharton, in his Conflict of Laws, as best harmonizing the authorities and effecting the most judicious results, and which was cited approvingly by Mr. Justice Hunt

in Scudder *v.* Union National Bank, 91 U. S., 406, is, that 'Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.' This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws. And this conclusion is obviously just; for whatever cannot, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality."

Thus it has been settled that the *lex fori* determines the question as to who may sue. (Story, Conflict of Laws, section 565.)

Also the *lex fori* determines the character of the process, whether by arrest or otherwise; (Story, sections 568 and 571). This is illustrated in our own State in the case of *Garr* vs. *Stokes,* 1 Harrison, 403, where Chief Justice Hornblower held that a statute of the State of New York, which was the State where the promises had been made and were to be performed, which exempted the defendant from arrest and imprisonment in an action upon those promises had no application in this State, and said (p. 405):

"This is a question of *lex fori* and not of *lex loci contractus*—and the former must prevail."

Citing *Bank of United States* vs. *Donnally,* 8 Pet. 361, p. 372.

See also *Wood* vs. *Malin,* 5 Halst., 208, p. 211, where the court held that a person arrested in this

State upon a contract made in the State of New York, where both the plaintiff and defendant resided at the time the contract was made, would not have the benefit of the insolvent law of New York in this State so as to exempt him from arrest.

Also the *lex fori* determines the form of judgment to be entered; (Story, section 572), and likewise determines questions of the application of the statute of limitations or prescriptions of suits, and lapse of time (Story, section 576).

This latter question has also been settled in this State in *Gulick* vs. *Loder,* 1 Gr., 68, where the suit was on a judgment of the Pennsylvania court, and the statute of limitations was set up. Chief Justice Ewing said (p. 69):

> "We need make no inquiry into the rules for the limitation of actions in the State of Pennsylvania where this judgment was obtained; since remedies are to be regulated and pursued according to the *lex fori,* the law of the place where the action is instituted, and not by the *lex loci contractus,* or the law of the place where the contract was made or the judgment rendered."

Citing many cases.

In *Harker* vs. *Brink,* 4 Zab., 333, the same principle was applied to our statute relating to joint obligors, where the contract upon which the action was founded was made and to be performed out of this State. Chief Justice Green said (p. 345):

> "The place where the contract was made or to be performed cannot be in any wise material to the inquiry. It is true that all contracts are presumed to be made in reference to the laws of the country where they are entered into or to be performed; but this applies to the contract itself not to the mode of enforcing it. The law of the place where the contract is made will decide the validity of the contract, and will govern its na-

ture, obligation and construction. But it is universally established that the forms of remedies, the modes of proceedings, and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted. Story on Confl. of Laws, section 242, 263, 556.

"The doctrine of the common law, to use the language of Justice Story, is so fully established on this point, that it would be useless to do more than state the universal principle which it has promulgated, that, in regard to the merits and rights involved in actions, the law of the place where they originated is to govern; but that all forms of remedies and judicial proceedings are to be according to the law of the place where the action is instituted, without any reference to the domicil of the parties, the origin of the right, or the country of the act. Story on Confl. of Laws, Section 558."

In *Bullock* vs. *Bullock,* 6 Dick., 444, affirmed 7. Dick., 561, the question at issue, as stated by Justice Van Syckel in his dissenting opinion (7 Dick., 573), was: "Whether our courts of equity will establish a lien upon New Jersey lands so as to give effect to the New York decree," the suit having been to enforce a decree for alimony entered in New York. It was determined that a new suit would necessarily have to be brought in this jurisdiction, and that the remedy in such case was to be governed by the *lex fori.*

The Court of Chancery summed up all the cases above cited (6 Dick., pp. 450-451), and it was conceded, even in the dissenting opinion, that the *lex fori* applied to the remedy (7 Dick., 573).

See also *Armour* vs. *McMichael,* 7 Vr., 92, p. 94.

The *lex fori* was applied by the Supreme Court of the Untied States in *Bank of United States* vs. *Donnally,* 8 Pet., 361, to a suit brought in Virginia on

a promissory note made and to be performed in Kentucky. The notes were not sealed, and it appeared that by the laws of Kentucky an action of covenant would lie in that State on an unsealed contract. The court held in an opinion by Mr. Justice Story that a like action would not lie in another State where covenant could be brought only on a contract under seal, and that the statute of limitations of Virginia set up in defense was good, and that the Kentucky statute, which would otherwise have saved the case, had no application.

The statute of Minnesota here in question may in one sense be said to relate to the merits and rights of the parties, but it more truly relates to the forms of remedies and modes of proceedings. (*Harker* vs. *Brink, supra.*) Questions as to what matters are or are not for the consideration of the jury and questions as to the quantum of evidence (*Ferguson* vs. *C. R. R. Co., supra*), and the materiality of evidence are necessarily questions relating to remedies and modes of proceedings.

In *Scudder* vs. *Union National Bank,* 91 U. S., 406, a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the firm then present in Chicago. Suit was brought in the District of Illinois and the court held that the validity of such acceptance was to be determined by the law of the forum, which was Illinois. Justice Hunt discussed and analyzed the rule as follows (p. 411):

> "The rule is often laid down, that the law of the place of performance governs the contract.
>
> Mr. Parsons, in his 'Treatise on Notes and Bills,' uses this language: 'If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated.' P. 324.

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (Young *vs.* Harris, 14 B. Mon., 556; Parry *vs.* Ainsworth, 22 Barb., 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract (p. 317). Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. Dacosta *vs.* Hatch, 4 Zab., 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. Aymar *vs.* Shelden, 12 Wend., 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent. interest, which is legal in that State, the note is valid, although but seven per cent. interest is allowed by the laws of the former State. Miller *vs.* Tiffany, 1 Wall., 310; Depeau *vs.* Humphry, 20 How., 1; Chapman *vs.* Robertson, 6 Paige, 634; Andrews *vs.* Pond, 13 Pet., 65.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well considered decisions of this country and of England will sustain these positions."

In order to give effect to the Minnesota statute evidence of the alleged fraud must be admitted. This is a matter which respects the remedy. It relates to the admissibility of evidence. The rules of evidence are to be supplied by the law of the forum. Such evidence is not admissible in this State against a *bona fide* holder for value.

The plaintiff is a *bona fide* holder for value of the notes in suit. The procedure in such case has been laid down by Justice Depue in *Holcomb* vs. *Wyckoff*, 6 Vr., 35, as follows (p. 36):

"In an action by an endorsee against the maker, the course of proceeding at the trial is to prove the making of the note and its endorsement, from which a consideration for the note will be implied. Upon proof being made that the note

was obtained by fraud, or was fraudulently put in circulation, the plaintiff, to recover, must show that he bought it before maturity, *bona fide,* and for value. Duncan, Sherman & Co. *vs.* Gilbert, 5 Dutcher, 521. Where the evidence shows that the plaintiff is a *bona fide* holder before maturity, for the full value of the note, or where he has taken it from a precedent holder who has given full value, and to whose rights he has succeeded by virtue of the endorsement, he may recover the full amount of the note, without regard to defenses to which it might be subject, as between the original parties. It is also the settled law in this State that, where the note is valid between the original parties, and has been transferred by endorsement, to pass the legal title, no defects in the contract of endorsement will affect the endorsee's right to recover the full amount of the note. Durant *vs.* Banta, 3 Dutcher, 624. In the case first stated, the endorsee, or some prior holder whom he represents, having paid full value on the transfer, obtains an equity to recover of the maker, who has put negotiable paper in circulation, the full consideration he, or a precedent holder, has paid for it. In the case last stated, the note being valid in its inception, and the maker being liable on the instrument for the full sum named therein, he cannot avail himself of defects in the consideration upon which the contract of endorsement was made."

See also *DeKay* vs. *Hackensack Water Co.,* 11 Stew., 158, p. 162.

Under the New Jersey rule, therefore, any evidence of fraud as between the maker and the original payee would have been excluded at the suit of the plaintiff, he being a *bona fide* holder for value.

To give effect to the Minnesota statute requires a

complete reversal of the New Jersey rule and the admission of evidence which, under our law, would never be admitted. Matters of this kind necessarily relate to the forms of remedy and judicial proceedings, and are to be according to the law of the place where the action is instituted.

Harker vs. *Brink, supra,* p. 346.

Scudder vs. *Union National Bank, supra,* p. 412.

Justice Matthews in *Pritchard* vs. *Norton, supra,* expressly held that rules of evidence are to be supplied by the law of the forum. He said (p. 133):

> "The rules of evidence are also supplied by the law of the forum. Wilcox *vs.* Hunt, 13 Pet., 378; Yates *vs.* Thomson, 3 Cl. & Fin., 544; Bain *vs.* Whitehaven, &c. Railway Co., 3 H. of L. Cas. 1; Don *vs.* Lippmann, 5 Cl. & Fin., 1. In Yates *vs.* Thomson, *supra,* it was decided by the House of Lords that in a suit in a Scotch court to adjudge the succession to personalty of a decedent domiciled in England, where it was admitted that the English law governed the title, nevertheless it was proper to receive in evidence, as against a will of the decedent, duly probated in England, a second will which had not been proved there, and was not receivable in English courts as competent evidence, because such a paper according to Scottish law was admissible. In Hoadley *vs.* Northern Transportation Co., 115 Mass., 304, it was held that if the law of the place, where a contract signed only by the carrier is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law

> of the place where the suit is brought. In a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement, different from that imputed by law, would be received in defense, although by the law of the latter State no agreement different from that which the law implies from a blank indorsement could be proved by parol. Downer *vs.* Cheseborough, 36 Conn., 39. And upon the same principle it has been held that a contract, valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the Statute of Frauds prevails, unless it is put in writing."

So in *Knights of Pythias* vs. *Meyer,* 198 U. S.,, 508, suit was brought on a certificate of life insurance which by its terms waived the right to prevent physicians from testifying as to knowledge derived professionally. The suit was brought in New York. The New York statute forbids physicians testifying as to matters learned by them professionally unless the provisions of the statute are expressly waived by the patient upon the trial. In this case the patient was dead. It was urged that the contract was an Illinois contract (although this was overruled), and that the New York statute had no application. Although the court overruled the contention that it was an Illinois contract, it considered the effect of the contention as though well founded in fact, and overruled it on the ground that the rule was that all matters respecting the remedy and *admissibility of evidence* depend upon the law of the State where the suit is brought. The court said (p. 517):

> "These contentions may be said to have the same ultimate foundation, but regarding them as separate and independent, the first is based on the ground that plaintiff in error derived the

> right from its contract with Meyer to the testimony of the physicians, which right attended the contract in whatever forum suit upon the contract might be brought. This is certainly debatable. The general rule is that all matters respecting the remedy and *admissibility of evidence* depend upon the law of the State where the suit is brought. Northern Pacific R. R. Co. *vs.* Babcock, 154 U. S., 190; Wilcox *vs.* Hunt, 13 Pet., 378; Pritchard *vs.* Norton, 106 U. S., 124; Bank of the United States *vs.* Donnally, 8 Pet., 361."

2 Wharton on Conflict of Laws, 3d edition, section 752, says:

> "There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case."

In *National Express & Trans. Co.* vs. *Morris,* 15 App. D. C. 262, p. 283, it was held that a statute of a State in which a corporation was created, rendering entries on the books of the corporation admissible in favor of the corporation in an action against a person sought to be charged as a stockholder, would not apply to an action in the District of Columbia since it pertains to the remedy.

In *The City of Carlisle,* 39 Fed., 807, the court overruled the provisions of the British Merchants Shipping Act, which provided that an entry made by the master in the official log book under certain circumstances, and all entries made in any official log book as in the statute directed, should be received in evidence in any proceeding in any court of justice, etc. (p. 816). The court said "that this does not settle the question for this court. So far as it declares the admissibility of the log book as evidence, it is only in force in British courts. By the law of this court, the *lex fori,* the competency of evidence in a proceeding before it must be determined and not that of Great Britain." Citing Wharton Conflict of Laws, section 752.

A case strongly in point is *Hoadley* vs. *Northern Transportation Co.,* 115 Mass., 314. The suit was against a common carrier. The goods in question had been delivered to the Transportation Company at Chicago, Illinois, to be transported to Lawrence, Massachusetts, and a bill of lading containing the contract of transportation was delivered in Illinois. The goods were destroyed at Chicago in the great fire. The law of Illinois was that (p. 306) "a bill of lading which limits the carrier's common law liability for loss by fire would not raise a presumption that its terms were assented to, but such assent if relied on must be shown by other and additional evidence." The trial court ruled that the Illinois law governed the case.

By the law of Massachusetts, where the case was tried, the rule was that the acceptance of a bill of lading inferred assent, and amounted to evidence of the contract between the parties. The court reversed the trial judge and held that the Massachusetts rule, the *lex fori,* should govern, on the ground that the admission of evidence was to be settled by the law of forum. Judge Colt said (p. 306):

> "It is a general rule that personal contracts must have the same interpretation and binding force in all countries which they have in the place where made. The contract is presumed to have been entered into with reference to the law of that place. If formalities and solemnities are there required to give validity to it, the requirement must be shown to have been observed. But the law of the place where the action is brought, by the same general rule, regulates the remedy and all the incidents of the remedy upon it. The law of the former place determines the right; the law of the latter controls the admission of evidence and prescribes the modes of proof by which the terms of the contract are made known to the

court, as well as the form of the action by which it is enforced."

He further said, with reference to his conclusion that the remedy upon the contract was the true question involved (p. 307):

"It is not always indeed easy to determine whether the rule of law sought to be applied touches the validity of the contract or only the remedy upon it. In the opinion of the court, the rule of law laid down in Illinois and here relied on by the plaintiff affects the remedy only, and ought not to control the courts of this Commonwealth. The nature and validity of the special contract set up is the same in both states. It is only a difference in the mode of proof. A presumption of fact in one state is held legally sufficient to prove assent to the special contract relied on to support the defense. In the other state it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other. The instructions given at the trial upon this point did not conform to the view of the law above stated, in which, upon more full consideration, we all concur."

In *Helton* vs. *Alabama Midland Ry. Co.* (Ala.), 12 Southern, 276, the question arose as to whether the statute of Georgia, where the accident took place, or the rule of law as it existed in Alabama, where the case was tried, should prevail with reference to the proof of negligence. In discussing the law, which led to the conclusion that the *lex fori* should prevail, the court said (p. 285):

"There are classes of cases, arising upon contracts and wills, and perhaps otherwise, where rules prescribed by the local law partake of the nature of evidence, and yet so attach to the act or contract as to become a part of the right or

obligation itself. Cases of this character will find illustration in the work of Judge Story on the Conflict of Laws (section 631, *et seq.*), but it will be observed that that eminent author states, in section 634a, 'as a general truth, that the admission of evidence and the rules of evidence are rather matters of procedure than matters attaching to the rights and titles of parties under contracts, deeds, and other instruments.' In Bristow *vs.* Sequeville, 5 Exch., 275, it was held that a deed declared inadmissible in evidence by the law of the place where executed for the want of a stamp would nevertheless be received in evidence by the courts of another country, if proper according to the *lex fori.*"

The court also cited and relied upon, among other cases, *Hoadley* vs. *Northern Transportation Co.*, 115 Mass., 314.

There is a statement contrary to my contention in Story in his Conflict of Laws (sections 317 and 332), to the effect that where by the law of a country where a negotiable note is made and payable, equitable defenses are let in in favor of the maker, the law of the place where the note was made governs. This dictum has crept into some of the opinions of the Judges, although I have found no case where the issue was raised or decided. The cases cited in the note (to 4th ed.) do not bear out the text. The cases cited (section 332) are *Ory* vs. *Winter*, *Evans* vs. *Gray*, *Charters* vs. *Cairnes*, all found in Martins (Louisiana) reports. I have examined those three cases. None of them supports the text.

They were all decided by the Eastern District of the Supreme Court of Louisiana.

Evans vs. *Gray* was decided in 1822, and is found reported in 6 Martin, 238. It was begun by attachment on a note made in Kentucky. The defense was failure of consideration. The suit was between the

maker and payee of the note, and the rights of third persons or of *bona fide* purchasers for value were in no wise involved.

Charters vs. *Cairnes,* 8 Martin, 1, was decided in 1825. It also was an attachment suit on contract and the case turned on the validity of an assignment or deed of trust given in New York. The case in no respect dealt with negotiable paper, and is not at all in point.

Ory vs. *Winter,* 8 Martin, 142, and 9 Martin, 321, was decided in 1826. This was a suit on a promissory note made in Mississippi, and endorsed to the plaintiff. It was shown by a statute of Mississippi that the maker of a note in that State could set up an equitable defense against a *bona fide* endorser, which he could offer against the payee. The statute, however, evidently deprived the note of its negotiable character and it is apparent from the language of the court that the case was decided upon the express understanding that they were not dealing with a negotiable note. The court referred to the general rule that the validity of a contract must be ascertained in relation to the law of the country where it is made and then said (p. 142):

> "We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another State which can take the case out of the general principle. The argument which attempts to do so takes for granted the note was negotiable in our understanding of the term, though the very object of the statute was to take from it that characteristic."

The adoption of a rule of law other than that laid down in the country of the forum is purely a matter of remedy. Even assuming that the rule as suggested in Story is correct, I cannot conceive of its being adopted as the law of this State. It is entirely con-

trary to the settled rule and public policy of this State.

But apart from that, the provisions of the Minnesota statute which are essential to making operative the Minnesota rule, namely, that the question of fraud shall be admitted in evidence and submitted to the jury, is so essentially a part of the remedy as to completely distinguish the case at bar from the rule as stated in Story last above referred to, and to make applicable the *lex fori*.

Assuming for the sake of argument that the Minnesota statute was applicable to this case, then there are a number of errors of which we complain, both in the admission and rejection of evidence, in denying the motion to overrule the defense and in the charge to the jury, any one of which we say constituted reversible error.

The Minnesota statute, if applicable, cast upon the defendant a double burden, first, of establishing that his signature to the notes had been obtained by a fraudulent representation, trick or artifice, as to the nature and terms of the contract so signed, and that at the time of the signing he did not believe that it was a note; and also of establishing that he was not guilty of negligence in signing the notes without knowledge of their terms.

On this theory the trial judge allowed great latitude to the defendant in showing facts with reference to his alleged deficiencies of education, his alleged lack of familiarity with business matters, and generally allowed evidence with reference to the circumstances in great detail under which the notes were signed.

Quite contrary to his liberality with the defendant, however, he was extremely strict with the plaintiff in rebutting this evidence.

This strictness with the plaintiff, as opposed to his

liberality toward the defendant, characterized the rulings of the trial judge throughout the case.

For example: The agency contracts (P. 6, P. 7, P. 8, and P. 9) were signed at the same time the notes were, and were part and parcel of the same transaction. The trial judge allowed the defendant to go into the preliminaries which preceded the signing of the notes, in great detail, but refused the same privilege to the plaintiff with reference to the signing of the contracts, although it was impossible to separate the one from the other (p. 11, l. 17).

Again, during the examination of the plaintiff's witness Kubach, the court compelled him to answer, although he did not understand the question. The dialogue was (p. 197, l. 36):

"(*The Court.*) Just answer the question.

A I would like to understand it.

(*The Court.*) You will answer the question."

Again, on examination of the plaintiff's witnesses the defendant's counsel attempted to move to strike out certain answers as not responsive, and when his attention was called to the fact that it was not in his province to make such a motion, the court asserted: "If counsel cannot do it, the court can" (p. 207, l.40), and struck out the answer; and this same thing occurred in the examination of Mr. Cole, a witness for the plaintiff (p. 241, ll. 2-15).

Again, the trial judge refused to permit the plaintiff's counsel to refer even to the date of a paper for the purpose of having it identified preliminary to making an offer in evidence (p. 208, l. 10, to p. 209, l. 30); or to permit the plaintiff's counsel to lay a proper foundation for the offer in evidence of the paper, Identification G. (p. 238, l. 30 to p. 240, l. 15); or to permit the plaintiff's counsel to make an offer of proof (p. 288, ll. 20-30); and greatly restricted the plaintiff's counsel in his efforts to argue the question

of the materiality of the paper Identification G. (p. 290, l. 27 to p. 293, l. 20).

In connection with many of these rulings exceptions were prayed, which are set up as grounds of the appeal.

II.

The Trial Judge Committed error in denying the Plaintiff's Motion to Overrule the Defense, and in Refusing the Plaintiff's Third, Fourth, Fifth, and Sixth Requests to Charge.

The motion to overrule the defense (p. 302) was denied and exception taken. The ground of the application was that the facts as presented did not even under the Minnesota statute set up such a defense as entitled the defendant to go to the jury.

The Third, Fourth, Fifth and Sixth requests to charge were as follows:

> "3. In considering whether or not the defendant was negligent in signing the notes in suit, the jury cannot acquit him of negligence if the jury find the fact to be that he trusted another person to fix the form and measure of the obligation which he was signing without exercising that supervision which was in his power of observing the character of the paper which he was signing.
>
> 4. There is no evidence in the case of any force, intimidation or compulsion practiced upon the defendant to compel him to sign the notes in suit, and if the jury find that he signed the notes voluntarily, even though carelessly, and through trust imposed in another, he is nevertheless guilty of negligence and the verdict should be for the plaintiff.
>
> 5. If the jury find that the defendant through neglect of precautions within his power affixed

his name to the notes in suit without knowing their character, the consequent loss ought not to be shifted from him to the plaintiff, but the defendant should bear the loss as between him and the plaintiff in this suit.

6. The fact that the defendant claims that he could not read the form of the notes is not sufficient to acquit him of negligence in signing them unless the jury find that there was some compulsion or threat practiced upon him sufficient to compel him to surrender his voluntary judgment in signing said notes."

Exception was taken to the refusal of the court to charge as requested (p. 313, l. 1).

Each of these requests was based upon the decision of courts where a similar kind of defense had been set up, under similar circumstances.

The Minnesota statute presented for consideration three separate sets of facts: (a) Were the signatures to the notes obtained by fraudulent representation, trick or artifice as to the nature and terms of the contracts so signed; (b) did the defendant in signing believe that he was signing something other than a promissory note, and (c) was the defendant free from negligence in signing without knowledge of the terms of the paper which he signed.

The trial judge left it for the jury to say whether the alleged turning up of the corner of the contract, etc., constituted a fraudulent representation, trick or artifice (p. 308, l. 15).

It may be noted in passing that the trial judge nowhere left it to the jury to say as a matter of fact whether the defendant believed that the paper which he was signing was a promissory note.

With reference to the question of the defendant's negligence in signing the notes, the trial judge charged as follows (p. 309, l. 27):

> "Now you must take all the testimony into consideration and say whether or not he exercised the ordinary prudence which a reasonable business man should do in signing a paper without having spread it before him to see just what he was doing."

The trial judge also told the jury that the defendant knew nothing about any of the notes until he had signed them all and they all turned up in the hands of the Rock County Bank (p. 310, l. 1), (although this was one of the questions for the jury to decide) and then said (p. 310, l. 4):

> "So that is a matter you have a right to take into consideration in saying from the testimony in this case that the defendant's knowledge of the business, that his knowledge of the world, whether he was acting as a careful, prudent man would do in signing these notes which he says he signed in such a way as would make him unable to see the whole paper to which he was putting his name, because if he was negligent the statute says he cannot come into court and set up the defense."

I have set forth these two extracts from the charge, because they contain the only instructions upon the question of the defendant's negligence as bearing upon the signature of the notes, although the trial judge does discuss the question of the negligence in signing the letter of September 28, 1908, Ex. P. 10 (pp. 332 and 243, l. 30; also p. 310, l. 16, etc.).

The facts in the case, even the defendant's own story of the alleged deception, show that there was no force, intimidation or compulsion practiced upon him to compel him to sign the notes; it shows further —taking his own story as true—that he relied absolutely on the representations of Mr. Kubach as to what he was signing and except for his own haste or his desire to accommodate Mr. Kubach in his

haste, there is no reason why (even if he himself could not have thoroughly examined and read the paper to which he was asked to put his name), he could not have taken it to his wife or son or some other person who could have fully explained to him the contents of the paper he was asked to sign.

According to the defendant, the first note, Ex. P. 1, was signed in Mr. Kubach's office in the basement of the bank building (p. 59, l. 40) and the defendant's description of the signing is as follows (p. 60, l. 13):

"A And he sat in front of me and had a tablet or book what was laying on a table and he said, 'We make out two contracts for Nobles County, and one for you and one for the company.'

Q What next happened. Go on and tell it?

A I told him I didn't care for any more, I don't want to bother with it. Well, he told me, 'You make more money by this than by anything else.' So he asked me whether I want to read it and I told him I can't read it.

Q You told him you could not read it?

A I told him I could not read it. Well, then he told me what he should read it, and I don't care, I can't much understand anyway from that, I told him, so he start to explain some to me and then I signed my name down on the corner."

The second note Ex. P. 2 was also signed in the office in the basement of the bank building (p. 64, l. 25), and the proceedings according to the defendant were as follows (p. 67, l. 1):

"Q What did he do, that is Kubach?

A Well, he didn't do anything, but he asked me if I want to sign it.

Q Did he read it to you?

A He read some of it to me.

Q Did he pretend to explain it?

A Yes, he explained some.

Q Can you remember what he said?

A No; he said, 'Best thing what you can do and make more money by this than by farming.' "

The defendant also testified that Mr. Kubach told him it would not cost him anything to be an agent (p. 67, l. 36), and that following this conversation he signed the note (p. 68).

The third contract Ex. P. 3 was signed at the defendant's farm in the grannery (p. 71, l. 25).

Mr. Kubach explained to the defendant how he could make more money in selling the machines and moulds to the farmers (p. 72, l. 1), and thereupon he signed the contract and also the note.

The defendant testified that the reason he did not look it over and examine it, "I took his word for it. He told me it was just the same like the top one" (p. 73, l. 20).

The last note Ex. P. 4 was signed on a Sunday morning in the basement of the Rock County Bank Building in the presence of both Mr. Kubach and Mr. Cole (p. 75).

The procedure seems to have been very similar as in the signing of the previous note (pp. 166-167). It will be noted that in connection with the signing of each note, the defendant signed an agency agreement. Exs. P. 6, P. 7, P. 8 and P. 9, each one of which he seems to have fully understood.

The testimony of Mr. Kubach was that the papers were not a part of a tablet at all; that he had fully explained the matter to the defendant in both German and English (p. 181, l. 16); that he had read him the note and showed him where to sign his name (p. 184), and that the papers were spread out on the table and were perfectly obvious to the defendant (p. 184, l. 3; p. 188, l. 28; pp. 190 and 194). Cole corroborates Kubach as to the signing of the last note Ex. P. 4, at which time he was present (pp. 234 and 235).

This being the evidence, it is apparent, even from the defendant's own testimony, that he neglected precautions within his power and relied absolutely on the word of strangers with whom he was engaged in a business transaction without having attempted to read the paper or examine it or take it to some person to read or examine for him.

In this state of the proofs, it is doubtful whether even under the Minnesota statute there was a question for the jury as to his negligence; but even assuming that there was, the plaintiff was certainly entitled to the instruction of the trial judge in a more ample degree than the mere statement to the jury that if the defendant was guilty of negligence he could not set up the statute as a defense. The plaintiff was entitled to have the jury instructed upon some of the elements which constituted negligence in the signing of a note under the circumstances as proven in the case in accordance with the adjudications of the courts upon that question. Such instructions were embodied in the Third, Fourth, Fifth and Sixth requests to charge.

In *Mackey* vs. *Peterson*, 28 Minn., 298; 13 N. W., 132, the Supreme Court of Minnesota adopted the rule as a principle of law that where the maker of a note is induced by fraud to sign and deliver it, not knowing it to be a note or bill, but supposing it to be some other instrument, such a fraud is a defense against the *bona fide* holder, provided that the defendant was himself free from negligence. It was on the strength of this case that the motion was made to overrule the defense (p. 303, l. 1). This case was decided before the statute in question was passed, but the statute was passed the year following as the virtual embodiment of the rule laid down in that case. See *Yellow Medicine County Bank* vs. *Tagley*, 57 Minn., 391; 59 N. W., 486, p. 487.

In the Mackey case the facts as stated by the court, were as follows:

"On the trial, the plaintiff proved that the note was transferred to him in the usual course of business, before due, for a valuable consideration, and that he had no notice of any defect in or defense to it. The defendant, without offering any evidence that would tend to prove that plaintiff was not a *bona fide* holder, offered to prove that he signed the note supposing it to be merely a receipt for a plow which the company had delivered to him to try; that the agent of the company presented the instrument to him for his signature, told him it was a receipt, at his request read it to him; that as so read it was a receipt and nothing else; that there was no one who could read English, within half a mile of the place where it was signed; that he then believed the agent read it truly and relied on such reading; that he signed the instrument supposing it to be a receipt and nothing else and that he did not intend to sign, and did not know he was signing a note, and that he never signed any other instrument for said company. On plaintiff's objection this evidence was excluded, and the ruling excluding it is the only error here alleged. The facts which defendant offered to prove would avoid the note in the hands of the original payee The question is, would they take the case out of the rule that a *bona fide* purchaser of negotiable paper for value, and before maturity, takes it clear of all equities and defenses on the part of the maker? The rule includes the defense that the maker was induced by false and fraudulent representations to execute the instrument."

The court by Gilfillan, *C. J.*, discussed the following cases: *Foster* vs. *Mackinnon*, 4 L. R. C. P., 704; *Putnam* vs. *Sullivan*, 4 Mass., 45; *Douglas* vs. *Matting*, 29 Iowa, 498; *Chapman* vs. *Rose*, 56 N. Y., 137, as establishing the principle that in the absence of

contributory negligence such a defense was valid as against a *bona fide* holder, and then said, page 134:

"In Shirts *vs.* Overjohn, 60 Mo., 305, the rule was approved that any negligence on the part of the signer would hold him to the rule.

In Densmore *vs.* Steinbert, 11 N. W. Rep.,872, the trial court instructed the jury that the degree of care required to admit the defense was 'the diligence and care that a man of ordinary care and prudence would have used under similar circumstances to ascertain its contents.' The Supreme Court held this to be error, and said 'that he should in the language of Byles, *J.* (in Foster *vs.* Mackinnon), above cited, have been not guilty of any negligence in so signing the paper.

That case presents more pointedly than any we have met the question as to the degree of negligence which will exclude the defense in cases where it is conceded it would otherwise be admissible. If such a defense is to be admitted at all, the rule as to negligence thus laid down is the only one consistent with the protection due to commercial paper. Where a party, through neglect of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper. Tested by this rule, the facts which defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself there was no reason, except, perhaps, his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom he had a right

to rely. Instead of doing that, he chose to rely upon an entire stranger, and that stranger a party opposed to him in interest, and the only person under any temptation to deceive him as to the character of the paper he was asked to sign. One who, without any necessity, so misplaces his confidence ought not to be heard to claim that the paper he is in consequence misled to sign should be taken out of the rule protecting commercial paper. Order affirmed."

In *Chapman* vs. *Rose,* 56 N. Y., 137, the court said (p. 140), that the evidence tended very strongly to show that the signature of the defendant to the note sued upon was obtained from him through a very gross and fraudulent representation perpetrated upon him by one Miller; that when he signed it he supposed it was a paper of a very different character; that just before signing it he had signed an order for the delivery to himself of a hay fork and that it was represented to him that the paper which was afterwards proved to be a note was a duplicate of that order and that he had signed it without examination upon the statement of Miller that such was its character. The note which he in fact signed came into the hands of a *bona fide* holder, and, as the court expressed it:

"The question which arises on the branch of the charge now under consideration, is whether it is enough, as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument."

The court in answer to this question said (p. 141):

"It is quite plain that if the law is such that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. To in-

sure irresponsibility only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary, at least, to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss. If it be objected that there must be a duty of care, in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representations of another, he puts confidence in that person; and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to answer to it."

The court then discussed the cases of *Foster* vs. *Mackinnon*, *Putnam* vs. *Sullivan* and *Douglas* vs. *Matting*, and concluded (p. 143):

"In all these cases the real ground of decision is not that the party means to make a promissory note, but that meaning to make an obligation in writing, and which was put in writing that it might of itself import both the fact and the form and the measure of the obligation, he trusted another to fix that form and measure without exercising that supervision which was in his power and by which perfect protection was possible. In such cases, the rule is, that he is bound by the act

of him who has been trusted in favor of a holder in good faith."

The ruling of *Chapman* vs. *Rose* was further applied by the New York Court of Appeals in *Page* vs. *Krekey*, 137 N. Y., 307, where the court said (p. 312):

"If he actually signed the paper, though procured to do it by fraud, and is chargeable with negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Such cases are not governed by the rules applicable to the *bona fide* holder of negotiable paper procured by fraud, but by the equitable rule that where one or two innocent parties must suffer, he who has put it in the power of a third person to commit fraud must sustain the loss. If the defendant is to be held liable in this case, it must be upon the principle that by his misplaced confidence in Thinnes, he enabled him to obtain property from the plaintiff, who is an innocent third party. (McWilliams *vs.* Mason, 31 N. Y., 294; Western N. Y. L. I. Co. *vs.* Clinton, 66 *id.*, 326; Powers *vs.* Clark, 127 *id.*, 417; Casoni *vs.* Jerome, 58 *id.*, 315; Baylies on Securities & Guarantors, 214; Burge on Suretyship, 218.")

In *Ort* vs. *Fowler* (Kan.), 2 Pac. Rep., 580, Judge Brewer (afterwards of the U. S. Supreme Court) discussed the instructions which had been laid down by the trial court (p. 582) and which were:

"2. 'The law is that where one or two innocent parties must suffer because of the fraud of another, that one must suffer who by his own negligence made it possible for the fraud to be committed. If, therefore, you believe from the evidence that defendant negligently signed the note in question under the belief that he was signing an ordinary contract for the agency for

the sale of certain wire-fence material in Halstead township, and delivered the same to the agent of Wilson, Parks & Company, and that said note was assigned to plaintiff for a valuable consideration, and before it became due, and he knew nothing of the fraud practiced upon defendant at the time of the purchase of said note, then plaintiff is entitled to recover the amount of the note and interest, and this regardless of the fact whether there ever was such a firm in existence as the firm of Wilson, Parks & Co. or not.' "

"3. 'If the note was procured from the defendant without any negligence on his part, by fraud or trickery, and without any consideration, then plaintiff cannot recover; but the mere relying upon the reading and word of a stranger, if such was the fact, would be evidence of such negligence on the part of defendant and would make him liable for the amount of the note in the hands of an innocent holder for value.' "

Judge Brewer affirmed the general proposition that when one or two innocent parties must suffer by reason of the fraud of a third, that one must suffer who, by his own negligence, made it possible for the fraud to be committed (p. 582), and then said:

"But the point of objection is in the affirmation that the mere relying upon the reading and word of a stranger is such negligence as will make the party so relying liable for the amount of the note in the hands of a *bona fide* holder."

He sustained the instructions of the trial judge and in doing so discussed the possible views entertained towards such a proposition and said (p. 583):

"A third is the view adopted by the trial court, that, as matter of law, one must be adjudged guilty of such negligence as to render him liable, who, possessed of all his faculties, and able

to read, signs a bill or note, relying upon the assurance of the reading of a stranger that it is a different instrument. We approve of the latter doctrine. It presents a case, of course, of which one of two innocent parties must suffer, but the *bona fide* holder is not only innocent, but free from all negligence. He has done only that which a prudent, careful man might properly do, while, on the other hand, the maker of the note has omitted ordinary care and prudence. A party cannot guard against forgery, but if in possession of his faculties, and able to read, he can know the character of every instrument to which he puts his signature, and it is a duty which he owes to any party who may be subsequently affected by his act to know what it is which he signs. By his signature he invites the credence of the world to every statement and promise which is in the instrument he has subscribed, and he is guilty of negligence if he omits to use the ordinary means of ascertaining what those provisions and statements are. If he has eyes, and can see, he ought to examine; if he can read, he ought to read; and he has no right to send his signature out into the world affixed to an instrument of whose contents he is ignorant. If he relies upon the word of a stranger he makes that stranger his agent. He adopts his reading as his own knowledge. What his agent knows he knows, and he cannot disaffirm the acts of that agent done within the scope of the authority he has intrusted to him."

He cited in support of the view approved by him the following: 1 *Daniel, Neg. Inst.*, Sec. 850; *Putnam* vs. *Sullivan*, 4 Mass., 45; *Douglas* vs. *Matting*, 29 Iowa, 498; *Chapman* vs. *Rose*, 56 N. Y., 137; *Shirts* vs. *Overjohn*, 60 Mo., 305; *Dinsmore* vs. *Stimbert*, 12 Neb., 433; S. C. 11 N. W. Rep., 872; *Mackey*

vs. *Peterson,* 29 Minn., 298; S. C. 13 N. W. Rep., 132; *Hopkins* vs. *Ins. Co.,* 57 Iowa, 206; S. C. 10 N. W. Rep., 605.

In *First State Bank, etc.* vs. *Borchers* (Neb.) 120 N. W., 142, a note in the hands of a *bona fide* holder was defended on the ground that the signature of the maker had been procured by fraud and upon the payee's representation that the note which he signed was a copy of an agreement relative to an option to purchase a farm gate. It appeared that the defendant could not read the English language and relied upon the payee's statement. The trial judge charged the jury that it was the duty of one signing his name to an instrument to read it, if he could read it, or, if he could not read at all, to otherwise learn the contents of the instrument he was signing so that he might not be imposed upon by fraud or sign a note that might cause innocent purchasers thereof to suffer. This instruction was approved upon the authority of a number of cases, among others *Mackey* vs. *Peterson, supra.*

In *First National Bank* vs. *Hall* (Mo.), 108 S. W., 633, the maker of a note who could sign his name, but who could not read or write, signed a paper which he supposed was an agreement for the sale of three hay bailers. At the time he signed it, he was told that he was being appointed an agent to sell a patent hay bailer and was told that the paper he was signing was a contract which had to be sent to the company so that they would forward the hay bailers. The maker's story was that the company's agent read a part of the paper to him, and without endeavoring to have any member of his family read it for him, he signed it upon the strength of the representations of the agent. His defense was overruled as against the *bona fide* holder of the note, the court saying (p. 634):

"His own testimony proved he did not even require Green to read all the paper he signed before he affixed his signature; and he said he thought Green said it was a contract. Such carelessness cannot be excused at the expense of an innocent holder of negotiable paper. No fact appears which mitigates defendant's negligence in not having the paper read to him by some member of his family who was present, or at least read in full by Green. Defendant was not shown to have been infirm in mind or body; but, on the contrary, was in full enjoyment of his faculties and of good intelligence. No relation of confidence or trust existed between him and Green, for all the circumstances show the latter was an entire stranger to defendant until this visit. We do not say that in every instance an illiterate man must ask some one, other than the party seeking his signature to an instrument, to read it before he signs it. In the case of one dealing with an old acquaintance and trusted friend carelessness might not be imputed if the signer was deceived by relying on the representations of the other party. The facts before us are different. It is generally, and we believe universally held to be inexcusable carelessness for a person who can read an instrument to sign it without reading; and in such instances the signer, if it is a negotiable note, cannot defend against an action brought by an innocent holder on the ground of fraud in procuring his signature. If a man cannot read, and members of his family are standing by who can, it is as easy to have them read a paper as it would be to read it himself; and certainly when he contents himself with a partial reading by a total stranger, he is in fault."

The court in support of its ruling cited the following cases, saying (p. 634) :

"Cases directly in point that such conduct as defendant's establishes negligence as a matter of law are Lindley *vs.* Hofman, 22 Ind. App., 237, 53 N. E., 471; Fisher *vs* Von Behren, 70 Ind., 19, 36 Am. Rep., 162; Baldwin *vs.* Barrows, 86 Ind., 351; Mackey *vs.* Peterson, 29 Minn., 298, 13 N. W., 132, 43 Am. Rep., 211; Citizens' Bank *vs.* Smith, 55 N. H., 593; Bedell *vs.* Herring, 77 Cal., 572, 20 Pac., 129, 11 Am. St. Rep., 307."

Keller vs. *Schmidt* (Wis.), 80 N. W., 935, was the case of a defendant, who was a German farmer and unable to read or write English, and to understand it but imperfectly when spoken, having signed a contract for lightning rods on his house and barn. The next day, under a threat that if he did not pay or settle it might cost him half his farm, he signed a paper which turned out to be a note. He testified that no one read it to him, that he could not read it and that he did not ask any one to read it for him. The court held that he was guilty of such negligence as to preclude any successful defense, relying upon *Mackey* vs. *Peterson* among other cases.

Another case of the same general character is *Brown* vs. *Feldwert* (Ore.), 80 Pac. Rep., 414. There the court directed a verdict for the plaintiff, a *bona fide* holder, which was affirmed. The defense was that the defendants were induced to believe through the fraudulent statements of a Dr. Meyers that they were signing an agreement to pay the money upon a consideration which never came to pass, and not a negotiable instrument. The court by Wolverton, *C. J.*, in discussing the defense, said (p. 416):

"It is essential that the note was procured without the negligence of the maker. This much is established by the cases cited by appellants. Green *vs.* Wilkie (Iowa), 66 N. W., 1046, 36 L. R. A., 434, 60 Am. St. Rep., 184; Shenandoah National Bank *vs.* Gravatte (Neb.), 95 N. W.,

694; Keller *vs.* Ruppold, 115 Wis., 636, 92 N. W., 364, 95 Am. St. Rep., 974; Frederick *vs.* Clemens, 60 Mo., 313; DeCamp *vs.* Hamma, 29 Ohio St., 467. In Shirts *vs.* Overjohn, 60 Mo., 305, it was held that: 'Where it appeared that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a *bona fide* holder.' This case bears a marked analogy to the one at bar, and seems to state the concensus of judicial opinion upon the subject."

The court further, in commenting on a defense of this character, said (p. 416):

"The defendants have wholly failed to negative negligence on their part. The answer shows that Dr. Meyers conversed in their own language, was well dressed, and appeared to be a man of education and fair dealing, and therefore that they reposed confidence in him and took for granted what he read to them to be a true rendition of the instrument they were about to sign. It does not appear, however, but that they could read English, and could readily have informed themselves then and there of the real contents of the paper; and, having not done so, they were negligent, and the defense of fraud cannot, therefore, avail them as against an innocent holder.

Fisher *vs.* Von Behren, 70 Ind. 19, 36 Am. Rep., 162."

In the note to *Green* vs. *Wilkie,* 36 L. R. A. at page 437, it is said in discussing what is negligence:

"There is substantial agreement (in the cases) that signing the paper without attempting to learn its contents, will be negligence."

Many cases are analyzed including *Chapman* vs. *Rose,* 56 N. Y., 137; *Mackey* vs. *Petersen,* 29 Minn., 298; 43 Am. Rep., 211; *Fisher* vs. *Von Behren,* 70 Ind., 19; 36 Am. Rep., 162; *Williams* vs. *Stoll,* 79 Ind., 80; 41 Am. Rep., 604; *Douglass* vs. *Matting,* 29 Iowa, 498, 4 Am. Rep., 238; *Shirts* vs. *Overjohn,* 60 Mo., 305, which overruled earlier cases and has since been followed and approved in *Frederic* vs. *Clemens,* 60 Mo., 313, and in *Cannon* vs. *Moore,* 17 Mo. App. 92, and *First National Bank* vs. *Stanley,* 46 Mo. App. 440.

In discussing the effect of statutes (p. 439) the note says:

"Some of the States have statutes permitting fraud to be set up in defense to a note in the hands of a *bona fide* holder. But the decisions under those statutes do not seem to be very different from those in States where no statutes exist. * * * The Minnesota statute avoiding the note in the hands of a *bona fide* holder, if it was procured by fraud, applies only if the maker did not intend to sign a note, or know that he was doing so. Yellow Medicine County Bank *vs.* Tagley, 57 Minn., 391; 59 N. W., 486."

See to the same general effect the discussion in the note to *Fargo Gaslight & Coke Co.* vs. *Fargo Gas & Electric Co.,* 37 L. R. A. at pages 598-599.

The danger of the Minnesota statute to the stability of negotiable paper unless a strict rule be enforced, is obvious. Under the Minnesota statute and the rule which it establishes as construed by the

Supreme Court of Minnesota in *Yellow Medicine County Bank* vs. *Tagley*, 59 N. W., 486, it is extremely easy, as was pointed out by the Court of Appeals of New York in *Chapman* vs. *Rose, supra*, for a maker desiring to escape his obligation to create a situation which would bring him within the rule. In the Tagley case the court said that "this statute applies only when the party believes that he is not signing a negotiable instrument at all."

A reading of the direct examination of the defendant will show how his astute counsel, in which he was aided by the liberal rulings of the trial judge in his behalf, in permitting leading questions, led the defendant to testify so as to bring himself within this Tagley case. In this connection he was repeatedly asked over our objection this question with reference to his signing of the notes:

> "When he told you this about the contract, did you or not believe what he said?" (p. 68, l. 2.)
>
> "When he told you that the lower paper was a copy of the contract, did you believe what he told you?" (p. 77, l. 31.)

Both of these questions were objected to and are set forth as sub-divisions g and h of the second general ground of appeal (p. 4, ll. 30-36).

These questions seem to me to be improper. They gave the defendant a chance to say the very thing which the jury were there to find under all the circumstances of the case, namely, whether the defendant did in fact believe when he signed the paper that he was not signing a negotiable instrument. The defendant had to establish the truth of that proposition to bring himself within the purview of the Minnesota statute. Of course, he would, if given the opportunity, say that he did not believe that he was signing a negotiable instrument. That was the very point of the case. The jury were there to determine that

question from all the facts and circumstances and the question should have been overruled.

One of the plaintiff's requests to charge was that there should be a verdict for the plaintiff (p. 316, l. 26). This request was complimentary to the motion to overrule the defense. If, as the cases show, the facts here did not establish a case where the defendant was free from contributory negligence under the Minnesota statute, then the motion to overrule the defense should have been granted, as well as the direction of a verdict for the plaintiff.

III.

The Trial Judge improperly excluded evidence, both oral and documentary, bearing upon the issues of any alleged fraudulent misrepresentation, trick or artifice imposed on the defendant in the signing of the notes, and also bearing upon his own negligence in signing such papers.

Under this heading may be grouped the questions asked and overruled, and set up in the first ground of appeal (p. 2) as sub-divisions d, e, f, g, h, i, k and n, also sub-division b of the fourth ground of appeal (p. 6, l. 6) that the trial judge ruled out a certain contract signed by the defendant Edward G. Freick & Son, and offered by the plaintiff and marked Identification G.

The story of the defendant with reference to the alleged deception practiced upon him in the signing of the notes was absolutely denied by Mr. Kubach, at whose instance he had signed the notes, and by Mr. Cole who was present when some of them were signed. The defendant's story was in substance that Kubach had represented to him that he should sign the agency contracts in duplicate, one to be kept by the defend-

ant, and one to be kept by Kubach, for his company; that after he had signed the first contract Kubach had turned up the corner of the one signed, exhibiting a line on a paper underneath for him to sign, and that he had signed the second paper assuming that it was the same as the first one.

On the other hand Kubach denied that he had any tablet (p. 180 and p. 189) or that he had turned up any corner (p. 183), and stated that he had talked to him to explain the matter in both English and German (the defendant is a German) (p. 181, l. 1), and that the matters were discussed at length and that the defendant saw the notes and knew absolutely what he was doing (p. 184, p. 188, p. 190, pp. 193-194). He was corroborated by the testimony of Cole, who participated in the last note which was signed on Sunday (pp. 234-235).

(It was admitted that under the laws of Minnesota the fact that one or more of the contracts or notes was signed on Sunday, did not affect the liability, and that that point had no place in the case (p. 115, l. 30).

In addition to the oral testimony there was admitted in evidence a letter addressed to the cashier of the bank and admittedly signed by the defendant, acknowledging the notes. It appears as Exhibit P. 6, page 325. (There are two exhibits P. 6; the other one is the first of the agency contracts.) It also appears as Exhibit P. 10 (p. 332) and is printed in full on p. 243, line 33. The defendant admitted that he had signed this paper (p. 112, l. 22).

A number of the errors which we claim were committed center around the contract Identification G.

It appeared that every time one of these notes was signed, there was signed at the same time an agency contract, and the notes were given to pay for the machines and molds which by the terms of these various contracts the Fence Machine Company agreed

to ship the defendant for use in his business as its agent in the territory referred to in the contract. After the defendant had signed the four notes and the four contracts which they accompanied, he and Messrs. Cole and Kubach, representing the Fence Machine Company, got together and made an entirely new arrangement. Under the arrangement which had existed up to that time as set up in the four agency contracts (Exhibits P. 6, P. 7, P. 8 and P. 9, pages 325-332), the defendant had been appointed the agent of the Fence Machine Company for certain specified territory. By Exhibit P. 6, Nobles county, Minnesota (p. 327, l. 5); by Exhibit P. 7, all of the State of North Dakota (p. 328, l. 27); by Exhibit P. 8, all of South Dakota, except two counties named (p. 330, l. 10); and by Exhibit P. 9, all of Minnesota, except eight counties specified (p. 331, l. 26). By the new arrangement these four contracts were cancelled, and the new one substituted therefor. The defendant conceded not only that he had signed this new contract, Edward G. Freick & Son (Identification G), but that it was to take the place of these other contracts (p. 110, l. 30).

It was the contention of the plaintiff as bearing upon the knowledge of the defendant in the signing of the notes, that he and his son Herman had virtually formed a partnership for the purpose of selling the Fence Company's machines and molds in the territory covered by the agency contracts, and that the defendant had fully acquainted Herman with the facts, and further that in order to furnish an opening for his son Herman, the defendant had given up the four agency contracts and in place of them had signed the special agency contract, Identification G., which he admitted he had signed Edward G. Freick & Son. The defendant did not produce Herman at the trial, and he denied positively that Herman knew anything about the contracts (p. 93, l. 17).

It became material, therefore, for the plaintiff both as contradicting the evidence of the defendant, and as tending to fasten knowledge on him, to establish the relationship of Herman in the matter. It seemed material, therefore, to cross examine the defendant upon the circumstances surrounding the signing of the special agency contract and of the relations of Herman to that general situation. Therefore, on cross examination (pp. 119-121) the following questions were asked:

> (P. 119, l. 15): "Didn't you on that day (the day Identification G. was signed), before that contract was signed, go out with this Mr. Augustine, who was one of Mr. Kubach's party, to see a man named O. Baake, to get him to sign a similar kind of contract and note to those others which you had signed?"
>
> (P. 119, l. 33): "Q Now on this Monday when you signed the special agency contract, isn't it true that Mr. Cole waited at your house with Mrs. Freick and Herman until you returned from some place where you had been?"
>
> (P. 120, l. 9): "Isn't it true that after this special agency contract was signed, your son Herman went with Mr. Cole on a tour occupying several weeks in the interests of this Fence Machine Company, of which you had taken the general agency contract?"

These appear as paragraphs f, g and h in the first ground of appeal (p. 2, ll. 18-38).

Each of these questions was overruled and objection noted. Their materiality seems to me to be obvious. If the defendant had answered in accordance with the fact, he would have had to admit that he went out with Mr. Augustine, one of the Fence Machine Company's men to secure Baake's signature to similar contracts and notes to the very

ones which he claimed he knew nothing about, and had signed under misrepresentation. He would further have had to admit that while he was gone on that errand Cole, another of the Fence Machine Company's men, together with his wife and his son and partner, Herman, were waiting for him to return to take up further business of the same general character with him, and further he would have had to admit that after he signed the special agency contract his son and partner, Herman, went with Mr. Cole on a tour occupying several weeks in the interest of the Fence Machine Company, the business of which involved the securing of contracts and notes similar to those which he had himself signed and afterwards repudiated.

The special agency contract (Identification G) was offered in evidence and overruled by the trial judge (p. 290, l. 26-p. 293). The exhibit is printed pages 333-334.

When this contract was first identified on cross examination by the defendant (p. 110) the court suggested that it could be offered in evidence if counsel for the defendant did not object (p. 110, l. 40). They did object, as appears from what the court said on page 238, line 25. When later at the suggestion of the defendant's counsel, the plaintiff endeavored to offer it in evidence, counsel objected, and the trial judge changed the attitude which he had taken earlier (p. 110, l. 40) and even tried to overrule it before it was even offered (p. 239, l. 28); and afterwards when it was formerly offered, overruled it altogether (p. 293).

It appeared from the testimony of Cole, who was present when this exhibit was signed (p. 236) that it was signed by Mr. Freick in the presence of his wife and his son, Herman, as well as Cole, and that Cole had been waiting for him until he returned from his trip with Augustine to interest Mr. Baake in the fence business (p. 236, ll. 22-36). Cole testified fur-

ther that the signing of this contract (Identification G) was preceded by a discussion and calculation as to the amount of the notes now in suit, and Cole stated to the defendant that the amount stated in the contract (G) equalled the amount of the notes previously given. (See testimony of Cole, pp. 238-242.) It further appeared that after the special agency contract had been signed (Exhibit G) the defendant surrendered to Cole the four agency contracts which he had previously signed contemporaneously with the notes (Exhibit P. 6, P. 7, P. 8 and P. 9), and that Cole afterwards turned them in to the company (p. 267, l. 26-p. 268, l. 3).

In fact by this contract (G) the defendant released the Fence Co. from the obligations of the earlier contracts (p. 334, l. 20).

In view of these facts the materiality of the special agency contract (Exhibit G.) becomes apparent; it took the place of the four special agency contracts which had previously been signed, and increased the scope of the agency of the defendant from an agent for a specified territory to a special general agent with power to appoint agents and to sell machines and molds anywhere in the United States where territory had not previously been assigned (p. 333, l. 15). It recited that it was between the Fence Machine Company and Edward G. Freick & Son, the son, according to the testimony of the plaintiff's witnesses, being Herman.

It recited a consideration of $4,520, which is the exact amount of the notes which had been given by the defendant upon the signing of the previous agency contracts. (There was an earlier note for $200 which was not the subject of this suit.) There is no suggestion that any additional note was signed upon the signing of this special agency contract. It recited that for this consideration of $4,520 (which was represented by these notes) the company agreed to ship

a certain amount of machines and molds and conferred a special agency upon the defendant and his son. At the time of the signing of this exhibit, the four previous contracts which were less extensive in scope, were given up by the defendant and surrendered to the company. Furthermore this special agency contract contemplated the taking by the defendant and his son as agents of the company, of contract and notes similar to those which he himself had previously signed (p. 334, l. 17).

The whole scope of the paper was such as to tend to fasten knowledge upon the defendant of the earlier proceedings with Kubach, and his associates. It tended to show his knowledge of the contracts which he had previously signed, his knowledge of the notes which he had signed contemporaneously with them, and generally to disprove his evidence that he had signed these papers ignorantly, that his son, Herman, knew nothing about them, and that he had been tricked into signing the notes. The exclusion of this paper from the jury must necessarily have been prejudicial to the plaintiff.

In this connection the trial judge overruled all offers of the plaintiff to show any facts or circumstances surrounding the execution of this Exhibit G or any subsequent use of it.

The attention of the plaintiff's witness, Cole, was directed to the surrender by Freick of the earlier contracts (Exhibits P. 6, P. 7, P. 8 and P. 9), and was then asked this question (p. 272, l. 16):

> "Q Did he give you any paper or anything in exchange for those contracts which he then gave up?"

The trial judge refused to permit him to answer the question, and exception was taken. It was designed to show by this from the admission of the defendant that he had given in exchange for those contracts this

contract G, and thus to further contradict him, as well as further emphasize the importance of that contract.

The plaintiff when on the stand in rebuttal testified to a conversation which he had with the defendant at the Rock County Bank some time after the bank had discounted the notes with reference to the notes in suit, in connection with which the evidence was as follows (p. 282, l. 5):

"Q Did Mr. Freick at that time ask for the notes, and say that the fence people had changed the contract on him and he did not like it and did not want to pay the notes?

Mr. Canfield. I object to it as incompetent, irrelevant, immaterial and not rebuttal and it is not for impeachment.

The Court. I will allow it.

A Yes, sir.

Q What else did he say at that time?

The Court. Oh, no, if you are going to contradict the witness, you will have to call his attention to what was said and then ask him. You can not put the whole case in again.

Q Did not Mr. Freick in connection with this conversation pull a contract out of his pocket and hand it to you?

Mr. Canfield. That is objected to as an attempt to contradict a witness on an immaterial point.

The Court. I will overrule the question."

Exception was taken to this ruling of the judge and the same is set forth as sub-division O of the first ground of objection (p. 3, l. 27). This exception is similar to one taken on the cross examination of the defendant when his attention was directed to the same incident, and he was asked: "And when you

said that you pulled this contract, Identification G., out of your pocket?" (p. 121, l. 30). This question also was overruled and exception taken (see ground of appeal, page 2, line 39). On the re-direct the trial judge did not even wait to find out what contract was referred to. As a matter of fact the contract, Exhibit G., was the one referred to, and if the question had been answered in the affirmative, as it would have been, it would have been proper to follow it up by showing that the defendant had at that time produced the contract, Exhibit G., in corroboration of his statement, as testified to by the plaintiff in the preceding question, that the fence people had changed their contract on him and that he did not like it. It would have appeared that this Exhibit G. was the very contract which the plaintiff testified that the defendant said had been changed on him. The establishment of this would have tended to show the defendant's knowledge of the previous contracts and notes which he had signed, quite contrary to his testimony in the case.

IV.

The Trial Judge committed error in permitting certain depositions taken by the Defendant to be read in evidence, and in overruling evidence designed to weaken the testimony of these witnesses.

The trial judge permitted the defendant to read in evidence the depositions of certain witnesses, namely, Olson, Harrison, William Martin, Lunde and Biss, all of whom claimed that they had been tricked by Kubach into signing notes without their knowledge. Their allegations were all denied by Kubach. The trial judge admitted this evidence (pp. 115-118) on the authority of *Crosby* vs. *Wells*, 44 Vr., 790.

I observe that there is no specific exception set forth in the record, but the reading of these depositions was preceded by a long discussion and argument, and it was perfectly apparent to the trial judge's mind that we objected to their reading (p. 116); particularly the deposition of Edward Biss, which we again called the court's attention to as improper (p. 177, l. 32, etc.). By the Practice Act of 1912, bills of exception are abolished. If the trial judge's attention is called to the point, that would seem to be enough.

In the Wells case the misrepresentations with other persons than the defendants were the acts of the plaintiff himself, or his agents (pp. 803-804), whereas in the case at bar the misrepresentations of Kubach, if in fact made, were in no wise connected with the plaintiff, who had no connection whatever with Kubach, and who was a *bona fide* holder for value of the notes in suit. I contend therefore, that these depositions were improperly read in evidence.

Whatever may be said in defense of the ruling of the trial judge as to the reading of the depositions of those who dealt with Kubach, there seems no defense of his admission in evidence of the deposition of Edward Biss. Biss had had no dealings with Kubach at all, but with one Augustine, who was not connected with the defendant Freick in any way in connection with the signing of the notes, and who had not figured in those transactions at all. There is no authority whatever in the Wells case to support the reading of the deposition of Biss.

In connection with the testimony of Biss, assuming it was properly read, the plaintiff on rebuttal was asked the following questions, which were overruled by the trial judge (p. 289, l. 16):

> "Q Do you hold any of the notes of Edward Biss?" (p. 289, l. 27).

"Q Do you hold any notes of Edward Biss made by him to the order of the National Fence Machine Company and endorsed by it?"

Exception was taken and the objections are set forth in the first ground of appeal as sub-divisions t and u (p. 4, ll. 1-8).

Had the plaintiff been able to prove that he held notes of Edward Biss, which he had taken as a *bona fide* purchaser, there would have been an explanation in the minds of the jury of the prejudice on the part of Biss against the plaintiff, which would have been proper for their consideration in weighing his evidence against the plaintiff.

In this same general connection with reference to the testimony of the defendant's witness Olson, the plaintiff was allowed in rebuttal to prove that he was the owner of certain notes of Olson, and was then asked the following questions, which were overruled (p. 288, l. 9):

"Q To whose order were the notes made which you hold?"

Page 288, l. 29:

"Are the notes which you hold notes made by Ole T. Olson to the order of the National Fence Machine Company, and endorsed by it?"

Exception was taken to the overruling of these questions, and they are set forth as sub-divisions r and s of the first ground of appeal (pp. 35-40).

These questions seem to be equally material with the questions asked Biss, and overruled.

V.

The Trial Judge erred in his charge to the jury in reference to the status of the plaintiff as an innocent holder, and in refusing the plaintiff's seventh request to charge.

There was no room for dispute but that the plaintiff was an innocent holder and a *bona fide* purchaser under the law. This was settled by the deposition of Mr. Daley, a Minnesota lawyer (p. 43, p. 130, and p. 176).

(At first the trial judge ruled out this deposition, but later reversed himself (p. 130) and it was read at p. 176, ll. 25-40.)

The charge of the trial judge proceeds upon the theory that the plaintiff was an innocent holder. This was so because he had obtained the notes from the bank, which, as the deposition of the cashier, Mr. Martin, conclusively showed, had taken the notes without notice of any infirmities (pp. 28-30), and Mr. Daley's deposition showed (p. 176, l. 25), that if the one from whom the plaintiff purchased the notes was a *bona fide* purchaser for value, before maturity and without notice, the plaintiff as his purchaser was entitled to all the rights of a *bona fide* purchaser.

Nevertheless in his charge to the jury the trial judge said (p. 305, l. 30):

> "It also appears in the case that the bank which first took these notes from the fence company, discounted them in the regular course of business. The cashier says that at the time he took them he knew of no taint affecting the notes whatever; he supposed they were regular notes and he discounted them. They afterwards passed into the hands of the plaintiff; he claims to have been an innocent holder, but he says when he

was upon the stand, that before he took the notes, 'I knew about what the defense was or something about it'; so although in the eye of the law, having taken the notes from an innocent holder for value, if the case was in New Jersey he would be deemed an innocent holder although at the time he took them he knew there was some taint attached to the notes, and although morally perhaps, he took these notes, knowing there was some taint attached to them, and although legally he is in the position of an innocent holder, it is a circumstance you have a right to take into consideration in deciding this case, whether at the time he took them they were tainted with fraud or not."

In this connection the plaintiff had requested the judge to charge the seventh request, which was refused, and which read as follows (p. 317, l. 30):

"7. Under the law of Minnesota the plaintiff is entitled to the benefit of the innocent purchase of the notes in suit by the Rock County Bank and if the jury find that the Rock County Bank did in fact purchase said notes *bona fidely* and without knowledge of any infirmity in them, the plaintiff is entitled to the benefit of such innocent purchase by the bank and the fact that at the time he purchased them he knew of the infirmities now claimed by the defendant is of no avail to the defendant as against the plaintiff in this suit."

In refusing to charge as requested and in charging as he did, the trial judge took a most inconsistent position, which must have been confusing to the jury and prejudicial to the plaintiff. On the one hand he told the jury that the plaintiff was legally in the position of an innocent holder, and on the other hand, he told them that morally he was not in the position of an innocent holder, and that the jury had a right

to take into consideration in passing upon the plaintiff's legal rights the moral question of whether at the time he took the notes they were tainted with fraud or not. If the plaintiff was in fact legally an innocent holder, as he was, he was entitled to the benefit of that position before the jury. The jury, even it were legally possible for them to do so, could not be expected to sift out the legal and moral positions of the plaintiff as the holder of the notes. If the questions relating to the alleged fraud as applied to the plaintiff as an innocent holder could not be used against him legally, the trial judge had no right to tell the jury that they could be used against him morally. The plaintiff stood before the court and jury on his legal rights. If in the eye of the law he was an innocent holder, then he was entitled to the benefit of that position, and the trial judge had no right to instruct the jury that they could consider any other than his legal position in the matter.

VI.

The Trial Judge committed error in his charge to the jury in telling the jury that the evidence was that the Defendant knew nothing about any of the notes until he had signed them all, and they had turned up in the hands of the Rock County Bank.

One of the chief issues in this case under the Minnesota statute was whether the defendant had signed the notes knowing them to be notes. There was a great deal of evidence on both sides of that question, and if the Minnesota statute is properly in the case, this particular question was under the evidence purely a jury question.

The charge of the trial judge on this question was confused and contradictory. At times he seemed to

leave it to the jury to say whether or not the defendant did have knowledge of what he was signing, and at other times he told them that the defendant had no knowledge until after the notes had been signed and discounted at the bank. For example, the trial judge charged (p. 307, l. 16):

> "Now whether he had such knowledge or not is a question that you gentlemen must determine. You recollect his testimony, as to the way in which he says this second paper, which turned out to be the note, was signed; that the contract was upon the top and this note was under it and they turned the edge of the contract up so that he saw nothing but the line and he was told that that was a duplicate contract which had to go back to the company, and on the strength of that he signed it and that he did not know, his testimony is, that he had signed the notes until afterwards when they turned up in the Rock County Bank."

In that part of his charge his statements about the notes having turned up in the hands of the Rock County Bank was prefaced by the statement that it was the testimony of the plaintiff, so that standing by itself it is probably unexceptionable, but later on in his charge he said this (p. 309, l. 33):

> "The mere fact that he signed four different sets of notes can be no reflection upon the defendant in this case unless the evidence shows that before he signed some of the subsequent ones he knew that he had been tricked in signing the prior ones. There is no evidence of that sort in this case, because the evidence is that he knew nothing about any of the notes until he had signed them all and they all turned up in the hands of the Rock County Bank. So that is a matter you have a right to take into consideration in saying from the testimony in this case, with the defendant's knowledge of the business, with his knowl-

edge of the world, whether he was acting as a careful, prudent man," &c.

His language here is quite positive. He says in so many words that there is no evidence in the case that the defendant knew that he had signed any of the notes until after they were all signed, and he does not say that it is the defendant's evidence that he knew nothing of the notes until they turned up in the hands of the Rock County Bank. He says "*the* evidence is" that he knew nothing of the notes, etc. This is in marked contrast to the previous part of his charge and must have had its effect upon the jury, especially coming, as it did, toward the close of his charge. It was tantamount to the judge's eliminating from the jury any consideration of the question of the defendant's knowledge in signing the notes, and leaving the question of contributory negligence as the only question in the case. Under the evidence in the case one of the fundamental questions was whether the plaintiff knew that he had signed the notes at the time he signed them, and the charge of the judge was necessarily prejudicial to the plaintiff.

VII.

The Trial Judge committed error in charging the jury that the Plaintiff's letter of September 28th, 1908, to the Rock County Bank (Exhibit P. 6, page 325), did not help the Plaintiff at all if the notes had already been obtained by fraud.

In his discharge to the jury the trial judge said (p 311, l. 2):

"Mind, at the time this was given, if the notes had already been obtained by fraud, this did not help the plaintiff at all, because the defendant had a right to invoke the protection of that stat-

ute—and if in your judgment those notes were obtained by fraudulent representation, trick or artifice and if the defendant was not guilty of negligence in signing them in the way in which he signed them there, no matter what happened afterwards, under the Minnesota statute the defendant has the right to ask you to give him a verdict."

This can hardly be correct. Even assuming that the defendant's signature to the note was obtained by fraudulent representation, trick or artifice, and that the defendant was not guilty of negligence in signing them in that way, nevertheless a great many things which happened afterwards, might, under the Minnesota statute, disentitle the defendant to a verdict. For example, he might have waived the fraud, assuming it existed, after it had been called to his attention; or he might, by other circumstances, have been put on notice of the previous fraud, assuming it existed, in such a way that his subsequent actions would constitute a waiver. The history of the signing of this letter is set forth on page 243 of the printed book and the letter itself reads as follows:

"Luverne, Minn., Sept. 28, 1908.

Mr. Martin, Cashier,
Rock County Bank,
Luverne.

Dear Sir:

This is to certify that I have had some business dealings with Chas. Kubach, General Manager of the National Fence Machine Co., of Abilene, Kans.; also with the Company for which I have given my notes.

This will advise you that the business done is entirely satisfactory with me and that it will be

perfectly agreeable with me for you to handle my notes.

Very respectfully,

(Signed) ED. G. FREICK."

The defendant admitted that he had signed this letter, and it was a fair question for the jury whether, in so signing, he had not waived the fraud, of which he complained, in the signing of the notes. Certainly it was not proper for the trial judge to have told the jury that the subsequent signing of this letter, nor anything else which happened afterwards, would in no way help the plaintiff, if the signature to the notes had, in fact, been obtained by fraud.

I respectfully contend that the record sent up shows that errors were committed prejudicial to the rights of the plaintiff, and that the judgment for the defendant should be reversed.

Respectfully submitted,

CONOVER ENGLISH,

Of Counsel with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

RAY B. HINKLY, Appellant, vs. EDWARD G. FREICK, Appellee.	On Appeal From New Jersey Supreme Court.

BRIEF FOR APPELLEE.

THE MINNESOTA STATUTE WAS ADMISSIBLE AS A DEFENSE IN THIS ACTION.

The first point in the brief of counsel for appellant is that the Trial Judge committed error in permitting the Minnesota Statute to be set up as a defense, which statute reads as follows:

> "No. 2747. INSTRUMENTS OBTAINED BY FRAUD.—No person, nor his heirs or personal representatives of any person whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law Merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it

to be a bill of exchange, promissory note, or other paper negotiable under the Law Merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

The appellee relied upon this Statute as a defense to this action and in support of his contention as to the facts in this case and the law applicable thereto relies upon *Hinkly* v. *Freick* (the same parties as in the case at bar) decided by the Supreme Court of Minnesota and reported in 127 N. W., page 940, a copy of which opinion is herewith set forth in *toto* because of its importance, both as to the construction of the Minnesota Statute, its admissibility and its application to the merits in the case at bar.

"*Hinkly* v. *Freick.*

(Supreme Court of Minnesota. Sept. 30, 1910.)
(Syllabus by the Court.)

1. BILLS AND NOTES (par. 329*)—ACTION AGAINST MAKER—DEFENSES—FRAUD.

The common-law rule that the fraud of the payee of negotiable instruments in securing its execution and the knowledge thereof by the purchaser before maturity is a good defense to an action against the maker was not modified nor repealed by Section 2747, Rev. Laws 1905.

(Ed. Note.—For other cases, see Bills and Notes, Dec. Dig., Par. 329*.)

2. BILLS AND NOTES (par. 329*)—ACTION AGAINST MAKER—DEFENSES—FRAUD.

That section created a new and different defense in cases where the signature to the negotiable instrument was fraudulently obtained by trick or artifice as to the nature and terms of the contract, and where the maker did not believe the paper signed to be a negotiable instrument and was not negligent in signing it without knowledge of its terms.

(Ed. Note.—For other cases, see Bills and Notes, Dec. Dig., par. 329*.)

3. BILLS AND NOTES (par. 489*) ACTIONS—ADMISSIBILITY OF EVIDENCE.

In this case the Trial Court erred in excluding evidence of knowledge by the purchaser of the negotiable instrument before its maturity concerning fraudulent means claimed to have been employed in obtaining the signature to the instrument.

(Ed. Note.—For other cases, see Bills and Notes, Dec. Dig., par. 489*.)

4. EVIDENCE (par. 138*)—COMPETENCY—SIMILAR FACTS—SYSTEMATIC INTENT TO DEFRAUD.

Ordinarily, evidence of similar but unconnected facts is properly excluded. An exception, however, is recognized where the evidence is designed to show systematic intent to defraud.

(Ed. Note.—For other cases, see Evidence, Cent. Dig., pars. 414, 414½; Dec. Dig., par. 138.)

5. EVIDENCE (par. 138*)—COMPETENCY—SIMILAR FACTS—SYSTEMATIC INTENT TO DEFRAUD.

In this case it was error to exclude evidence that the payee of a promissory note alleged to have been

procured by fraud had acted in pursuance of "systematic method" and had perpetrated "other similar fraudulent practices in obtaining other persons to sign notes."

(Ed. Note.—For other cases, see Evidence, Cent. Dig., pars. 414, 414½; Dec. Dig., par. 138*.)

Appeal from District Court, Rock County; JAMES H. QUINN, Judge.

Action by R. B. Hinkly, substituted for the Rock County Bank of Luverne, against Ed. G. Freick. Judgment for plaintiff, and defendant appeals from an order denying a new trial. Reversed, and new trial ordered.

E. H. Canfield, for appellant. A. J. Daly, for respondent.

JAGGARD, *J.*: This was an action to recover on a promissory note, with interest, sold and indorsed for value in the ordinary course of business to a bank for which plaintiff was substituted. The defendant answered claiming that his signature was obtained by fraudulent representations, trick, and artifice, as to the nature and terms of the instrument so signed by him; that at the time of signing the same he did not believe it to be a bill of exchange, promissory note, or other negotiable paper; and that he was not guilty of negligence in signing such paper without knowledge of its terms. Defendant is a German by birth and education and imperfectly acquainted with the English language. The fraud and trick charged to have been practiced in securing the defendant's signature to the note consisted in inducing the defendant first to sign a contract of agency for the sale of wares of the National Fence Machine Company, which contract was part of a tablet of papers, and underneath which contract was fastened the note in suit which was kept concealed from view. After the

contract had been signed, the agent of the fence machine company, the claim is, raised the lower right-hand corner of the contract so signed exposing a place for signature on the paper beneath and told the defendant that the paper beneath was a duplicate of the contract just signed, and which the defendant should sign for the company to retain; only the corner of the lower paper, the place for signing, was exposed, and the defendant, believing the representations made to be true, signed his name thereon in ignorance of the true character of the instrument, and without seeing the face of it. The case was tried before a jury. A verdict was rendered in favor of the plaintiff. This is an appeal from an order denying a motion for a new trial.

1. The first assignment of error is that the Trial Court improperly sustained plaintiff's objection to the cross-examination of the witness intended to show want of good faith on the part of the bank in purchasing the note and the notice and knowledge on the part of the bank officials of fraud claimed to have been practiced on the defendant in obtaining his signature thereon. This Court has frequently expressed itself as being averse to reversing a decision of the Trial Court because of error in rulings as to mere evidence. In cases where the objection raised is technical, as generally happens, and does not show substantial prejudice, the propriety of this course is obvious. In this case, however, the ruling on evidence prevented defendant from establishing a substantial defense. The evidence having been excluded, no charge to the jury with respect thereto would have been appropriate, nor could defendant be properly required to have requested any charge with respect thereto.

That the fraud of the payee of the promissory note in securing its execution was known to his vendee at the time of its purchase before maturity undoubtedly is a good defense at common law. *Per contra* a vendee who purchases a negotiable instrument for value in the ordinary course of business in good faith and without knowledge of fraud in its execution can enforce the note though voidable as between the parties. The question then arises as to the effect upon this defense of Section 2747, Rev. Laws 1905. That section reads:

> "Instrument obtained by fraud. No persons, nor the heirs or personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick or artifice as to the nature and terms of the contract so signed, that at the time of the signing he did not believe it to be a bill of exchange, promissory note or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to the jury."

We are of opinion that this statute did not extinguish, repeal or modify the common-law defense, but added a new and additional defense. No term of the statute indicates any intention to affect the

common-law defense by abolishing or modifying it; intention to repeal it by implication, not favored by the law, in no wise appears. The two defenses differ in this: Under the common law plaintiff must prove fraud in obtaining the note and knowledge by the purchaser of that fraud. Where the maker of the note was negligent, the rule would not be altered; for negligence is no defense to fraud. Under the statute the defendant would not have to prove knowledge of the fraud by the purchaser for value, but would have to prove that the maker of the note was not guilty of negligence.

Accordingly, the exclusion of the evidence was error unless the allegations of the pleadings were not sufficiently broad to permit the introduction of the common-law defense. The answer set forth: "That this defendant was prevented from examining said second printed paper by the aforesaid fraudulent representations, trick and artifice. That if said defendant did sign said 'promissory note,' he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the law merchant at the time he signed the same. That this defendant was not guilty of any negligence in signing said paper without knowledge of its terms. That the plaintiff, and its officers and agents, had due notice and knowledge of the aforegoing facts before the alleged transfer of said 'promissory note' to plaintiff." Under this statute, if the defendant proved the fraud and knowledge thereof by the bank, he brought his case under the common-law rule. If he failed to prove such knowledge, but did prove the fraud, and "that this defendant was not guilty of any negligence in signing the paper without knowledge of its terms," then he brought himself within the statute. The conclusion follows that it was prejudicial error to exclude the evidence.

"2. It is also assigned as error that the Trial Court erred in excluding testimony designed to show that the payee of the note perpetrated the fraud on plaintiff in pursuance of a 'systematic method' and to show 'other similar fraudulent practices in obtaining other persons to sign notes.' It is true that that question asked and overruled was not accompanied by an offer to prove, as is ordinarily required in order that the excluded evidence may be held to justify reversal. The Court, however, expressed itself as understanding the controversy, so that the ordinary rule does not apply. The ruling we think constituted reversible error. As a general proposition the *maxim res inter alios acta* applies. Under the ordinary rule this evidence should have been excluded. There is, however, a well-recognized exception in the case of fraud. Fraud opens wide the door for all fairly relevant evidence including evidence as to similar but unconnected facts in order to show systematically fraudulent intention on the part of the party sought to be charged. Chase's Stevens on Evidence, arts. 10-13, pp. 36-54.

"Another error is assigned but is not material in view of the fact that a new trial must be had. It is so ordered.

"Reversed, and new trial ordered."

Counsel for the appellant has cited numerous cases purporting to bear upon the admissibility of this statute. We do not think any of his citations, except that of Story on Conflict of Laws, Sections 317 and 332 (cited on page 18 of his brief) are applicable to the matter under consideration. They all agree that the *lex fori* governs the remedy and the method of proof, but that the *lex loci contractus* governs matters relating to the merits and rights of the parties.

We contend that whether or not this defense is admissible in this suit relates to the merits of the case and the rights of the parties.

The following quotations and references, we think, show without doubt that this defense is admissible in a trial here and that the *lex loci* governs the admissibility of the defense to the notes. The defense was that the signature was obtained by fraudulent representation, trick or artifice as to the nature and terms of the contract signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note or other paper negotiable under the law merchant and that he was not guilty of negligence in signing such paper without knowledge of its terms and that the question of this negligence under the statute was a question for the jury.

> "The *lex fori* may be first eliminated as the governing law with respect to the nature and extent of the obligation assumed by the maker or acceptor; in other words, with respect to the liability of, and the defense available to, the maker or acceptor, so far as matters of substance are concerned."
>
> *Wharton on Conflict of Laws,* 3rd Ed.. Sec. 451b.

In support of this text Wharton cites the following cases from which we either quote or give points involved in the cases.

Where promissory notes were executed in Louisiana but were made payable in Mississippi and indorsed in Mississippi and the endorsee sues in Louisiana, the law of Mississippi and not that of Louisiana must be the law of the case.

> *Brabston* v. *Gibson,* 9 *Howard* (*U. S.*), 263.

Where a note was made in Kentucky, the laws of which State allow the same defense to be made against a note in the hands of an assignee whether assigned before or after it becomes due, that may be made against the original holder or payee, and suit was brought upon said note in Illinois, against the administrator of the maker, who had removed to this State: Held that the laws of Kentucky at the time of the making and assignment of the note should be the rule of decision and the defendant might avail himself of any defense that he could have availed himself of, if the suit had been prosecuted in Kentucky.

> "The existing laws of Kentucky at the time of making and assigning the notes, form a portion of the contract when made, and the liability of the maker should be determined thereunder."
>
> "We are equally well satisfied that the fourth plea setting up a defense under the laws of Kentucky which was clearly available there, should be permitted in our Courts and that a change of residence of defendant has not changed his rights, or those of his representatives under a contract made under and with reference to those laws."

(Plea was that notes were executed without any consideration, as well when notes were assigned before, as after they became due.)

Stacy v. *Baker,* 2 *Ill.,* p. 417.

A note was made and indorsed in Ohio. Held that the law of Ohio as to the rights of the indorsee govern.

Smith v. *Blatchford,* 2 *Ind.,* 184.

Where bill of exchange had been purchased in New York and accepted there and acceptance had been obtained by fraud, and without consideration, and holder bought it *bona fide* without any knowledge of fraud, an action in Connecticut, the law of New York governs—he may recover only such damages as allowed by law of New York which was amount actually paid.

Roe v. *Jerome,* 18 *Conn.,* 138

"When a note is made and indorsed in one country, and is sued upon in another, the indorsee's title depends on the *lex loci contractus.*"

Yeatman v. *Cullen,* 5 *Blackf.,* 240 (*Ind.*).

The laws of a State where a promisosry note is made and assigned, must govern as to the validity of the defense to a suit brought on the note in another state, by the assignee against the maker.

Ibid.

If contract is executed in any particular state, then the statutory law of that state fixing the character of such contract and denying the right to make certain defenses to it becomes a part of the contract.

Stevens v. *Gregg,* 89 *Ky.,* 461.

Note made and payable in Kentucky, suit in Massachusetts: Held executed in and to be governed by the law of Kentucky which provided that subjected in hands of indorsee to any defense the maker has against the payee before notice of transfer.

Shoe & Leather Bank v. *Wood,* 142 *Mass.,* 563.

Note made in Vermont. Suit in New Hampshire: Question of whether another note by way of set-off could be put in must be according to law of Vermont.

Bliss v. *Houghton,* 13 *N. H.,* 126.

Question of whether payment to payee before maturity on New York note can be set-off in suit by indorser in Vermont. Settled by New York law.

Harrison v. *Edwards,* 12 *Vt.,* 648.

> "But suppose a negotiable note is made in one country and is payable there, and it is afterwards indorsed in another country and by the law of the former country equitable defenses are let in in favor of the maker, and by the latter such defenses are excluded: What rule is to govern in regard to the holder in a suit against the maker to recover the amount upon the endorsement to him? The answer is, the law of the place where the note was made: for there the maker undertook to pay: and the subsequent negotiation of the note did not change his original obligation, duty or rights."

Story on Conflict of Laws, Sec. 17.

See also:

Randolph on Commercial Paper, Secs. 38 & 50.

See also:

Kimball v. *Kimball* (*N. H.*), 73 *Atl.,* 408 and cases cited therein.

See also:

Spies v. *National City Bank,* 61 *L. R. A.,* p. 207. Note b.

The question of interest is governed by the *lex loci.*

Freece v. *Brownell,* 35 *N. J. L.,* 285.

It bears an analogy to the question of the liability of a married woman on her contract which liability is governed by the *lex loci.*

Wright v. *Remington,* 41 *N. J. L.,* 41-52.

The Court of Minnesota in the case of *Hinkly* v. *Freick* (127 *N. W. Reporter,* p. 940) (copied *Ibid.*) construes this Minnesota Statute.

The construction of the Courts of a state where a statute exists, will govern our Courts in its construction.

Alleghany Co. v. *Allen,* 69 *N. J. L.,* 270.
Roubiech v. *Haddad,* 67 *N. J. L.,* 522.

There is no doubt therefore that this statute was admissible in evidence as a defense to this action.

This statute is a defense to the note in the hands of any person even a *bona fide* purchaser and was passed after the decision of *Mackey* v. *Peterson,* referred to in the brief of appellant.

The plaintiff was not a *bona fide* purchaser of this note without notice of any defense to which it might be subject in his hands by the defendant. Shortly after the Rock County Bank became possessed of these notes they notified the defendant that they held the notes and he thereupon called at the bank and there saw the plaintiff as testified by

Mr. Martin, the cashier, the plaintiff being the President of the bank, but Martin did not hear the defendant's reply (p. 31, l. 31).

Defendant says he called about September 29th (p. 81, ll. 35-40) and then details an interview he had with Martin, the cashier of the bank, which held the notes and by whom they were afterwards disposed of to the plaintiff herein and which interview he says was overheard by the plaintiff (pp. 82, 83), in which he said, "I never know when I give any notes," and Mr. Martin said they were left for collection and defendant replied, "I told him not to buy them. The notes were no good. I would not pay them," and Hinkly, the plaintiff herein told him he had better go and see these men, referring to the payees of the notes (p. 84, ll. 30-40 and p. 85, ll. 1-10).

So that the jury had a right to find if they believed this evidence that the plaintiff herein took these notes from the bank of which he was President with knowledge that their validity and legality was and would be disputed by the defendant herein and that he would claim the protection of the Minnesota statute herein referred to.

THERE WAS NO ERROR IN DENYING THE PLAINTIFF'S MOTION TO OVERRULE THE DEFENSE AND IN REFUSING HIS THIRD, FOURTH, FIFTH AND SIXTH REQUESTS TO CHARGE.

The application to overrule the defense (p. 302) is on the ground that the facts proven did not under the statute entitle the defendant to go to the jury. This is statutory, for the statute provided that on the question of whether the defendant was guilty or negligence in signing the paper. "The question of negligence in any suit on such contract shall in

all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

This, therefore, is a plain mandatory statutory direction to the Trial Court so that whatever may have been the weakness of the defense, the Judge was bound to leave the question of negligence to the jury, because that was an essential part of the statute and was a part of the very defense to which he was entitled thereunder.

O'Gara, King & Co. v. *Hossing,* 88 *Minn.,* 401.

The parties to this suit, it must be borne in mind in considering this point and the question of the admissibility of the statute, are citizens of Minnesota. The notes were executed, indorsed and made payable in Minnesota where the defendant had a right to expect that he would be called upon to meet the issue and not that he might, by some hap-hazzard chance be caught in this State and sued by a citizen of Minnesota upon a Minnesota contract and service made upon him while passing through this State, returning to his home from a trip to Europe.

In considering the request to charge it must be borne in mind that the jury had a right to find under the testimony of the defendant (pp. 59 to 78, 13th line inclusive) that he was satisfied as to the execution of the original contract of agency and signed the second paper which he says was immediately beneath the contract in pad form under the belief and upon the representation that it was a duplicate of the original contract on top whereby in each instance it turns out to have been a promissory note.

It does not present the case of a defendant executing a contract which he had before him which he could not read about whose terms he was misled. He took such steps as satisfied him as to the contents of the first paper he signed and signed the second paper upon the assumption that it was a duplicate, so that the cases cited by the appellant would have no force in this case even in the absence of this statute. To have charged as requested, would have been to have violated the plain terms of the statute and taken the question of the negligence of the defendant from the consideration of the jury.

In his brief (p. 23) counsel says that the Trial Judge nowhere left it to the jury to say as a matter of fact whether the defendant believed that the paper which he was signing was a promissory note.

We think in making this statement, counsel overlooked a portion of the charge to the jury, a portion of which is found on page 307, line 10, reading as follows:

> "The defendant says at the time that he signed this contract and the others which are in evidence, he thought he was taking an agency for the sale of the product and of the fence company and that he had no knowledge that he was signing a note. Now, whether he had such knowledge or not is a question that you gentlemen must decide. You recollect his testimony," etc.

The quotation from the charge of the Court as to negligence (top of p. 24 of appellant's brief), is correct, but does not give the whole of the charge upon the question of negligence. In any event the extract there quoted sums up the situation in a nut shell because if he did not exercise the ordinary

prudence of a reasonable man he was of course negligent. It was but the reverse of the statement that he must not have been negligent. The Court further says (p. 309, lines 20 to 28) just preceding this quotation,

> "But there is another question which you have got to consider in this case and that is whether or not, if he signed by false representation, trick or artifice, he was guilty of negligence, because this statute says that he must show that he was not guilty of negligence in signing such a paper without knowledge of its terms."

Further on page 310, line 15, etc., the Court said:

> "Because if he was negligent the statute says he cannot come into Court and set up the defense."

The Court further says, page 312, lines 11-16:

> "But if you find that the defendant knew what he was signing or if he did not know, he was guilty of negligence, then I say to you under the law the plaintiff is entitled to a verdict for the full amount of the claim."

The criticism of the part of the charge (310, line 1, etc., top of p. 24 of appellant's brief) that defendant knew nothing about the notes until he signed them all, is not well founded when taken into consideration with the context of that part of the charge. The Judge was speaking of the claim of the defendant that he knew nothing of these notes and of course the jury understood that if they believed the evidence of the defendant at all, he knew nothing of these notes. There is no evidence that

his attention was called to any of them until they all turned up in the Rock County Bank.

The questions put to the defendant as to whether he knew he was signing a note as set forth in page 40 of appellant's brief and printed case, page 68, line 2; page 77, line 31, were of course pertinent and proper. It was proper to ask the defendant this question as to his knowledge. If he did know that would end the case. If he said e did not know, it then left it for the jury to pass upon the truth of his statement. It would be on the same principle that a defendant charged with larceny could not be asked in direct examination whether he was guilty of the charge as appellant's counsel argues that would be the question which the jury were there to decide.

The request to direct a verdict for the plaintiff was in contravention of the statute as we have heretofore pointed out.

TRIAL JUDGE DID NOT IMPROPERLY EXCLUDE EVIDENCE BEARING UPON THE ISSUES OF THE QUESTIONS OF FRAUDULENT MISREPRESENTATION, TRICK OR ARTIFICE IMPOSED ON THE DEFENDANT IN THE SIGNING OF THE NOTES.

As to the letter addressed to the cashier of the bank, page 6, the defendant testifies, pages 297-298, that it was explained to him that when they told him about this letter that he said he had never signed any notes and they then told him that those notes referred to notes which he, as agent of the company was to take for the company, from the customers and take to the bank. This letter could not affect the question of the character of the bank as a holder because the bank had already purchased these notes when this letter was supposed to have been signed.

As to Exhibit G for identification, this was also signed September 28, 1908, after all the notes had been given. And, therefore, could be of no evidential value as to the issue of the manner in which the notes were signed. The only issue in this case is whether he was tricked into signing these notes and whether he was guilty of negligence. If anything, this contract would have shown an additional fraud perpetrated upon the defendant because this purports to express a consideration of Forty-five hundred and twenty dollars, whereas the four contracts which appellant claims were superseded by this contract, expressed no consideration. Under those agreements he simply agreed to do so much business for the company and no giving of notes was mentioned in the other contracts.

If it was error not to admit "G" it was certainly not prejudicial to the interests of the appellant.

This Exhibit G for identification makes no reference to any notes that up to that time had been signed by the defendant and therefore was of no evidential value in favor of the appellant.

We do not see the materiality of questions which appellant claims would go to show that defendant's son Herman had knowledge that Exhibit G for identification was to take the place of the four original contracts. As we said before, the only issue in the case was whether defendant knew he signed the notes or whether he was tricked into signing the notes. The attempt to show that his son knew about certain contracts in which no reference to notes was made does not seem to us to be evidence which would shed any light upon this issue.

The defendant says in relation to all these contracts that he asked Mr. Kubach and Mr. Cole what would happen under his contracts if he did not sell a sufficient number of machines and he was advised that the only penalty would be that he would lose

his contract, but there was no mention of any notes (see p. 77, ll. 1-12, inc., and p. 65, ll. 5-14, inc.).

With reference to the questions overruled and referred to on page 44 of appellant's brief, the most of this evidence was supplied by the defendant in his direct examination on rebuttal, page 294 in which he admits going to see Baake with Augustine (p. 295, ll. 30-40), that Cole awaited them on their return.

The questions referred to on page 48 of appellant's brief were properly overruled for the reason given by the Court and also because they were not rebuttal. Rebuttal must be a specific denial of an allegation of a witness for the defense.

THE DEPOSITIONS TAKEN BY THE DEFENDANT WERE PROPERLY ADMITTED BY THE COURT.

These depositions were admitted upon the theory that they all showed that in the general conduct of this business the same identical fraud in the same identical manner had been perpetrated by these fence men upon these other witnesses during the same period.

They were properly admissible.

Crosby v. *Wells*, 73 *N. J. L.*, 790.

The appellant claims that that case is not parallel to the case at bar because in that case these so-called connected acts were those of the plaintiff. This position is not tenable in this case. There is no claim of any acts on the part of the plaintiff so far as the original fraud upon the defendant is concerned. He suffered so to speak (although not innocently) because of the fraudulent conduct of the payee of the note. Evidence of the acts of this payee similar to the acts under investigation in

the case at bar go to show his knowledge, intent and design just as surely as though he were the plaintic. The issue in the case at bar is the knowledge, intent and design of the payee in the notes and the same payee was to be found in all the notes given by these other defrauded witnesses.

See also:

Hinkly v. *Freick,* 127 *N. W.,* 914.
Yakina Bank v. *McAllister* (*Wash.*), 79, *Pac. Rep.,* 1119.

Appellant objects specifically to the deposition of one Biss because he dealt with one Augustine instead of with Kubach with whom the defendant herein and the other witnesses had dealt. But the evidence shows that they were engaged in a common operation and during the taking of the deposition of Biss and referring to Augustine and Kubach, Mr. Daly then appearing for the plaintiff herein said, "We don't question that they were working together," page 163, lines 1 and 2.

The questions, page 289, addressed to the plaintiff as to whether he held notes of this witness Biss (referred to in appellant's brief, pp. 50-51) were properly overruled because they were not rebuttal and because they were not admissible until those questions had been first put to Biss and he had been given an opportunity of explaining the situation.

The question overruled, page 288, line 29 (appellant's brief, p. 51) was properly overruled for the reasons given by the counsel in making the objection.

THERE WAS NO ERROR IN THE CHARGE IN REFERENCE TO THE STATUS OF THE PLAINTIFF AS AN INNOCENT HOLDER.

We had, heretofore, pointed out why, in our judgment the plaintiff was not a *bona fide* purchaser without notice.

The plaintiff did say (p. 25, lines 18-20):

> "Q. And at the time you acquired these notes from the bank you knew the defense claimed by this defendant, did not you? A. Well, I knew about what it was, something about it,"

so that the plaintiff knew that the defendant disputed the validity of these notes when he took them over.

We do not think that there is any fault to be found with the charge as quoted on pages 52 and 53 of appellant's brief. The Court, if anything, was favorable to the appellant in that it says that although morally he may have had notice of the defense of these notes, yet legally he was in the position of an innocent holder and that is a circumstance which the jury might consider. We think this inference is favorable to the appellant.

The Seventh Request of the appellant was properly refused because to have charged it would have been virtually to deprive the defendant of his rights under the Minnesota statute because under that statute he is entitled to set up this defense whether the appellant was a *bona fide* purchaser or not. In other words, under the statute his position is no better if he had no knowledge of the infirmity than if he had. The statute was available as a defense against him in either contingency.

There was no error in the charge of the Court concerning the lack of knowledge on the part of the defendant as to the notes until they turned up in the bank. The defendant on page 81, lines 34 to

40, inc., says that the first he heard of the existence of these notes was about the twenty-ninth of September when he got a letter from the Rock County Bank about them. The second part of the Court's charge on page 55 of appellant's brief must be read in connection with the first extract so that on the whole there was no doubt in reading the whole charge that the Court left it to the jury as to whether he knew he was signing notes (see extracts from charge in our brief, *ibid.*).

What the Court meant in the second extract was as shown by reading the full charge, that there was no evidence to show that these notes had been brought to the attention of the defendant in any manner since the supposed execution thereof until they were brought to his attention by the Rock County Bank on September 29th, so that he did not sign any of the notes after having been charged with the existence of any former note and immediately upon getting this letter from the bank he proceeded at once to the bank and told them of the fraud which had been practiced upon him (p. 82). And this conversation took place with both Mr. Martin and the plaintiff herein.

THERE WAS NO ERROR IN THE CHARGE OF THE COURT WITH REFERENCE TO THE EFFECT OF THE LETTER OF SEPTEMBER 28TH, EXHIBIT P-6.

The extract quoted in appellant's brief (pp. 56-57) must be read in connection with the context wherein the Court refers to the circumstances under which the signature to this letter was obtained and where defendant claimed that he was misled into signing this by the allegation of the agents that it referred to notes he was to take from his proposed customers for fence machines and also

that this document was executed after the notes had been discounted by the bank.

There is no pretense that anybody in this case was misled by this document nor that the plaintiff or the bank ever had their attention called to this letter before purchasing the notes so that its only effect would be to contradict the claim of the defendant and in that light the charge of the Court was correct. There was no claim on the part of the appellant that this document operated as a waiver of the fraud or served to estop the defendant from setting up the statute (see p. 297, lines 35 to 40, inc., p. 298, lines 1 to 40, inc., p. 299, lines 1 to 30, inc.).

There being no errors in the trial, the judgment should be affirmed.

Respectfully submitted,

J. T. HORTON,
HORTON & TILT,
CLIFFORD L. NEWMAN,
Of Counsel with Respondent.

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New Jersey
Court of Errors and Appeals

Notice of Appeal

(*Filed,*)

NEW JERSEY SUPREME COURT

HUDSON COUNTY

RAY B. HINKLY, Plaintiff, v. EDWARD G. FREICK, Defendant.	}	On Contract.

To Messrs. Horton & Tilt,
Attorneys of Defendant.

SIRS:

TAKE NOTICE that the plaintiff appeals from the whole of the judgment entered in this case by the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, on the following grounds:

1. The following questions were overruled:

a. To the witness, Charles J. Martin: "And as a matter of fact you acted as you did in all other cases as cashier of the bank when you purchased this paper, did you not?"

b. To the defendant on cross-examination: "How did you think you were going to get those if you did not pay for them?"

c. To the defendant on cross-examination: "Why did you sign that paper Edward G. Freick & Son?"

d. To the defendant on cross-examination: "Do you remember you talked over with Mr. Cole and Mr. Kubach this contract before it was signed, the three of you down in the back building basement;" also the action of the Trial Judge to strike out the answers to said questions.

e. To the defendant on cross-examination: "Don't you know that this contract specifically mentioned the notes?"

f. To the defendant on cross-examination: "Didn't you on that day, before that contract was signed, go out with this Mr. Augustine, who was one of Mr. Kubach's party, to see a man named O. Baake, to get him to sign a similar contract to those others which you had signed?"

g. To the defendant on cross-examination: "Now on this Monday when you signed the special agency contract, isn't it true that Mr. Cole waited at your house with Mrs. Freick and Herman until you returned from some place where you had been?"

h. To the defendant on cross-examination: "Isn't it true that after this special agency contract was signed, your son Herman went with Mr. Cole on a tour occupying several weeks in the interest of this Fence Machine Company of which you had taken the general agency contract?"

i. To the defendant on cross-examination: "And when you said that you pulled this contract, Identification G, out of your pocket?"

j. To the witness Charles Kubach: "Now just tell us what the conversation was;" and also to the action of the Court in striking out the answer on the Court's own motion.

k. To the witness Charles Kubach: "Mr. Kubach, at the time these contracts and notes were signed by Mr. Freick, was any suggestion made by you that he should sign a duplicate contract?" 10

1. To the witness Thaddeus P. Cole: "Do you know as a result of the signing of this contract whether the earlier contracts which are in evidence here, namely, P. 6, P. 7, P. 8, and P. 9, were surrendered to your company on the signing of this contract, which is G for identification?"

m. To the said witness Cole: "Give the conversation as near as you can about the note, with reference to the note, after you had done this figuring which you refer to," and also to the ac- 20 tion of the Court in striking out the answer on the Court's own motion.

n. To the said witness Cole, on re-direct-examination: "Did he give you any paper or anything in exchange for those contracts which he then gave up?"

o. To the plaintiff in rebuttal: "Did not Mr. Freick in connection with this conversation pull a contract out of his pocket and hand it to you?"

p. To the plaintiff in rebuttal: "In the City of 30 Luverne?"

q. To the plaintiff in rebuttal: "Where and under what circumstances?"

r. To the plaintiff in rebuttal: "To whose order were the notes made which you held?"

s. To the plaintiff in rebuttal: "Are the notes which you hold, notes made by Ole T. Olson to the order of the National Fence Machine Company and endorsed by it?" 40

t. To the plaintiff in rebuttal: "Do you hold any of the notes of Edward Biss?"

u. To the plaintiff in rebuttal: "Do you hold any notes of Edward Biss made by him to the order of the National Fence Machine Company and endorsed by it?"

2. The following questions were admitted:

a. To the defendant: "When you met Mr. Hinkly there, what, if anything, did he say to you?"

b. To the defendant: "What was said by him and by you?" and other questions asked to the defendant as supposedly material under the Minnesota statute with reference to his conversations with Charles Kubach, and the circumstances surrounding the signing of the notes.

c. To the defendant: "When he told you that the paper underneath the top one was a copy for the company, did you or not believe what he said?"

d. To the defendant: "Why did you sign the under paper without reading it?"

e. To the defendant: "What did he say and what did you say?"

f. To the defendant: "Now at that time was there anything said about giving or making any promissory note."

g. To the defendant: "When he told you this about the contract did you or not believe what he said?"

h. To the defendant: "When he told you that the lower paper was a copy of the contract, did you believe what he told you?"

i. To the defendant: "Have they ever been around there to your knowledge since?"

j. To the witness Charles Kubach: "How long after going there did you engage room below the Rock County Bank?"

k. To the witness Charles Kubach: "Afterwards there was some litigation in regard to that note, wasn't there?"

l. To the witness Charles Kubach: "Knowing all this, why didn't you go to Luverne and try to straighten matters out?"

m. To the witness Charles Kubach: "How did you happen to go there?"

n. To the witness Charles Kubach: "It never occurred to you to feel offended because someone assailed your character until you came here. Is that right?"

o. To the witness Thaddeus P. Cole: "How long since you learned that litigation commenced at Minnesota between Mr. Hinkly and this defendant?

p. To the defendant in sur-rebuttal: "Well, what did he say about this paper? What did he say about it? What did Mr. Cole say to you about that paper?"

q. To the defendant in sur-rebuttal: "Did he read that paper over to you?"

r. To the defendant in sur-rebuttal: "Did he say anything more than what you have said about what that notice is?"

s. To the defendant in sur-rebuttal: "When he told you it was what you have just stated, did you believe what he said was true?"

t. To the defendant in sur-rebuttal: "What was Mr. Cole's manner, or how did he act, while you were there with this paper at the time you signed it?"

3. The Trial Judge admitted documentary evidence as follows:

a. A certain statute of the State of Minnesota designated 895 Section 2747, referring to instruments obtained by fraud.

4. The Trial Judge overruled documentary evidence as follows:

a. A certain letter offered by the plaintiff signed "Ole T. Olson," and marked for identification I.

b. A certain contract signed "Edward G. Freick & Son," offered by the plaintiff, and marked for identification G.

c. The report of the case of Mackey v. Peterson, reported in Volume 29 of Minnesota Reports, page 298.

5. The Trial Judge refused to permit the plaintiff's counsel to make an offer of proof.

6. The Trial Judge refused to strike out the deposition of Edward Biss.

7. The Trial Judge denied the motion of the plaintiff to overrule the defence.

8. The Court charged the jury:

a. "They afterwards passed into the hands of the plaintiff; he claims to have been an innocent holder, but he says when he was upon the stand, that before he took the notes, 'I knew about what the defense was or something about it; so although in the eye of the law, having taken the notes from an innocent holder for value, if the case was in New Jersey he would be deemed to be an innocent holder although at the time he took them he knew there was some taint attached to the notes, and although morally perhaps, he took these notes knowing there was some taint attached to them, and although legally he is in the position of an innocent holder, it is a circumstance you have a right to take into consideration in deciding this case, whether at the time he took them they were tainted with fraud or not."

b. "The defendant says at the time that he signed this contract and the others which are in

evidence he thought he was taking an agency for the sale of the product of the fence company and that he had no knowledge or not is a question that you gentlemen must determine.

You recollect his testimony as to the way in which he says this second paper, which turned out to be the note, was signed; that the contract was upon the top and this note was under it and they turned the edge of the contract up so that he saw nothing but the line and he was told that that was a duplicate contract which had to go back to the company, and on the strength of that he signed it and that he did not know, his testimony is, that he had signed the notes until afterwards when they turned up in the Rock County Bank. Now if he knew what he was signing at that time, that it was a note, no matter whether he ever got any consideration for the notes or not—the evidence in this case is he did not—they got in the first place in the hands of a bank as an innocent holder, and the bank had a right to recover and any one else who took them from the bank would have a right to recover as an innocent holder, unless the defendant can invoke the protection of the statute. The statute says 'if his signature was obtained by a fraudulent representation, trick or artifice.' Now if his signature was obtained to the notes in the way in which he says it was—and of course you must believe his testimony before you can relieve him from the obligation on these notes—if his signature was obtained in that way; if the corner of the contract was so turned up that he could not see the whole of the paper he was signing and he was merely told it was a duplicate contract which had to go back to the company, then it is for you gentlemen to say whether that was a fraudulent representation, trick or artifice.

If it was any one of the three and he was induced to sign it by reason of that, then he has a right to invoke the protection of this statute."

c. "The mere fact that he signed four different sets of notes can be no reflection upon the defendant in this case unless the evidence shows that before he signed some of the subsequent ones he knew he had been tricked in signing the prior ones. There is no evidence of that sort in this case, because the evidence is that he knew nothing about any of the notes until he had signed them all and they all turned up in the hands of the Rock County Bank."

d. "But at the time this letter was written the bank already had the notes in its hands, unless it was possibly the last note which was given on September 26th; there is some confusion of testimony about that. Mr. Martin, the cashier of the bank and the one of all others who ought to know, says he got that note from Mr. Kubach, who endorsed it in the bank 'without recourse' and that he gave him credit for it in his account or gave him the money. Mr. Cole says he took it to the bank on the morning that he got it, before he took the train in the afternoon to go away from the town. As there is a conflict of testimony between these two people and between the cashier, it is for you to say whether you think the cashier, who is disinterested in this case and whose duty it was and who is evidently—presumably—testifying as he did under this commission with his books before him, ought to know when he took the note or from whom he took it, or whether these people would know who gave it to the bank."

e. "Mind, at the time this was given, if the notes had already been obtained by fraud, this did not help the plaintiff at all, because the defendant had

a right to invoke the protection of that statute—and if in your judgment those notes were obtained by fraudulent representation, trick or artifice, and if the defendant was not guilty of negligence in signing them in the way in which he signed them there, no matter what happened afterwards, under the Minnesota statute the defendant has the right to ask you to give him a verdict. That is all there is in this case, the question of fraud."

8. The Court refused to charge the jury as requested by the plaintiff as follows:

a. "There should be a verdict for the plaintiff."

b. "It is the policy of the law to protect commercial paper, especially in the hands of third persons, and the jury can not find that the defendant was not guilty in signing notes in suit if the jury find that he failed to exercise such diligence and care as a man of ordinary care and prudence would have used under similar circumstances to ascertain the contents of the papers which he signed."

c. "In considering whether or not the defendant was negligent in signing the notes in suit, the jury can not acquit him of negligence if the jury find the fact to be that he trusted another person to fix the form and measure of the obligation which he was signing without exercising that supervision which was in his power of observing the character of the paper which he was signing."

d. "There is no evidence in the case of any force, intimidation or compulsion practiced upon the defendant to compel him to sign the notes in suit, and if the jury find that he signed the notes voluntarily, even though carelessly, and through trust imposed in another, he is nevertheless guilty of negligence and the verdict should be for the plaintiff."

e. "If the jury find that the defendant through neglect of precautions within his power affixed his name to the notes in suit without knowing their character, the consequent loss ought not to be shifted from him to the plaintiff, but the defendant should bear the loss as between him and the plaintiff in this suit."

f. "The fact that the defendant claims that he could not read the form of the notes is not sufficient to acquit him of negligence in signing them unless the jury find that there was some compulsion or threat practiced upon him sufficient to compel him to surrender his voluntary judgment in signing said notes."

g. "Under the law of Minnesota the plaintiff is entitled to the benefit of the innocent purchase of the notes in suit by the Rock County Bank and if the jury find that the Rock County Bank did in fact purchase said notes *bona fidely* and without knowledge of any infirmity in them, the plaintiff is entitled to the benefit of such innocent purchase by the bank and the fact that at the time he purchased them he knew of the infirmities now claimed by the defendant is of no avail to the defendant as against the plaintiff in this suit."

h. "The defendant admits having signed the letter addressed to the bank, which is Exhibit P-10, and the evidence further is that this letter was presented to the Bank at the time the last note, Exhibit P-4, was discounted, the effect of all of which is to estop the defendant from denying his liability on the said note Exhibit P-4, and a verdict for the plaintiff for the amount of the said note, $1,152 with interest, must be awarded in any event.

McCARTER & ENGLISH,
Attorneys of Plaintiff-Appellant.

Declaration

(*Filed,*)

NEW JERSEY SUPREME COURT

Hudson County, ss:
of the Eleventh day of March, Nineteen Hundred and Twelve. Edward G. Freick, the defendant in this suit, was summoned to answer unto Ray Benjamin Hinkly, the plaintiff therein, in an action upon contract, and thereupon the plaintiff, by McCarter & English, his attorneys, complain; For that the defendant heretofore to wit, on the first day of April, nineteen hundred and nine, to wit at Luverne, Minnesota, to wit at Hoboken in said county to wit at Trenton was indebted to the plaintiff in eight thousand dollars for goods sold and delivered by the plaintiff to the defendant at his request; And in the like sum for work done and materials furnished by the plaintiffs for the defendant at his request; And in the like sum for money lent by the plaintiff to the defendant at his request; And in the like sum for money paid by the plaintiff for the use of the defendant at his request; And in the like sum for money received by the defendant for the use of the plaintiff; And in the like sum for interest for the forbearance by the plaintiff at the defendant's request of money due and owing from the defendant to the plaintiff; And in the like sum for money due from the defendant to the plaintiff on an account stated between them; and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said several sums of money on request. Yet the defendant hath disregarded said said several promises, and hath not paid

the said several sums of money, nor any of them, or any part thereof, although often requested so to do, but to do so hath hitherto wholly refused, and still doth refuse, to the damage of the plaintiff Eight Thousand dollars, and therefore he brings his suit, &c.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

Notice is hereby given that this action is brought to recover the amount due on four promissory notes, of which the following are true copies:

"Luverne, Minn. Sept. 14th, 1908.

On or before the First day of January, 1908, I, or we, promise to pay to The National Fence Machine Co., or Bearer, Five hundred seventy-six and no/100 Dollars $576.00/100, for value received, payable at Luverne, Minn. with 8 per cent. interest from date until paid.

P. O. Luverne, Minn.

Witness #23667 Jan. 25 1909
Jun 10 1909
Jul 28 1909

ED. G. FREICK."

(Endorsed)

"Without recourse
The Nat'l Fence
Machine Co. by
Chas. Kubach
Mgr.
Pay to the order of
R. B. Hinkly
without recourse
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas.")

Declaration

"Luverne, Minn. Sept. 18th, 1908.
On or before the First day of April, 1909, I, or we, promise to pay to The National Fence Machine Co., or Bearer, Fourteen hundred-forty and no/100 Dollars $1440.00/100, for value received, payable at Luverne, Minn. with 8 per cent. interest from date until paid.

E. G. FREICK."

P. O. Luverne, Minn.
Witness 23673

Jun 10 1909
Jul 28 1909

(*Endorsed*)

"Without recourse
The Nat'l Fence Machine Co.
by Chas. Kubach
Pay to the order of
R. B. Hinkly,
without recourse
Rock County Bank, Luverne, Minn.
By C. J. Martin, Cas.")

"Luverne, Minn. Sept. 24th, 1908.
On or before the First day of April, 1909, I, or we, promise to pay to The National Fence Machine Co., or Bearer, Eleven hundred-fifty-two and no/100 Dollars, $1152.00/100, for value received, payable at Luverne, Minn. with 8 per. cent. interest from date until paid.
P. O. Luverne, Minn.

ED. G. FREICK."

Witness 23679.

Jun 10 1909
Jul 28 1909

(*Endorsed*)

"Without recourse
The Nat'l Fence Machine Co.
by Chas. Kubach, Mgr.
Pay to the order of
R. B. Hinkly,
without recourse
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas.")

"Luverne, Minn. Sept. 26th, 1908.

On or before the First day of April, 1909, I, or we, promise to pay to The National Fence Machine Co., or Bearer, Eleven hundred, fifty two and no/100 Dollars, $1152.00 for value received, payable at Luverne, Minn. with 8 per cent. interest from date until paid.

ED. G. FREICK."

P. O. Luverne, Minn.

Jun 10 1909
Jul 28 1909

Witness 23684

(*Endorsed*)

"Without recourse
The Nat'l fence Machine Co. by
Chas. Kubach, Mgr.
Pay to the order of
R. B. Hinkly,
Without recourse
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas."

Plea and Notice

Judgment will be claimed in the sum of four thousand three hundred and twenty dollars with interest thereon and costs of suit.

McCARTER & ENGLISH,
Attorneys of Plaintiff.

Plea and Notice

(*Filed,*)

NEW JERSEY SUPREME COURT

HUDSON COUNTY

RAY BENJAMIN HINKLY, Plaintiff, vs. EDWARD G. FREICK, Defendant.	On contract. Plea and notice.

And the said defendant, by J. Tracey Horton and Horton and Tilt, his attorneys, comes and defends the wrongs and injuries, when, etc., and says that he did not undertake or promise in manner and form as the plaintiff hath above thereof complained against him, and of this he puts himself upon the country.

J. TRACY HORTON
and HORTON & TILT,
Attorneys of Defendant.

To the above named plaintiff or his attorney:

Please take notice that at the trial of the issue joined in the above stated cause, said defendant will give in evidence, under the foregoing plea of general issue, the following defenses:

(1) That the said plaintiff is not a holder thereof for value.

(2) That defendant received no consideration from "The National Fence Machine Company" or from the plaintiff for said writings purporting to be defendant's notes.

(3) That so far as the defendant knows, on information and belief, there is not and never was any person, firm or corporation having the name and style of, or doing business as "The National Fence Machine Company."

(4) That this defendant did not believe or know at the time he is alleged to have signed the writings purporting to be "defendant's promissory notes" that the same were bills of exchange, promissory notes, or other papers negotiable under the Law Merchant, and that if in fact this defendant did sign any paper or writings called "promissory notes" as described and set forth in the bill of particulars annexed to the plaintiff's declaration filed in the above stated cause of action, the defendant's signature thereto was obtained by fraudulent representation, trick or artifice by one, Charles Kubach, the person who is purported to have endorsed the aforesaid mentioned "promissory notes" as Manager for "The National Fence Machine Company" all of which "The National Fence Machine Company" and the plaintiff and their agents had due notice and knowledge before the alleged transfer of the said "promissory notes" to the plaintiff.

That this defendant was prevented from examining the papers or writings purporting to be the said "promissory notes" by fraudulent representation, trick or artifice on the part of the said alleged payee of said alleged notes by and through its officers or agents and more particularly by and on the part of the said Charles Kubach. That

if the said defendant did sign said "promissory notes" he did not believe them to be bills of exchange, promissory notes or other paper negotiables under the Law Merchant at the time he signed the same. That this defendant was not guilty of any negligence in signing said papers without knowledge of its terms.

That the plaintiff had due notice and knowledge of the foregoing facts before the alleged transfer of said "promissory notes" to the plaintiff.

That the said writings, contracts, and promissory notes, purporting to be the defendants, if made, were made, signed, executed and payable within the State of Minnesota, the place of residence of the said plaintiff and of this defendant.

That there was at the time said writings, contracts and promissory notes are purported to have been signed by said defendant, and now is, a statutory provision in the said State of Minnesota as follows:

> "No. 2747—INSTRUMENTS OBTAINED BY FRAUD—No person, nor his heirs or personal representatives of any person whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the Law Merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the Law Merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for

the Jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a Jury."

That by reason of the aforesaid statute of Minnesota in this regard the said defendant will, at the trial of the above stated cause of action, claim to have the full benefit of said statute and claim the right to submit the facts as hereinabove set forth in this notice inasmuch as the said writings, or contracts, or promissory notes are purported to have been made, executed and to be performed within the State of Minnesota and that the within named plaintiff and defendant are residents within the State of Minnesota.

J. TRACY HORTON,
and HORTON & TILT,
Attorneys of Defendant.

Judgment

(*Filed,*)

RAY BENJAMIN HINKLY,
vs.
EDWARD G. FREICK.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the County of Hudson, on the first Tuesday of April, in the year of our Lord, one thousand nine hundred and twelve, by whom etc., and the same day is given to the parties aforesaid there etc.

And now at this day, to wit, the twenty-first day of August, A. D., nineteen hundred and twelve, before our said Supreme Court at Trenton come

the said parties by their attorneys aforesaid, and the Justice before whom etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at Jersey City, in and for the County of Hudson, before his Honor, Benjamin A. Vail, as Circuit Court Judge, on the twelfth day of June, in the year of our Lord, Nineteen hundred and twelve, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant, by their respective attorneys within mentioned, and the jurors of the Jury, between the parties aforesaid, in the plea aforesaid, being also summoned, come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn upon their oaths say, that the said defendant did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, but that the said plaintiff take nothing by this said writ against the said defendant.

Therefore it is considered that the said plaintiff, Ray Benjamin Hinkly take nothing by his said writ, and that the said defendant, Edward G. Freick, do go thereof without day, &c.

And it is further considered that the said defendant, Edward G. Freick do recover against the said plaintiff, Ray Benjamin Hinkly, the sum of Sixty-five dollars and fifty cents for his costs and charges by him about his defence in this behalf laid out and expended by the Court now here adjudged to the said defendant and with his assent according to the form of the statute in such case made and provided, and that the said defendant, Edward G. Freick, have execution thereof, etc.

Judgment signed this twenty-first day of August, A. D., nineteen hundred and twelve.

WILLIAM S. GUMMERE, C. J.

Case

NEW JERSEY CIRCUIT COURT

HUDSON CIRCUIT

RAY B. HINKLY,
vs.
EDWARD G. FREICK.

Testimony taken on the 10th day of June, 1912, before Hon. Benjamin A. Vail, Circuit Judge, and a jury.

Appearances:
McCarter & English, Esqs., for plaintiff.
Horton & Tilt, Esqs., (Mr. Horton) and Mr. Canfield of the Minnesota Bar, for defendant.

The Court: There is no question about the signature to the note?

Mr. English: No, sir. I understand the signatures of the notes are admitted—the signatures of the notes referred to and set up in the bill of particulars annexed to the declaration are admitted.

Mr. Horton: Just read the note.

Mr. English: September 14, 1908, for $576, payable 1st of January, 1908.

Mr. Horton: Yes, the note is made payable before it was given.

Mr. English: That is a typographical error.

Mr. Horton: I did not want to be technical but I want to have it straight.

Mr. English: January, 1909, it should have been. It is the following January.

Mr. Horton: What does the note itself say.

Mr. English: That is what it says.

Mr. Horton: The note says dated September 14, 1908, made payable on or before January blank, 1908.

Mr. English: No.

Mr. Horton: No; on the first day of January, 1908.

Mr. English: The draughtsman has been right, and we will read it 1908.

The Court: How would that affect a note?

Mr. Horton: It is made payable before it is dated on the face. I thought maybe his note was right and my copy was wrong, but I stand on it now.

Mr. English: I suppose if we explain it—

Mr. Horton: It explains itself.

The Court: Can you explain it after the notes gets in the hands of somebody else?

Mr. English: I am not sure about it. Here is the signature admitted, a promise to pay $576.

The Court: Certainly. Then if it was anything it would be a demand note.

Mr. English: Yes. That is as good. The defense was not set up in the specification of defences.

Mr. Horton: It is in the plea of general issue.

The Court: The other notes are properly drawn?

Mr. Horton: I have not compared them.

Mr. English: September 18, 1908, payable on the first day of April, 1909. September 24, 1908, payable the first day of April, 1909. The fourth one, September 26, 1908, payable 1st of April, 1909.

Mr. Horton: It seems to be all right.

Mr. English: Well you admit the signature of the notes?

The Court: Yes. Of course the note speaks for itself for what it shows.

Mr. Horton: Yes, we say that is our signature.

Mr. English: I will offer in evidence right at the beginning a note dated September 14, 1908, payable on or before the first day of January, 1908, to the order of the National Fence Machine Company or bearer, $576 signed Edward C. Freick, the signature to which is admitted, and endorsed without recourse by the National Fence Machine Company and by the Rock County bank to the order of R. B. Hinkly.

The Court: What do those dates mean, January 25th and June 10th?

Mr. English: There are no dates on the endorsement here. It is not on the note.

The Court: Then the next note, June 10th and June 28th?

Mr. English: All the same. No dates on the back. It was marked by the commission.

(Note marked Exhibit P-1.)

Mr. English: We next offer the note of September 18, 1908, payable on the 1st day of April, 1909, for $1,440, to the order of the same persons as before, signed Edward G. Freick, signature to which is admitted, and endorsed similarly as the preceding one.

(Note marked Exhibit P-2.)

We next offer in evidence note dated September 24, 1908, payable on or before the first day of April, 1909, for $1,152, and signed Edward G. Freick, signature to which is admitted, to the same payee as before and endorsed similarly to the other two.

(Note marked Exhibit P-3.)

Next offer in evidence note dated September 26, 1908, payable on or before the first day of April,

1909, for $1,152, signed Edward G. Freick, signature to which is admitted, to the order of the same payee, and endorsed in the same way as the preceding three.

(Note marked Exhibit P-4.)

I will state that each one of these notes, as appears on the face, is dated at Luverne, Minnesota.

RAY B. HINKLY, called and sworn on his own behalf, testified as follows:

Direct-examination by Mr. English:

Q. Mr. Hinkly, you live where?

A. At Luverne, Minnesota.

Q. What is your business?

A. I am in the manufacturing of brick and tile and also a farmer.

Q. Are you the owner of the four notes which are in evidence here as Exhibits 1, 2, 3 and 4 for the plaintiff?

A. Yes, sir.

Q. From whom did you purchase the notes?

A. From the Rock County Bank.

Q. Did you pay value for them?

A. Paid face value for them.

Q. When did you buy them relative to the time when they became due for payment?

The Court: He is the plaintiff. I thought you asked when he purchased them as referring to the time—

Mr. English: I want to know whether he bought them before the due date?

Q. Did you buy these notes before they became due?

Mr. Horton: Objected to as leading.

A. After they became due.

Mr. English: Do you object?

Mr. Horton: It is rather leading.

Q. Have these notes been paid ?

A. No, sir.

Q. How much is due now, the full value of each note?

A. Yes.

CROSS-EXAMINATION by Mr. Canfield:

Q. Mr. Hinkly, when did you buy these notes?

A. In August, 1910.

Q. Of whom?

A. Let me just see the notes (examines papers). August, 1909, I purchased the notes.

Q. You individually?

A. Yes; that is I purchased them from the bank.

Q. You bought them of the bank in 1909, you say?

A. Yes, yes.

Q. Now you think again, Mr. Hinkly; wasn't it in 1910 or 1911?

A. I think it was 1909.

Q. You are certain of it?

A. Yes, I am certain of it.

Q. Was that not at the time the Rock County Bank was reorganized?

A. Yes.

Q. Up to that time you had been its president, hadn't you?

A. Yes, sir.

Q. And you retired as president, did you not?

A. Yes.

Q. Now at that time did you actually pay over any money for these notes?

A. Do you want me—

The Court: Just answer the question.

A. There was no cash handled in the transaction.

Q. No. In the division or disposition of the assets of the bank you took out some including these notes, didn't you?

A. Yes.

Q. And the gentlemen who succeeded you in control of the bank retained the other part of the—

Mr. English: I object to what the other gentlemen did.

The Court: Yes; I suppose that is going too far, what others did.

Q. And at the time you acquired these notes from the bank you knew the defense claimed by this defendant, didn't you?

A. Well, I knew about what it was, something about it.

Mr. English: Which defense?

Mr. Canfield: I think that is all.

RE-DIRECT-EXAMINATION by Mr. English:

Q. You took them over as the equivalent of cash in this adjustment

Mr. Canfield: I object.

The Court: That is a conclusion. He says that no money was passed between them.

Q. When you say that no cash passed in this arrangement, were these notes accepted as the equivalent of cash?

Objected to as calling for a conclusion.

Question withdrawn.

Mr. English: Now I want to read in evidence the deposition of the cashier of the bank, Mr. C. J. Martin.

Mr. Horton: May it please the Court, some of the questions asked of Mr. Martin

before the commissioner I desire to make objections to. I think in fairness to all sides that those questions that I desire to object to should not be read to the jury.

Mr. English: When I get up to the questions that you want to object to call my attention to it and I will stop.

This is the deposition of a witness taken in Minnesota:

"CHARLES J. MARTIN, was called and duly sworn, according to law as a witness on behalf of the plaintiff, and examined by A. J. Daley, plaintiff's attorney, testified as follows:

Q. Where do you live and how long have you lived there?

A. In Luverne. Thirteen and a half years.

Q. What connection do you have with the Rock County Bank of that place?

A. Cashier.

Q. About how long have you held that position?

A. About thirteen years.

Q. Are you acquainted with Ray Benjamin Hinkly, the plaintiff in this case?

A. Yes.

Q. How long have you known the defendant?

A. About thirteen years.

Q. Do you remember the circumstances, and where and when you first saw that paper, Plainitff's Exhibit C?—"

Mr. English: Plaintiff's Exhibit C is the same as Exhibit P-1, which is the first note.

"A. We purchased that note September 15th, 1908, from Mr. Kubach.

Q. When you say we, do you or do you not refer to the Rock County Bank?

A. I do."

The Court: What was the date of the purchase?

Mr. English: Purchased September 15th.

The Court: It is dated September 18th.

Mr. English: No; the first one. Purchased the next day.

"Q. And who transacted the business for the bank?

A. I did.

Q. State the circumstances connected with your purchase of that particular note in question?

A. Mr. Kubach brought in that note and two others and endorsed the three and I gave him credit for the amount less a discount of five per cent off the face of the notes."

Mr. English: I can say for the information of the Court and jury that it was endorsed, Charles Kubach, National Fence Machine Company by Charles Kubach, manager.

"Q. Now, is the endorsement that you speak of as being made by Charles Kubach the one which appears upon the back of Exhibit C as follows: 'Without recourse, The National Fence Machine Company. By Charles Kubach, Mgr.?'

A. It is.

Q. Were you acquainted with the defendant at the time you purchased this particular note?

A. I was.

Q. How long had you known him?

A. About nine or ten years.

Q. Was this transaction had during the regular business hours and in your regular banking room?

A. Yes, sir."

Mr. Horton: I desire to object to the next question because it calls for a conclusion.

(After a discussion the Court permitted the question and allowed an exception to the defendant.)

"Q. At the time you purchased this note as you have testified, did you know anything whatever about any defense to the note?"

Mr. Horton: I object and ask that the answer be stricken out.

The Court: Yes; you ask that the question be overruled and the answer stricken out.

Mr. Horton: I ask an exception.

"Q. At the time you purchased this note as you have testified, did you know anything whatever about any defense to the note?

A. I did not.

Q. I now show you Plaintiff's Exhibit D (which is the same as note P-2). When did you first see that paper and under what circumstances and where?

A. On September 19, 1908, in the banking room of the Rock County Bank.

Q. Who had it?

A. Charles Kubach.

Q. At that time did you or not purchase that note?

A. We did."

Mr. Horton: That question I also desire to object to for the same reason.

The Court: Yes, you make the same objection and I make the same ruling and you have the same exception.

"Q. And at the time you purchased it was or not the endorsement on the back thereof: 'Without recourse, The National Fence Machine Company, by Chas. Kubach?'

A. Yes.

Q. And what did you pay for that note?

A. We credited his account with the face of the note $1,440.00 less the discount of $72.00.

Q. Was or not that transaction had during the regular business hours of the bank?

A. It was.

Q. At the time you purchased that note did you know of any defense to the note?

A. I did not.

Q. I now show you Plaintiff's Exhibit E and ask you when, where and under what circumstances you first saw that note? (Exhibit E is the same as No. 3, dated September 24, 1908.)

A. On September 25, 1908, it was presented to us for discount by Charles Kubach, after endorsing it 'Without recourse, the National Fence Machine Company, by Chas. Kubach, Mgr.'

Q. Was that or not during the regular business hours of the bank?

A. It was.

Q. And did or not the bank purchase that note at that time?

A. It did.

Q. And what did it pay for it?

A. The face less the discount of $57.80.

Q. At the time that you purchased that note did you know anything about any defense to the paper?

A. I did not.

Q. I now show you Plaintiff's Exhibit F and ask that you state when, where and under what circumstances you first saw that paper?

A. On September 28, 1908, Mr. Kubach presented the same for discount after endorsing it 'Without recourse, The National Fence Machine Company, by Chas. Kubach, Mgr.'

Q. And what did you pay for it?

A. The face less a discount of $100.00.

Q. At the time you purchased that note did you or not know anything about any defense to the paper?

A. I did not.

Q. Now you have testified that as to some of these notes you gave Mr. Kubach credit. You may state when the money was actually drawn from the bank by Mr. Kubach or any one else on these various transactions?

A. On September 15th, he deposited $440.80 and drew out $570.00.

Q. At the time of the first transaction that you have testified to now what balance did he have on deposit?

A. $194.83.

Q. What was the highest amount that he ever had on deposit from that time on until his accounts were closed?

A. $206.78.

Q. When was his account finally closed and the balance that they had credit for withdrawn?

A. September 26, 1908.

Q. As I understand you you purchased the note Exhibit F on September 26. How did the bank pay for that draft?

A. Either in draft or cash at the time.

Q. Now, as to Exhibit E, how did you pay for that?

A. We credited Mr. Kubach's account with $1,094.40.

Q. When was that credit withdrawn?

A. On the same day.

Q. After you had purchased these four notes that you have now identified did you see and hear any talk with the defendant in the bank?

A. I did.

Q. How long after the last transaction as near as you can state?

A. Within a few days.

Q. At that time, did you or not show him these four notes that you have now identified?

A. I did.

Q. And what did he say, if anything?

A. I do not remember whether he made any reply to me personally or not.

Q. Did you hear him say anything about these several notes to any one else at that time?

A. Yes.

Q. Who?

A. Mr. Hinkly.

Q. The plaintiff in this case?

A. Yes.

Q. What connection did Mr. Hinkly at that time have with the Rock County Bank?

A. He was president.

Q. Now what did you hear him say to Mr. Hinkly at that time and what did Mr. Hinkly say to him as near as you can state it?

A. I heard Mr. Hinkly ask Mr. Freick if there was anything wrong with the transaction and if so he had better consult an attorney before these men connected with the Fence Machine Company had left town.

Q. What did Mr. Freick say?

A. I do not recall what answer he made.

Q. Do you know whether or not at that time Charles Kubach or the other men that had been with him had left town?

A. Some had left, but I do not know which ones.

Q. Do you know one Wm. Martin who lives here in Luverne?

Mr. English: Do you want me to read that? I do not think it is material. This

bears on an entirely different transaction. I don't know whether I am permitted to split up a deposition, but to my mind this has no bearing on the case at all.

The Court: The testimony was taken by you?

Mr. English: Yes, take under our application.

The Court: If the other side do not object you can go on with it.

Mr. Horton: You better go on with it.

"Q. Do you know one Wm. Martin who lives here in Luverne?

A. I do.

Q. How long have you known him?

A. Four or five years.

Q. It is claimed that he had some conversation with you at some time in the fall of 1908 with reference to the kind of business that Charles Kubach and these other men with him were carrying on here in Luverne. Did you or not have any conversation or conversations with him about this National Fence Machine Company or about these men that were here representing that company?

A. I did. Two.

Q. When was the note bought by you?

A. August 28, 1908.

Q. And when did Mr. Martin pay it off, if at all?

A. He paid it October 8, 1908.

Q. Was that or not after these men representing this Fence Machine Company had left, and if it was after, how long after was it?

A. About ten days after they left town.

Q. Now, in the first conversation that you had with this Wm. Martin what did he say to you and what did you say to him with reference to

this Fence Machine Company and these men that were here?

A. He said if those Fence Machine people bring in any more paper of mine do not take it. And I replied, 'All right, Mr. Martin. Did you give any more notes?' He said no. Then, why don't you make that request? Are you afraid of a duplicate? He said no.

Q. Anything further at that time?

A. That was all the conversation we had at that time.

Q. Now, you had a later conversation with him did you?

A. Yes, at the time he paid the note.

Q. Now, what was that conversation as near as you can give it?

A. He came in and said he wanted to pay that note and after paying it he called them frauds.

Q. Well, what did he say when he called them frauds and was that all?

A. It is all I recall at the present time.

Q. Now, was or not that last conversation had after you had purchased all these notes against the defendant which you have now identified?

A. It was after.

Q. About how long after the last transaction?

A. About ten days.

Q. And about the same length of time after they had been fully paid for?

A. Yes.

Q. Now, these four notes which you have identified are each endorsed by you as cashier of the bank to R. H. Hinkly. About what was the date of these endorsements?

A. Some time in August between the 12th and the 22d, 1909.

Q. And these notes were then by the bank turned over to the plaintiff in this case were they?

A. Yes, sir.

Q. In connection with what sort of a business transaction?

A. In connection with the reorganization of the bank.

CROSS-EXAMINATION on behalf of the defendant by E. H. Canfield, his attorney:

Q. Where did this Kubach carry on his business while in Luverne?

A. In the basement under the Rock County Bank and in the street between Rock County Bank and First National Bank.

Q. Is the basement of the bank, or that part of the basement occupied by him, way in the front end of the building and near the main entrance to the bank?

A. Yes, sir.

Q. Kubach had sample of fence and machine on exhibition near the sidewalk next to the Rock County Bank did he not?

A. Yes, sir.

Q. How long was he operating at these two places altogether as long as you remember it?

A. Six or eight weeks.

Q. Was he a stranger in Luverne?

A. Yes, sir.

Q. Have you ever seen him in Luverne since he left?

A. No, sir.

Q. During that period the plaintiff was the president of the Rock County Bank?

A. Yes, sir.

Q. And active in the management of the bank?

A. Yes, sir.

Q. Before purchasing any of these notes in suit did you have any conversation with Mr. Hinkly in regard to the notes from Mr. Kubach or the firm he represented?

A. Yes, sir.

Q. What was said?

A. Mr. Hinkly made the statement to me that they would sell these fence machines to the farmers and probably have some papers to sell and I asked him if he wanted me to take the paper that they brought in and he told me to take whatever I considered good. After the purchase of the first two notes given by Wm. Martin and Carl Miller he asked me if he had brought in any and I told him yes, two, both these papers. He asked me what I discounted them and I told him $3.00 each. He said the discount he thought was a little too small and I told him that I would rather take a small discount on good notes of this kind than a larger discount on notes that were not as good. He told me that his understanding with Mr. Kubach was that we would discount their paper at five per cent.

Q. In the purchase of these notes in suit you acted on the directions that had been previously given you by Mr. Hinkly?

A. I did.

Q. From the banking room of the Rock County Bank you could see out and see these men when they were operating on the street, through the windows?

A. Yes.

Q. During that time you saw Mr. Hinkly in frequent conversation with him did you?

A. I do not remember seeing him talk with them out on the street, but he had some conversation with them inside of the bank.

Q. Did you hear it?

A. I think I heard some of them.

Q. Do you remember what the substance of it was?

A. I do not.

Q. Do you know whether it related to the kind of business they were carrying on?

A. I remember one conversation that Mr. Hinkly had with the first men that appeared here concerning letters of recommendation.

Q. Did any conversation you heard relate to the kind of business they were carrying on?

A. I do not recall such conversation.

Q. Was the bank in the habit of discounting paper offered by strangers going through the country?

A. I do not think that the bank was in the habit of doing that, although they occasionally bought paper offered by strangers.

Q. And in those cases usually at a very much larger discount?

A. I think so.

Q. Then the taking of this paper at five per cent discount from this stranger Kubach was an unusual thing was it not with the bank? A. No.

Q. Had the bank ever at any other time, to your knowledge, taken as large an amount of negotiable paper as that in suit from a stranger at as low a discount as five per cent?

A. No.

Q. Or had the bank, in your knowledge, ever taken any amount of paper from an entire stranger at as low a discount as five per cent?

A. I do not know.

Q. To your knowledge?

A. I could not answer that positively without referring to the books.

Q. Have you any recollection of such an instance?

A. No.

Q. In taking the paper in suit you did so mostly upon the direction of Mr. Hinkly did you not?

A. Yes, sir.

Q. At that time had you any personal knowledge whatever of the National Fence Machine Company?

A. No, sir.

Q. Or did the bank ever have any direct business transactions with the National Fence Machine Company either by correspondence or in person other than through this man Kubach?

A. No.

RE-DIRECT-EXAMINATION by A. J. Daley, Plaintiff's Attorney:

Q. Do you mean to say Mr. Martin that you did not act in the capacity of cashier of the bank when you discounted these notes in question, but simply exercised no judgment except as directed by Mr. Hinkly?

A. Yes.

Q. You used no judgment as to whether the paper was good or bad, genuine or forged?

A. I did.

Q. And as a matter of fact you acted as you did in all other cases as cashier of the bank when you purchased this paper, did you not?''

Mr. Horton: I object to that question on the ground it is leading and calls for a conclusion. That was objected to on the record.

The Court: Question overruled.

Whereupon the plaintiff by his counsel,

prays a bill of exception, which is hereby allowed and sealed accordingly.

(Seal.)

"Q. You do not mean to say that you were acting just simply as an errand boy in this transaction were you?

A. No, sir.

Q. And were you or not acting as cashier of the bank?

A. Yes, sir.

Q. Now, when you say that you acted simply under the direction of Mr. Hinkly in this matter what do you mean by that statement?

A. I mean that Mr. Hinkly advised me to do certain things and I followed his advice and wishes as nearly as I could.

Q. Was there anything unusual in your following the advice of Mr. Hinkly with reference to the management of the business of the bank?

A. No, sir, I always attempted to exercise my office as cashier as he desired. He having the general management of the institution.

Q. And in the purchase of this particular paper, then as I understand you—"

Mr. Horton: I object on the ground that it is leading and it was answered before.

The Court: I will allow it.

"Q. And in the purchase of this particular paper, then as I understand you, you acted no more under his directions than you did in the general transaction of the rest of the business including the discounting of other paper?

A. I did not.

Q. And did you or not in the purchase of this particular paper endeavor to exercise your own

judgment as to the character of paper that you were getting for the bank?''

Mr. Horton: I object to it as leading.

The Court: I do not see that it makes any difference.

Mr. English: I withdraw the question.

Mr. English: I will put in evidence the deposition of Andrew J. Daley.

Mr. Horton: I desire to object to the testimony of Mr. Dailey on the ground that the questions and answers do not purport to show that the best proof is being offered, and on the further ground that it deals with subject-matter that is purely remedial and not substantive. This part of the deposition is nothing more than to identify the gentleman. Next, the last question on the first page—

The Court: Where he is asked about the law of Minnesota? I suppose that is your objection.

Mr. Horton: Yes. The best way to prove a statute is by producing the statute.

The Court: Here he evidently read from the stataute. Do you object to that?

Mr. Horton: Yes, I think I ought to. I think my case demands me to object to that question and ask that the answer be stricken out, because it is not the proper way to prove it.

(After further discussion, Mr. English produced the Minnesota statute, which Mr. Canfield admitted was a copy of the revised statute of Minnesota.)

Mr. English: Now I will read the deposition of Mr. Andrew J. Daley:

"ANDREW J. DALEY, being first duly sworn according to law, testified as follows:

Q. State your name, age, residence and occupation?

A. My name is Andrew J. Daley; I reside at Luverne, Rock County, Minnesota; am fifty-four years old, and I am a practicing lawyer admitted to the practice of law in all the Courts of the State of Minnesota.

Q. How long have you been such practicing attorney?

A. Twenty-one years."

Mr. English: Now I offer in evidence Section 4981 of the revised laws of Minnesota for 1905, reading as follows:

"All hunting, shooting, fishing, playing, horse racing, gaming and other public sports, exercises, and shows; all notices disturbing the peace of the day; all trades, manufacturers, and mechanical employments, except works of necessity performed in an orderly manner so as not to interfere with the repose and religious liberty of the community; all public selling or offering for sale of property, and all other labor except works of necessity and charity are prohibited on the Sabbath day; Provided, that meals to be served upon the premises or elsewhere by caterers, prepared tobacco in places other than where intoxicating liquors are kept for sale, fruits, confectionery, newspapers, drugs, medicines, and surgical appliances may be sold in a quiet and orderly manner. In works of necessity or charity is included whatever is needful during the day for good order, health or comfort of the com-

munity; but keeping open a barber shop or shaving and hair cutting shall not be deemed works of necessity or charity, and nothing in this section shall be construed to permit the selling of uncooked meats, groceries, clothing, boots, or shoes."

I offer in evidence so much of the revised laws of Minnesota for 1905 as covers Section 4981. I understand it is admitted that this book is a properly authenticated copy of the statute of Minnesota.

Mr. Canfield: Yes, I understand it is so admitted by both parties.

"Q. Has this statute been construed by the Supreme Court of Minnesota, and if so, what has been held as to notes or other contracts executed on Sunday, and in what case has the Court construed this statute and where are such cases to be found?"

Mr. Horton: I object to it as purely argumentative.

The Court: I will admit the evidence as far as it refers to the decision of the Supreme Court.

Mr. English: Shall I read the first part of the answer?

The Court: No; the last part, where he says it has been construed in the case of Ward vs. Ward.

Mr. English: I ask permission to read the first part of the answer and the Court overrules it?

The Court: Yes.

Whereupon the plaintiff by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

"A. This is so held in the case of Ward vs. Ward, reported in the 75th Minnesota Reports, page 269, and in the case of Joy vs. Koch, reported in 108 Minnesota Reports, page 160."

Mr. English: I will next offer in evidence Section 2733 of the revised laws of Minnessota:

"The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than ten dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity."

I offer in evidence so much of the book as contains that section.

Mr. Horton: The next question is objected to:

"What is now and what has been the law of the State of Minnesota for ten years or more last past with reference to the title and right acquired by the purchaser of dishonored or past due negotiable promissory notes?"

I object to any such question as this binding the parties. What is the common law there is common law here and it is for the Court and jury to say what the common law is.

The Court: I will overrule the question.

Whereupon the plaintiff by his counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. English: "Q. What proof is required in Minnesota as to the endorsement by the payee of a negotiable promissory note"

Mr. Horton: I object.

Mr. English: I have the statute on that. I withdraw the question.

I offer in evidence Section 4730 of the revised laws of Minnesota for 1905, reading as follows:

"In actions brought on promissory notes or bills of exchange by the indorsee, the possession of the note or bill shall be *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed. Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until such person shall deny the signature or execution of the same by his oath or affidavit; but

this shall not extend to instruments purporting to have been signed or executed by a person who has died before the requirement of such proof."

I offer in evidence so much of the book last mentioned as contains that section.

Mr. Horton: I object for the further reason that it appears to be a remedial statute and not a substantive statute.

The Court: That is a question of law really. I will admit it as a matter of evidence. What effect it has is another matter.

Exception noted for defendant.

Mr. English: Having put that section in evidence I will read this question: "What proof is required in Minnesota as to the endorsement by the payee of a negotiable promissory note? A. Revised laws of 1905, Section 4730 provides as follows," and then the answer sets up what I have read in evidence. It continues:

"This statute has been held to apply—"

Mr. Horton: I object to that part of the answer being read as a conclusion of the witness.

The Court: You may read the last part, that it has been construed and followed in cases.

Mr. English: I ask permission to read the part which I started to read.

The Court: I decline to give permission.

Whereupon the plaintiff by his counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. English: I will read the balance of the answer then: "This has been held by the Supreme Court of Minnesota in the following cases: First National Bank vs. Loyhed, 28 Minn., 398. National Bank vs. Mallan, 37 Minn., 404. First National Bank vs. Compo. Board Mfg. Co., 81 Minn., 274."

Mr. English: I offer in evidence the deposition which has been read.

The Court: No; you don't offer them in evidence, you read them into the record.

Mr. English: I did not know how else I could set up these exceptions. I will ask the stenographer to mark for identification the deposition of Mr. Martin which has been read and the deposition of Mr. Daley which has been read.

Deposition of Mr. Martin marked A for identification. Deposition of Mr. Daley marked B for identification.

Mr. Horton: I do not think that is the proper course.

The Court: You do not have to identify them, because these depositions are taken out of the state and they come here addressed to the Court and the Court hears them and such as are proper are read into the record. If you use them as exhibits—

Mr. English: I do not propose to put them in evidence. I suppose they will be filed by the Clerk of the Court anyhow.

The Court: They will have to be filed. If the case has to be printed they will have to be printed like other testimony.

Mr. English: I offer in evidence exemplified copy according to the Act of Congress

of the Charter of the National Fence Machine Company.

Paper marked Exhibit P-5.

Mr. English: If your Honor will permit me to make an offer and produce books later, I will offer on the record the various volumes referred to in the deposition.

I offer in evidence the report of the case of Ward vs. Ward as reported in 75 Minnesota, page 269 and so much of that volume as contains the report of that case.

Mr. Horton: Do you think that is proper evidence for the jury?

Mr. English: I understand the law of other states is proved like any other testimony in the case.

Mr. Horton: We might bring the decision here to reverse that.

The Court: That might be competent. I do not suppose there is any difficulty about counsel agreeing what the latest decision of the Court of Minnesota on this question is.

Mr. Horton: I think it is a question to be argued before the Court.

The Court: The Court can not take judicial notice of the decision of the Supreme Courts of other states. It has to be produced in some way, and of course it has to be produced in the way of evidence so as to get it properly before the Court. I will allow you to make your offer.

Mr. English: I also offer in evidence report of the case of Joy vs. Koch, reported in 108 Minnesota Reports. That relates to Section 4981. It is at page 160. I offer so much of that volume as contains the report.

Motion to nonsuit

Now as to construing Section 4370 I offer the report of First National Bank vs. Loyhed, 28 Minnesota, 396, so much of that volume as contains that report.

Also the case of National Bank vs. Mallan, 37 Minnesota, 404; so much of the books contains that report.

Also the case of First National Bank vs. Compo. Board Manufacturing Co., 61 Minnesota, 274; so much of the book as contains that report.

Plaintiff rests.

Motion to nonsuit.

Mr. Horton: May it please the Court we ask for a nonsuit on the ground that the plantiff has not shown himself to have the title to these notes; he has not proven the signatures of the previous endorsers and payee, and he has not proven that the bank is a bona fide holder, particularly in view of the first exhibit, identified as Exhibit C, it appearing that the note was taken by the bank before it was dated, and that would seem to me to compel the plaintiff—

The Court: If that was fatal to that note, still I could not grant a nonsuit because there are three other notes.

Mr. Horton: It seems to me that the plaintiff ought to show his title to be clear, and for the further reason that the endorsement seems to prove its irregularity. You will notice that the endorsement is made by the National Fence Machine Company by Charles Kubach, manager. Now the law would not presume that a corpora-

tion can endorse its paper by any manager—no law will presume such authority or give a manager any such authority. There is no proof that he was manager or who he is or what he is, and the paper, the exhibit, speaks for itself, and that the evidence now is that the National Fence Machine Company is a corporation, and the notes speak for themselves that the endorsement is by one manager, and there is no evidence here to show any authority for any such endorsement. The law will not presume that a corporation passes the assets of such corporation by a manager; and that the plaintiff ought to be put to proof in that regard.

Mr. English: I will read this section of the Minnesota law: "In actions brought on promissory notes or bills of exchange by the endorsee, the position of the note or bill shall be *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed."

The Court: I will not grant a nonsuit in this case. It seems to me that under that statute it makes a *prima facie*. There is a question I think whether that first note has been properly described, but that would prevent the granting of a nonsuit, of course.

Mr. Horton: I ask that the note be stricken out at this time.

The Court: No, I won't strike it out at this time. I will hear you. You may renew the application of course, to strike out before the case is closed. You have your objection now. You may proceed with your defense.

Defendant's Testimony

Mr. Horton: I offer in evidence the statutes of Minnesota, which has been already marked in evidence for the plaintiff, 895, Section 2747—

Mr. English: I object to it as immaterial.

The Court: That is the statute which you set out in your specification of defenses?

Mr. Horton: Yes.

The Court: I will admit it.

Whereupon the plaintiff by his counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. Horton: "Instrument obtained by fraud.

"No person, nor the heirs or personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

EDWARD G. FREICK, the defendant, being sworn in his own behalf, testified as follows:

Direct-examination by Mr. Canfield:

Q. Mr. Freick, you are the defendant in this case, are you?

A. Yes.

Q. Are you a little bit deaf? Are you somewhat deaf?

A. Yes.

Q. Where were you born?

Mr. English: I object.

A. In Germany.

Q. Just a minute when there is objection.

The Court: I will let the answer stand.

Q. When?

A. 1857, 25th day of December.

Q. When did you come to America?

A. When I was twenty-six years old.

Q. Before coming to America what schooling had you?

A. I had little German school.

Q. Well, I mean how much—

Mr. English: I object. Is that material?

The Court: It may be, on the question of fraud.

Q. How much schooling?

A. When I was ten years old the old folks hired me out on a farm to herd cattle and sheep and since that I have been only some winter months in school.

Q. Did you ever study English any before coming to America?

A. No.

Q. Did you know anything of it before coming to America?

A. No.

Q. When did you first come to America? Where did you settle first?

A. In Durand, Cedar County, Iowa.

Q. Was that in a town or on a farm? A. It was in a town. I hired out on a farm.

Q. Was that in a German speaking or English speaking community?

A. It was all German settlement.

Q. How long did you live there? A. Three years.

Q. From there where did you go?

A. I go to Minnesota—to Rock County, Minnesota—Luverne, Rock County, Minnesota.

Q. While living in Iowa, did you study English or go to school any?

A. No.

Q. Where did you settle, that is, whether in a town or on a farm, in Minnesota? A. On a farm.

Q. Stayed on a farm until when?

A. Until four years ago.

Q. What were your neighbors mostly English speaking or German speaking people?

A. It was all German settlement, all German speakers.

Q. What language did you use most?

A. German.

Q. Have you ever studied English except as you have picked it up hearing it talked by others?

A. No.

Q. Can you read English?

A. No.

Q. Can you read it at all?

A. Very little.

Q. Did you ever engage in any business besides farming?

A. No.

Q. Do you still live at Luverne, Rock County, Minnesota?

A. Yes.

Q. Do you know Mr. Hinkly?

A. Yes, sir.

Q. Where does he live?

A. He lives in Luverne, Rock County, Minnesota.

Q. How long have you known Mr. Hinkly, the plaintiff?

A. About as long as I was there in Luverne.

Q. About how long was that?

A. About twenty-four years.

Q. About twenty-four years you say?

A. Yes.

Q. Speak up clearly so we can hear. Are you acquainted with the Rock County Bank?

A. Yes.

Q. Up to two or three years ago do you know who the president was?

A. Yes.

Q. Who was it?

A. R. P. Hinkly.

Q. Where does this bank building stand, on what street in Luverne?

A. On Main Street.

Q. Is it near a corner?

A. Right on a corner, yes.

Q. Facing what way?

A. Facing to the south and the east.

Q. Where is the main entrance to the bank?

A. Right off the southeast corner.

Q. Under the front end or south end of the bank was there a room in the basement?

A. Yes.

Q. How was it entered; how did you get into it?

A. Down on the south side there was a stairway on the sidewalk and down in the cellar.

Q. How far was the head of that stairway from the main door to the bank?

A. It was close by it.

Q. Well, about how far?

A. About two or three steps.

Q. Do you know whether during all of 1908 Mr. R. B. Hinkly was the president of the Rock County Bank and active in its management?

A. Yes.

Q. You understand that, do you? Do you remember in 1908 meeting a man by the name of Charles Kubach?

A. Yes.

Q. About when did you first see him?

A. About the 14th day of September.

Q. 1908? A. 1908.

Q. Before you saw him did you see and have any talk with Mr. H. B. Hinkly in regard to some fence machines?

A. Yes.

Q. Where did you see him?

A. I seen him once when I looked on the fence—I came to the postoffice and was looking on the fence, so Mr. Hinkly came up to me.

Q. Where was this fence that you speak of?

A. It was on the east side of the Rock County Bank of Minnesota.

Q. About how far from the bank building was it?

A. It was just close over the sidewalk—about a foot from the sidewalk.

Q. When you met Mr. Hinkly there what if anything did he say to you?

Mr. English: I object. There is no claim made in the case whatever that the bank

or Mr. Hinkly were any party to the alleged frauds put upon this man by the fence people.

The Court: No, but Hinkly was the plaintiff in this case. If they can show that before the bank took the paper he had knowledge of the fraud which attached to these notes, and he afterwards took them, it is for the jury to say whether he did not take them with full knowledge, if the testimony tends in that direction—is that your object.

Mr. Canfield: That is the purpose of the testimony.

The Court: I think it is competent.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. Now what did he say?

A. I was looking on the fence, so Mr. Hinkly came out, I don't know where he came from, he stood by me and he said, "Well, Mr. Freick, that is the kind of fence what you should have." "Well, I don't know what I won't bother with that," I told him. "Most every farmer could make that kind of fence, could make his own posts any wires," so I told him I didn't want to bother with it. I may buy me a mould, I told him, to make posts.

Q. Now I don't understand clearly. This sample fence and the machine attached to it stood on the east side of the bank, did it, in the street?

A. Yes.

Q. Now were there windows in the bank on the east side?

A. Yes.

Q. Next to the fence?

A. Yes, next to the fence—next to the sidewalk.

Q. After that conversation with Mr. Hinkly did you see Charles Kubach?

A. Yes.

Q. Where did you first see him?

Mr. English: I object. You have not brought out the date of this alleged conversation with Mr. Hinkly. I think we are entitled to that. I want him to find out the date when the alleged conversation was.

The Court: You may.

Mr. Canfield: The witness said it was shortly before he had a talk with Mr. Kubach.

The Court: You may ask him.

Q. Do you know what date it was that you talked with Mr. Hinkly this first time that you have described?

A. No; it was some time before.

Q. Before what?

A. Before I seen Kubach this last time, this time that we are speaking of, this was some before.

Q. Well, before what date? When was it you first saw Kubach, you say?

A. Well, about this note?

Q. The first time you saw him to talk with him?

A. Well, it was when I bought a mould from him.

Q. When was it?

A. I couldn't say the date.

Mr. English: You have already said you met him on September 14th.

Q. Didn't you say you saw him on September 14th?

A. Well, it was some time before. I gave another note.

Q. I wish you would notice the question and answer it. Didn't you say that you saw him on September 14th?

A. Yes.

Q. Well, now, was it before that or after that that you talked with Mr. Hinkly?

A. It was before that.

Q. About how long before? A. Oh, a week or ten days before.

Q. Yes, a week or ten days. Now where did you see Kubach on September 14, 1908? A. He came down to my barn.

Q. How far is that from the Rock County Bank?

A. Oh, three blocks.

Q. Ordinary sized city blocks?

A. Yes, sir.

Q. Is it or not on the same street?

A. Yes, it is. I lived on Main Street too.

Q. Did you there have some talk with Mr. Kubach at your barn?

A. Yes.

Q. What was said by him and by you?

A. Well he—

Mr. English: I object to it as utterly immaterial. If it was not for this Minnesota statute this would be entirely immaterial. Does your Honor think it is material even under the statute?

The Court: I do. I think as far as this subject matter is concerned it is controlled by the Minnesota statute.

Mr. English: May I have an exception for the purpose of protecting my right. I do not want to be continually bobbing up to object. Will it be understood that all this is subject to my exception.

The Court: Yes. I want you to be perfectly clear about my ruling. My ruling is that as far as the merits of this controversy are concerned they are controlled by the laws of Minnesota, because the transaction was there, the parties were there at the time and the contract was made there and the notes were due there if they were due anywhere.

Mr. English: My position is that the section which counsel offered in evidence for the defendant does not affect the merits in the sense in which your Honor has used the term, that it is purely a matter of *locus fori* and is immaterial and is improper.

The Court: Yes.

Mr. English: Your Honor grants me an exception on all this line of evidence?

The Court: Yes. I think that covers it, that one exception. That goes to the foundation of it.

Whereupon the plaintiff by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

(Question repeated.)

The Court: You object on the ground that this is a mere matter of procedure and consequently is governed by a law

here and we have nothing to do with the law of Minnesota.

Mr. English: Yes, and under my construction it is utterly immaterial evidence.

The Court: And does not go to the merits at all but is a matter of procedure.

Mr. English: I say this, if it was not for this statute which is in evidence this would be clearly immaterial under our New Jersay law.

The Court: I agree with you on that.

Mr. English: The only thing that makes it material is the existence in the case of this statute.

The Court: If their law was the same as ours there would be no question about it.

Mr. English: Yes.

Q. What was said by Mr. Kubach and by you when he came to your barn?

A. He said, "Mr. Freick, you got back from Dakota." I said—

Q. Mr. Freick, I don't want to encumber the record.

The Court: Come down to the matters relating to this.

Q. I want you to confine your answer to what was said, if anything, about any fence dealing between you and Kubach. Just leave everything else out. What did he say?

A. He asked me what I had a little time to come down with him to his office, to the Rock County Bank building.

Q. Did he say anything more then?

A. I told him, well, I didn't have much time, I just got ready ready to go out in country.

Q. Yes. Did he say anything more? Go right on and tell.

A. Well, it don't take very long. He said, "Mr. Freick, I like you to come down to the office, and I had a letter from the company; they like what you take a little more territory."

Q. Is the first time that you talked with Kubach at your barn?

A. No; I talked with him before.

Q. Now wait; you have got mixed. I want you to tell about what was said the first time Kubach came to your barn I think it was the 14th of September, you said?

A. Oh.

Q. That is what I want. What did he say then?

The Court: That is the date of the first note, is that what you mean?

Mr. Canfield: About the 14th.

Q. What did he say then?

A. He told me to come down with him to his office and he want to sell me—he want to let me have Nobles County for agent, to be an agent for Nobles County.

Q. Is that the first time he came to your barn—the first time?

Mr. English: That is what he says?

A. Yes, about the 14th of September.

Q. Go on; what else was done?

A. "Mr. Freick," he said, "you ought to take a little more territory." I go down with him to the bank—to his office.

Q. What time of day was that?

A. It was in the morning.

Q. Yes. Where did you go when you reached the bank building?

A. He told me to sit down—

Q. Where did you go when you reached the bank building?

A. Down in the basement, in the bank.

Q. With whom?

A. With Mr. Kubach.

Q. Was anyone else there?

A. No.

Q. Now when you got in there go on and state what happened and what was done?

A. Well, and he told me to sit down on a table—

Q. Sit down on a table?

A. Yes, on a side of a table.

Q. Well, go on?

A. And he sat in front of me and he had a tablet or book what was laying on a table and he said, "We made out two contracts for Nobles County, and one for you and one for the company."

Q. What next happened. Go on and tell it?

A. I told him I didn't care for any more, I don't want to bother with it. Well, he told me, "You make more money by this than by anything else." So he asked me whether I want to read it and I told him I can't read it.

Q. You told him you could not read it? A. I told him I could not read it. Well, then he told me what he should read it, and I don't care, I can't much understand anyway from that, I told him, so he start to explain some to me and then I signed my name down on the corner.

Q. What position was he in when you first signed your name? Where was he and what was he doing?

A. He was sitting on the table and had his hand always on the tablet.

Q. Can you just show—illustrate it to the jury.

A. He sat on the table and kept his hand always on the book (placing hand on book).

Q. On which side of you was he?

A. He was sitting on front of me. I sitting on

the north side from the table and he was sitting on the east side.

Q. You say he kept his hand on this tablet?

A. Yes.

Q. You mean by that a bunch of papers fastened together, do you?

A. Yes.

Mr. English: I object to it as leading.

The Court: Yes.

Q. Then did you or not sign your name on the top paper?

A. Yes, sir.

Q. Where was his hand when you signed your name?

A. It was right on the top paper.

Q. On the same paper?

A. Yes.

Q. After you had signed your name the first time, that is on the top paper, then what did Mr. Kubach do?

A. He left up a little corner and show me there is one—other one is the same—is for the company —sign here.

Q. Just show how he did (witness illustrates by turning a corner of paper over).

Q. Just as you are indicating now?

A. Yes, just so I could see the line.

Q. Then what did you do?

A. I signed it.

Q. While you were there that day, September 14, 1908, did you sign your name more than twice?

A. No.

Q. When he told you that the paper underneath the top one was a copy for the company did you or not believe what he said?

Mr. English: I object.

A. Yes.

Mr. English: I object, Wait, wait. That certainly is beyond the scope of our statute, I should think. I should think that is a matter of fact for the jury to say. I do not believe he can describe his mental process.

The Court: I think it is competent.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

(Question and answer repeated.)

Q. During any of this talk between you and Kubach was anything said at any time about the giving of a promissory note?

A. No.

Q. Or any other paper except the two contracts?

A. Was nothing said about paying any money.

Q. Did you at the time know that you were signing a promissory note?

A. No.

Q. Why did you sign the under paper without reading it?

The Court: What was said at the time I think would be competent; but I think it is competent. He may answer.

Mr. English: I object to why he did it.

Whereupon the plaintiff by his counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

A. I took Mr. Kubach's word for it.

Q. Now, Mr. Freick, I will show you Exhibit P-2, the note of $1,440, dated September 18, 1908;

do you remember having any transaction with this same man Kubach about September 18, 1908?

A. Yes.

Q. Where did you see Kubach that day?

A. He came down to my barn again.

Q. Came to your barn?

A. Yes.

Q. In the City of Luverne or not?

A. Yes, sir.

Q. About what time of day was that?

A. It was in the morning.

Q. Anybody with him or was he alone?

A. There was a couple of men—I believe there was two men along with him.

Q. Do you remember who they were?

A. Was one working man, I don't know his name, and I think one was Augustine, his name.

Q. Who was this man Augustine that you refer to?

A. It was one man working for the company, agent.

Q. One of these same fence machine fellows?

A. Yes, sir.

Q. Did you there have any talk with Kubach at your barn?

A. Yes.

Q. What did he say and what did you say?

Mr. English: I object to it.

The Court: I will permit it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

A. Well, he asked me whether I was ready to make some posts, set up a mould, and he was going to show me to make some fence posts.

Q. Now we want to get over that. You did something about that then, didn't you, fixing some posts there that day?

A. Yes.

Q. After that what next was done or said?

A. And he want me again to come down to his office, to the Rock County Bank building, down below.

Q. You say he want you; what did he say to you?

A. "Mr. Freick, I have a letter from the company and they want—like you to take more territory."

Q. Did he say what territory?

A. South Dakota.

Q. How far is the City of Luverne from South Dakota?

A. Oh, about eighteen miles, from the line, where I live.

Q. What else was said?

A. Well, I told him, "I don't care for any more, I wouldn't bother with it."

Q. Go on and tell everything.

A. So he told me better come down to his office, down to the Rock County Bank building.

Q. Go right on; don't make me ask questions every time.

A. So he showed me the State of South Dakota; he said it was—I don't remember how many counties it was taken out, some counties—

Q. You say he showed you the State; what do you mean by that?

A. On a map he showed me the State.

Q. Showed you a map?

A. On a map.

Q. What else was done?

A. And then he would like to have me take the agency up for South Dakota.

Q. Yes. Who else was there besides you and Kubach, in the room?

A. I don't remember there was any one else.

Q. Don't remember any one else. What next happened?

A. Well, I told him I don't care for it, and he said, "You better take it and you make more money by this and it don't cost you anything if you make any sales or we take the agency away from you and appoint somebody else."

Q. If you couldn't make sales?

A. If I couldn't make sales.

Q. Did you or not say anything to him about your making a good agent or anything like that?

A. No; I don't want it, I told him.

Q. Go right on and tell what next happened?

A. Well then we sat down on the table and he had the tablet laying again on the table and told me he make up two contracts, "one for you and one for the company and you better come on and sign it."

Q. Did he do any writing while you were there?

A. No.

Q. You spoke of this contract that was on top; was that a writing or a printed thing?

A. It was some printing and some writing, I believe.

Q. Do you know whether there were blank spaces in it for writing?

A. Yes.

Q. Was there?

A. I don't understand the question.

Q. Were there—

Mr. English: I object. Let him describe it.

Mr. Canfield: I would, but it is very difficult to get it out of him.

Q. Can you tell whether there were blank lines or places to write in, printed forms?

Mr. English: I object to it as an improper question. This witness can describe this just as well as not if he wants to.

The Court: I think it is not an improper question.

A. Yes.

Q. Did you see Mr. Kubach write in any while you were there in the room?

A. No.

Q. Well, do you know when those were made, when the writing was done?

A. Well, it was all before we came in the room, it was done.

Q. Had you or not talked about taking the agency of South Dakota before he went into the office that day?

A. No.

Q. Now, when you sat down at the table what did Mr. Kubach do?

A. He sat down on the table, and he opened his grip and took out a tablet out of his grip it was all in the grip there, and he laid it on the table.

Q. Did he let go of it—

Mr. English: I object.

Q. —or hold on to it; what?

Mr. English: I object.

The Court: Allowed.

Q. What did he do? Describe how he did it.

A. He took the tablet out of his grip and laid it on the table and kept his hand on it and told me he make out two contracts, one for you and one for the company.

Q. Now did you read it?

A. No, I told him I couldn't read it.

Q. What did he do, that is Kubach?

A. Well, he didn't do anything but he asked me if I want to sign it.

Q. Did he read it to you?

A. He read some of it to me.

Q. Did he pretend to explain it?

A. Yes, he explained some.

Q. Can you remember what he said?

A. No; he said, "Best thing what you could do and make more money by this than by farming."

Q. Now at that time was there anything said about giving or making any promissory note?

A. No.

Mr. English: I object to it as an improper question. He can state what was said, but he can not lead him along like that.

The Court: It seems to me that under the statute that question is competent.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal)

Q. What, if anything, did he say about whether it would cost you anything or not? What did he say? Do you understand it?

A. No.

Q. Did Mr. Kubach tell you it would cost you anything to be agent; that you would have to pay anything to be agent?

A. No.

Q. What did he say?

A. "Don't cost you anything to be an agent; just only make sales to the farmers and collect money for it."

Q. And do what with it—do what with the money after you collected it?

A. Send it to the company.

Q. When he told you this about the contract did you or not believe what he said?

Mr. English: I object. That is the same question.

A. I believe it.

The Court: Allow it.

Whereupon the plaintiff by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal)

Q. You believed it?

A. Yes, sir.

Q. What did you then do?

A. I signed it.

Q. Signed what?

A. I signed the top contract first.

Q. How big a paper is it or was it; about how big?

A. Oh, about 8 inch square.

Q. Do you know whether that was a note or not, that top contract?

A. Yes.

Q. Was it?

A. Was not a note; it was too big.

Q. After you signed the top paper then what did Kubach do?

A. Well he said, "Sign here, the other one; this is the same, and that goes to the company. The company want to know what territory is taken." So I signed it; the other contract too.

Q. Well, when he told you that did you believe him?

A. Yes.

Q. What did you do then?

A. I signed it.

Q. After you had signed your name there the two times what did Kubach then do?

A. He took up the tablet and turned around and tore off the top one and gave that to me and the other one he put down in his grip again.

Q. Did you see the other one after he took off the top one?

A. No.

Q. When you signed your name on the under paper could you see what it was except a place to sign your name?

A. No, I couldn't see.

Q. Did you know then it was a promissory note under there?

A. No.

Q. If there had been would you have signed it?

A. No.

Mr. English: I object.

The Court: No, I think that is going too far.

Mr. Canfield: Possibly that is wrong.

Q, When you did sign it did you know that you were signing a promissory note?

A. No.

Q. Or any other—I will withdraw it. Do you know what the word "negotiable" means—negotiable?

A. No.

Q. Don't understand that word?

The Court: What difference does that make? They have to recover under the promissory note, because these are in the form of promissory notes.

Mr. Canfield: That is so.

Q. Mr Freick, I now show you the Plaintiff's Exhibit 3.

The Court: What is the date of that?

Mr. Canfield: Dated September 24, 1908.

Q. You recognize the signature? A. Yes, sir.

Q. Do you know whose it is?

A. Yes, sir.

Q. That is yours, isn't it?

A. Yes.

Q. Now, do you remember having any other transactions with Kubach on September 24, 1908?

A. Yes.

Q. Where did you see Kubach that day?

A. Down in my place, out in the country, fourteen miles from town.

Q. What were you doing that day?

A. I was working on a foundation for a corncrib.

Q. About what time of day did you see him?

A. On the forenoon.

Q. Who was with him, anybody?

A. Augustine, I think it was his name.

Q. Augustine? Do you know whether they came there to your place while you were there or not? Did they come to your place while you were there that morning?

A. Yes.

Q. How?

A. Drove out in a buggy from town, they said.

Q. You saw him come there with a buggy, did you?

A. Yes.

Q. At that time had you had any talk with him about taking any more territory?

A. Yes.

Q. Now notice the question. At that time had you before or prior to that time had any talk about taking any more territory?

A. No.

Q. When he came to the place what did Kubach say to you?

A. Well, he said, "Mr. Freick what you working here on the foundation, you could make a good deal more money by taking more territory and be an agent—take your time selling machines and moulds to the farmers, you make a good deal more money that way," and he want me to take—he asked me I got to take the job for North Dakota.

Q. This man Kubach is a pretty good talker, isn't he?

Mr. English: I object.

A. Yes.

The Court: Well—

Q. Well, what else did he say? What else did he say, anything?

A. "Better come down," and we go—we sat down same place. He had made out a contract for North Dakota. "Better take that." "I don't think I take any more," I said, "I didn't got time to it." "Well, you better come on," so he went along with me in the granery, in the driveway through a granary; so he opened his grip and he took out the tablet again and laid it on his knee, and he said, "We made out two contract for you for North Dakota, one for you and one for the company."

Q. Do you know whether that paper on top of the tablet was all made out?

A. Yes.

Mr. English: Same old tablet, was it?

Mr. Canfield: Seems to be a very useful one.

Q. What else? Go on and tell the rest?

A. Well, I can't remember all the words that was said then.

Q. Talked a good deal?

A. Yes; he told me that I could make more money this way, selling machines and moulds to the farmer and make agents.

Q. At that time was there anything said about your paying him any money?

A. No; don't need to pay any money out; don't cost me anything, only if I can make it—

Q. Was there anything said about giving a promissory note?

A. No.

Q. What else did he say, if anything, about why you should take North Dakota?

A. Yes; he asked me what I want to take North Dakota.

Q. When he produced the tablet and laid it on his knee what did he say to you about signing it, if anything? Say anything to you?

A. He asked me whether I want to sign that contract on top.

Q. What did you do or say?

A. Well, I signed it then and he lift up the lower corner and signed the next one too; he said the other one goes to the company.

Q. Why didn't you look at the paper underneath?

Mr. English: I object.

A. He had his hand—

Q. Wait a minute. I will withdraw the question. When he lifted up the lower corner of the top paper how much of the under paper did it expose or could you see?

A. Just enough to see the line where I could sign my name.

Q. What, if anything, did he say about what that was underneath?

A. It was the same one what this was on top.

Q. What did you do then; did you sign the one underneath?

A. Yes, sir.

Q. At the time you signed it did you or not believe it was a contract like the one on top?

A. I believe it was a contract like it was on top.

Q. Did you believe it was a note?

A. No.

Q. Why didn't you read it?

Mr. English: I object.

A. I couldn't read it.

Mr. English: I object. That is in the same line that has already been ruled on.

The Court: He said he couldn't. Proceed.

Q. Was there any other reason why you did not look it over? Was there any reason why you did not examine it?

A. I took his word for it. He told me it was just the same like the top one.

Q. You had lots of confidence in Mr. Kubach, did you?

Mr. English: I object.

The Court: I think this last question is going too far.

Q. Did you at that time sign your name more than twice?

A. No.

Q. Just twice? A. Just twice.

Q. Now, Mr. Freick, I show you Plaintiff's Exhibit 4, note dated September 26, 1908, for $1,-152; do you recognize the signature?

A. Yes.

Q. Can you see it?

A. Yes, sir.

Q. That is yours, isn't it?

A. Uh! Uh.

Q. Do you remember having any transactions with Mr. Kubach on that day, September 26, 1908?

A. No.

Q. You don't remember anything? Do you remember anything happening about that time? A. Yes.

Q. Well, what is it that you remember; go on and tell it?

A. Well, I don't know what that note is for. I can't remember what day.

Q. The last note, dated September 26, 1908. Do you remember seeing Mr. Kubach one Sunday morning?

A. Yes.

Q. Yes. Well now, what time that day, that Sunday, did you see him?

A. It must have been just little bit before ten; we was ready to go to church.

Q. Did you have any transactions with him that Sunday?

A. Yes.

Q. Where did you see him?

A. He came up to my house.

Q. What did he say to you?

A. He said he had a letter from the company and the company would like me to take more territory.

Q. Well, what territory did he mention? Go right on and tell what was said?

A. He would let me have the State of Minnesota.

Q. That he would let you have the State of Minnesota?

A. Yes.

Q. What did you say; go right on.

A. I don't care for any more, and my wife is just ready and want to go to church and I don't care for it today, and so he said, "Well, it won't take very long, Mr. Frieck. Just come down to

the office and it won't take very long," so we went down to his office, down to the bank, Rock County Bank.

Q. That was on Sunday morning?

A. Yes.

Q. When you got into the office, in the Rock County Bank, what did he do?

A. Well, he showed me the State of Minnesota.

Q. Showed you the state?

A. On a map.

Mr. English: How did he get from the farm to the Rock County Bank. I want to understand him. I understand he was there on the farm and now he is talking about the Rock County Bank.

The Court: He said he came to his house just before he was going to church.

Mr. English: He said the Rock County Bank was this conversation.

The Court: He said he came to his house just before going to church. He didn't say he was out on the farm.

Q. From your house you went to the bank, did you?

A. Yes.

Q. Along with whom?

A. With Kubach.

Q. With anybody else at all?

A. I don't remember. I believe Cole was there too.

Q. Are you sure about that?

A. I couldn't remember.

Q. When you got to the Rock County Bank building you went some place in it?

A. Went down in the cellar.

Q. When you got down there what did you do?

A. Well, he showed me on a map the State of

Minnesota and told me that it was left for me and the company would like to take me that territory from Minnesota too.

Q. Did he say anything about how much you would have to pay for it?

Mr. English: I object.

A. No.

Mr. English: I think he ought to ask what he said.

The Court: It is a leading question.

Mr. Canfield: I am aware of that.

The Court: You can ask him what was said.

Mr. Canfield: It is pretty hard to get out the facts.

Q. What else did he say; go on and tell it all.

A. I don't remember all the talk any more.

Q. Don't remember all of it?

A. No. He said that was left him and he would like to take me in the State of Minnesota, make the agent for it and selling to farmers moulds and machines.

Q. What did you do then and what did he do, both of you?

A. He opened the grip again and he said, "We make out two contract, one for you and one for company."

Q. Said they had made it up?

A. Yes.

Mr. English: He didn't say that.

Mr. Canfield: I so understood him.

Answer repeated by stenographer.

Q. Did he make anything out while you were there?

A. No; he just took them out of his grip and they was all made up.

Q. What did he do then after he took them out of his grip?

A. He laid them on a table and he asked me would I want to sign.

Q. Can you say just the words he used when he told you about signing them?

A. Well, he made out two contracts and I don't need to pay any money, "all that you have to do is to collect money from the farmers for sales what you made and send it to the company, and if you can't make it, can't make any sale, we take the agency job away and appoint somebody else.

Q. What else did he do then?

A. Then I told him that I didn't got—I signed it then. I signed the first contract.

Q. Where was Mr. Kubach when you signed the first contract, the top contract?

A. He set right on the front of me on the side of the table.

Q. After you signed the top one then what was done?

A. He lift up the lower corner and said, "The other one is the same and goes to the Company."

Q. What did you do? Did you sign anything more?

A. Yes; I signed the other one too.

Q. Could you see what the paper was that you signed the second time?

A. No.

Q. When he told you that the lower paper was a copy of the contract did you believe what he told you?

A. Yes.

Mr. English: I object.

The Court: Take your exception.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. While there that day did you sign your name more than twice?

A. No.

Q. Did you know that you had signed a promissory note there that day?

A. No.

Q. What?

A. No.

Q. Or did you believe that you had signed a promissory note that day?

A. No, I did not believe it.

Recess.

DIRECT EXAMINATION (continued), by Mr. Canfield:

Q. Mr. Freick, from the time you first saw this man Kubach until September 24, 1908, did you see him around the Rock County Bank frequently or not?

Mr. English: I object.

A. Yes.

Mr. English: I object to it as immaterial.

The Court: I do not see how that is material.

Mr. Canfield: I expected to connect this up with other evidence that the plaintiff was with him more or less while they were trying to negotiate deals of similar character.

Mr. English: There is no foundation for any such thing in the declaration.

Mr. Canfield; Bearing on the question of notice, that is all.

The Court: Well, if you are entitled to

the protection of the statute which has been offered in evidence in this suit you would not have to show anything of the sort. Still, where a fraud is set up of course there is considerable latitude allowed, and I will allow the question.

Mr. English: I know, your Honor, but pardon me, this is against Mr. Hinkly, who is not claimed to have had any connection whatever with the alleged frauds of the fence people.

The Court: I know, but if there was fraud in the getting of this contract, evidence from which the jury would have a right to infer that the plaintiff had cognizance of it at this time would be relevant.

Mr. English: That is not one of the defenses set up here. They are down by their defenses specified in the case.

The Court: What are their specifications?

Mr. English: Plea and notice annexed to the plea.

The Court: What are they? "That plaintiff is not a holder thereof for value." Why wouldn't it come under that?

Mr. English: Because counsel said that is not what they are driving at.

The Court: If this note was obtained by fraud and the present holder, the plaintiff in this case, knew of it, of course he did not get it for value.

Mr. English: Is that what you are showing?

Mr. Canfield: Yes, bearing on the question of his good faith.

The Court: Assuming that to be true, assuming they were fraudulently obtained and the plaintiff knew of of it, of course, he is not a holder for value. (Question and answer repeated.)

Q. During the same time did you see Mr. Hinkly with Mr. Kubach around the Rock County Bank?

A. Yes, sir.

Q. How often?

A. Well, I was not in town very often. When I was in town—

Q. Well, how often?

A. I see him two or three times anyway when I was in town. I was out in the country mostly. About three times.

Q. Where did you see them, Mr. Hinkly and Mr. Kubach?

A. Well, they were standing around the fence and talking about the fence and talking with people.

Q. How far was this fence from the entrance to the office under the Rock County Bank—how far from the fence?

A. Oh, about three rods.

Q. Well, was it as much as that?

A. Well, I couldn't say. It was on the east side—the fence was on the east side and the stairway down below—the entrance in the Rock County Bank, it was only a little over a rod and a half or such.

Q. Now, where did this man Kubach and the other men associated with him do the most of their business?

Mr. English: If he knows.

The Court: As far as he knows.

Q. As far as you know, while they were at Luverne.

A. Down below in the basement.

Q. Was it all down below in the basement?

A. Yes, every time when I went—

Q. No; besides the basement where else, any place?

A. On the street.

Q. On the street where?

A. Around the fence.

Q. At the corner of the Rock County Bank?

A. Yes.

Q. Do you know about how large Luverene is?

A. Yes.

Q. How large is it?

A. About three thousand people.

Q. Now, do you know whether this business that Kubach and others were carrying on attracted a good deal of attention of people around there?

Mr. English: Yes, or no, what do you know?

Q. Answer yes or no, whether it attracted the attention of people in town?

A. I don't understand the question.

Mr. English: It is obvious he can not answer it, because he says he was only there once in a while and he only saw Kubach there three times.

Mr. Canfield: If he doesn't understand it there is nothing to argue about it.

Q. When was it that you first heard anything about your having given any notes?

A. About the 29th of September.

Q. Well, how did you hear of it then?

A. I got a letter in the postoffice.

Q. Postoffice where?

A. In Luverne.

Q. Do you know who it was from?

A. Yes.

Q. From whom?

A. From Rock County Bank, Luverne.

Q. After you got this letter what did you do?

A. I went right up to the bank, Rock County Bank.

Q. Did you go in the bank?

A. Yes.

Q. Whom did you see when you went in the bank?

A. I seen Mr. Charlie Martin, Cashier, first.

Q. Cashier of what?

A. Cashier of the Rock County Bank.

Q. Anybody else?

A. Mr. Hinkly too.

Q. The plaintiff here?

A. Yes, sir.

Q. Did you have some talk with Mr. Martin?

A. Yes.

Q. Where was Mr. Hinkly at the time of the talk?

A. He was in the bank too.

Q. How near by?

A. Oh, about a rod from a half on, a little further back in the bank.

Q. Right in the same room?

A. Yes.

Q. Do you know whether he could hear your talk?

A. Yes.

Q. Could he?

A. Yes.

Q. What did you say to Mr. Martin?

A. I said to Mr. Martin I had a notice here

that looks to me like some notes here in the bank form.

Q. Well, what did he say?

A. Well, "There is here some," and then I asked him where they are.

Q. Yes.

A. And he was going and get them for me, going to show them to me.

Q. Do you mean to say—

Mr. English: I object.

Q. Do you mean to say that he went and got them?

A. Yes, sir.

Mr. English: I object. Counsel is certainly bound by the rules of ordinary examination in spite of the statute. He can not put words in his own witness' mouth like that.

The Court: The question is leading.

Mr. Canfield: I concede that, but I thought that considering the infirmity of the witness in expressing himself would excuse the question. (Answer repeated: "And he was going and get them for me, going to show them to me.")

Q. What did you mean by that answer?

A. He went and showed them to me.

Q. Oh, yes, he went and showed them to you. What was it he showed to you? (Hands witness notes.) Are these exhibits in this case 1 to 4 inclusive the notes that he showed you?

A. Yes.

Q. When he showed them to you what did you say?

A. I say, "I never know when I give any notes."

Q. What did he say?

A. "Well, there is some here," he said.

Q. "There are some here."

A. Yes.

Q. Go on with all that was said.

Mr. English: I object. Under this statute I do not see where this is material, because the evidence is that the bank took all these notes previous to the date that he gave.

The Court: This conversation occurred in the presence of this plaintiff and that would be a question whether it would not bind the plaintiff.

Mr. English: All right. (Question repeated.)

A. I asked Mr. Martin what he bought them.

Q. You asked him what he bought them?

A. I asked him what he bought these notes.

Q. What did he say?

A. Well, "They are left here for collection," he said.

Q. He said, "They were left here for collection"?

A. Yes.

Q. Go on; anything else said by anybody?

A. "And better not buy them"—

Q. Who said this?

A. Charlie Martin, the cashier.

Q. I know, but you started to say something else. What did you say then?

A. I told him—I asked him what he bought them. I told him not to buy them, the notes were no good. I would not pay them.

Q. Well, go on; anything else said?

A. Well, and Mr. Hinkly came in and talking and calling me and he asked me what I—and I

didn't have any notes—better go and see them fellows.

Q. Go on.

A. I told him, "Well, they are gone. They are—they left the town yesterday?"

A. No.

Q. Anything else said?

A. No, not what I know.

Q. Now to refresh your memory did Mr. Hinkly say anything to you about seeing an attorney?

A. Yes.

Q. What did he say about that?

A. "Well, then better see an attorney."

Q. Now you have told substantially all that was said by you when you were in the bank?

A. I don't understand it.

Q. Have you told all that you remember that was said in the bank at that time?

A. Yes, sir; I don't remember anything more.

Q. What did you do then?

A. Well, then I seen an attorney.

Q. You went out of the bank, did you?

A. Yes, went out of the bank.

Q. And saw an attorney?

A. Yes.

Q. Had you ever seen either Mr. Kubach or Cole or Augustine around Luverne before they appeared there with this fence machine business?

A. No.

Q. Have they ever been around there to your knowledge since?

Mr. English: I object.

A. No.

Mr. English: I object. When I object you wait.

The Court: I will allow it.

Mr. English: Utterly immaterial.

The Court: The question is allowed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. Canfield: I think that is all. If there is anything more it is customary to allow re-direct.

The Court: Cross-examine.

CROSS-EXAMINATION by Mr. English:

Q. How long have you lived in Rock County? Did you hear the question?

A. How many years?

Q. Yes.

A. Well, I got to figure that up. I move up there 1886.

Q. Since 1886; and you have lived within close vicinity of Luverne all that time?

A. Yes.

Q. I think you said your farm was about three blocks away from the bank building?

Mr. Canfield: No.

A. My house where I live yet.

Q. How long have you lived there three blocks away from the bank building?

A. About four years.

Q. Is that located on your farm?

A. I can't understand.

(Question repeated.)

A. No.

Q. Your farm is about a mile from there?

A. Where I live last, that is about a mile and a half.

Q. About a mile and a half from Luverne?
A. Yes.
Q. About four years ago you moved into town?
A. Yes.
Q. Where was it that you had this fence set up around your place, at the farm or at the house where you live?
A. At the house where I live.
Q. Now you were interested in the fence, weren't you?
A. No.
Q. Didn't you use fence on your farm?
A. I interested on the farm.
Q. You have a large farm, haven't you?
A. Yes.
Q. Over a thousand acres?
A. No.
Q. How many?
A. I might—I don't know—I got—
Q. Don't you know how much land you own?
A. I got five quarters.
Q. Five quarters?
A. Yes.
Q. And a quarter is a hundred and sixty acres?
A. Yes.
Q. That is eight hundred acres?
A. Yes.
Q. Yes; and you have to use a good deal of fence on your land?
A. Yes.
Q. You were interested in any invention or arrangement by which you could get fence, weren't you?
A. No.
Q. You became interested in this fence?
A. Well, little.

Q. And the thing that appealed to you about it was that you used a good deal of fence on your farm?

A. Yes, uh, uh.

Q. Is that right?

A. Well, I had all fence fixed up, you know.

Q. But fence is one of the expensive things about farming in Minnesota, isn't it?

A. I don't understand.

(Question repeated.)

A. I don't know.

Q. How long have you been a farmer?

A. I don't know exactly; about ten or fifteen years.

Q. You do know there are not very many trees out there and it is hard to get fence posts, isn't it?

The Court: I do not see how this is material on cross-examination. The only question is did you get anything for these notes?

Mr. English: All this goes to this general fishing character of the evidence as to what was negligence and what his attitude of mind was and all that.

The Court: Not at all. He might not have been willing to buy fence stuff to put on his farm. The only question is was he negligent in signing these notes, whether he got anything for it or not.

Q. You read the newspapers, don't you?

A. No.

Q. Can you read the newspapers in English?

A. No.

Q. You do, don't you?

A. No, sir.

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Q. Must have seen it?
A. Yes.
Q. Because you signed it?
A. Yes.
Q. You would not sign it if you had not seen it?
A. No.
Q. And this is one of those contracts that you have been testifying about, isn't it?
A. Yes.
Mr. Canfield: Speak up.
Q. Now, this was dated the 14th day of September, 1908, wasn't it?
A. 14th, yes.
Q. Yes, and that is the same date as the note?
The Court: No, that is not the date of the note.
Q. That is the note, Exhibit P-1, isn't it?
(Note shown witness.)
A. I can not see it.
(Mr. English places note in front of witness.)
A. I don't see what it is.
Q. Look and see. Isn't that September 14, 1908?
A. I see figure 14 there.
Q. Yes; September 14, 1908, and the contract and the note both bear the same date. After you signed that contract you took it with you, didn't you?
A. Yes.
Q. When after you had signed it did you first read it over?
A. I left it at my house.
Q. Left it at your house, and when did you first read it over?

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Q. How much of that fence did they have on your place?

A. Well, it was three posts set up.

Q. Three panels of it?

A. Yes.

Q. You are talking about your town house now, aren't you?

A. Yes.

Q. And that is where they set up the fence?

A. Yes.

Q. On your place about three blocks from the Rock County Bank Building?

A. Yes.

Q. That had been set up there some time before you had this interview of September 14th; that is right?

A. Yes.

Q. That had been set up during the progress of earlier negotiations between you and Mr. Kubach?

A. Well, I don't remember what time.

Q. But you remember it was set up by these people?

A. I guess so; I didn't see it.

Q. What's that?

A. I didn't see it set up.

Q. You mean you wasn't there when they put it up?

A. I wasn't there.

Q. You saw it afterwards?

A. Yes.

Q. And it stayed there for some time, didn't it?

A. Yes.

Q. Now, I show you a paper having the name of Edward G. Freick; is that your signature?

A. Yes, sir.

Q. What is that paper?

A. Well, it was papers for the—that he make me sign.

Q. Well, what is written up at the top of it?

A. I don't know.

Q. Put on your glasses. Got your glasses with you?

A. No, I didn't have no glasses.

Q. You do use glasses, don't you?

A. No.

Q. Didn't you testify in some other proceeding that you always use glasses?

A. Well, I didn't got any.

Q. You haven't got any?

A. No.

Q. You didn't bring any along?

A. No.

Q. Came all the way from Minnesota without your glasses, eh?

A. I don't use them any—hurt my eyes.

Q. You can read better without them?

A. No, I can't read.

Q. How can you read your signature there, Edward G. Freick?

A. Yes.

Q. You can read that all right, can't you?

A. Yes.

Q. You can read the other signature there too, can't you?

A. No.

Q. Can't read that, eh?

A. No.

Q. Whose signature is that?

A. I don't know.

Q. Did you ever see this paper before?

A. Well, I must see it.

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Q. Haven't you stood on the streets in Luverne and read newspapers in English?

A. No.

Q. Never?

A. No.

Q. When was it that you first became acquainted with Mr. Kubach?

A. About the 14th day of September.

Q. That was the first time, eh?

A. Well, we had some dealing before, but I don't know whether it has anything to do with this note.

Q. You had some dealings before that?

A. Yes.

Q. So the 14th day was not the first time you had seen him?

A. No.

Q. You saw him on the 14th when he came out to your farm, or were you at your house?

A. I was up to the house this time.

Q. At your house in town?

A. Yes.

Q. When was it that they first set up the fence on your place?

A. I don't know nothing about it.

Q. Well, was it the 14th of September or after that?

A. It was before September—

Q. Before that; so when you seen Mr. Kubach before that he had set up some of this fence on your place; is that right?

A. I don't know when that fence was set up.

Q. You do know whether it was before the 14th of September or after?

A. Yes.

Q. It was before that date?

A. Yes.

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A. I didn't took no attention to it, I left it at the house.

Q. When did you first look at it and read it?

A. Well, I didn't look at it at all.

Q. Who had it for you; did your wife?

A. I lay it away in the house.

Q. Told your wife about it, didn't you?

A. No.

Q. Told your son Herman about it?

A. No.

Q. When did you first tell Herman about it?

A. I don't know that I told him about it.

Q. Told him about the other contracts?

A. No.

Q. Herman never knew anything about these contracts?

A. No.

Q. Was Herman in school?

A. He was out on the farm.

Q. He had been at business college, hadn't he?

A. Yes, he went—

Q. You have got another son, Edward, haven't you?

A. Yes.

Q. You told him about it?

A. No.

Q. Was Edward the boy that had been to business college?

A. No.

Q. Which one had been at business college?

A. Herman.

Q. Now which one did you tell about the contracts?

A. Didn't tell any one about it.

Q. Neither of them ever knew about it, eh?

A. No.

Q. Was not Herman with you on that Sunday when you went in the basement of the Rock County Bank with Mr. Kubach?

A. No.

Q. Herman wasn't there, eh?

A. No.

Q. Were you there all alone?

A. Yes.

Q. All alone, eh? Yes, all right. You say after you took that you never looked at it at all? (Indicating paper.)

A. No.

Q. Put it away in the drawer?

A. Yes.

Q. Where did you put it?

A. In a drawer where I have my papers.

Q. Where do you keep that drawer? What is it in, in a desk?

A. It was where I do a little writing.

Q. This was the second of these contracts you had signed, wasn't it?

A. I don't know.

Q. Didn't you sign one when they first put up the fence around your place?

A. Yes.

Q. Yes; that was a couple of townships, wasn't it?

A. Yes.

Q. Yes.

A. No; it was for two townships.

Q. Yes; one of the 14th of September was for Nobles County?

A. Yes.

Q. That is the second one you had signed?

A. Yes.

Q. Did you put this one with the first contract in the drawer?

A. No.

Q. Where did you put it?

A. Well, I put it some other place, I don't remember where it was.

Q. Didn't keep them together?

A. No.

Mr. English: I will have this marked for identification, September 14th.

Paper marked C for identification.

Q. Now was this contract a part of the tablet that you have been talking about?

The Court: Which contract?

Mr. English: One dated September 14th, C for identification.

A. I don't understand the question.

Q. I want to know if this contract of September 14th was a part of that tablet which you have talked about that Mr. Kubach you say had?

A. Yes.

Q. Was it fastened to it?

A. Yes.

Q. How was it fastened to it?

A. Well, looks to me it was fastened on one end just like a tablet.

Q. Like a pad with glue on the end and you tear them off?

A. Yes, glue on the end. Was together on one end.

Q. That is the way it looked to you?

A. Yes.

Q. Did he tear them off in your presence?

A. I didn't see his tearing it off.

Q. He handed it to you, because you took it home and put it in your drawer?

A. He turned around and when he turned around he tear it off and gave it to me.

Q. He turned around and tore it off and gave it to you?

A. Yes.

Q. After he had made you sign that he handed it to you?

A. Yes.

Q. Was that on the tablet, this note?

A. I did not see it; I don't know anything about a note.

Q. Where was the second paper which you signed; was that fastened on the tablet?

A. Well, I don't know where it was. I say the second paper was just below the top one.

Q. Below the top one, like that (indicating)?

A. Yes.

Q. One under the other?

A. Yes.

Q. Way up there?

A. Yes.

Q. Do you mean to say you could not see the difference between a note and the contract?

A. No.

Mr. Canfield: Didn't say that.

Mr. English: I am cross-examining.

Q. Do you mean to say you could not see the difference betwen the note and the contract?

A. I did not see the note.

Q. When you signed the note you noticed that printed matter there, right above where the names are signed, didn't you?

A. I don't know.

Q. No, no; I asked you when you signed that contract which was laying on the table, you say, didn't you see that printed matter there, that printing?

A. Yes.

Q. When you signed the note you did not see any printing, did you, of that kind?

A. I didn't see so far up; I just seen the line where I could sign my name.

Q. Couldn't you see it was a totally different kind of paper?

A. I don't remember.

Q. Don't remember?

The Court: Let me see one of those contracts?

Q. Now that fence which was set up on your property was stuff which was bought by you, wasn't it?

A. No.

Q. You bought that fence which they set up there?

A. No.

Q. Then you bought the moulds to make it?

A. No.

Q. You bought a set of moulds?

A. I bought a set of moulds; I have them in my barn.

Q. What's that?

A. I had that in my barn, that set of moulds.

Q. Now you paid for those, didn't you? They didn't give them to you did they?

A. No.

Q. You paid for them?

A. Yes.

Q. Did you pay cash?

A. No.

Q. You paid with a note, didn't you?

A. No, I never paid for it.

Q. How did you pay for them then?

A. Never paid for them yet.

Q. Did you pay the cash for them?

A. No.

Q. You gave them something in exchange for them, didn't you?

A. I didn't give them any.

Q. They didn't give them to you as a present, did they?

A. On the first mould what I bought?

Q. Yes; those first moulds you bought, didn't you?

A. Yes.

Q. And paid for them?

A. No—well, I gave a note for them.

Q. Yes; you gave a note for them. Now I show you Exhibit P-2, and that is dated September 18, 1908, isn't it?

A. Yes.

Q. Now I show you a contract signed Edward G. Frieck; is that your signature?

A. Yes.

Q. That is dated September 18, 1908, isn't it?

A. Yes.

Q. And you signed this contract at the same time that you signed this note P-2, didn't you?

A. I don't know nothing about a note.

Q. Well, after you had signed a contract for two townships, remember?

A. Yes.

Q. And after you had signed a contract for Nobles County, which is dated September 14th; remember?

A. Yes.

Q. Then you signed a third contract for one of the Dakotas, didn't you?

A. Yes.

Q. Which Dakota was that?

A. South Dakota.

Q. You can't remember which one it was?

A. South Dakota.

Q. Did you sign a contract for South Dakota first or for North Dakota first?

A. South Dakota.

Q. South Dakota first, eh; and the contract which you signed was the one dated September 18, 1908, wasn't it?

A. Yes.

Q. Well now look at that and see whether you were not mistaken and that you signed for some other state? Does that say South Dakota?

A. I can't see it.

Q. Well, look at it right there and read it?

A. I can't read it.

Q. Can't read it, eh? Which State did you sign a contract for $1,440 for, which Dakota?

A. I can't remember.

Q. Can't remember. It was for one of them, wasn't it?

A. I guess so.

Q. Now where was this contract of September 18, signed; at your house or in the basement of the bank building??

A. I think in the basement of the bank building.

Mr. English: I will have this marked for identification.

Paper dated September 18, 1908, marked D for identification.

Q. Before you went to the bank and signed the contract Mr. Kubach and his associates came out to your house and saw you?

A. Yes.

Q. And they talked to you there?

A. Yes.

Q. And then you all hands adjourned to the bank building; is that right?

A. I guess so.

Q. Was it the same day or another day?

A. I don't understand.

Q. Did you go to the bank building and sign this contract on the same day that Mr. Kubach came to your house or was it some later day?

A. It was on the same day.

Q. On the same day?

A. Yes.

Q. He represented to you that this was an opportunity to make some money?

A. Yes.

Q. You wanted to make money?

A. Yes.

Q. You were to sell to the farmers fence machines and fence moulds, weren't you?

A. Yes, sir.

Q. How did you think you were going to get those if you did not pay for them?

Mr. Canfield: That is objected to as improper cross-examination.

The Court: It is not cross-examination.

Mr. English: It seems to me it is cross-examination on the paper which he admits he signed in connection with that transaction.

The Court: They have not brought suit on contracts, they have brought suit on promissory notes.

Mr. English: But under the statute we are going into the man's state of mind and what he said and what he believed and all that, and what consideration he got for the notes.

The Court: They have a right to do that, but this is going entirely beyond that. As far as those contracts prove anything at all they prove merely an agent. Agents do not ordinarily have to pay for goods when they are taken for sale.

Mr. English: He says he gave notes and he got nothing for them. I want to show he gave those notes for value received.

(Question repeated.)

The Court: It seems to me you overlook the real question in this case. This witness says he signed what he supposed to be contracts in duplicate. Now it turns out he signed the promissory notes which he says he knew nothing about. If that is so those notes were obtained by fraud. If they were obtained by fraud that statute gives him a perfect defense to the case.

Mr. English: Yes, but I have a right to show whether they were or not obtained by fraud.

The Court: I have ruled on the question.

(Question repeated.)

Q. It was your expectation to act as agent for this company and sell to the farmers this fence equipment, wasn't it?

A. Yes.

Q. That is what you had in mind?

A. Yes.

Q. That is why you were so interested in these negotiations with Mr. Kubach.

Q. Is that right?

A. I don't understand a while ago.

Q. I understand all that. The thing which interested you in Mr. Kubach was that you thought you were getting an opportunity to act as agent to sell in various specified States and counties this fence material?

A. Yes.

Q. You were the man who was going to make a sale of the fence material and deliver over the goods, weren't you?

A. I have to collect the money for them.

Q. The company was going to send the fence machines and moulds to you, weren't they?

A. Yes.

Q. You were going to turn around and sell them?

A. Yes.

Q. Did you think they were giving you all those fence machines and fence moulds?

A. Why, I have to collect money for them and turn the money over to the company.

Mr. Canfield: I object.

The Court: That question is overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. They read this contract to you, didn't they?

A. I don't know. I couldn't understand it.

Q. I didn't ask you whether you could understand it. I asked you whether Mr. Kubach did not read this contract to you before you signed it? You have already sworn that he did.

A. I don't know whether he did or not.

Q. Do you change your testimony of this morning?

The Court: I did not understand him to say this morning that he did read it. He said he told him what was in it. That is a different thing.

Q. Mr. Kubach told you what was in this contract, didn't he?

A. Yes, sir.

Q. When he told you what was in the contract you knew that the company were turning over to you a certain number of machines and a certain number of sets of moulds, didn't you?

A. I couldn't understand what he talking. I

told him I couldn't understand much English. I couldn't understand what it means.

Q. You knew you were expected to sell moulds and fence machines, didn't you?

A. Yes.

Q. Now, when you did buy some moulds for yourself, which you have testified to, you had to pay for them, didn't you?

A. Yes.

Q. When you gave that note?

A. Yes.

Q. Now, how did you expect to get these other machines and moulds if you did not pay for them?

A. I have to make sales and collect the money first and send it up to the company.

Q. Didn't he tell you that the company held you responsible for those sales?

A. No; if I couldn't get the money for it, for the sales.

Q. Didn't he tell you that after you had sold the number of machines and moulds mentioned in the contract that they would sell you all additional ones for $2.50 apiece so you could make a large profit? Remember his telling you that?

A. I don't remember.

Q. Well, now, try to think?

A. I can't remember any talk; I have forgotten all this.

Q. Forgotten about it, eh?

A. Yes, sir.

Q. You remember these other things?

A. A little.

Q. You don't remember that?

A. No.

Q. You can't remember that Mr. Kubach told you that after you had sold the various machines and moulds which were called for in the contract

that they would sell you any additional machines and moulds at $2.50 apiece so that you could make a large profit?

A. Yes.

Q. You remember that now?

A. Yes.

The Court: It seems to me this is wandering far afield. You bring suit on notes and now you are really turning this into a suit upon a contract.

Q. Now, I show you note Exhibit P-3, signed by you. That is dated, September 24, 1908, isn't it?

The Court: What is that, a note?

Mr. English: Yes.

A. That is my signature.

Q. That is your signature, and it is dated September 24, 1908, Luverne, Minnesota?

A. Yes, 24 there.

Q. Now, I show you another paper; is that your signature at the bottom of it?

A. Yes.

Q. That is a contract dated September 24, 1908?

A. Yes.

Q. This was giving you the territory for the other Dakota, wasn't it?

A. Yes, sir.

Q. You were interested in getting this other Dakota so as to send Herman out and get him in the thing, weren't you?

A. No, I wasn't interested in it.

Q. No; but you wanted to develop this business and make a place for Herman too?

A. No.

Q. Don't you remember that?

A. No; I don't talk with him.

Q. Isn't it a fact that a part of your interest in this whole proceeding which led you to sign these various contracts for increasing the amount of territory was so that you and Herman could work the business together?

Objected to as incompetent. Question overruled.

Whereupon the plaintiff by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. Now, I show you a paper here, a typewritten paper, which is signed Edward G. Freick & Son?

A. Yes.

Q. "Special contract agents." That is right?

A. I don't know.

Q. Why did you sign that paper "Edward G. Freick & Son."

The Court: It seems to me I have overruled this testimony and yet you are asking the same questions over again.

Mr. English: I did not mean to, your Honor. I thought it was a different thing.

The Court: If you will say that these questions which you are now asking him have any relation to the notes upon which you sue in this case, of course I will allow you to go on, but unless you do say so I won't allow it.

Mr. English: I do say so, because this paper which I hold in my hand specifically mentions the notes.

The Court: Let me see it, please.

Mr. English: Over on the second page.

(Hands paper to the Court.) I call your attention that the amount of the considerations stated there is the exact amount of the notes which are sued for in this case. I might further call your attention to the fact that the consideration named in the contract is the identical amount named in the consideration of the notes; I mean in these other little contracts about which I have attempted to cross-examine. They connect it up absolutely.

The Court: It don't appear that they got any consideration expressed in the contracts, it don't appear he got the material or machines expressed in the contracts.

Mr. English: I am coming to that. As a matter of fact it was shipped to him, and I propose to bring that out. I will ask him now if you would like to have me.

Q. The fence company shipped you a whole lot of moulds and machines, didn't they?

A. I don't know nothing about it.

Q. Don't you know that there came to the station at Luverne a large quantity of these machines and moulds consigned to you after you had signed these various contracts?

A. I don't know anything about it.

Q. And you let them stay there at the station for some time?

A. Well, there was some.

Q. Yes, there was some. Came consigned to you. The railroad notified you of it, didn't it?

A. I didn't take no attention to it.

Q. Didn't pay any attention to it?

A. No.

Q. You knew these machines and moulds came there?

A. Well, I don't know nothing about it.

Q. You just said a minute ago some came.

A. There was some—I got notice once and I didn't take no attention to it?

Q. You got notice but you didn't pay any attention to it?

A. No.

Q. But you know as a matter of fact that there were sent to and arrived at the Luverne station a lot of these machines and moulds?

A. I didn't understand the question.

Q. You knew as a matter of fact that there was sent to you and there arrived at the Luverne station a large quantity of these machines and fence moulds?

A. I know there was some.

Q. You know that, don't you?

A. Yes.

Q. That was after you had signed these various contracts?

A. Yes.

Mr. English: Now will your Honor permit me to pursue this further?

The Court: Show that contract which you are now offering to the other side. They have not seen it.

Mr. English: I have not offered it yet.

The Court: You can not examine him about it until it is offered.

Mr. English: I didn't know I could offer it on the defendant's case. I have no objection to doing that at all. (To defendant's counsel) I am going to ask him about September 26. Do you want to see it? The reason I want to ask about this

one is that it is the last one and it follows chronologically. (Hands paper to defendant's counsel.) The one I was talking about just preceding, the typewritten contract, was the one dated September 24, 1908. Now adopting the Court's suggestion I show you that. (Hands paper to defendant's counsel.) Now he has already identified this and I will have it marked for identification.

Paper dated September 24, marked E for identification.

Mr. English: Have you seen this one of the 26th?

Mr. Canfield: Yes. You have shown that to us.

Q. Now look at your note P-4, for $1,152 that is dated September 26, isn't it?

A. Yes.

Q. That is the one you say was made on Sunday?

A. Yes, sir.

Q. Down in the bank building?

A. Yes.

Q. I show you a contract; is that your name signed to that?

A. That is the contract.

Q. Yes; and that is the contract which was signed on Sunday in the bank building?

A. Yes; the same what I seen another contract just like it.

Q. But this bears date September 26, 1908, the same as the note?

A. Well, I didn't see the note.

Q. Look at it now.

Mr. Canfield: Don't they show for themselves?

The Court: Of course they do.

A. I see the date, but I didn't see the note.

Q. I understand that you didn't see the note, but I want you to look at it now and tell me if the date of the contract is not September 26, 1908, which is the same date as you say the note is?

A. Yes.

Q. And that gives you the agency of the whole State of Minnesota excepting eight counties, doesn't it?

Mr. Canfield: I object. It seems to me this is all improper.

Mr. English: Will you just let me ask another question, please, before I am overruled?

The Court: Yes.

Q. This says that you have the agency for all the State of Minnesota except eight counties numbered on the back, don't it?

A. I don't remember.

Mr. Canfield: I object.

The Court: Now you see if that paper is offered at all it speaks for itself. It is not competent for this witness to testify as to what it contains.

Mr. English: I appreciate that now, but I am getting to the signature of this note. If your Honor will permit me I will show you that it is entirely material when I am through.

Q. Do you remember that when you signed this contract on Sunday for the State of Minnesota, Mr. Kubach told you that some of the counties were already gone? A. Yes.

Q. So he numbered or he wrote the names of the counties which were out of the contract down on the back of it, didn't he?

A. I don't remember.

Q. Well, look at it and see?

A. Well, I didn't see any on the back— I didn't see the back of it.

Q. Do you remember that he told you that this contract covered the State except eight counties which he wrote on the back?

A. No, I don't remember.

Q. Don't remember that?

A. No.

Q. You do not deny it, do you?

A. No.

Mr. English: Now we will come down, taking the Court's suggestion, to this last paper which I propose to show the witness, signed, "Edward G. Freick & Son."

I will have the paper of September 26, marked for identification.

Mr. Canfield: No objection.

Paper marked F for identification.

Q. Look at this paper which is already signed, which you say was signed by you, "Edward G. Freick & Son." Do you see it?

A. Yes, it was signed.

Q. That was to take the place of these other contracts which you had signed, wasn't it?

A. Yes.

Mr. Canfield: Will you offer it in evidence?

Mr. English: I can't offer it on your case. I will have it marked for identification.

Paper marked G for identification.

The Court: You can offer it now as part of your case if they do not object.

Q. You expected to go off South about that time, didn't you?

Mr. Canfield: I object.

A. No.

The Court: I don't see what difference where he expected to go would make.

Mr. English: The next question will make it clear.

Q. Do you remember you talked over with Mr. Cole and Mr. Kubach this contract before it was signed?

A. No.

Q. The three of you down in the bank building basement?

A. No.

The Court: That would be utterly incompetent, conversation about a written contract before it was signed. I will not allow you to offer testimony as to what occurred at the time it was written. Strike out that answer and I overrule the question.

Q. Do you remember saying to Mr. Kubach and Mr. Cole in the basement of the bank building that the cold weather was coming on and your notes were coming due and you wanted some other arrangement

A. No.

Q. And then do you remember as a result of that remark, that this contract which is marked G for identification was drawn up and signed?

A. I don't remember anything about that contract.

The Court: Of course if that testimony is not objected to I will allow it.

Q. Well, you signed this contract?

A. Yes, sir.

Q. Don't pretend there was any corner turned upon this contract, do you?

A. I signed—Cole came up to my house and he wanted to take a train and he prayed I do it quick and get rid of it. They wanted to take the train. I didn't read it over and they didn't read it to me and I don't know nothing about that contract.

Q. But you did sign, "Edward G. Freick & Son"?

A. Well, yes, I signed that.

Q. Yes; you signed that?

A. Yes.

Q. Don't you know that this contract specifically mentioned the notes?

Mr. Canfield: I object.

The Court: Question overruled. The contract speaks for itself.

Q. Now I show you a paper dated September 28, 1908; that is your signature?

A. Yes.

Q. You knew that these notes were going through the Rock County Bank, didn't you?

A. No.

Q. That is why you signed this paper, didn't you?

A. No. I don't know nothing about that paper.

Q. Don't know nothing about that, eh? Don't know anything about anything you signed?

A. No.

Q. You know that is your signature though, don't you?

A. Yes.

Mr. English: Mark that for identification.

Paper marked H for identification.

Q. Now, Mr. Hinkly showed you this letter at

one of the times you were at the bank, didn't he?

A. Yes.

Q. You said, "Yes, I know about that, and that is all right," or words to that effect, didn't you?

A. No.

Q. Didn't say that, eh? A. I don't know nothing about it, I told him.

Q. Didn't know nothing about it, eh?

A. No, sir.

Q. You said on your direct-examination that on various times when Mr. Kubach came to you at the time you say these notes were signed unknowingly, Kubach said he had a letter from the company and they wanted you to take another space or territory; remember?

A. I don't understand the question.

Q. Do you remember that Mr. Kubach said that he had had a letter from the company and that they wanted you to take South Dakota?

A. Yes.

Q. And then he said he had another letter and they wanted you to take North Dakota?

A. Yes.

Q. Then he said he had another letter and they wanted you to take the State of Minnesota?

A. I don't remember.

Q. Did you get any letters from the company?

A. Yes, I got one.

Q. Got it here?

A. No.

Q. You did not bring it, eh?

A. No. I believe it was written out right on the—

Q. Typewritten letters, signed by the secretary of the company?

A. Yes, it was written—

Mr. Canfield: Wait. I object.

The Court: How does he know?

Mr. English: He received them. I might say, "purporting to be signed by the secretary."

The Court: Have you called on them to produce the letters?

Mr. English: No, sir; because I didn't know of them until this morning.

The Court: If your client did not inform you that is his misfortune.

Mr. English: Will your Honor let me ask this question?

Q. Did you read those letters?

A. No.

Q. Did not read them?

A. No.

Q. Who assists you in your business transactions?

A. I don't understand.

Q. Who helps you in your business transactions; your wife?

A. Oh, my lawyer.

Q. You don't run to your lawyer every time you do a little piece of business, do you?

A. I do business—I never do much business.

Q. You don't do any business?

A. No.

Q. How did you get hold of this eight hundred acres of land then?

A. Well, I seen a lawyer then and the bank.

The Court: That is going too far.

Mr. English: I guess that is all.

Mr. Horton: I offer in evidence, your Honor, the testimony of Ole T. Olson, J. P.

Hanson, William Martin, William Lemke, Nels Olunde and Edward Biss.

The Court: That is the testimony taken under a commission. You better read from the original and let me have the copy.

Mr. Horton reads as follows:

"OLE T. OLSON, was called and duly sworn according to law as a witness on behalf of the defendant, and examined by E. H. Canfield, defendant's attorney, testified as follows:

Q. Where do you live?

A. In Luverne, Minnesota.

Q. How long have you lived in Luverne?

A. Ten years next fall."

Mr. English: I object to the next question as immaterial, what transactions this particular man had. It has no bearing whatever on this case.

The jury was excused till tomorrow morning at 10 o'clock.

After discussion counsel for the respective parties submitted briefs to the Court, for the Court's consideration overnight.

It is admitted by counsel for the respective parties that under the law of Minnesota the fact that one or more of the contracts or notes were signed on Sunday does not affect the liability, and that point will not be raised in this case.

Adjourned to June 11, 1912, 10 a. m.

Jersey City, New Jersey, June 11, 1912.

The Court: Do counsel desire to make any further argument on the motion before me last night?

Mr. English: I simply suggest to your Honor that I did not find any case which covers such a situation.

The Court: Did you see Crosby vs. Wells in the Court of Errors?

Mr. English: No. Do you think that covers it? I do not argue against the Court of Errors.

The Court: This is the Court of Errors and this was a suit arising out of the sale of oil shares and the Court said this: "Even in a civil action, evidence of offers by the plaintiff to sell certain oil shares to persons other than the defendant, accompanied by words commendatory of the shares, may be given by the defendant as serving to give character to the knowledge, intent or design of the plaintiff, in entering shortly afterward into a contract of sale of like shares with the defendant, and thus logically to establish particular elements of those fraudulent representations which were links in the chain of proofs of the defense."

That cites Blake vs. Albion Life Assurance Society, an English case in the law reports; there the judge said: "The question, when closely examined, appears to be whether, by enlarging the view, light can be thrown on the true nature of the transaction, which, taken by itself, may be innocent or fraudulent. I think this may be

done. The answer to the objection that evidence of frauds on other persons can not be admitted in that this transaction is one of a class; that there are features in common, the features being the false pretense and a knowledge of that false pretense on the part of the defendant, and the moment that is shown the plaintiff's case is established."

Holmes on Evidence lays down the same rule and cites a number of cases, both English and American, United States Supreme Court, New Hampshire, Massachusetts; but Jones on Evidence did not cite this case. I don't know why.

Mr. English: Then I assume from that that your Honor will permit the reading of this deposition. May I ask the indulgence of the Court to re-call Mr. Freick for further cross-examination on some matters which I thought of last night and which I overlooked yesterday.

The Court: Last night I read over the depositions to see whether they would come within the rule, and it seems to me they do, excepting the evidence of one witness who did not sign the note. I think that is a little remote.

Mr. English: I think so.

The Court: What do you say to that, Mr. Canfield? That is the evidence where he says he discovered that something was wrong and he did not sign the note. That is the testimony of Mr. Lemke, on page 16 of this deposition.

Mr. Canfield: May I suggest that as I view this subject I do not regard that as a

matter of any consequence, whether it culminated in the party's signature to the note at all, for the reason that this evidence is directed to the question of intent, a method, a general plan or scheme by which these parties sought to obtain the signature of parties to notes. Now in my judgment it would be of no importance whether they succeeded in getting Mr. Lemke's signature to a note or not, if they were by this method trying to do so.

The Court: He doesn't say in this testimony that he knows they were attempting to get a note from him. I think that that is going a little too far, but as far as the other testimony is concerned I have no hesitation in admitting it.

Mr. English: Before we do that shall I re-call the plaintiff?

The Court: Yes, for further cross-examination.

EDWARD G. FRIECK, re-called for further cross-examination:

By Mr. English: Q. Mr. Freick, I want you to direct your attention to the time when you were in the basement of the Rock County Bank Building when this last contract and note were signed, and I ask you if your son, Herman was not with you at that time?

A. No.

Q. He was not there?

A. No.

The Court: That is the one of September 26th?

Mr. English: Yes.

Q. Now where was the contract which we have called the special contract, the typewritten one, which you signed "Edward G. Freick & Son," signed, in the bank building or at your house?

A. At my house.

Q. At your house; that was Monday, the 28th of September, 1908?

A. Yes.

Q. You remember that?

A. Yes.

Q. Didn't you on that day, before that contract was signed, go out with this Mr. Augustine, who was one of Mr. Kubach's party, to see a man named O. Baake, to get him to sign a similar kind of contract to those others which you had signed?

Objected to as not proper cross-examination. After a lengthy discussion Mr. English amended the question by adding "and note." The question was again objected to as not proper cross-examination, irrelevant and immaterial, and the question is overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Now on this Monday when you signed the special agency contract, isn't it true that Mr. Cole waited at your house with Mrs. Freick and Herman until you returned from some place where you had been?

Objected to on the same ground. Question overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. Isn't it true that after this special agency contract was signed your son Herman went with Mr. Cole on a tour occupying several weeks in the interest of this fence machine company of which you had taken the general agency contract?

Objected to on the same ground.

Question overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. Now I want you to direct your attention to the time when you came to the Rock County Bank after you had received this notice which you spoke of through the mail. Did you not at that time admit to Mr. Hinkly and Mr. Martin that these notes now in suit were your notes?

Objected to as improper cross-examination and as calling for a conclusion and not the proper way to lay the foundation for contradiction.

Q. Mr. Freick, at the time that you were at the Rock County Bank in response to the notice which you received through the mail, when you were there with Mr. Hinkly and Mr. Martin and these notes were under discussion and produced as you testified they were, did you not say to those gentlemen "Those are my notes"?

A. No.

Q. And did you not say on that occasion to those same gentlemen that the fence company had changed the contract and that you did not like it and that therefore you did not want to pay the notes?

Objected to as not the proper form of question on which to base an impeachment, and irrelevant and immaterial.

Question allowed.

A. I told them before I would not pay the notes.

Q. No; just answer the question.

Mr. Canfield: I move to strike it out.

The Court: Just strike out that answer, and just answer the question. The answer is not responsive.

Mr. Canfield: Yes or no.

(Question repeated.)

A. No.

Q. But you did tell them you would not pay the notes, didn't you?

A. I told them before that I first got the notice.

Q. That is what I am talking about, when you got that notice and went to the bank and they produced the notes.

A. I told them—the cashier.

Q. And when you said that you pulled this contract, identification G, out of your pocket?

Objected to as not the proper foundation for impeachment, and irrelevant and immaterial.

Question overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Q. Now you remember on this occasion when you went to the bank in response to that notice Mr. Martin got the notes, didn't he?

The Court: You went all over this yesterday.

Q. When you were at the bank in response to this notice and saw Mr. Martin and Mr. Hinkly and when Mr. Martin asked you, "These are your notes, are they not, Mr. Freick?" didn't you answer, "Uh" or some such expression of that character?

A. I don't remember.

Q. Don't remember that?

A. No.

The Court: Is that an admission?

Mr. English: Depends on the kind of "uh."

Q. If not "uh," "huh, huh" or something like that.

The Court: It seems to me that is frivolous.

Mr. English: It is not intended to be.

The Court: He may answer.

Q. What do you say to that?

A. I don't know what the question is.

Q. The question is, when Mr. Martin handed you those notes in the bank and asked you if they were not your notes, didn't you say or give a sound which sounded like "Uh, huh," or something like that?

A. I don't remember.

Q. And did you not on that occasion say in answer to this question, "You know you gave those notes and that the bank is holding them," didn't you answer, "Yes, and I suppose I will have to pay them."

A. I don't remember that at all.

Q. You don't remember that either?
A. No.

Mr. English: That is all.

Mr. Canfield: I do not think there is anything I care to ask him.

Mr. Horton: I will read the depositions, the testimony on behalf of the defendant:

"OLE T. OLSON, was called and duly sworn according to law as a witness on behalf of the defendant, and examined by E. H. Canfield, defendant's attorney, testified as follows:

Q. Where do you live?
A. In Luverne, Minnesota.
Q. How long have you lived in Luverne?
A. Ten years next fall.
Q. In the fall of 1908 did you have any transaction will any person claiming to represent the National Fence Machine Company?
A. Yes.
Q. Do you remember the name of the person?
A. The boss was Kubach.
Q. And did you have some kind of business transaction with this man Kubach?
A. Yes.
Q. Where?
A. I first saw him in the moving picture show at Luverne.
Q. Was any business done there?
A. No.
Q. The next time was where?
A. At my residence.
Q. When was that?
A. In the month of September, 1908.

Q. About what time of the day did he come there?

A. About half-past five.

Q. In the evening?

A. Yes.

Q. Who was with him, anybody?

A. Augustine.

Q. Now, when he came there did you have any talk with either of these men?

A. Yes.

Q. What was talked about?

A. Kubach wanted me to take the agency of the fence.

Q. What did he say to you about it?

A. He said he had a good opportunity for us to sell their fence. He said he got three townships left to sell their machines and molds.

Q. Did he say anything to you about signing anything?

A. No, sir.

Q. Any time during the talk?

A. No, sir.

Q. Signing anything?

A. Contract.

Q. What did he say about what kind of contract?

A. He told me to come down to his office after supper and he would tell me all about it.

Q. Did you sign anything at your house?

A. No.

Q. After supper then did you go down to his office?

A. Yes.

Q. Where was that office?

A. In the basement of the Rock County Bank Building.

Q. When you reached there who was present?

A. Kubach and Augustine.

Q. After you went into the basement what did you first do?

A. I sat down in a chair there.

Q. What did Kubach and Augustine do?

A. Augustine was on the north side of the table and Kubach on the south side of the table.

Q. And where did you sit with reference to the table?

A. I was sitting by the door.

Q. Who did the talking, Augustine or Kubach?

A. Kubach.

Q. What did he say in substance?

A. He said he had a good opportunity for me to sell their machines and molds, and would like to get me to sell their machines and molds in three townships.

Q. What else was done?

A. He would like to have a farmer that understood fences to sell them.

Q. Anything else?

A. I said I could not do it. I was no salesman at all.

Q. What else?

A. He said you can try it, don't cost anything, the agency will be taken away from you if you don't sell anything. And that was all there would be to it.

Q. What next was said?

A. I told him again I did not like to do it because I was no salesman, and then I asked them if it cost anything and they said no, we just sell for so much and if you can not sell it we will just take it away and get another man in your place.

Q. Now, what next was said?

A. He said he would like to have a contract so he know who was working for us and we have to have monthly settlements so we get contract. And then I said I could try it. The contract was lying on the table and he said you come over here and I will read it over to you, and I went over and he read it over and explained it to me.

Q. Did he read from more than one paper?

A. No, just one paper.

Q. That was what?

A. That was the contract.

Q. Was it a note?

A. No, no note at all.

Q. After he read it over what did you do?

A. He told me to sign there and I signed the contract.

Q. What did you do?

A. I signed it.

Q. After you had signed the contract then what happened?

A. He said we had to have another one. We have to have one each and then he turned up a little piece so I could see a line and then I signed that.

Q. What did he say that was?

A. He said it was a contract for him.

Q. What did he say about whether it was a copy?

A. He just said it was a contract for him. He said we have to have one each.

Q. Did you sign your name more than two times?

A. No, sir.

Q. During the time you were in the room was anything said about any note?

A. No, sir.

Q. By anybody?

A. Nobody at all. He said I just had to take notes from the farmers.

Q. Now, did you see any promissory note there?

A. No, I did not.

Q. Did you know that you signed any promissory note?

A. No, sir.

Q. At the time you were there did you know that you had signed any promissory note?

A. No, sir.

Q. Would you at that time knowingly have signed any promissory note?

A. No.

Q. At that time did you believe that you had signed any promissory note or other negotiable instrument of any kind?

A. No, sir.

Q. After you had signed your name the two times as stated by you, what did you then do?

A. I sat there and he went up and took the contracts and turned around behind me and he then handed me the contract.

Q. What contract, was that the one you had signed?

A.

Q. Did you, or not, afterwards learn that you had signed a note of some kind there that night?

A. No, sir.

Q. Well, later on did you learn that sometime you had signed the note?

A. Yes.

Q. At sometime after you were in the basement of the bank building did you learn or hear that you had signed a promissory note?

A. Yes.

Q. How did you hear it?

A. I got a notice from Mr. Hinkly, that was all I knew about it.

Q. What Mr. Hinkly?

A. R. B. Hinkly.

Q. How did you get the notice from Mr. Hinkly?

A. By letter.

Q. After you got the letter what did you do?''

Mr. English: I object. I do not think the rest of this is material. The history of the transaction after that is immaterial as bearing on this case, adopting your Honor's suggestion from the Wells case. We have now reached the point where it seems to me the rule does not apply at all, because all this is utterly immaterial as affecting one case.

Mr. Horton: No objection made to it at the time of the deposition.

Mr. English: That is true of yours.

Mr. Horton: The Court has ruled on them.

Mr. English: Is your understanding that nothing that was not objected to in Minnesota can be objected to now?

Mr. Horton: Yes, I understand that ruling. If I am in error of course I would be glad to be corrected.

The Court: Have you found the case in the Supreme Court on that question that I suggested to you?

Mr. English: No, sir. My understanding is, and always has been that nothing not objected to at the time the testimony was taken can afterwards be objected to.

That has been the reason for counsel cross-examining, to raise objections.

The Court: That has always been my understanding too, but I have an indistinct impression that some time ago the Supreme Court decided that objections could be made at any time, but I think it was never reported; it came up on depositions.

Mr. English: It has always been the practice of the bar to fortify themselves by being on hand and raising objections.

The Court: Then how could you object now?

Mr. English: I can not, but counsel objected yesterday to similar questions.

Mr. Horton: The Court ruled upon them and we submitted to the ruling.

Mr. English: I think the Court ruled in the opposite direction. If that is so, we will have the situation corrected. If the Court now rules it is too late to take advantage of this situation, I will waive the objection, of course, but I am frank to say I always understood that was the rule. As I always understood the rule I could not raise this objection.

The Court: In the absence of that decision of the Supreme Court I shall hold that objections now come too late, and if I ruled the other way yesterday I will allow that testimony to go in. Did I rule some out?

Mr. English: Yes; You ruled some of mine out.

Mr. Horton: I want to be fair; if the

Court feels it ought to go in I do not want to stand on technicalities.

The Court: That has always been the understanding of the bar up to that decision, and I think that decision Judge Collins had, not as judge, but some case he took up to the Court, when it said objections could be made at any time. It was my notion of the law, and in the absence of that I think it would be safer for me to say that no objections can be raised now, and that will apply to the testimony that you offered yesterday, and I will allow the same.

Mr. English: I think that is the rule and that your Honor ruled the other way yesterday.

The Court: If I did I will reverse myself. I believe you were right.

Mr. English: When he gets through I will go back to mine.

The Court: I wouldn't have any hesitation at all if I didn't have a recollection of that case, but as long as that is only an indistinct impression I think it would be better not to rule out testimony unless it was objected to when it was taken, and I will let this in now.

Mr. English: When he is through I will put that in.

The Court: You better go on now, Mr. Horton.

Mr. Horton continues reading as follows:

"Q. After you got the letter what did you do?
A. I went to Mr. Christopherson.
Q. Well, any time after that did you discover

that you had signed a note, did you take some steps to find out if there was a note?

A. No, I didn't, I didn't know that I had signed a note.

Q. Have you since in some way, any way, found out that you signed the note?

A. Yes.

Q. Now, for how much, how large a note?

A. $1,020.00 altogether.

Q. Did you ever at any time during the past five years give your promissory note to any one connected with the bank or any one else?

A. No, sir.

Q. Now, Mr. Olson, at some time later on did you or not go to the bank to see the note that they claimed they had?

A. No, sir.

Q. Never went to the bank?

A. No.

Q. Did you go anywhere to see?

A. I did not.

Q. Did you ever see the paper?

A. No, I never saw it at all.

Q. Up to the present time have you ever seen the note at all?

A. No.

Q. Did you ever have any talk with Mr. R. B. Hinkly about it?

A. A little talk.

Q. When and where was that?

A. At the old postoffice.

Q. About when?

A. It was in the winter of 1909 and 1910.

Q. Now, then did you have a talk with him in 1909 or 1910?

A. Yes, just once.

Q. What did he say to you?

A. I can't remember the words.

Q. Well, the substance.

A. He said I had some notes there.

Q. Did he say what they were given for or who to?

A. No, he just said he had some notes against us.

Q. What did you say?

A. I said I didn't have any notes and I did not give any notes at all.

Q. What did he say?

A. Your signature is on the notes.

Q. Anything more?

A. No, that is all.

CROSS-EXAMINATION on behalf of the plaintiff by A. J. Daley, his attorney:

Q. At the time that you testified you were in the basement of the Rock County Bank Building with Mr. Kubach and signed a contract on some fence machine business how many papers did you sign altogether?

A. Two papers.

Q. And you signed no note or notes at that time?

A. No, sir.

Q. Or at any time in connection with that?

A. No, sir.

Q. You are certain of that?

A. I am certain of that.

RE-DIRECT-EXAMINATION by E. H. Canfield, defendant's attorney:

Q. Did you read the second paper that you signed that day?

A. No, sir.

Q. Or see any more of the face of it than the place where you signed your name?

A. No, sir, I did not.

RE-CROSS-EXAMINATION by A. J. Daley, plaintiff's attorney:

Q. Did you read the first paper that you signed?

A. No, I did not.

Q. Could you have read it if you had tried?

A. Yes, I could but I couldn't understand it very good and he read it for me.

Witness excused.

(Signed) OLE T. OLSON."

Mr. Horton: I will read the deposition of J. P. Hanson, as follows:

"J. P. HANSON, sworn as witness on behalf of the defendant, testified as follows:

Examined by Mr. Canfield:

Q. Mr. Hanson where do you live?

A. Southwest of town.

Q. And what is your business?

A. Farmer.

Q. Were you living at the same place in September, 1908?

A. Yes, sir.

Q. In September, 1908, did you meet Charles Kubach?

A. He came out to my place.

Q. You met him did you?

A. Yes, sir.

Q. And where, at your farm where you live?

A. Clinton Township.

Q. That was at the farm?

A. Yes, sir.

Q. About what time in the day was it that he came out there?

A. Why I think it was towards evening.

Q. What were you doing at the time?

A. I was out moving some stubble.

Q. Had you ever met this man Kubach before?

A. No, sir.

Q. Now do you remember whether that was on the 11th of September, 1908?

A. No, I don't remember the date, but it was some the middle of September.

Q. Now you were in the field moving stubble?

A. Yes, sir.

Q. Did he go to where you were working?

A. Why he and another fellow came up there where I was working.

Q. Who was the other fellow, if you know?

A. I don't remember the name of the other fellow.

Q. Do you know whether it was Cole or Augustine?

A. No, sir.

Q. Now when Kubach got there to where you were what did he do?

A. Well, he commenced to talk about selling fence machines and molds.

Q. And after talking a while then what did he do?

A. Well, then he got a grip out and took some papers out.

Q. Opened the grip?

A. Opened the grip and took the papers out and showed me a contract.

Q. He showed you a paper first did he?

A. Yes.

Q. Now how was this paper, was it fastened to any other papers?

A. Well, there was a little bunch of papers.

Mr. Daley: I object to any placing of meaning in the mouth of the witness.

Q. I want to know how many papers there were, and how they were fastened together, if you know.

A. I didn't notice how they were fastened together.

Q. Do you know what a tablet is?

A. Just a bunch of papers about that long I think (indicating 6 or 7 inches).

Q. Now when he showed you these papers what part did he show?

A. The contract.

Q. Was that on the top?

A. That was on the top.

Q. And what did he say to you about it? What did he say it was?

A. He said it was a contract.

Q. Contract for what?

A. For the machines.

Q. Well I know, but contract of agency or contract to buy them or what did he say?

Mr. Daley: I object to counsel leading this witness. I think he has a perfect right to ask about the conversation—

The Court: Leave that out. Just go on.

Mr. Horton: I will eliminate that. (Continues reading.)

Q. What kind of a contract did you say it was?

A. Well it was about an agency in Clinton Township and I don't remember just the name of the next right south of me, the next township right south.

Q. Was this printed or not?

A. Yes, it was printed.

Q. Did you notice when he showed you this paper on the top whether there was any writing in with the print?

A. No, just the print.

Q. While he was there did he do any writing?

A. No, sir, not that I can remember of.

Q. Perhaps you didn't understand me. In this printing was there any blank spaces to write in, where he could do some writing in there?

A. Not that I remember of, only them places where I signed my name.

Q. Well, now after he showed it to you did he say anything more to you about—or did he say anything to you about signing it?

A. He read it for me and then asked me to sign it.

Q. Now did you sign it?

A. Yes, I signed it.

Q. Now before you signed it or at the time you signed it was anything said about any note?

A. No, sir.

Q. Not anything. Did you see any note?

A. No, sir.

Q. Or did you know that there was any note connected with it at all?

A. No, sir.

Q. Now I will show you Defendant's Exhibit 3. Look at that Mr. Hanson. Can you state whether that is the paper that you signed there?

A. Yes, sir.

Q. That is the one, and that is your signature?

A. Yes, sir."

The Court: One moment there. There ought to be some identification of it otherwise it is meaningless. Are you agreed as to what that Exhibit 3 was? Is it an exhibit in this case?

Mr. English: I haven't any knowledge about it, your Honor, except as I see this.

The Court: Well, you will have to go on.

Mr. English: Can not be anything in this case, because it is something that he is said to have signed.

The Court: You will have to go on and read the testimony just as it is.

Mr. Horton: I think it will explain itself as we go along. (Continues reading.)

"Q. Now what I want to call your attention to is the writing along in the blank spaces in the printed part. Did this man Kubach write it in while he was out there in the field or not?

A. I don't remember if he wrote it or not, or if it was there before I signed it I don't remember.

Q. Did you see him sign his name there in the field?

A. No, sir.

Q. Now when you signed this Exhibit 3 did you notice the signature, whether it was there above your name before you signed it?

A. No, sir.

Q. You didn't notice?

A. No, sir.

Q. Do you know whether it was or not?

A. No, I don't remember.

Q. Now in what position was this paper when you signed it? Was anybody holding it or how was it?

Mr. Daley: I want to interpose another objection to leading questions because this witness has intelligence enough to be able to testify to this purely collateral matter by testifying what took place at the time, and what was said and done without having the words put in his mouth.

The Court: The objection is overruled.

Q. (Question read.)

A. He had his grip on the seat on the buggy and after he read this for me and then I signed it and after I had signed it he held his hand like this and held this corner up and told me to sign this under here, that it was a copy, the same for the Company, so I signed it.

Q. You signed it down there?

A. Yes, sir.

Q. Now do you know what it was except what he told you?

A. No, sir.

Q. Did you read it?

A. No, sir.

Q. Why didn't you read it?

A. I took his word for it you know. He told me that is just a copy to the Company he was going to send down to the Company.

Q. Now did you sign your name more than twice there that day?

A. No, sir.

Q. Now after you had signed both times what was done with the two papers that you signed?

A. I got this paper.

Q. Well just what motions were made or what was done by either you or him?

A. He handed me this and then the other one he closed up in his grip again and then he left.

Q. Did you after signing it see the other paper at all?

A. No, sir.

Q. I mean that day?

A. No, sir.

Q. Now this is dated September 11th. Is it your recollection that it was about that time or not?

A. Why I couldn't say just exactly the date, but it was around the middle of September.

Q. What did he do after you had signed the two papers, did he stay there or go away?

A. No, he went right away.

Q. And after you had signed the two papers some time after did you learn what the second paper was?

A. Why I didn't know that until pretty close to Christmas.

Q. Until nearly the following Christmas?

A. No.

Q. And then did you find what it was?

A. Why, I was out picking corn and my neighbor came over and told me.

Q. That would be hearsay. I am just asking if you found out what it was?

A. That day, yes.

Q. Where—well, did you see it?

A. No, I didn't see it.

Q. Well, any day afterwards did you go and see it?

A. Well, to the Rock County Bank after I had my corn in.

Q. And what did you find there?

A. A note.

Mr. Dale: Objected to as not the best evidence, and calling for a conclusion of the witness, and not the evidence itself.

The Court: The question was answered.

Q. Do you remember the amount of it? I am just asking if you remember?

A. $144.

Mr. Canfield: I will offer Defendant's Exhibit 3 in evidence.

The Court: Received in evidence without objection.

Q. Mr. Hanson, did you notice when you signed this paper whether there was any pin—

A. No, sir.

CROSS-EXAMINATION by Mr. Daley:

Q. Now the second paper that you signed that day that you signed Exhibit 3, did it look like Exhibit 3 as far as you could see it?

A. I couldn't see any more than the corner of it.

Q. Did you understand my question Mr. Hanson?

A. Yes, sir.

Q. Will you answer it?

(Last question read.)

A. So far as I could see.

Q. Have you got the other paper you signed now that day?

A. No, sir.

Q. Do you know where it is?

A. No, sir.

Q. Have you ever had it since?

A. Yes.

Q. What did you do with it?

A. I don't know, it might be down home, around there, and I might of put it in the stove.

Q. Now you say so far as you saw the other paper it looked like this one, Exhibit 3, did it?

A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Canfield:

Q. Did you sign your name more than two times that day?

A. No, sir.

Q. And afterwards when you found the note did you pay it?

Mr. Daley: That is objected to as immaterial.

Q. I don't care about paying it, did you obtain it—did you get it?

A. Yes, I got it.

Q. And do you know that that was the same paper that you signed there that day, the second paper?

A. No, sir.

Q. You don't know it, but you believe so?

Mr. Daley: That is wholly immaterial.

A. I know my name—

Mr. Daley: Just a moment.

Q. Or did you at any other time sign any paper besides these two papers for this National Fence Company, or this man Kubach?

Mr. Daley: Objected to as immaterial.

The Court: The objection is overruled.

Mr. Daley: Note an exception.

A. No, sir."

"WM. MARTIN, sworn as a witness on behalf of the defendant, testified as follows:

Examined by Mr. Canfield:

Q. Mr. Martin where do you reside?

A. Luverne.

Q. And have lived in Luverne about how long?

A. Three years and a half.

Q. And during that time you have been fairly well acquainted here in this city have you?

A. Yes, sir.

Q. Do you remember seeing Mr. Kubach?

A. Yes, sir.

Q. Mr. Cole?

A. Yes, sir.

Q. And Mr. Augustine?

A. Yes, sir.

Q. What year was that?

A. Well, it was two years ago, in 1908.

Q. Now about when did you first see these men here and what time of the seasons?

A. I think it was the last of July or the 1st of August.

Q. Now prior to that time do you know whether they were entire strangers to the community or not?

A. They were.

Q. About how long did they remain here?

A. To the best of my knowledge about two months.

Q. And during that time what was their business while here?

A. Selling territory for fence machines and cement molds for posts, making fence posts.

Q. Where did they have their office or principal place of business here?

A. Under the Rock County Bank.

Q. And during that time did they have anything on exhibit?

A. Yes, sir.

Q. What was it and where was it?

A. Oh, they had a short piece of fence on the street close to the bank, on the corner.

Q. Now do you know whether during that time these three men were working apparently together?

A. Yes, sir.

Q. Pursuing the same business?

A. Yes, sir.

Q. Now in August, 1908, did you have any conversation or transaction with Kubach?

A. Yes, sir.

Q. Where did that commence?

A. On the corner outside of their office, and near this fence.

Q. Did you have a conversation there with Kubach?

A. Yes.

Q. And then later on you had further conversations did you?

A. Yes, sir.

Q. Where was that?

A. In the basement.

Q. Of the Rock County Bank?

A. Of the Rock County Bank.

Q. Now will you state all that transpired between you and Kubach in the basement of the Rock County Bank. First I will ask you about when was it?

A. About the last of August I think.

Q. Along about the last of August?

A. It might not have been so late as that.

Q. But it was in August was it?

A. It was in August, some time in August.

Q. Now you may go on and state all that transpired.

A. Why, he wanted to sell me some territory of those molds and fence machines, and I told him I didn't like to do business with him that way, and he recommended it very highly and give me a recommendation from the Rock Rapids Bank to read, so I did do a little business with him.

Q. Well, go on and state what it was.

A. It amounted to a hundred dollars about, a little over maybe; I don't remember just what it was; and it run along a few days—about three days I think, and I met him again there and he wanted to know if I wouldn't buy more stock of him. I says no, sir, I don't want any more. He

says you don't seem very much enthused of that business. I says no, sir, I am not. He says well, we want to get an active man to do that business. He says would you sell out what you have bought of me? I say yes, sir.

Mr. Daley: Is it claimed that this is a similar transaction or are you getting in something new entirely?

Q. What I wanted to direct your attention to Mr. Martin is the transaction, if there was one, regarding the signing of some papers.

A. Yes, sir.

Q. Now are you leading up to that or are you past it?

A. No, I am not up to that, not exactly.

Mr. Daley: Just a moment. I submit he should get up to the transaction that is claimed that is similar to this. We certainly don't want to go into collateral proceedings that are not like this.

The Court: Of course if it doesn't turn out to be it can't possibly do any harm. Get up to that point as quick as you can.

Q. Omitting all unnecessary preliminary details come right down to the transaction between you and Kubach when you made any contract, if you did. Now where did you meet with him to do that, if you did?

A. In the basement.

Q. Now you had there a conversation with him did you?

A. Yes. sir.

Q. Now then tell just what happened there, and what was said.

A. He brought a contract to me, opened up a satchel and took some papers out and read the contract.

Q. Now before going on I want to ask you in what shape or condition were these papers?

A. The papers were two together and pinned at the end, or at the upper side.

Q. Well, were there any other papers below that?

A. I don't think there were.

Q. Now go on and tell what happened.

A. And he read this contract. He read it very fast. He was in a great hurry and now he says you have one contract and the Company—

Q. First, did you sign the top one?

A. Yes, I signed that one.

Q. Now did he call your attention to the one below before or after you had signed the top paper?

A. After.

Q. After you had signed it?

A. Yes, sir.

Q. Now you had signed the top paper then?

A. Yes, sir.

Q. And had anything been said to you about the paper that was beneath before you signed it?

A. No, sir, not then.

Q. Now after you had affixed your signature to the top paper then what did Kubach do?

A. He says we must have another contract to send to the company and he says this is exactly like the one you have signed, and tipped up the corner and he says you sign here, and I signed that.

Q. Now did you read it, the one below?

A. No, I didn't read the lower one.

Q. Why didn't you read it?

A. Well, he was in such a hurry, everything was done so quick. He says there is a team

waiting me here at the door, and he said I have got to make a ride this evening. This was in the evening too. And I didn't stop, I took his word for it, being the same thing, and it looked the same to me, and I signed it, and we had a very few words more and went out at that time.

Q. After you had signed your name the two times what was done with these papers?

A. He gave me the top one and he kept the other one.

Q. Now when he took the second paper did you observe what it was then?

A. No, sir, I didn't see the face of it.

Q. You didn't see the face of it?

A. No, sir.

Q. What was done with the first paper that you signed? What did you do with it?

A. I took it.

Q. Have you that paper yet?

A. I think I have in my home.

Q. Now do you know whether the paper you signed was on the same kind of a form as that, the top paper I mean?

A. I think it is the same thing.

Q. And was it substantially the same size and shape?

A. I think so, yes sir.

Q. Now afterwards did you hear anything more about that second paper that you signed?

A. In about three days I did.

Q. Well, now state what you heard and what you did?

A. The three men were together and we had some conversation. We talked considerable that day but I can't tell what was said. Anyway it come up that I had signed a note. I says "No,

I haven't signed any note." He says, "Surely you did" and I says, what is the note for and he says, "Why for this stuff you are going to have and the territory." Well, I says, "I didn't know of any such thing." Yes, he says, you have signed a note. Well I didn't say any more. It made me feel kind of mean and I got up and went out. As I was going out he told me he would like to see me the next morning.

Q. This was Kubach?

A. Yes, sir. I says what time in the morning and he says about nine o'clock. I was down the next morning and he asked me if he couldn't sell me some more territory and I says no, sir. He wanted to know if he couldn't sell me more molds for the posts and do more business, take some more townships he kept urging me.

Q. Just omit all you can. I want to get at what he finally did with reference to this note.

A. I told him no. He says would you sell this territory that you have bought, give back the papers. I says yes. He says, would you give me back even for what you have bought if we do the business the same as we do, you give back the papers and give up the territory, and I said yes, sir. We had quite a long talk of different things. He said he want to get a good man to do this business.

Q. Just omit that. Did he do something about this note?

A. Yes, he says you come tomorrow morning and you can have the money for the note. Me says I can't give the note but I will give you the money for the note.

Q. Did he tell you where the note was?

A. No, not that morning. And I went out

again. He seemed to be in a hurry. He said he had to go away and he said you come again tomorrow morning and we will see what we can do, and I went the next morning and he says, I can't attend to that this morning either Mr. Martin, he says, you will have to wait until tomorrow morning. I came there three times in succession and then he gave me the money to get the note from Charley Martin at the Rock County Bank.

Q. Now, did he say anything about when you should get the note?

A. I started out with the money to get the note and he called me back and he says, "Don't pick up that note just yet," he says, "Leave it there for a few days."

Q. Did he tell you why?

A. No, sir, not then. I saw him later. Now he says, "Martin don't give us away," he says. You are getting your money back he says, now don't give us away.

Q. Well, what did you do then?

A. I left the note there for a little while, I think it was something like a week.

Q. That is, you mean it was something like a week before you went after the note?

A. Yes, sir.

Q. Now when you went after the note who did you see?

A. Mr. Martin.

Q. Now can you tell about when it was?

A. I couldn't give the date, no.

Q. Well, in what month was it?

A. I think it was in August yet.

Q. You finally went in and took up the note did you?

A. Yes.

Q. And with whom did you have any conversation, if anybody?

A. Mr. Martin.

Q. Now did you make any statement to Martin?

A. Yes, sir.

Q. What did you say?

Mr. Daley: This is objected to until it is made to appear that this statement or conversation was had prior to the sale of the note to the Rock County Bank, and of course there is nothing to show the date of this conversation at all, except guess, and the witness can fix this by the papers themselves, which he says he has. I don't think they should be allowed to drag something in for the purpose of striking it out afterwards. Do you claim this was before the Bank bought the notes? If not, I shall object to it as incompetent.

Q. Well, you fix the time as near as you can when you went in and got the note.

A. The last days of August sometime.

Q. The last days of August?

A. I think it was. I am not sure about that.

Q. Well, could you say it was sometime before the 10th of September any way?

A. I think it was.

Q. Now what did you say to Mr. Martin at that time?

A. I says "Those fellows hadn't ought to be allowed here Mr. Martin" I says, "They are tricksters." He says do you think so? I says I know so, and there wasn't but a very few words with us, as there was a gentleman stepped in to do business with him and we stopped our conversation.

CROSS-EXAMINATION by Mr. Daley:

Q. Well, when you got your money back from Mr. Kubach then as I understand you he requested you not to mention the transaction that you had had?

A. I took it that way.

Q. And you didn't tell Mr. Martin in the Rock County Bank anything about how Mr. Kubach had got your note did you?

A. No.

Q. And you told no one else?

A. No.

Q. At any time, until now?

A. Oh yes, my friends and I have talked about that sometimes.

Q. But rather on the quiet?

A. Yes, sir.

Q. Now the reason why you didn't tell Mr. Martin in the Rock County Bank, or Mr. Hinkly, or any one else connected with that bank about the transaction was because they gave you your money back and you promised not to give them away?

A. No, it was because we didn't have time to talk any more as there was another gentleman stepped in to do business with Mr. Martin and stopped our conversation. I didn't see Mr. Hinkly in the bank. I saw no one but Mr. Martin.

Q. No, no, the reason I say that you didn't tell either of them was because you had promised Mr. Kubach not to tell anybody about it?

A. No, I didn't promise him.

Q. Now, do you remember having a conversation with Mr. R. B. Hinkly in the postoffice here in Luverne shortly after the first trial of this case here?

A. No, sir.

Q. And he asked you something about why you didn't tell them in the bank that they were swindlers or anything to that effect, if you knew about it? Do you remember that?

A. No, sir.

Q. And that Mr. Hinkly said to you "Well, if you knew they were swindlers why didn't you tell me about it" and you said in substance because when they gave me the money I promised to keep still about it until they were gone. Now didn't you have a conversation in substance like that with the plaintiff in this case, Mr. R. B. Hinkly, shortly after the first trial of this action, in 1909. in the postoffice here in Luverne?

A. I don't remember of having any conversation with Mr. Hinkly about this business at all, only with Mr. Martin.

Q. Well now do you say that you didn't have such a conversation, or one in substance like that, at the time and place I have stated?

A. No, sir.

Q. You don't say you didn't?

A. No, I wouldn't say I didn't, but I don't have no recollection of such a thing.

Q. You can bring in this contract to fix the date of it can't you?

A. If I can find it. I don't know for certain about finding that.

Q. Well, now how about the note that you paid?

A. The note I destroyed.

Q. So that you can't fix the date any better than this?

A. I don't think so, unless I can find that contract.

Q. Well, if you can find the contract

I will ask that you look it up and fix the date of it as near as you can after dinner?

A. Yes, sir.

Q. If you will just come to the stand and fix it if you can.

A. Yes, sir.

Q. Now I will show you Plaintiff's Exhibit A, and ask you if the note that you gave was substantially a similar looking piece of paper to this exhibit?

A. I couldn't tell Mr. Daley, that man handling it so quick and that was under the other paper, and I didn't see it only he snapped off that one and handed it to me and the note I didn't see much of it.

Q. Why now Mr. Martin you got the note afterwards in the Rock County Bank you said, and paid it, and destroyed it. Now, didn't you see the paper when you got it and destroyed it?

A. I was glad to get it and I didn't pay much attention to the size of it. I only saw my signature there and destroyed it.

Q. Right there on the spot?

A. Yes, sir.

Q. And you have no recollection as to the sort of looking paper it was at all?

A. I saw it was a note.

Q. You saw it was a note?

A. Yes, sir.

Q. Well, you saw it was no such size paper as this Exhibit 3, didn't you?

A. Well, I don't think it was.

Q. Well, you know it wasn't don't you, to be perfectly frank?

A. Well, it might not have been.

Q. I am asking you if you don't know that it was no such size paper as Exhibit 3?

A. Well, my recollection is not very clear on that.

Q. Well, have you no recollection at all, do you mean to say, as to the size of that paper when you got it, paid it and destroyed it?

A. Well, I didn't pay much attention to that. I was glad to get the note and get rid of it.

Q. Especially after you got the money?

A. Yes, sir, after I got my money back; that was all I was after.

Q. That was all that you went into the business for wasn't it?

A. Sure, like yourself."

Mr. Horton: Now the next is the one that is ruled out, William Lemke.

The Court: Yes; then you come to page 20, Nels Lunde.

Mr. Horton reads as follows:

"NELS A. LUNDE, sworn as a witness on behalf of the defendant, testified as follows:

Examined by Mr. Canfield:

Q. Mr. Lunde where do you live?

A. Southwest of Luverne.

Q. About how far from here?

A. About three miles.

Q. And what is your business?

A. Farming.

Q. And how long have you been living where you now do?

A. Thirteen years.

Q. And engaged in the same business I suppose?

A. Yes, sir.

Q. Do you remember meeting a man by the name of Kubach in the summer or fall of 1908?

A. Yes, sir.

Q. Do you recollect about when that was, what time of the month or season?

A. In August some time I guess.

Q. I think it was the 21st, do you know whether that is correct?

A. I think so.

Q. Now where did you see this man Kubach?

A. In Luverne.

Q. Was that the first time you met him?

A. That is the first time.

Q. Did you do any business with him that time?

A. No, sir.

Q. Now subsequently, later, did you again see him somewhere?

A. Yes, sir.

Q. Where was that?

A. Up at the farm.

Q. Now, when he came there what were you doing?

A. I was plowing.

Q. In the field?

A. In the field, yes sir.

Q. And what did Kubach do?

A. Well, he tied his team to the post and went through the fence, through the field.

Q. Came through the fence where you were at work?

A. Yes, sir.

Q. Now, then, what did he do and say? Just state as clearly as you can.

A. He said he wanted me to take a township and sell that fence machine and cement molds, and he asked me what township I wanted. I told him that I didn't care about it, I did not

have time, I says, I am a farmer and I can not leave my work; so he asked me if I didn't think them machines and moulds was all right; I said yes, I think so. He kept on talking there. I can't remember all what we was talking about. Sometimes we was talking about farming.

Q. Come right down to the real transaction as rapidly as you can. What was done?

A. Well, he asked me if I wanted to take Beaver Creek Township, he said he had that left. I said no, I don't want to take Beaver Creek township, if I would take any township at all I would take Martin. He says that is all right, and then he took up some papers and he showed them to me.

Q. Well, now in what shape were these papers, and where did he put them and how did he handle them?

A. Well, he had them on a tablet.

Q. On a tablet?

A. Yes, sir.

Q. And this I understand was out doors?

A. It was out in the field.

Q. Now, where did he place these papers?

A. Well, he stood there and held them.

Q. He held them first. Did you after a while sign something?

A. Yes, sir.

Q. Where did he place them before you signed them?

A. He was standing there holding them.

Q. Held them in his hand?

A. Yes, there was two of them.

Q. Now, this paper that was on top, what did he say about that?

A. He said it was a contract.

Q. Did he say anything more about what kind of a contract it was?

A. That I had a right to sell all that stuff in Martin Township so nobody could come in there and sell in my place.

Q. Up to that time had he said anything about the making of a promissory note?

A. No, sir.

Q. Or had he said anything about you paying any sum of money?

A. He was talking about he would send me so many molds and I would sell some and pay him $6,—send $6 to the Company for each mold.

Q. Now, at any time did he say anything to you about signing this paper that he showed to you? What did he say, if anything?

A. Well, he told me that we had to have a contract between us, that I had to sign a contract.

Q. Well, now what did you sign first?

A. I signed a contract.

Q. Well, where was that?

A. It was out in the field.

Q. I know, but what position was that contract in when you signed it?

A. It was laying loose on the tablet.

Q. On the top?

A. On the top.

Q. He was holding it I think you said, when you signed it?

A. Yes, sir.

Q. And after you signed it then what did he do and what did you do? Did he say anything or do anything? Now understand me, Mr. Lunde, you signed your name once first didn't you?

A. Yes, sir.

Q. And that was on the top paper was it?

A. Yes, sir.

Q. Now, after you had signed your name on the top paper then what next was done?

A. I signed another paper, the contract duplicate.

Q. Now, just tell us how that was done, how he brought about your signature. Take anything and illustrate it if you can.

A. Well, two of them was out there and I had one on each side; one set and held it on that end and the other hold it there and I was right in between them and when I signed the first paper they just turned up that corner.

Q. Who did that?

A. The one on that side. I don't know who that was.

Q. Cole or Augustine?

A. Well, I didn't know any one else than Kubach. I didn't know the name of the other one.

Q. When he turned up the corner what did he say if anything?

A. Well, he told me that was a duplicate contract that they should send in to the company.

Q. Then did you sign your name the second time?

A. Yes, sir.

Q. On the paper below?

A. Yes, sir.

Q. Now, when you did that did you see what it was?

A. I did not.

Q. Did you sign your name more than two times there that day?

A. No, sir.

Q. Just the two times?

A. Yes, sir.

Q. At that time did you have any note outstanding anywhere? Do you remember?

A. No, sir.

Q. Since that day have you given your note?

A. Yes, sir.

Q. But not to this company?

A. No, sir.

Q. Now, after you signed your name the second time what did they do with these papers?

A. Well, I didn't know just what they was doing.

Q. What was done with the top paper?

A. One paper was handed to me.

Q. Which one?

A. Well, I didn't see which one it was, but I know it was the one that I signed first; that is, it looked like it.

Q. But did you after that see the face of the paper you signed the second time?

A. Yes, I have seen it.

Q. No, there that day I mean.

A. No, sir.

Q. Did they show it to you that day?

A. No, sir.

Q. What did they do with it apparently?

A. Stuck it in their pocket.

Q. Now, at that time did you know that you had signed any promissory note?

A. No, sir.

Q. Or any kind of a note?

A. No, sir.

Q. Did you afterwards learn that you had that day signed a note?

A. Yes, sir.

Q. When did you learn that, about when?

A. Oh, a few days after.

Q. And when you did that—did you find the note sometime after that?

A. Yes, sir.

Q. Did you see it?

A. Yes, sir.

Q. Where was it?

A. In the bank.

Q. In what bank?

A. First National Bank.

Q. And do you know what has become of it? Is it in existence or not?

A. I have it in my pocket.

Q. Oh, you have it in your pocket; I didn't know that. Will you produce it Mr. Lunde, if you please.

Note produced and marked Defendant's Exhibit 5.

Q. Now, I will show you Mr. Lunde Defendant's Exhibit 4. You may state whether that is the first paper that you signed there that day.

A. Yes, sir, this is the first one.

Q. Do you know whether that was already written out, that is, the blank spaces filled out before they came there?

A. Yes, sir.

Q. Now, I will show you Defendant's Exhibit 5, Mr. Lunde. You may state whether that is the second paper that you signed there that day.

A. Yes, sir.

Q. Now, did you notice whether through the edge of the papers there was any pin at the time you signed?

A. No, sir.

Q. Didn't notice that?

A. No, sir.

Q. Well, did you notice whether there was or not?

A. No, sir.

Mr. Canfield: I will offer in evidence Defendant's Exhibit 4.

The Court: Received without objection.

Mr. Canfield: Also Defendant's Exhibit 5.

Received without objection.

CROSS-EXAMINATION by Mr. Daley:

Q. You say you found this note, Exhibit 5, in the First National Bank here in Luverne, did you?

A. Yes, sir.

Q. About what time?

A. When I paid it, the first of December.

Q. That is, you paid it just when it was due?

A. Yes, sir.

Q. Now, did you read this contract Exhibit 4, before you signed it?

A. Yes, sir.

Q. You noticed just how it read did you?

A. Yes, sir, I read it twice.

Q. While you were reading it over where was it?

A. In the field.

Q. No, I mean with reference to being in your hands or in their hands?

A. Well, it was in Charley Kubach's hands.

Q. He was holding it and you were reading it?

A. Yes, he was holding it on one end and I was holding it on the other end.

Q. And there was just two papers then was there, or was there only one?

A. I saw only one when I read it.

Q. Well, now when you signed the paper after reading it you noticed that it was this Defendant's Exhibit 4, did you, or one like it?

A. Yes, sir.

Q. Now, you say you didn't notice any other paper than that. Well, did you see Mr. Kubach's name signed before you signed yours?

A. Yes, sir.

Q. On both the papers you signed?

A. No, sir.

Q. Well did you notice that his name was not on one of them?

A. Yes, sir.

Q. So you noticed they were not alike then did you?

A. Yes, sir.

Q. And you knew you were not signing two papers exactly alike at the time?

A. Well, not the same feeling out there.

Q. Well, of course you didn't see the word "by" on the second one you signed did you?

A. No, sir.

Q. And you didn't see the words "local agent" either did you on the second one you signed?

A. No, sir.

Q. Well, then you noticed distinctly they were not alike?

A. Just down there they were not alike."

"EDWARD BISS, sworn as a witness on behalf of the defendant, testified as follows:

Examined by Mr. Canfield:

Q. Mr. Biss, where do you live?

A. Out in Springwater.

Q. And what is your business?

A. Farming.

Q. Where were you living during the summer and fall of 1908?

A. In Springwater township.

Q. And were still farming then?

A. Yes, sir.

Q. During that summer did you meet some men by the name of Kubach, Cole and Augustine?

A. Yes, some of them. I met Kubach and Augustine.

Q. And about what time did you see them?

A. On the way driving into town.

Q. About when was that?

A. Oh, it was in the afternoon.

Q. What month?

A. Why that was in September.

Q. The fore part or the latter part, which?

A. Well I don't know.

Q. Well now did you have any transaction—

A. I ain't sure just when it was exactly, I forget that, what date it was.

Q. Did you have any transaction with either Augustine or Kubach?

A. Yes, sir.

Q. I mean in a business way?

A. Yes, sir.

Q. Well when was that?

A. Well it was the first part of September.

Q. Now with which one of these men was it?

A. That was Augustine.

Q. And where was it?

A. It was out on the farm.

Q. Anybody with him?

A. No, sir.

Q. At that time do you know whether Augustine and—

Mr. Daley: We don't question that they were working together.

Q. Now what happened out there? Just go on and tell what happened.

A. Well I spoke to them before when I drove to town. They told me to come down to the basement. They had their office under the Rock County Bank, and they was going to tell me and show me what kind of molds they had for making fence posts and what kind of machines they had to make fences, so I went down and they showed me and told me it was a great thing, and they wanted some men here to sell machines and to sell the molds and so they asked me if I was going to take a job in some county or township to sell them. Well I told them I didn't know, I didn't have much time for it.

Q. Well, there wasn't anything done there but talk?

A. No, just talk.

Q. I want to get out to the farm, and what happened there.

A. He came out there right at noon, while I was eating dinner.

Q. August?

A. Yes. I went outside and I know it was him and then he told me that I could get Moody County if I wanted it, and so I told him well I would try it if I could sell anything over there next spring. Of course I wouldn't have time this fall I told him.

Q. Now what did he say, if anything, about whether you would have to pay any money or not?

A. No, he didn't say anything.

Q. Say anything about any note?

A. No.

Q. Never mentioned any note at all?

A. No, sir.

Q. While you were talking there did he produce some papers?

A. Yes, sir.

Q. Whereabouts did he do that?

A. It was in the granary. I told him to come in the house but he wouldn't do that because he said he was in a hurry.

Q. He produced some papers. What shape were those papers in?

A. Well it looked like a half dozen or a dozen contract blanks.

Q. Were they together in a bunch?

A. They were pinned together.

Q. Well now did he show you one of them?

A. Yes.

Q. Where was that?

A. Right in the granary.

Q. Where was the one that he showed you?

A. On top.

Q. Now did you read it over or he read it over?

A. He read it, and I follow the lines when he read it.

Q. After he read it what did he say to you about it?

A. Well he said I had to sign a contract then.

Q. Well now then what did you do?

A. Well I signed the contract.

Q. Now have you got that with you?

A. Yes.

Q. Just produce it please.

The contract was produced by the witness.

Q. Now after you had signed the paper that was on top that you call the contract, what then was done?

A. Why it was—he just turned the bottom corner and I signed the second contract.

Q. What did he say it was that was below?

A. He said he had to have two contracts to send one to the company and one for me to keep.

Q. Now did you believe what he said?

A. Yes, sir.

Q. How did he hold it when you say he turned it up?

A. Well he got down on one knee on the floor and he rested it on the other knee like that, and I signed the first one and he turned the corner and I signed the second one.

Q. Was he holding it in his hand right along?

A. Yes, just like this.

Q. After you signed your name the second time did you sign any more?

A. Yes, sir.

Q. What did you sign?

A. Well he had some kind of paper, and then he said to me that the company want to know what kind of property I got, and so he asked me how many horsese I had and how many cattle and hogs and stuff I had, so he wrote everything down and he kept that paper.

Q. That was written with what pencil or pen?

A. There was some writing at the top but he wrote it down with a pencil how many cattle and hogs I had.

Q. It was not a promissory note?

A. No.

Q. While you were signing down there on his knee did you sign more than twice?

A. No.

Q. Just two times?

A. Just two times.

Q. After you had signed the two times what did he say if anything?

A. After I signed the two times then he took

different paper out of his satchel and he said he wanted to know how many horses I had and he wrote that down after I signed the contract.

Q. I want to know what was done with these two papers you first signed?

A. He folded it in a check book or bank book and he put them back in his pocket.

Q. Did you get one of them afterwards?

A. Yes, sir.

Q. That is this one here?

A. Yes, sir.

Q. Did you see the other one afterwards?

A. No, sir.

Q. Now this Exhibit 6, is the one that you first signed there that day?

A. Yes, sir.

Q. And which Augustine gave you before he left?

A. Yes.

Mr. Canfield: At this time I will offer in evidence Exhibit 6.

The Court: Received without objection.

Q. Now did you know that day that you had signed any promissory note at all?

A. No, I did not.

Q. Or any kind of a note?

A. No.

Q. Afterwards did you find out what you had signed?

A. Well I got a letter from the Rock County Bank.

Q. Now following the receipt of that letter did you go to the Rock County Bank?

A. Well, not right away.

Q. Well any time?

A. Yes, I did.

Q. Well did you see anything there?

A. Well I seen the note.

Q. Saw a note?
A. Against me.
Q. To whom?
A. To the fence company.
Q. To this fence company?
A. Yes, sir.
Q. Now at any other time besides this one time did you ever sign any note or any other paper for the National Fence Company?
A. No, sir.
Q. Just had this one transaction?
A. Yes, and the other one where he asked how many cows and cattle and stuff I had.
Q. So then do you know now that the note at the bank is the second paper that you signed out there that day?
A. Yes, it has to be.

CROSS-EXAMINATION by Mr. Daley:

Q. Well are you sure you signed that one at the bank?
A. Well no, I aint sure that I signed that one.
Q. No, you told them that you never signed it didn't you?
A. Well I told them I didn't sign no note.
Q. Well you told them you didn't sign that piece of paper that they showed you?
A. I signed the top one.
Q. You told the Bank, Mr. Martin or Mr. Hinkly, or whoever showed you that note in the bank, that you never signed it?
A. I said I didn't give no note, I didn't sign no note.
Q. Do you understand me?
A. Yes.
Q. Well did you tell them that you never

signed the piece of paper that they showed you?

A. Well my signature was on the note.

Q. That was your signature was it?

A. Yes, sir.

Q. But didn't you tell them it wasn't?

A. No, I did not.

Q. You did not?

A. No, I did not.

Q. You said that was your note did you?

A. Yes, I said it was my writing.

Q. Well this note that you gave, did it look something like Exhibit 5 that I now show you, in size?

A. Well no, the second paper was the same size as the top one that I signed.

Q. The second paper that you signed out there that day was the same size as the top one?

A. That is the way it looked to me. Of course he held it down and I only seen the bottom corner.

Q. But you saw that it was the same didn't you?

A. Well he had probably half a dozen or a dozen blank contracts and I signed the top one, and he turned the top one and I signed the second one.

Q. Now did you notice whether they both looked exactly alike at the bottom?

A. At the bottom?

Q. When you signed them?

A. I seen just that row where I should sign my name at the bottom on the second paper.

Q. I am asking you if you noticed that the two papers looked exactly alike at the bottom.

A. They did.

Q. Did you see whether they were signed, either of them, before you signed them?

A. No.

Q. You didn't see any signature on there ahead of yours?

A. Well there was a signature on the top one.

Q. Well, wasn't there on the bottom one?

A. I didn't see the second row. He only pulled it back far enough so I could sign the name on the row.

Q. On the bottom line?

A. Well on the line.

Q. Well was it on the top line or the bottom line that you signed it?

A. I ain't sure about that.

Q. Well the signature on the top line was that of Mr. Augustine on the one that you saw first?

A. On the note?

Q. No, Mr. Augustine signed the top paper before you signed it didn't he?

A. He had his name right there on the top one.

Q. Look at it. Was it signed that way before you signed it?

A. Yes, sir.

Q. Well now on the second one did you see his name above yours, like that?

A. No, sir.

Q. Well then you noticed?

A. He didn't open it far enough.

Q. Wait until I get the question asked. Now you noticed that the bottom one had two lines on didn't you?

A. No I did not.

Q. Well if it turns out that you signed your name on the top line and there is one below it, then you must have seen two lines?

A. That must have been then.

Q. If you signed on the top line you must have seen two lines?

A. Well if I signed the top one, yes.

Q. In fact he turned up the top one entirely so that you saw all the right end of the bottom one, didn't he?

A. No.

Q. Did you try to?

A. Why no, he held it right down with both hands.

Q. I asked you if you tried to see it.

A. No.

Q. You made no effort to see it at all?

A. No.

Q. Now how was it that he held those papers down on his knee? Will you just take those two exhibits that are in evidence and show the jury how he held them down on his knee?

A. They looked like a bunch.

Q. I am not asking you what it looked like, I am asking you to show how he held them on his knee.

A. He had them like this.

Q. Well, now, where was the space for you to write when you wrote your name, was it over his knee?

A. Yes, like this.

Q. With the line where you wrote on top of the knee?

A. Yes.

Q. That is right is it?

A. Yes, sir.

Q. Well now he held it just like that?

A. Yes, sir.

Q. By the way, did you see any pin holding them together?

A. There was a pin on this end, the pin hole is right there yet.

Q. And where were you standing or sitting?

A. Well I got down right in front of him and wrote it.

Q. Something like this did you?
A. Yes.
Q. And wrote it there?
A. Yes, sir.
Q. Well now how did he turn it up for the second one to sign?
A. He turned it like this, and he said for me to sign.
Q. Well, get up to the top line and show us.
A. Well, maybe I didn't see it.
Q. Well, let's see whether you did or not.
A. (Witness indicates.)
Q. That is about the way it was was it?
A. I suppose it has been.
Q. You think that is about right do you?
A. Yes—well he may have turned it a little more like this. I couldn't say exactly but I know he turned the corner.
Q. There was a pin in there?
A. Yes.
Q. Now isn't it true that he turned it up that way on account of the pin?
A. No, I didn't see no other writing, only I seen the two lines, or one line, I don't remember, but I didn't see any writing.
Q. We have crinkled that all up. It was not bent across like that before you did it now?
A. I don't know.
Q. You didn't see all these crinkles across this corner until after you done that way?
A. Probably he didn't move it as much as I did.
Q. Now, Mr. Biss, did you sign on the top line or the bottom line?
A. I couldn't say for sure.
Q. Can't you say that now?
A. Well I seen it now on the top line.

Q. And clear up under the printed matter?
A. Yes.
Q. That is right?
A. Yes.
Q. This is your signature to Exhibit E, isn't it?
A. Yes.
Q. Now, after that was done, after you had signed the first two papers, you signed another paper did you?
A. Yes.
Q. But before you did that he put the note and the contract in his pocket did he?
A. Yes.
Q. Then he told you—
A. I mean the two contracts, as far as I know.
Q. Well, you know now it was a note don't you?
A. Well, it must have been.
Q. Well, you know it now don't you?
A. Sure I know it.
Q. You can read, you know a note when you see it?
A. Yes.
Q. And you know that Exhibit E, is a note?
A. Yes.
Q. And you know that is the paper you signed that day?
A. No, I do not.
Q. Well, it wasn't was it?
A. Well, I don't know.
Q. Well, Exhibit E, is the paper you talked about seeing in the Rock County Bank isn't it?
A. Yes, sir.
Q. Now, Exhibit F, is the other paper you signed that day?
A. Yes, sir.

Q. Did you read it before you signed it?
A. I seen the top printing on there.
Q. Did you read it I asked you?
A. Yes.
Q. You know what was in it?
A. Yes.
Q. Now, you understood when you made the statement, Exhibit F, that the company wanted to know what property you had didn't you?
A. Yes, sir.
Q. So as to know whether you were entitled to credit or not?
A. Yes, sir.
Q. For machines you were buying or should buy in the future?
A. Yes, sir.

Mr. Daley: We will offer in evidence as part of the cross-examination of the witness Plaintiff's Exhibit F.

The Court: Received without objection."

Mr. English: Now, I suppose we might put in the part of the plaintiff's original case which was omitted.

I will read in evidence the following questions and answers out of the deposition of Andrew J. Daley, down to the bottom of the first page:

"Q. What law of Minnesota governs the making of notes and other contracts on Sunday?"

The Court: You really got in what you wanted.

Mr. English: And the answer.

The Court: You got in the cases you cited.

Mr. English: This is all in, because I got in evidence the statute which he quotes from.

The Court: You offered the cases, where he said this had been decided.

Mr. English: Here is what I want:

"Q. Has this statute been construed by the Supreme Court of Minnesota?" Referring to section—

Mr. Horton: Your Honor ruled on that.

Mr. English: Referring to Section 4981, which is already in evidence.

"Q. And, if so, what has been held as to notes or other contracts executed on Sunday, and in what cases has the Court construed this statute and where are such cases to be found?"

The Court: These cases you have in.

Mr. English: "Answer. The Supreme Court of Minnesota has held in effect that any contract executed in connection with a private sale or other transaction of a private character on Sunday is valid. This is so held in the case of Ward vs. Ward—"

Mr. Horton: If the Court please, the Court passed upon that after hearing the argument.

The Court: I did pass upon it and I said objection had not been made at the time and could be made now, but this morning I changed that ruling so as to let in that other testimony, because objection was not made in time.

Mr. English: I suppose I am entitled to read the law in?

The Court: Yes. He refers to the cases. We have those cases. If those cases do not support what he says it can not do any harm, because he gives those cases as his authority.

Mr. English: (Continues reading):

"Ward vs. Ward, reported in the 75th Minnesota Reports, page 269, and in the case of Joy vs. Koch, reported in 108 Minnesota Reports, page 160."

Mr. English: We already have in evidence Section 2733, which is referred to in the deposition, so I won't read that.

I offer in evidence this question and answer:

"Q. What is now and what has been the law of the State of Minnesota for ten years or more last past with reference to the title and right acquired by the purchaser of dishonored or past due negotiable promissory notes?"

Mr. Horton: I object to that question. The Court has already passed upon it.

The Court: He has not finished reading it.

Mr. Horton: He is reading the answer. My argument was that it was purely remedial and was not substantive, and I think the Court ruled on it after an argument, because I have scratched out here "overruled," not on the ground that it was not objected to at the time of taking the deposition, because it was read here and we argued whether or not it was relevant and competent.

The Court: Well, if the objection was not made at the time the testimony was

taken hasn't it got to go in for what it may be worth?

Mr. Horton: Perhaps your Honor misunderstood what I said. The matter yesterday was not objected to on the ground that objections were not made at the time of the taking of the depositions, but objections were made on the ground that he was attempting to prove a conclusion, that he was attempting to argue the case by citing the law.

The Court: Yes, but the testimony having been put in then, no matter how incompetent or how irrelevant, without objection, the question is can the objection be made now. The objection comes too late, no matter what the reasons were. I do not think it can do any harm anyhow. You may take an exception to that if you like. No objection having been made at the time the testimony was taken I think the testimony will have to be read now.

Mr. Horton: I submit.

Mr. English: "Answer. It is the common law of Minnesota and has been over since the State was organized, that the purchaser of a dishonored or a past due note acquires all the rights thereto of the person from whom he purchased the same, so that if the one from whom he purchased the same was a *bona fide* purchaser thereof for value, before maturity, in due course of business, and without any notice of any defense, the purchaser from him would be entitled to all the rights of the *bona fide* purchaser."

"Q. What proof is required in Minnesota as to the endorsement by the payee of a negotiable promissory note?

A. Revised Laws of 1905, Section 4730 provides as follows: 'In actions brought on promissory notes or bills of exchange by the indorsee, the possession of the note or bill shall be *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed. Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until such person shall deny the signature or execution of the same by his oath or affidavit; but this shall not extend to instruments purporting to have been signed or executed by a person who has died before the requirements of such proof.' This statute has been held to apply to a corporation endorsement, so that if the endorsement is made in the name of the corporation by some individual it is *prima facie* evidence that such endorsement was made by the payee by proper authority. This has been held by the Supreme Court of Minnesota in the following cases: First National Bank vs. Loyhed, 28 Minn., 398. National Bank vs. Mallam, 37 Minn., 404. First National Bank vs. Compo Board Mfg. Co., 61 Minn., 274."

That completes our case and the defendant rests.

Mr. English: About this last deposition that has been read, we are a little embarrassed about it, under the view that no objection was made in the west. It relates all the way through to the proceedings of this man Augustine, and is not connected with the defendant Freick in any

way at all, and that this deposition, aside from any objection which might have been made is wholly immaterial and beside the question in this case.

The Court: I have already decided this morning to admit it.

Mr. English: All right.

Plaintiff's Testimony in Rebuttal

CHARLES KUBACH, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

Direct-examination by Mr. English:

Q. Where do you live, Mr. Kubach?

A. Abilene, Kansas.

Q. In the year 1908 were you general manager of the National Fence Machine Company?

A. I was.

Q. Are you the Mr. Kubach whose name has been mentioned in the testimony in this case?

A. Yes, sir.

Q. When did you first become acquainted with the defendant Mr. Freick?

A. Along about the first of September, 1908.

Q. Do you remember when you first had any business transactions with him?

A. Yes.

Q. When was it?

A. I think it was on the second day of September.

Q. After that did you have any subsequent business transactions with him?

A. Yes, sir.

Q. Now, I show you the note which is in evidence as Exhibit P-1, which is dated September 14, 1908. Were you present when that note was signed by Mr. Freick?

A. I was.

Q. Was any other paper signed at the same time?

A. Yes.

Q. I show you a paper which is marked for identification C, also dated September 14, 1908; was that signed at the same time that the note was?

A. Yes, sir.

Q. Where was it that that Exhibit C, for identification and note P-1, were signed?

A. In my office.

Q. Where was your office at that time?

A. It was in the basement of the Rock County Bank.

Q. At Luverene?

A. Luverne, Minnesota, yes.

Q. Had you seen Mr. Freick previous to the time the contract was signed in the basement of the Rock County Bank?

A. Yes.

Q. How soon previous to that had you seen him?

A. I saw Mr. Freick the first time on the second day of September.

Q. Where was that that you saw him?

A. That was in the country.

Q. At his house?

A. No, sir.

Q. Or at his farm?

A. That was between his farm and Luverne.

Q. How soon previous to the actual signing

of this note P-1, had you seen him? When last before that had you seen him?

A. Well, I can't recall exactly how long he was in the office before—

Q. Had you seen him at his house before that day or his barn, or did you meet him for the first time in connection with that particular transaction in the basement of the Rock County Bank?

A. This is the second time I seen him.

Q. That is only the second time you had seen him?

A. When we made this deal yes.

Q. Now, at the time this contract and note were signed did you have what he has described as a tablet?

A. No, sir.

Q. In what shape were the papers; just tell the jury how the papers were arranged?

A. The papers were—if you will give me another contract I will show you. (Another paper handed witness.) These papers were arranged this way and was in the pigeon-hole in my desk just like that.

Q. In the pigeon-hole in your desk?

A. Yes.

Q. That is the one form of the contract—the note and the duplicate of the contract?

A. Yes.

Q. All fastened together?

A. Yes, sir.

Q. With a pin?

A. Yes, pinned together. There was several in there.

Q. Do you speak German?

A. Yes.

Q. Did you talk with Mr. Freick in German or in English or both?

A. Both.

Q. At the time these papers were under discussion did you explain to him the nature of the contents of the papers?

A. I certainly did.

Objected to as calling for a conclusion.

Objection sustained.

Q. What did you say to Mr. Freick as to the contents of the papers which he was signing, and did you say it in English or German?

A. The transaction was made in English. We had talked German about other things—visited quite a while. I asked Mr. Freick if he would not handle Nobles County on this proposition. He made some deals with me previously and knew the character of the deals.

The Court: No.

Mr. Canfield: I move to strike out completely the statement as to what he—

The Court: That ought to go out. Just answer the question.

Q. Just confine yourself to the conversation. You asked him if he would handle Nobles County, and Nobles County is the one mentioned in the contract?

A. Yes. I asked if he would handle Nobles County and showed him the possibilities that there were in that county if he would take the agency for it.

Q. Yes.

A. Showed him that he would be in position to make township agents which we were doing at that time; realized six dollars a set for these machines and moulds from these township agents.

Each agent was required to take twenty-four machines and moulds to get the township agency.

Q. Did you tell him that?

A. Yes; I told him that.

Mr. Canfield: State what was said.

A. Yes; I told him I would furnish the machines and moulds at $2.50 each; he would sell them in two dozen lots at $6 each, which would be $144 and the deal would net him $84 on each and every township. Thoroughly discussed and understood in every deal—

The Court: No.

Mr. Canfield: I object to the last answer and ask that it be stricken out as a voluntary statement.

Mr. English: I don't understand counsel can move to strike out, but he can object as not responsive.

The Court: That is not responsive.

Q. You discussed it with him like that?

A. Yes; we figured it up, what the possibilities would be in the county if he would make those agents.

The Court: You need not clap your fingers. We can understand it.

A. I am a little bit excited. My character has been assailed here.

The Court: You need not volunteer anything at all; answer the question and stop.

Q. Following the description as you have described it what was done then?

A. I figured it up on a blank piece of paper, what this business could net him if he would succeed in placing those agents and agents would succeed in selling the moulds and machines—figured it up on a piece of paper and Mr. Freick thought it looked pretty good.

A. Excuse me.

Q. Don't tell us what he thought; tell us what he said.

A. He asked me—

Q. After you figured it up and showed him the figures what happened?

A. I told him, I said "Mr Freick, I will tie this county up to you. You will get the agency for this county. You will be permitted to make these agents and sell these machines and moulds. Here is the possibility. I will assign this county to you for $576."

Q. Yes.

A. "And I will give you plenty of time to give you a chance to make it out of this business, so you won't have to invest any money," and he voluntarily told me that he had a team and buggy and could handle the county, and we signed her up.

Q. At the time you signed this contract and told him that you would sell it to him—sell the county to him for $576, was that note there?

A. Yes, it was there.

Q. Did he see it?

A. Yes, saw it and discussed it.

Q. Did you, as has been described, turn up the corner in such a way as to conceal the face of the note or the character of the paper?

A. They were separate; I separated the papers before they were signed. Here is the consideration of the contract, $576.—

Mr. Canfield: I object.

The Court: Just answer the questions.

Q. You separated the papers. Where were they laying?

A. I had them in the pigeon hole when he came to the office.

Q. After he got there?

A. We were sitting at my desk in my office.

Q. They were spread out on the desk?

A. Yes, they were on the desk and I separated them and read them.

Q. Did you read him the note?

A. Yes, read him the note.

Q. Was it concealed under your hand, the hand resting on the paper?

Mr. Canfield: That is objected to as calling for a conclusion and as leading.

The Court: It is a leading question.

Mr. English: I will restate it.

Q. Just describe to the Court and jury the position of the contract on top of the contract and of the note?

A. I read the contract to Mr. Freick carefully. I says, "Now, Mr. Freick, here is the contract. Now, you sign this under my name if it suits you." He listened; we went over it carefully. He says, "All right." "Sign that." I says, "This is the note now that goes to the company. Here is the note for $576," that is what I told him, and he signed that. He understood there was a note there.

Mr. Canfield: I object and move to strike it out as not responsive and volunteered.

The Court: Strike it out.

Q. What about a duplicate contract which you keep for the company; was anything said about that?

A. There wasn't anything said about duplicate contract, and I always keep a copy of a contract, always have a record, keep tab on the territory.

Mr. English: I offer in evidence the contract which has already been identified

by the defendant and which is marked C for identification.

Paper marked P-6.

The Court: Any objection?

Mr. Canfield: Not at all; we want that in.

Q. Now, Mr. Kubach, I show you the note which is in evidence as Exhibit P-2, bearing date September 18, 1908; that note was signed in your presence?

A. Yes, sir.

Q. And at the same time was there signed a contract also bearing date September 18, and which is marked D for identification?

A. Yes, same time.

Q. Where were those papers signed?

A. They were signed in my office.

Q. In the basement of the bank building?

A. Yes.

Q. Had you seen Mr. Freick the day before or shortly before those papers were signed—had you seen him at his barn?

A. Yes, put up a sample of the fence at his barn.

Q. Sample of the fence?

A. Sample fence and post, yes.

Q. Now, this contract which is D for identification deals with what territory?

The Court: It speaks for itself; you need not ask that.

Mr. English: Then I will offer the note in evidence.

Mr. Canfield: May I look at it? (Examines.)

No objection.

Paper marked Exhibit P-7.

Q. After you had seen Mr. Freick at his house and discussed with him the making of this new contract, when was it after that that you met him in your office in the bank building?

A. I did not get that.

(Question repeated.)

A. What new contract?

Q. This contract of September 18th, Exhibit P-7?

A. Will you let me see the contract? I made so many I get them mixed. (Examines paper.)

A. I saw Mr. Freick occasionally, yes, after making this contract.

Q. No; I mean before. I want to know how long it was after you had seen him at the barn that you met him in your office and signed that up?

A. I think it was the next day.

Q. Next day, yes?

A. Yes.

Q. Did you tell him at either of those conversations that it would not cost him anything?

A. No, sir; I did not.

Q. What did you tell him in reference to that?

A. When I was at his house to put up the sample he referred that he had a son Herman, in college—

The Court: No, no; strike that out. Answer the question.

Q. What did you say to him in reference to it not costing him anything, or what was said on that subject at the time of the signing of this contract P-7 and the note P-2?

A. Well now, I didn't tell him it wouldn't cost him anything; I told him it would cost him $1,440 for the State of North Dakota.

Q. Did you tell him how that $1,440 was made up—tell him the basis on which those figures were arrived at?

A. Yes, we talked about the possibilities of the State.

Q. Just tell us what the conversation was along that line?

A. Well, I said, "Mr. Freick, it looks like you could put your boy in this business and take North Dakota and let him work that State," and I showed him the possibilities of the business in making those local agents—

Mr. Canfield: Confine it to your talk.

Mr. English: I understand it is talk.

A. And he would also have the right to sell counties and he probably could make some big money.

Q. What did he say to the suggestion that he could put his boy Herman in charge?

A. He talked very favorably—

Mr. Canfield: I object and move to strike out the answer.

Q. Not what he thought.

Mr. Canfield: Will you please let me state my objection?

The Court: That answer should go out as not responsive.

Q. Don't tell us what Mr. Freick thought; tell us what he said. What did he say in answer to your suggestion that his boy Herman could take up and operate this contract in Dakota?

A. He said that he thought his boy could handle it.

Q. Just describe to the jury how the papers were arranged at that time? Was there any tablet?

A. No, sir.

Q. Did you explain to him the character of the note which he was signing?

A. Yes.

Mr. Canfield: I object to it as calling for a mere conclusion.

The Court: You asked him to explain. Ask him what he said.

Q. What did you say to Mr. Freick at that time in reference to the note Exhibit P-2 which he signed?

A. I told him I would assign the State of North Dakota to him for $1,440, which would be the equivalent of ten local agents, and I told him, you know, the amount of agents we have made here—"you know we have written these local agents in your own county. It looks plausible that you can do it in North Dakota," and I simply made the sale to him on this basis.

Q. Did he see the note at the time he signed?

A. He certainly did.

Q. Just tell the jury whether the papers were covered up and the corner turned up or whether they were in such position that he could see and did see what he was signing?

A. The papers were separate, just like they were in the other deal, and I asked him to sign that contract; read it to him carefully, $1,440 for North Dakota, and I gave him the note and asked him to sign the note; showed him the amount, $1,440, and he signed it.

Q. Now, I call your attention to Exhibit P-3 which is in evidence, which is the note dated September 24. Was that note signed in your presence?

A. It was.

Q. I also call your attention to the contract which is dated September 24th, marked for identi-

fication E. Was that contract signed in your presence by Mr. Freick at the same time the note was signed?

A. Yes, sir.

Q. Where were those papers signed?

A. They were signed on his farm.

Q. Did you at the time they were signed have the papers in the form of a tablet as he has described?

A. No, sir; I never had any tablet.

Q. He says that at that time nothing was said about the paying of any money; is that true?

A. He was to pay $1,152—

Mr. Canfield: I object.

Q. The question is, he says nothing was said at that time about paying any money, and I ask you if that is true?

A. No, sir.

Mr. Canfield: I object to it as calling for a conclusion of the witness, grossly improper and everybody ought to know it.

The Court: It is rebuttal. The witness testified that nothing was said. His attention was called to that and this is rebuttal. He may answer.

Q. Just tell the jury what was said by you to Mr. Freick and by Mr. Freick to you at the time the note P-3 and the contract E for identification were signed?

A. I drove out to Mr. Freick's farm, that is to his first farm, the farm I supposed he was on and I met his son Herman. Mr. Freick himself had gone over to another place he had, so I took the matter up with his son in regard to taking on South Dakota.

Mr. Canfield: I object to it as hearsay.

The Court: That is not testimony.

Q. Come down to the point where Mr. Freick himself got into it.

A. I then drove over to where Mr. Freick was and I told him that I came out to talk to him about taking South Dakota in addition to North Dakota; that I had seen his son Herman and had talked it over with him, and he asked me what he said and I told him as near as I could he thought it was a good proposition, that it would be all right to take it, and I told him I would make him special prices on this county. He wanted to know how much it would be—on this State I mean—and I told him I would make him this State for $1,152, the equivalent of eight local agents, and he said, "Well, fix her up." I told him I had the contract fixed and read it to him, read the note to him, fixed it up there in the buggy shed.

Q. Now, tell us whether this—

Mr. Canfield: Has this been offered?

Mr. English: I will offer in evidence the contract dated September 24, which has already been marked for identification E.

Paper marked Exhibit P-8.

Q. Now, at that time tell us how the papers were with reference to Mr. Freick's ability to see the note which he was signing?

A. They were separated before he signed them.

Q. Did you tell him that it was a note that he was signing?

A. Why, he asked me if this is the note and I read it to him—$1,152.

Q. Did he have the paper in his hand at the time he asked that question?

A. Didn't pick it up; he signed it.

Q. Did he say, "This is the note?"

A. Yes; he asked me if this is the note when he went to sign it and I read it to him, and I said, "Yes, that is the note, $1,152," and then he signed.

Q. Now, I show you the note which is in evidence as Exhibit P-4, dated September 26, 1908, for $1,152; was that signed in your presence?

A. Yes, it was.

Q. And at the same time was the contract bearing the same date, marked F for identification, signed?

A. Yes, sir; this is a contract which was signed at that time.

Paper offered in evidence and marked Exhibit P-9.

Q. I notice on the back of this contract the name of a number of counties written. Just explain that.

Mr. Canfield: I object. Don't it explain itself?

Mr. English: It appears there, but I would like to inquire why they were written there. Do you object?

The Court: He may ask if he knows.

Q. Who wrote the names of the various counties which appear written on the back of this contract, if you know?

A. Mr. Cole wrote this contract and wrote those counties on it.

Q. I see in the body of it it says, "Excepting eight counties." Are they the counties referred to?

Mr. Canfield: I object; that is attempting to modify or change the terms of the contract in writing.

The Court: I do not see how that is competent.

The contract must speak for itself.

Mr. English: all right sir. It does speak for itself.

Q. Now, where was this contract signed and the note?

A. My office.

Q. When was it signed?

A. This contract was made on Sunday, the following Sunday after this South Dakota deal was made.

Q. By the South Dakota deal you refer to Exhibit P-7. Well, how did it happen that Mr. Freick came to your office at that time, and who was with him?

A. Well, Mr. Freick and his son Herman came to my office about nine o'clock.

Q. Yes.

A. Mr. Cole had been over to the house early in the morning and asked them if they could come over.

Q. Yes.

A. And they said they would.

Q. Well, you met them in the bank building, in your office?

A. I met them in my office; they came over and when we was there—

Q. Just tell us what was said in reference to the signing of this contract and the note, Exhibits P-4 and P-9 respectively, which deal with the State of Minnesota, excepting certain counties?

A. Mr. Cole had—I guess that wouldn't be proper, would it?

Q. No; just tell us what was said. Just tell us the conversation which you heard and participated in in the presence of this gentleman?

A. I said to Mr. Freick and his son what

would be the matter if, since they had North and South Dakota they take the balance of Minnesota.

Q. What did he say to that?

A. And we figured up the possibilities as usual, and I told him I would make it to him at the same price as North Dakota, for $1,152. He and his son were there and we discussed the matter at length, talked about it, and finally the son said, "Pa might as well take this. We have got the others." And we fixed it up.

Q. At that time did you say to Mr. Freick, "you do not have to pay any money"?

A. No, sir.

Q. What did you say about the payment of money?

A. I told him I would give him time, give him a chance to make it out of the business and I would take his note, that is what I told him.

Q. Did you tell him the amount for which you would take his note?

A. Yes, told him $1,152.

Q. Now, at the time the papers were signed was the note in such a position that it could be seen and was seen by Mr. Freick?

A. It was made right out—

Mr. Canfield: I object to it as calling for a mere conclusion of the witness.

The Court: Ask him if it was in a position where it could be seen.

Q. Was the note in such position that it was seen by Mr. Freick?

A. Certainly was.

Mr. Canfield: I object.

Q. At the time he signed the note—that is the question.

The Court: That calls for a conclusion.

You can ask him if it was in a position where it could have been seen and then ask him what was done afterwards.

Q. Was the note in such position at the time it was signed that it could have been seen by Mr. Freick?

A. Yes.

Q. Describe the position it was in?

A. It was laying on the desk.

Q. Was it covered up by the contract or any other paper?

A. No, sir.

Mr. Canfield: I object. Wait one minute. Mr. Kubach, when there is objection I would be glad if you would wait.

A. Beg pardon; I didn't hear an objection.

The Court: Proceed.

Q. Mr. Freick says that at the time he signed this note, Exhibit P-4, it was covered up by the contract Exhibit P-9 and that you turned up the corner in such a way that he could see nothing except the line where he signed his name; is that true?

A. No, sir.

Mr. Canfield: I object. Wait, wait. Objected to as calling for a mere conclusion and not the facts, and as improper.

The Court: I think it is competent. I will allow it.

Q. Answer the question?

A. I did answer it.

(Answer repeated by stenographer.)

Q. Did you tell him at the time he signed this note, Exhibit P-4, that he was signing a duplicate contract of Exhibit P-9?

A. No, sir, I did not.

Q. What did you tell him he was signing?

A. Told him he was signing the note.

Q. Were you present when the contract which is marked for identification G, was signed?

A. I signed that, yes.

Q. No; my question was whether you were present?

Mr. Canfield: Wait, wait.

Q. My question is whether you were present at the time it was signed by Mr. Freick?

Mr. Canfield: I wanted to make a motion if I could get in here through the cracks. I move to strike out that last answer as not responsive to the question.

(Question and answer repeated by stenographer.)

The Court: That is not responsive and I will strike out the answer.

(Question repeated.)

A. I was not present when Mr. Freick signed it.

Q. Who was present, if you know, when that was signed by Mr. Freick?

The Court: How can he tell?

Mr. English: I asked him if he knows.

The Court: Well, by hearsay?

Mr. English: I will withdraw the question.

Q. Were you present when the paper marked H for identification was signed by Mr. Freick?

A. No, sir.

Q. Now tell me who was present with you, if anybody, at the time the first contract and the note of September 14, were signed?

A. Mr. Augustine was there then.

Q. Was Mr. Cole there?

A. No, sir.

Q. Was Mr. Cole present when the note and contract of September 18th were signed, that is, the one dealing with North Dakota?

A. No, sir; I sent Mr. Cole to Correctionville.

Q. He wasn't there?

A. No.

Q. Was Mr. Cole present when the note and contract of September 24th dealing with South Dakota, was signed?

A. No, sir

Q. Was Mr. Cole present when the note and contract of September 26th dealing with Minnesota, was signed?

A. No, sir.

Q. That was the one signed on Sunday?

A. Yes; he was there that day.

Q. There on that Sunday?

A. Yes, he was there that day.

Q. That is the only one of the four at which he was present?

A. Yes.

Q. After you obtained these notes you discounted them at the bank?

Mr. Canfield: I object.

Mr. English: I don't know whether that is proper on re-direct. Do you object to it?

Mr. Canfield: I don't know what is the use of taking the time for that.

Q. Mr. Kubach, do you know Ole T. Olson?

A. I do—Ole F. Olson, of Luverne?

Q. Yes.

A. Yes, sir.

Q. Did he sign any contract or note or both in your presence?

A. He did.

Q. Do you remember where that was?
A. In my office.
Q. In the bank building?
A. Yes.
Q. Did you say to him at that time that it would not cost him anything, or words to that effect?
A. No, sir; I did not.
Q. What did you say to him with reference to any cost or anything of that character?
A. The first deal I made with Ole T. Olson—
The Court: Just answer the question.
Q. Did you have more than one transaction with him?
A. Yes, sir.
Q. Did he sign more than one note?
A. Yes, sir.
Q. Now confine yourself to the first note in the first deal; what did you say to him at the time of the signing of the first note in the first contract wih reference to whether or not it would cost him anything?
A. I don't know. I did not tell him it would not cost him anything.
Q. Did not?
A. No, sir.
Q. What did you tell him?
A. I told him it would cost him three hundred dollars, that is what I told him.
Q. In what shape was that obligation placed?
A. Ole T. Olson took four townships—
The Court: Just answer the question.
A. I would like to understand it.
The Court: You will answer the question.
A. How we arrived at the amount?

Q. Was his obligation to pay three hundred dollars met by cash or by note, or how?

A. By note.

Q. Was the note signed at the time the first contract with him was made?

Mr. Canfield: I object. Such questions are improper.

The Court: It is very leading.

Q. Tell what else was signed at the time the contract with Ole T. Olson was signed?

A. He signed a note for three hundred dollars.

Q. Tell the Court and jury the position of the papers at the time Ole Olson signed his name? Were they in tablet form or how were they?

A. No, sir, it was not.

Q. How was the position?

A. They were separate.

Q. Was the note in such position that it could have been seen by Mr. Olson?

A. Certainly was.

Q. Did you tell him that it was the note that he was signing?

Mr. Canfield: I object to it as leading and calling for a conclusion.

The Court: It is surely leading.

Q. What did you say to him in reference to whether or not he was signing a note?

A. I told Mr. Olson that I would furnish him—

The Court: Just answer that question.

A. I told him that he was signing a note, yes.

Q. You told him he was signing a note?

A. Yes; he knew he was signing a note and read it.

Mr. Canfield: I object.

The Court: Strike it out.

Q. Did you tell him what he was signing it for?

A. Yes.

Q. What for?

A. I sold him—

Q. No; what you told him?

A. I told him I would furnish him with three machines and three moulds for each township, for the four townships, at $12.50 each, and would furnish all additional moulds and machines at $2.50.

Q. Yes.

A. And the four townships with the six machines and six moulds in each township netted up three hundred dollars, for which I took his note.

Q. Did you tell him the note was in payment of those machines and those moulds?

Mr. Canfield: I object.

Q. What did you tell him the note was in payment for?

A. Payment for those machines and moulds, certainly.

Q. Do you know Mr. J. P. Hanson?

A. Yes, I remember Mr. Hanson.

Q. He says he lives southwest of the Town of Luverne, that he signed—did you have any businss transactions with him?

A. Yes, I did.

Q. Oh, just a moment; you said there was another note and contract which you had with Mr. Olson. How many altogether did you have with him?

A. Three or four of them.

Mr. Canfield: To save you any work we will admit that he will testify to substantially the same matters with reference to the succeeding notes.

Mr. English: No; I want to try my own case.

Q. You had three or four contracts with him?

A. Yes.

Q. Did you sign a note in connection with each one of those contracts?

A. Yes, he did.

The Court: How is that competent? You called this witness to rebut the testimony of a witness offered on the other side. You can not rebut something he did not testify to.

Mr. English: I think he did testify to it. I want to see.

The Court: He testified to one transaction, as I recollect it.

Q. Well, now we will go on to Mr. Hanson. You say you remember him?

A. Yes, I remember Mr. Hanson.

Q. Did you have any business with him?

A. I did, yes.

Q. What was it?

A. I sold Mr. Hanson two dozen sets of moulds at six dollars a set.

Q. Did he sign a contract in connection with that arrangement?

A. Yes.

Q. What else did he sign?

A. Signed a note for $144.

Q. At the time that note was signed were your papers in the shape of a tablet or anything of that character?

Mr. Canfield: I object. Wait. That is objected to as simply calling for a mere conclusion of the witness.

The Court: In order to contradict that you have to show the language of the witness.

Mr. English: That is what I am trying to do. This word tablet is mentioned in the testimony of the witness which I hold in my hand.

The Court: If you are reading from that testimony all right.

(Question repeated.)

A. They were not.

Q. Did you have the papers in your grip and did you take the papers out of your grip prior to—just prior to discussing this contract?

A. No, sir.

Q. Where were your papers?

A. In my wallet, in my pocket.

Q. Where did you carry your wallet, in your pocket?

A. Yes.

Q. Did you at the time when Mr. Hanson signed the note hold the contract and note in your hand and hold the corner of the contract up and tell him to sign the paper underneath?

A. No, sir.

Q. Just describe how the note was signed?

A. They were signed like the others that I have described. It was taken separately from the contract and showed him it was one hundred and forty-four dollars.

Q. Was it exhibited to him in such a way that he could have seen that it was a note?

Mr. Canfield: I object.

Mr. English: That is the language of the Court which I have adopted. The Court suggests it.

The Court: I will allow it.

(Question repeated.)

A. Yes, sir.

Q. Do you know William Martin, of Luverne?

A. I do, yes.

Q. Did you have any business dealings with him?

A. Yes.

Q. Did he make a contract with your company for an agency?

A. Made a contract with me, yes, sir.

Q. Where was that made, if you remember?

A. My office.

Q. At that time when he was there in your office did you open up a satchel to take some papers out?

A. No, sir, I did not.

Q. Where were the papers which you produced at that time?

A. They were on my desk.

Mr. Canfield: I object. Where is that about that?

Mr. English: On page 9.

Q. Did he at that time sign more than one paper?

A. Yes, sir.

Q. What were the papers which he signed?

A. He signed a contract and a note for $144.

Q. At the time he signed the contract and the note were the papers arranged in such a way that the note was below the contract?

Mr. Canfield: I object to it as calling for a conclusion.

The Court: He is using the words, as I understand, of the witness. Am I correct?

Mr. English: Yes, reading right out of the testimony.

(Question repeated.)

A. No, sir, they were separated.

Q. Is it true that you held the papers in such a way that he did not see the face of the note which he signed?

Mr. Canfield: I make the same objection and that it is incompetent too.

The Court: Well, this witness can say what he did or did not do. He can say whether it was in such a position if he could have seen it.

Mr. English: No, this witness is called on rebuttal, and here is the statement which was made.

The Court: That question I allow, but you asked him if he did see it.

Q. At the time this contract with Mr. Martin was signed and the note did you hold the paper in such a way that he could have seen the contract and the note both of which he says were signed?

A. They were separated. He could see either one of thm.

Q. Now, it appears from his testimony that you afterwards bought back his contract and gave him some money. What is the fact about that?

A. I did.

Q. Why did you do it?

Mr. Canfield: I object to it as improper, irrelevant and immaterial.

The Court: I think that calls for a conclusion.

Mr. English: Your Honor, here is some testimony from which an inference is supposed to be drawn. Now, it seems to me that the person who is the chief actor in the proceeding can explain why.

The Court: That witness testified to the conversation which took place at the time the money was paid, and you can ask him as to the conversation.

Q. At the time you paid him this money, did you say: "Martin, don't give us away, you are getting your money back; now, don't give us away"? Did you say that or anything like that?

A. No; I said to Mr. Martin—

Mr. Canfield: I object.

Q. What did you say?

A. I said to Mr. Martin that I had a man that would take four townships including his own and asked him if he would not take it, and he said no, he did not want any more, and I asked him if he would let me cancel that if I gave him back the money, and he said, "Yes, I will," and I cancelled his contract and gave him back—I had already sold his note, and I paid him the money for it. I sold the township to Ole T. Olson afterwards.

Q. Did you have anything to do with contract with Mr. Lundi?

A. Yes.

Q. Who was with you on the occasion of the Lundi transaction, do you remember?

A. Mr. Cole.

Q. Is it true that at the time he signed his contract nothing was said about a promissory note?

A. No, sir.

Q. What was said about a promissory note?

A. I sold,—he gave me a note for $144.

Mr. Canfield: I object. The form of the first question indicates that the purpose is impeachment—that I think is perfectly

proper on that theory, and that is where it ought to stop; the second question, the last one, would be improper on that theory.

Mr. English: The witness testified that is not true and I asked him what was said.

The Court: I will allow it.

Mr. Canfield: I want to find out what course the counsel is following.

The Court: This witness is called in contradiction and rebuttal of that testimony. The proper course has been followed to call his attention to the language and then he can be asked to explain if any explanation is necessary. You may proceed.

(Question and answer repeated.)

Q. What was said at the time the note was given, or about the signing of a note?

A. He signed the note and contract like they all did. I told him they would have to give a note for those machines and moulds. He signed for $144.

Q. At the time the note was signed were the papers held in such a way that he could have seen the note he signed?

A. Certainly was. The contract was drawn up before his eyes.

Q. It appears from his deposition that you asked him to take Beaver County, and he said he wanted Martin County. Had a contract previously been written up for Beaver Township—I mean Beaver Creek Township?

A. Yes, sir; I had a contract written for Beaver Creek Township for Mr. Lundi.

Q. Did he sign a contract for Beaver Creek Township or for Martin Township?

A. He signed one for Martin Township. He would not take Beaver Creek.

Q. Where was the form of contract changed?

A. Right there in the field where we were.

Q. Was it held in such a way that he could have seen the changes which were made in it?

A. Yes, surely.

Q. And after that was signed was the note held in such a way that he could have seen the note?

A. Yes, certainly.

Q. Did you have anything to do with a contract with Edward Biss?

A. No, sir, I did not.

Recess till 2 p. m.

Afternoon session, 2 p. m.

By Mr. English: Q. Now, Mr. Kubach, direct yourself to Mr. Olson for a moment. After the signing of his note did you have any conversation with him in which he admitted that he had signed the note?

Mr. Canfield: I object to it as calling for a conclusion.

The Court: That is a conclusion. He might have said something that he thought was an admission which might not be.

Q. Did you ever have any conversation with him in reference to the discounting of the note which he had signed?

A. Yes, sir.

Q. What was that conversation?

Mr. Canfield: That is objected to as hearsay and not proper cross-examination, and as irrelevant and immaterial; and I object to it too for the reason that it is

not proper at this time for the purposes of impeachment, if that is the object of it.

The Court: I will allow this.

(Question repeated.)

Q. When was it, first, if you remember?

A. It was in my office shortly after he had made the last deal with Mr. Olson. I think it was on or about the 17th of September.

Q. Now, just tell us what the conversation was?

A. I told Mr. Olson, I said, "Now Ole, I have taken your notes for considerable money—"

The Court: Oh no; you ought to confine it to the words that Mr. Olson testified to.

Mr. English: He testified to two, one for over a thousand and a small one.

The Court: It must be restricted to those two.

A. I said I would like to realize on this paper at the bank; I am a stranger here and I would like to have a statement from you to show the bank that this deal is satisfactory with you, recommending that they can buy the notes.

Mr. Canfield: I object and move to strike out all of this statement as not responsive and incompetent, irrelevant and hearsay.

The Court: I do not think that answer is responsive to the question. This can only be used for the purpose of rebuttal of Olson's testimony.

Mr. English: I understand opposing counsel can not move to strike out the question as not responsive. If he has some other ground—

The Court: If counsel can not do it the Court can.

Mr. English: Is it stricken out?

The Court: Yes.

Mr. English: We pray an exception.

Whereupon the plaintiff by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Did he sign a statement as a result of that conversation?

A. Yes, sir.

Q. In your presence?

A. Yes, sir.

Q. I show you a statement dated Luverne, Minnesota, September 19, 1908—

Mr. Canfield: Show it to me without reading it.

The Court: Yes, show it to him.

Mr. English: I have not read it. I was simply identifying the paper.

Q. I show you a paper dated Luverne, Minnesota, September 19, 1908—

Mr. Canfield: I object to his reading any part of that and insist on it being shown to the witness.

The Court: That is not the proper way. You can show him a paper and ask him if that paper is the signature which you are referring to. You can not read it unless the paper is in evidence.

Mr. English: I suppose for the purpose of identification I could refer to the date of the paper?

The Court: I have ruled on the question. You can show him the signature and see if he can identify the paper.

Q. I show you a paper purporting to be signed "Ole T. Olson"—

Mr. Canfield: I object.

Q. Was that paper signed in your presence by Ole T. Olson?

Mr. Canfield: I object for the same reason.

The Court: He identifies the paper and then it has to be offered afterwards to see whether it is competent and then you have a chance to see it.

A. Yes, sir; this is the letter he gave me.

Mr. English: I offer the paper in evidence.

(Hands paper to Mr. Canfield.)

Mr. Canfield: I object to it for the reason that it is incompetent, irrelevant and immaterial.

The Court: It is overruled. It does not relate in any way to this particular case.

Paper marked for identification I.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

CROSS-EXAMINATION by Mr. Canfield:

Q. When did you first go to Luverne, Mr. Kubach?

A. I think it was along about the first of September.

Q. Do you know when?

A. 1908.

Q. Do you know what date?

A. I can not recall the exact date, no, sir.

Q. How long after going there did you engage room below the Rock County Bank?

Mr. English: I object to it as not cross-examination and as immaterial.

The Court: The question is allowed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

A. The room was already engaged.

Q. By whom?

A. By my assistant, Mr. Cole.

Q. What other assistant did you have beside Mr. Cole while operating at Luverne?

A. Well, I had Mr. Cole, Mr. Augustine and Mr. Allison, and Mr. Kline.

Q. How long did you remain in Luverne?

A. Well, from the time I sent my first man there until we left I think was about two months.

Q. On what day did you leave?

A. Well, it was on Monday morning after we made this last deal with Mr. Freick, I went to Correctionville, Iowa.

Q. How long have you been in this same business?

A. About thirteen years.

Q. During that time travelling over the country from place to place, were you?

A. Yes.

Q. Conducting the business on the same plan generally that you did it at Luverne?

A. Yes.

Q. Had you ever been in Minnesota prior to this time that you went there?

A. No, sir.

Q. Have you ever been there since?

A. Yes.

Objected to.

The Court: The answer may stand.

Q. Have you ever been in Rock County since?

Objected to.

A. No, sir, not in Rock County.

Q. Now, you say your first transaction with Mr. Freick was about September 2, was it?

A. Yes.

Q. How do you know it was on that date?

A. I judge so from the contract.

Q. Have you any independent recollection on the subject?

A. No, sir.

Q. You do not know from your own memory when you first had a transaction with him, do you?

A. I don't remember the exact day.

Q. No?

A. No.

Q. Did you have similar transactions with others before you met Mr. Freick?

A. Oh, yes.

Q. Who?

A. Well, I think the transaction with Mr. Lundi.

Q. Can you name anybody else?

A. Mr. Handy.

Q. Who?

A. Hanson.

Q. Can you name anybody whose name does not appear here on the depositions?

A. I can hardly do it without a record. I forget names.

Q. You forget names?

A. Yes.

Q. During the last thirteen years you have solicited this kind of business over a large territory of country, haven't you?

A. Yes, sir.

Q. During that time you have met thousands of different people?

A. Probably.

Q. Well, isn't that so?

A. Yes, yes, it is so.

Q. And talked this business to them?

A. Yes.

Q. To thousands of different ones?

A. Well, probably a thousand, yes.

Q. Well, more than a thousand, isn't it?

A. Well, it may be more.

Q. Several thousand?

A. Perhaps.

Q. Well, do you know?

A. I couldn't say how many thousand.

Q. Do you remember selling Mr. Freick a set of moulds when you first met him?

A. I did not sell him a set of moulds.

Q. Did not?

A. No, sir.

Q. Did not deliver any set of moulds before any of these notes were signed, did you?

A. No, sir, did not.

Q. Sure of that?

A. No, sir.

Q. Do you remember taking the first note for $12.50 for one set of moulds?

A. I did not take the first note for $12.50 for one set of moulds.

Q. Sure of that?

A. Yes, absolutely sure.

Q. Where were you when you first saw him?

A. I was about eight miles from town, between his farm and Luverne when I first saw him, caught up with him on the road.

Q. Had a talk with him the first time?

A. Yes, the first time I met Mr. Freick.

Q. Before you had seen him at all you had a contract all written out, didn't you, for him to sign?

A. Yes. This Mr. Cole had seen him. Yes.

Q. I didn't ask you anything about Mr. Cole.

The Court: Just answer the question.

Q. Just answer the question. And you went out for the purpose of inducing him to take an agency for some town?

A. Yes, that is what I did.

Q. You did not know he was going to do it?

A. No, did not know.

Q. You knew what his business was at that time, didn't you?

A. Yes.

Q. A German farmer?

A. Yes, retired.

Q. You knew from your conversation with him that he was a man without experience in anything except farming, didn't you?

A. Yes, sir, I expect so.

Q. Now, do you pretend to say that you can remember all of the talk that you and Mr. Freick had on that occasion?

A. No, sir, can't remember all.

Q. Who did you talk with about one of these deals yourself, before you saw Mr. Freick?

A. Why, I talked to so many I could not say who.

Q. You talked with so many?

A. Yes.

Q. Can you name a certain person whom you talked to before you met Mr. Freick about taking an agency?

A. Yes.

Q. Who?

A. I met,—I told you Mr. Lundi.

Q. Some one besides those whose depositions are on file here?

A. There was Carl Miller.

Q. Mr. Carl Miller?

A. Yes.

Q. Well, anybody else?

A. Mr. Windy.

Q. Mr. who?

A. Mr. Windy.

Q. Windy?

A. Yes, sir, Mr. Windy, lives north of Luverne.

Q. Did you make a deal with him?

A. Yes.

Q. Did you with Carl Miller?

A. Yes.

Q. Can you remember some one that you talked to just before you saw Mr. Freick with whom you did not consummate a deal?

A. Well, there is quite a few that I did not consummate a deal with.

Q. Can you name one person?

A. I could not; ain't got no record of names.

Q. Can you remember a conversation that you had with any other individual at Luverne that you did not consummate a deal with?

A. Well, I had several of them.

Q. I say, can you remember a conversation with any of them?

A. Well, I presume I can, yes. It was a new fence line.

Q. Oh yes. Do you remember a man by the name of Art, Henry Art?

A. Yes.

Q. You remember talking with him?

A. Yes.

Q. Do you remember what you and he both said? A. Why, I think I do, yes.

Q. Do you know you do?

A. Yes, sir.

Q. Every word of it?

A. I don't say that I do every word, no.

Q. Do you pretend to say, Mr. Kubach, that you can remember the details, the conversations, with various individuals three or four years ago all over the country?

A. I can when I make a deal with them, pretty near.

Q. You can remember them all?

A. Pretty near, yes.

Q. How many deals then did you make in 1908?

A. I could not tell without my record.

Q. Have you got an idea how many?

A. No.

Q. Approximately?

A. No.

Q. Did you make a hundred?

A. Oh, yes.

Q. A thousand?

A. I could not say.

Q. Could not say?

A. I would not want to swear to it.

Q. How many do you think you made? What is your impression now?

A. Probably made a thousand, I don't know.

Q. And you can remember conversations with those thousand people, can you?

A. I don't think so.

Q. Didn't you say you could remember all with those you dealt with?

A. I did not say all; I said pretty much I could, yes.

Q. Oh, pretty much?

A. Yes. The main subject I can remember.

Q. Then if you can remember the conversation with all of them you can remember all of their names, can't you?

A. No, sir.

Q. You can not? Now, you say the first transaction was on September—no—yes, September 2d?

A. I think it was, yes.

Q. How do you know it was the second of September?

A. Well, I told you I just judged by the contract; it was about that time.

Q. Then you don't have any independent recollection, do you?

A. No, sir.

Q. What did that transaction relate to?

A. Related to an agency.

Q. To an agency?

A. Yes; he was to sell our machines and moulds.

Q. Did it result in anything? Did anything come out of the negotiations that you had on that date?

A. Did anything come out of it?

Q. Yes?

A. I don't understand you.

Q. Did the talk you had with him on September 2d, result in the making of any contract of any kind?

A. Yes, sir.

Q. Do you remember what it was?

A. Yes, sir.

Q. At that time there was an agency contract signed, was there?

A. Yes, sir.

Q. And the note of some kind?

A. Yes.

Q. You remember the amount?

A. Oh, yes.

Q. Afterwards there was some litigation in regard to that note, wasn't there?

Mr. English: I object as not cross-examination in the first place.

The Court: I will allow the cross-examination of this witness.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

A. Yes, sir.

Q. You knew something of the history of that litigation also as it went on, didn't you?

A. No, sir; I gave my deposition there, that is all I know about it.

Q. You knew about the case being tried in Minnesota, didn't you?

A. I know about it now, yes, sir.

Q. You knew about it then, didn't you?

A. I knew about it being tried, yes. I gave my deposition.

Q. Now, you did not go to Minnesota to testify, did you?

Mr. English: I object.

A. No, sir.

Mr. English: I object to it as immaterial and not cross-examination.

The Court: You have gone about as far as I think you ought to go on this line in relation to that other note which is not in controversy here.

Mr. Canfield: Of course I do not think so.

The Court: What is the object of it?

Mr. Canfield: In the first place it is to test the witness's knowledge and recollection of the events and also lay the foundation for impeachment later on.

The Court: Well, you have a right to do that.

(Question repeated.)

The Court: That might lay the foundation for impeachment. You may proceed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Answer repeated.)

Q. Now, isn't it a fact that the reason you did not go there was because you were afraid you would be arrested on a criminal charge?

Mr. English: I object.

The Court: I think that is going too far. I will overrule that question.

Q. Now, have you any independent recollection of the date on which you first met Ole T. Olson?

A. No, sir.

Q. How many interviews did you have with him?

A. Oh, quite a few.

The Court: Quite a few means nothing. Can't you answer that better than that?

Q. Do you know how many you had with him?
A. Mr. Olson was in my office—
Q. I asked you if you know how many interviews you had with him?
A. Probably a hundred; I ain't certain.
Q. Then you are not certain?
A. I don't know how many.
Q. Then say so.
A. There is so many I forget.
Q. Who is this Ole T. Olson?
A. A resident of Luverne.
Q. A retired farmer, as you understand it?
A. Yes.
Q. A man about how old, apparently?
A. I should judge he is about my age.
Q. About your age?
A. I think so, yes. I would judge him to be that. I don't know his age.
Q. Did you inquire into his general character, financial and otherwise?
A. I inquired as to his financial standing, yes.
Q. And found that he was responsible?
A. Yes.
Q. Man of good standing?
A. Yes, sir.
Q. And the same of J. P. Hanson?
A. Yes, sir; all of them.
Q. You found when you met William Martin he was also a retired farmer?
A. Yes.
Q. Man of good standing?
A. Yes.
Q. —in the community? The same with Mr. Lundi? He was a farmer, wasn't he?
A. Yes.
Q. Responsible? A farmer of good standing?
A. Considered responsible? Yes.

Q. Now, you say, do you, that all of these responsible farmers of good standing were mistaken when they say that you concealed these notes in each case that they signed?

A. Certainly are, yes, sir.

Q. Yes?

A. Yes, sir.

Q. They are all mistaken?

A. Yes; those are that testified here.

Q. I call your attention to this exhibit P-6. Have you a copy of this?

A. Yes, sir; we retained a copy of it?

Q. Have you a copy of it?

A. Not here.

Q. That is what I asked you. Why didn't you bring your copy?

A. Did not need it.

Q. Did not need it?

A. No.

Q. Have you a copy of any of these?

A. I have a copy of every deal I made.

Q. Have you here a copy of any of these contracts?

A. No, sir.

Q. Why didn't you bring any of them? Why didn't you bring them?

A. Didn't think I needed them.

Q. Oh, yes; Now, were any of these copies signed by Mr. Freick?

A. No, sir.

Q. As a matter of fact this exhibit which is shown you was signed by you before you saw Mr. Freick, wasn't it?

A. No, sir; it was not signed before I saw Mr. Freick.

Q. I mean on the day on which he signed it?

A. I did not get the question.

Q. This was signed by you before you saw Mr. Freick the day he signed it?

A. Yes, sir.

Q. Yes?

A. Yes. Just this contract was signed by me before he came to the office.

Q. All made out and complete?

A. Yes; so I could show it to him.

Q. Before you had talked to him about selling him territory in Nobles County?

A. We talked to him about it.

Q. When did you talk to him about it first, and where?

A. In Luverne.

Q. Where?

A. In his barn.

Q. In his barn?

A. At his barn, yes.

Q. That is the same time that this was signed, wasn't it?

A. No.

Q. You went from the barn right to your office, didn't you?

A. Yes, that was signed in the office.

Q. But it was signed by you before you went to his barn, wasn't it?

A. Yes.

Q. And did you talk with him before you went to his barn about giving him the agency of Nobles County?

A. No, sir.

Q. But you had made this exhibit out complete?

A. Yes; went to the barn and asked him to come over to the office.

Q. Then you made out this contract all complete in all its terms before you talked to Mr. Freick about it at all?

A. Yes; had it in my pocket at the barn.

Q. That was your method in all cases, wasn't it?

A. Well, not always, no.

Q. As a general thing it was?

A. As a general thing, yes.

Q. You heard of somebody that you thought you might induce to go into this and you make out a contract to go and get him, don't you?

A. Make out a half dozen, yes, and drive out in the country and see them all in the same day. Made them out in the office. All prepared—make them in the office rather than in the plowed field.

Q. Why didn't you have Mr. Freick sign a copy of this contract?

A. It was not necessary.

Q. Why wasn't it necessary?

A. Why would it be?

Q. What? I am asking you?

A. No, I didn't think it was.

Q. Is there any one in charge of the principal office of this National Fence Machine Company?

A. Yes.

Q. Do they keep the records of the business there?

A. Yes, sir.

Q. Who has charge of it?

A. Mr. Wein was secretary of it at the time I had charge of it.

Q. You were the field man?

A. Yes.

Q. You did not make a practice of sending in a duplicate signed by the agent?

A. I reported every deal as it was made.

Q. Just answer the question. I say you did

not make a practice of having your agent sign a duplicate contract; is that so?

A. No, no, no.

Q. Left the whole evidence of the contract in the hands of the agent, did you?

A. No; kept copies of them.

Q. But not signed?

A. No.

Q. Then when Mr. Freick signed Exhibit P-6 he only signed his name there twice there that day, did he?

A. Yes, sir.

Q. Just as he told us?

A. Yes, just as he stated, except that one was a note and the other was a contract.

Q. Was any one present when this transaction of September 14th, took place?

A. Yes, sir.

Q. Who?

A. Mr. Augustine.

Q. Where is he?

A. I couldn't tell you.

Q. Isn't he in the employ of your company?

A. No, sir.

Q. How long since he quit it?

A. About three years.

Q. About three years? You have not known where he was since then?

Mr. English: I object.

Q. What did you say, no, sir?

Mr. English: I object.

The Court: I didn't catch any objection. The question is allowed.

(Question repeated.)

A. Yes; I heard where he was since then.

Q. As I understand you, Mr. Kubach, all three of the contracts, known as Exhibits P-7, P-9, P-8,

were made out by you and signed by you before the transaction resulting in Mr. Freick signing them?

A. They were not made out by me. They were made out at my instructions.

Q. They were made out?

A. Yes.

Q. Who made these out? Who did the clerical work?

A. Well, sometimes Mr. Augustine if he was in the office, sometimes Mr. Cole.

Q. Do you know whose writing Exhibit P-7, is in?

A. Yes, this is Mr. Augustine's writing.

Q. Is that true also of Exhibit P-8?

A. Yes, sir.

Q. And also of Exhibit P-9?

A. No, sir, that is Mr. Cole's.

Q. Mr. Cole's?

A. Yes, sir.

Q. Under whose direction were these papers drawn up?

A. Mine.

Q. Yes?

A. Yes.

Q. Were copies made of these papers at the same time the originals were?

A. Sometimes.

Q. Were they generally?

A. Generally, yes.

Q. Were they in these particular cases?

A. Yes, copies made and retained.

Q. And you say you brought some of these copies?

A. No, sir.

Q. And as I understand you, Mr. Kubach, you

were very careful indeed in all cases to show them their notes before they signed them?

A. Yes.

Q. Always did that?

A. Certainly do so, yes. The consideration was always understood and the note was—

Q. Now, I mean you always showed it to him?

A. Yes, I did.

Q. So that if you are mistaken in that particular you are mistaken all along the line, ain't you?

A. Yes, may be.

Q. Yes?

A. Yes. I am not mistaken in that particular, no, sir.

Q. Could not be mistaken?

A. No, sir, not in that particular.

Q. Would be impossible?

A. Yes, it would. I know what I am talking about.

Q. Had you operated in Minnesota any before going to Luverne?

A. No, sir.

Q. What?

A. No, sir.

Q. Not any at all?

A. No, sir.

Q. Did you sell Jackson County to any one while you were there?

A. I am not sure whether I sold that there or at Rock Rapids, Iowa; they are right near the line.

Q. Did you appoint an agent for Martin's county?

A. Could not say.

Q. While you were at Luverne?

A. I couldn't say offhanded.

Q. Do you know anything about it?

A. Not without looking it up.

Q. Do you know whether you appointed an agent for Pipestone County while you were there?

A. Yes.

Q. Who?

A. Carl Miller.

Q. Carl Miller?

A. Yes.

Q. Murray County, how is that?

A. Yes, sir.

Q. Some one in Rock County? Who was it appointed?

A. Mr. Windy.

Q. Had you disposed of Cottonwood County while you were there?

A. Yes.

Q. To whom?

A. Ole T. Olson.

Q. What in Watowan County?

A. I think he got that county too.

Q. He did?

A. I think he did, yes.

Q. Have you got copies of his contracts?

A. Yes, they are at home in the office.

Q. They are there?

A. Yes, on file, records of them.

Q. You know and have known for some time that most all of these men are refusing to pay their notes, don't you? You have learned that?

A. Not all of them, no sir.

Q. I say most all of them?

A. I don't know. No, sir; I didn't hear it.

Q. You didn't hear it?

A. No, sir.

Q. You have heard the reasons given for it, haven't you?

A. Yes, sir.

Q. And yet you have never been back to the country there or into the country?

A. Yes, I was not in Rock County, I was in Minnesota six months since.

Q. What part?

A. All over the State,—pretty much all over the State.

Q. If you were all over the State you would be there?

A. I was in Minneapolis most of the time.

Q. Knowing all this, why didn't you go into Luverne and try to straighten matters out?

Mr. English: I object.

The Court: That goes to the credibility of the witness. Question allowed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

(Question repeated.)

A. I had nothing to straighten out.

Q. Oh, you had nothing?

A. No, sir.

Q. You did not care anything about it?

A. Yes, I cared.

Q. But you regarded it with some degree of indifference, did you?

A. I did not think it was necessary for me to go.

Q. You did not feel it necessary?

A. No, sir.

Q. And so you regarded the matter with some indifference, did you?

A. No, sir, not exactly that.

Q. It never occurred to you to feel offended because you thought some one assailed your character until you came here; is that right?

Mr. English: I object.

The Court: Question allowed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

A. Yes, sir; I was always offended when anybody would assail my character, yes, sir. Nobody assailed it before this.

Q. But you did not care enough about it to go to Luverne and straighten these matters out?

A. No, sir, I did not. I did not know the extent of it at that time.

Q. You have known the extent of it for some time, haven't you?

A. No.

Q. Haven't you?

A. No, sir.

Q. Haven't you been in communication with Mr. Hinkly for the last two years or more?

A. I have not heard from Mr. Hinkly for two years or more?

Q. How did you happen to get here?

Mr. English: I object.

A. Well, I mean until this case come up.

The Court: It goes to the credibility of the witness.

Mr. English: How he happened to get here?

The Court: I will allow the question.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

A. I supposed these notes were all paid until this case came up.

Q. Didn't you know it was litigation in Minnesota?

A. Yes; I did not know the outcome of it.

Q. Weren't you in communication with Mr. Hinkly considerably two years ago?

A. No, sir.

Q. Don't you remember his attorney going down to Kansas to see you?

A. Yes; took my deposition. That has been more than two years though.

Q. That litigation went on for some time, didn't it? And you knew about it?

A. I understand it has. I did not know about it, no, sir.

Q. Do you mean to say, sir, that you have not known anything about the outcome of it until you were brought here or asked to come here?

A. No, not until recently, I say.

Q. What do you mean by recently?

A. Since the case was lost up there in the Supreme Court.

Q. Oh, since the case was lost up there?

A. Yes.

Q. Do you know when that was?

A. Probably six months ago.

Q. Wasn't it over a year ago?

A. Well, I don't know. If it was I did not know it.

Q. Did not know it?

A. No, sir.

Q. The fact is there has been a good deal of litigation around the country growing out of that transaction, hasn't there?

A. No, sir.

Q. Hasn't there been some in Iowa?

A. No, sir.

Q. You know that as a fact?

A. Yes, sir.

Q. Well, transactions then connected with the National Fence Company dealings?

A. No, sir.

Q. You say that under oath here before these jurors?

A. Yes.

RE-DIRECT-EXAMINATION by Mr. English:

Q. Mr. Kubach, at the time these contracts and notes were signed by Mr. Freick was any suggestion made by you that he should sign a duplicate contract?

Mr. Canfield: I object to it as calling for a conclusion and as leading.

Mr. English: On cross-examination some reference was made to these duplicate contracts and I want to ask him for the purpose of rebutting this inference whether at the time the note and the original contract were signed there was any suggestion of a duplicate.

The Court: I will overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

THADDEUS P. COLE, called and sworn on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. English:

Q. Mr. Cole, where do you live?

A. I live at Harrington, Dickinson County, Kansas.

Q. Were you connected with the National Fence Machine Company in 1908?

A. Yes.

Q. Do you know the defendant, Mr. Freick?

A. Yes, sir.

Q. When did you first meet him?

A. Met him at Luverne, Minnesota.

Q. When?

A. The latter part of August or the first of September, 1908.

Q. Did you have any business dealings with him in connection with the fence posts manufactured by your company?

A. Yes.

Q. Where were those business negotiations carried on?

A. I was associated with the deal with him at the office, our office, and then went out to his house.

Q. Which was the first one at the house or at the office?

A. I think there was two at his house.

Q. Two at his house?

A. Yes.

Q. Can you tell us the date of the first one at his house?

A. That was the selling of the first seet of moulds to make concrete posts.

Q. Was that set of moulds which was sold paid for by Mr. Freick?

A. Well, I considered it so; he gave his note.

Q. Do you know the amount of the note?

A. Twelve dollars and a half.

Q. Do you know anything about the fence which Mr. Freick says was set up on his premises?

A. Yes.

Q. What do you know about that?

A. I saw it there; it was put up in my absence.

Q. Was that put up, as the result of any negotiations which you had with Mr. Freick?

Mr. Canfield: I object to it as calling for a conclusion of the witness.

The Court: Well it is a conclusion. It calls for a conclusion.

Q. When next after that did you see Mr. Freick?

A. Well, I met him several times in the city.

Q. I mean business reelations with him?

A. That was the Sunday that the deal for Minnesota was made.

Q. When was that deal for Minnesota made?

A. In our office underneath the Rock County Bank.

Q. Tell who was there at that time?

A. There was myself, Mr. Kubach, Mr. Freick and his son Herman.

Q. Were you present when the contract and the note were signed?

A. Yes.

Q. Did you hear any discussion between Mr. Freick and Kubach with reference to the signing of this note?

A. Yes; we talked several hours about it.

Q. Did you hear Mr. Kubach tell Mr. Freick when he was signing a note, or did you hear him tell him to sign a note?

Mr. Canfield: I object to it as leading and as calling for a conclusion.

Question overruled.

Q. Did you hear any conversation between Mr. Freick and Mr. Kubach in reference to the signing of a note?

A. Yes.

Q. What was the conversation?

A. It was in reference to the price for the State of Minnesota, the amount and so forth.

Q. What was it? Not what it was in regard to, but what was the conversation? What did Mr. Kubach say and what did Mr. Freick say?

A. Mr. Kubach explained the possibilities—

Mr. Canfield: I object and move to strike out the answer.

The Court: Wait.

A. Maybe I did not understand the question exactly.

Q. What the Court wants you to do is to give the words of the conversation.

The Court: No, I want him to testify in a legal way.

Mr. English: I put it that way because I know your Honor wants him to testify in a legal way.

The Court has no wishes about it, except to get legal testimony.

Q. The point is you must state the words of the speakers that you heard, Mr. Freick and Mr. Kubach.

A. I doubt if I can do it verbatim.

Q. Can you give us the substance of the conversation?

A. I think so.

Q. What was it?

A. It was with regard to the possibilities in

Minnesota, the price asked for the State, and the length of time to pay for it in, in sum and substance.

Mr. Canfield: I move to strike out the entire answer as not responsive.

The Court: I think that is the witness' conclusion. You asked him to give the substance and that is proper for him to give the substance, but he is giving his conclusions.

Q. Now, in connection with that conversation what was said about the signing of a note?

A. Mr. Kubach told him that he would give him a certain length of time in which to pay for the consideration of the State of Minnesota.

Q. Did he say how the length of time would be expressed?

A. It was undoubtedly stated—

Mr. Canfield: Answer yes or no.

Q. I do not mean how long, but in what form?

A. Yes, yes.

Q. What was said about that?

A. By a note.

Q. I show you a note which is in evidence as Exhibit P-4 and the contract which is in evidence as Exhibit P-9, and ask you if those were the note and contract which were signed at the time you were present in the basement of the Rock County Bank Building on September 26th?

A. Yes, they are.

Q. Did you see them signed?

A. Yes, sir.

Q. At the time that the contract was signed did Mr. Kubach say to Mr. Freick that it was necessary for him to sign a duplicate contract or words to that effect?

A. No, sir.

Q. At the time those papers were signed was the note exhibited in such a way that Mr. Freick could have seen that he was signing the note?

Mr. Canfield: I object to it as calling for the conclusion of the witness.

The Court: Ask him the position of the note in reference to the contract. You see you are really asking him to give his opinion as to whether it could be seen or not. I think if he can testify as to the position it was in he ought to do that, and then it can be followed up by the question perhaps.

(Question repeated.)

A. Yes, sir.

Q. Just tell the Court and jury how the papers were exhibited to Mr. Freick?

A. They were taken down from the pigeonhole, the pin was taken out and they were laid on his desk in front of him to sign.

Q. Is it true that at that time Mr. Kubach said that Mr. Freick would not have to pay anything?

A. No, sir.

Q. What was said in reference to any payment?

A. He said he would give him a certain length of time to pay for it, give him a chance to realize money out of the business.

Q. Was that before or after the signing of the note?

A. That was before the note, while he was talking in regard to the deal.

Q. How long do you say you were all engaged there in conversation?

A. Oh, it was a big share of the morning. I

don't remember, possibly two hours, two hours and a half, I don't remember exactly, dinner time when I got through.

Q. Now I show you what has been termed the special agency contract, which is in evidence, which is marked for identification G. Were you present when that paper was signed?

A. Yes, sir.

Q. And where was it that paper was signed?

A. Mr. Freick's dining room at home.

Q. Who was there?

A. Myself and his wife and his son Herman.

Q. Do you know how long you were there together in regard to that transaction?

A. I think about an hour with Mr. Freick. I had been there about an hour before Mr. Freick came to the house.

Q. Do you know where Mr. Freick had been in the meantime?

A. He had been in the country with one of our men, Mr. Augustine.

Q. Do you know for what purpose?

A. Yes; they went to the country to see a prospect to try and make a deal.

Q. With reference to what?

A. For territory for an agency with a man by the name of Baake.

Q. Agency for this fence company?

A. For our company, yes, sir.

Q. You waited until he returned?

A. Yes.

Q. After he returned did he sign this paper?

A. Yes.

Q. Was it signed "Edward G. Freick & Son" in your presence?

A. Yes.

Q. What son of Mr. Freick was there at the time the contract was signed?

A. Herman.

Q. Did you hear Mr. Freick on that occasion say that he wanted to put his son Herman into this work in connection with some of the contracts which he had made?

Mr. Canfield: I object to it as leading and as calling for a conclusion.

Mr. English: I will withdraw the question.

Q. Was anything said on that occasion by Mr. Freick in reference to the connection of his son Herman with this business?

A. Yes; he said he hoped that Herman succeeded. Herman was going with me that day.

Q. Where to?

A. To Correctionville, Iowa.

Q. For what purpose?

A. To assist me in a stand there that I had opened previous to this time.

Q. Did he go with you?

A. Yes.

Q. How long were you gone together?

Mr. Canfield: I object to it as irrelevant and immaterial.

The Court: I do not see how that is relevant to this issue.

Mr. English: Because I asked Mr. Freick this on cross-examination; it is rebuttal of his denial.

The Court: It is a denial of an immaterial fact; it has nothing to do with the partnership which his son was in.

Mr. English: Except it shows the general condition of this whole situation as it was on the signing of the note.

The Court: This contract which you now have reference to was dated some days after the last contract.

Mr. English: One day. The next day, your Honor.

The Court: Well, one was the 26th and the other the 28th.

Mr. English: The other was drawn on Sunday, which was the 27th.

The Court: At any rate it was subsequent.

Mr. English: Yes.

Mr. Canfield: I am not in the habit of talking back to the Court. Mr. Freick was interrogated with regard to this same contract and objection was made and it was, as I remember, ruled out at that time.

The Court: Yes. Of course this paper has not been offered.

Mr. English: At your Honor's suggestion I showed this paper to counsel.

The Court: Yes, I know it, and you asked them to allow you to offer it now and they said they wanted you to go on with the ordinary and common procedure.

Mr. English: Yes, and I did that.

Q. Do you know as a result of the signing of this contract, whether the earlier contracts which are in evidence here, namely P-6—

Mr. Canfield: Why don't you offer this paper?

Mr. English: As counsel suggested I offer it in evidence.

Mr. Canfield: I object to it as incompetent, irrelevant and immaterial.

Mr. English: I thought you wanted to put it in?

Mr. Canfield: There is a difference between putting it in and offering it in.

Mr. English: I will have to lay the foundation for it. I thought he wanted it.

Mr. Canfield: The signature has been proved.

The Court: That does not admit it.

Mr. English: No; I will lay the foundation for it.

(Question repeated.)

Q. —P-7 and P-8 and P-9, were surrendered to your company on the signing of this contract which is G for identification?

Mr. Canfield: I object to it as incompetent, irrelevant and immaterial, and not proper at this time until the contract is received in evidence. It all relates to this contract and I think it is improper at this time.

The Court: Well, I have not seen the contract yet.

Mr. English: I was simply asking him if he knows. What he knows is another matter.

The Court: I do not think that is competent. That contract is overruled.

Mr. English: I have not offered it yet.

The Court: I thought that was your object in handing it to me.

Mr. English: You said you wanted to see it. I thought I had not laid a proper foundation for it. I handed to you at your own request. I am going to offer it before I get through with the case.

The Court: You can go on with this matter now.

Mr. Canfield: There are two jurors out of their seats.

The Court: You may argue the admissibility of it.

Mr. English: Well, I was going to offer some more evidence before I offered this contract.

(Question repeated.)

Mr. Canfield: I object to it.

The Court: Overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. At this conversation at the Freick home, when Mrs. Freick, Mr. Freick and Herman were all there was anything said about these notes?

A. Yes.

Q. What was said and by whom?

A. In figuring the deal up I figured that this deal would stand—

Mr. Canfield: I object.

The Court: That is not responsive.

Q. You did some figuring; as the result of that figuring what was said about the notes?

A. Each one was taken into consideration.

Q. In arriving at what—

Mr. Canfield: I object.

The Court: That is not an answer. Strike out the answer.

(Question repeated.)

A. I don't know that I can answer it intelligently without getting my other question.

Q. Give the conversation as near as you can

about the note, with reference to the note after you had done this figuring which you refer to?

A. The conversation about the note was in regard to the amount, so as to reach a consideration for this contract.

Mr. Canfield: I object and move to strike it out as not responsive.

Mr. English: I think counsel can not object.

The Court: Then the Court will assume to do it. It is not an answer. It is the witness's conclusion of what the conversation resulted in.

(Question repeated.)

Q. In the first place who did the talking?

A. I did.

Q. What did you say?

A. I told Mr. Freick that we would give him this contract in place of the other for the consideration that had been given for the other contract. Maybe that is—

Q. Did you say what the consideration was?

A. Yes.

Q. In what form it was?

A. Yes.

Q What did you say?

A. I said it would be $4,520.

Q. Is that the same total—well, I suppose that is a matter of calculation. In mentioning that sum of $4,520 did you mention the note?

Mr. Canfield: I object to it as leading.

Mr. English: I withdraw the question.

Q. What did you say, if anything, about the note, in connection with the sum total of figures which you have indicated?

A. I told him that this contract would be equal to the amount of the notes.

Q. Do you know whether Mrs. Freick speaks English?

A. Oh yes, she does.

Q. Do you know whether she reads and writes fluently?

A. Don't believe that I could swear to that.

Q. Now I show you a paper which the defendant admits bears his signature, which is H for identification, and ask you if that was signed in your presence?

A. Yes, sir.

Q. Where was it signed?

A. The same day that this last contract was made.

Q. And where was it signed?

A. At Mr. Freick's home in his dining room.

Q. Previous to the signing of that paper had anything been said about these notes in suit, or any of them?

Mr. Canfield: I object to it as leading and calling for a mere conclusion of the witness.

The Court: It is, Mr. English, and is really notifying the witness constantly that you want him to talk about these notes. I do not think you ought to do that. Read the question.

(Question repeated.)

Q. Previous to the signing and—

The Court: It don't make any difference now, you have notified him what you want him to say presently.

Q. Previous to the signing of that paper—

Mr. Canfield: Why don't you ask him what was said? What was the conversation?

A. To this paper?

Q. This paper you hold in your hand?

A. I told Mr. Freick that we wanted a paper to the bank in regard to our dealings, the dealings we had had with him there, and asked him if he would give me this paper in order that I might show the Rock County Bank that the business was satisfactory and that it would be agreeable with him for them to have his notes.

Q. Anything else said?

A. He said that would be all right when he signed it. I don't remember whether I said anything more or not in that respect.

Q. Then was that paper signed?

A. Yes.

Mr. English: I offer in evidence the paper which is H for identification.

Mr. Horton: This is objectionable, your Honor. It is after the date of the last note.

The Court: Let me see it.

Mr. Horton: It speaks for itself and it does not refer to any particular note or the note in dispute.

The Court: Well, I think that is admissible.

Mr. English: I offer it.

Paper marked Exhibit P-10.

Mr. English: I will read it to the jury:

Dated, "Luverne, Minnesota, September 28~~29~~, 1908.

"Dear Sir: This is to certify that I have had some business dealings with Charles Kubach, General manager of the National Fence Machine Company, of Abilene, Kansas, also of the company for

which I have given my notes. This will advise you that the business done is entirely satisfactory with me and that it will be perfectly agreeable with me for you to handle my notes.

"Very respectfully,

"EDWARD G. FREICK."

Q. In his testimony the defendant denied that he said to you and Mr. Kubach at about the time of or after the signing of the last contract, P-9, that the cold weather was coming on and the notes would be due and he wanted some arrangement made. Was any such remark made by Mr. Freick?

A. Yes.

Mr. Canfield: I object.

A. Beg pardon.

Mr. Canfield: I object to it as incompetent, irrelevant and immaterial.

The Court: You say that was the defendant's testimony?

Mr. English: Yes.

Mr. Canfield: Not the proper way to lay a foundation for impeaching.

Mr. English: I asked him in those words if he had not said that and he denied it.

The Court: If that is the language of the witness of course you have a right to rebut it, if you are sure of the language.

Mr. English: I am quite sure, because I was careful about it.

(Question repeated.)

Mr. Canfield: I move to strike out the answer. That is objected to as incompetent, irrelevant and immaterial, based on a false statement of the testimony.

The Court: Very well; if that is the objection we will have to go back to the testimony, because it only competent if it recites the testimony of the witness.

Mr. Canfield: And further that the question is not intelligible in form and not in legal form in any respect for the purposes of impeachment.

The Court: The answer will be stricken out until we can ascertain what the exact language was that the witness used and if this question is in the form of that it will be competent, otherwise it will not.

(Previous testimony of Mr. Freick read by the stenographer.)

The Court: Well, using the language of the witness, it is of course proper to ask this question.

Mr. Canfield: My understanding of the practice is this, that counsel ought to put the questions direct and plain for the purposes of impeachment, did you say so and so and then repeat the language.

Mr. English: I will adopt the suggestion with pleasure. We agree on that.

Q. Did Mr. Freick say in the presence of you and Mr. Kubach that the cold weather was coming on and his notes would be coming due and that he wanted some other contract or arrangement made?

A. Yes, he did.

Q. Where was that said?

A. That was in the office.

Q. In the bank building?

A. Our office.

Q. Down in the bottom of the bank building?

A. Yes.

Q. When was it said?

A. It was some time Saturday afternoon—Sunday afternoon—I beg pardon.

Q. When was that with reference to the date of the agreement—

Mr. Canfield, I object. Now you are getting off again.

Q. Can you tell me what date that was, the date of that Sunday?

A. No, sir.

Q. Well, can you fix it this way. When was it with reference to the Monday when you were at the Freick farm with Herman, Mrs. Freick and Mr. Freick?

A. Beg pardon; I was at their house in town.

Q. Well, their house in town, when was it with reference to that occasion?

A. It was the day before.

Q. It was the Sunday afternoon before that day?

A. Yes.

Q. Mr. Cole, do you know Mr. Lundi?

A. Yes.

Q. Whose deposition has been read?

A. Yes.

Q. Were you present at the time the note and contract were signed which he testified to?

A. Yes.

Q. Where was that?

A. It was in his field down at his farm.

Q. Did you take part in the conversation or was it carried on by Mr. Lundi and Mr. Kubach?

A. I took part.

Q. Did you hear Mr. Kubach name any townships which he asked Mr. Lundi to take a contract for?

A. Yes.

Q. What townships did he name?

A. Beaver Creek.

Q. What did Mr. Lundi say?

A. He said he would rather have Martin?

Q. Martin Township?

A. Yes.

Q. At the time the first suggestion was made for Beaver Creek Township did Mr. Kubach have any of those contracts already prepared that you have been speaking of?

A. Yes.

Q. Drawn up for what township?

A. Beaver Creek. I had drawn them up.

Q. As a result of Mr. Lundi's remark as to his preference what was done?

Mr. Canfield: I object to it as irrelevant and immaterial.

The Court: You may ask that.

Q. After Mr. Lundi's suggestion that he preferred Martin Township to Beaver Creek, what was done?

A. Mr. Kubach told him we would give him the other township, Martin Township.

Q. And after Mr. Kubach saying that what was done?

Q. He told me to rewrite the contract.

Q. Did you do it?

A. Yes.

Q. In the presence of Mr. Lundi?

A. Sitting on the ground right in front of the two of them.

Q. Did you see the note there at that time?

A. I took the note from the other contract and when I handed it to him I handed it to him together with the other contract.

Q. Which contract do you refer to?

A. To the one for Beaver Creek, which we had made out in town.

Q. When you say you handed it to him together with the other contract which contract do you there refer to?

A. I handed him the note together with the contract, I should say, for Martin Township.

Q. Was that handed in such a way that he could have seen the note?

A. Mr. Lundi was standing there and Mr. Kubach here, and I was standing on the ground and without getting up I passed in right up to him.

Q. How far apart were you?

A. I suppose they were possibly two feet, maybe three, just talking together.

Q. Do I understand that you personally handed him this note?

A. Yes, handed it right up to Mr. Kubach, together with the contract.

Q. In such a way that Mr. Lundi could have seen the note?

A. Yes, he saw me write it.

Q. Is it true that when this note was signed you or Mr. Kubach just turned up the corner of the contract?

Mr. Canfield: I object to it as calling for a conclusion.

Mr. English: I am rebutting the evidence of the witness.

The Court: I think you have a right to use the language of the witness.

(Question repeated.)

A. No, sir.

Q. Going back for a moment to the letter which is in evidence as P-10, what did you do with it after it was signed?

A. I took it up and gave it to the bank in the afternoon.

Q. When did you deliver that with reference to the negotiation of the last note which Mr. Freick signed (referring to Exhibit P-4)?

A. I gave that to Mr. Martin when I offered him the notes Minnesota for discount.

Q. That is Exhibit P-4, the last note?

A. It is $1,152, for Minnesota, I don't remember the—

(Note shown witness.)

A. Let me see the contract with it. Yes, that is the one.

CROSS-EXAMINATION by Mr. Canfield:

Q. What is your age?

A. Thirty-seven,—I had to figure it up.

Q. You say you live in Kansas?

A. Yes.

Q. How long have you been in the employ of this Fence Machine Company?

A. About six years.

Q. Are you in the employ of that company or in the employ of Mr. Kubach?

A. I am in the employ of the company.

Q. Under the direction of Mr. Kubach?

A. Beg pardon; may I ask what company you mean?

Q. Only been one referred to here, the National Fence Machine Company.

A. I was at that time in their employ, yes.

Q. Are you now?

A. No, sir.

Q. When did you quit their employ?

A. I think it was in 1909.

Q. Shortly after you were at Luverne?

A. I could not state positive, but I think it was about a year afterwards; I am not positive.

Q. About a year afterwards?

A. In that neighborhood, yes.

Q. That would be the fall then of 1909, would it?

A. I don't believe I can swear to that without looking it up; I haven't thought of it.

Q. When did you go to work for them?

A. I went to work for them in the fall of 1906, I think it was.

Q. Where did you begin work?

A. Wichita, Kansas.

Q. Under whose direction?

A. Under Charles Kubach as general manager.

Q. Usually from that time on travelled with him, did you?

A. Part of the time.

Q. There were three or four of you that went together, didn't you, usually?

A. Usually, yes.

Q. Like an invading army on a community?

Mr. English: I object.

A. A great deal the same.

Q. Operated usually in a place how long?

A. Until we got through, different lengths of time, all the way from two weeks to three months.

Q. No more than three months, was it?

A. I have put a little longer than that in on a stand or two.

Q. Never went back to the same community to work again?

A. Did not need to; finished it while I was there.

Q. It generally was not good policy, was it?

Mr. English: I object.

The Court: Yes, I won't allow that.

Q. During the time you were working for this concern you travelled over one state, more or less?

A. Over Kansas, Oklahoma, Iowa and Minnesota.

Q. Mr. Kubach was the manager of the force that usually travelled together?

A. When I was with him he was, yes, sir.

Q. During that time you interviewed thousands of people, didn't you?

A. I think so.

Q. Do you pretend that you can remember conversations that you had with all the people with whom you had dealings?

A. Not with all of them, no sir.

Q. How many of them can you remember?

A. Well, it would depend a good deal upon how their name was presented to me. I might remember it, all of them.

Q. The fact is you can not remember one tenth of them, can you?

A. I can not say with regard to that.

Q. You would not know one tenth of them if you saw them again?

A. I think so.

Q. Do you think that you would remember most of them?

A. Yes, I think I would, that I have dealt with mostly.

Q. Did you ever after transacting business with a man and after leaving the community have any communication, as a general thing, with them afterwards?

A. Lots of times.

Q. Now, you say you saw Mr. Freick on September 26th, did you?

A. I don't think I said that.

Q. 1908?

A. I don't think that I testified the date; I have not looked it up.

Q. Well, at the time that the contract here referred to as Exhibit P-9.

A. Is that for Minnesota? I expect I could identify it better that way.

Q. You looked at it. I supposed you knew what I referred to.

A. Yes, sir; I saw him the day that was signed.

Q. Where did you meet him that day?

A. At his house.

Q. What time?

A. At quarter of eight in the morning.

Q. Remember the day of the week?

A. Sunday.

Q. Sunshine?

A. Well, I couldn't say about that; I don't think it was raining though.

Q. Do you know whether it was a cloudy day or not?

A. No; I don't think I looked at it.

Q. Did you see anybody on the way down there?

A. I think I did.

Q. Which way did he live from where you had the office?

A. East.

Q. Straight east?

A. Yes, across the street.

Q. How long did you stay there at his place?

A. About two minutes.

Q. Who did the talking at his place?

A. I did.

Q. You did?

A. I was alone, yes.

Q. Whereabouts at his place did you see him?
A. At the door.
Q. At the door to what?
A. To his house.
Q. On which side is the door?
A. I think I went to the east side, if I am not mistaken; quite sure I did.
Q. Do you know that was it?
A. No, I am quite sure of it.
Q. Who else did you see there?
A. I think Mrs. Freick answered the door.
Q. Do you know she did?
A. No.
Q. That is what I am trying to find out, just what you know.
A. I would not swear to that.
Q. Did you see anybody else there at that time besides Mr. Freick?
A. Not that I remember of.
Q. Do you remember the first word that was spoken?
A. "Good morning," yes, sir—I spoke it.
Q. You spoke it?
A. Yes.
Q. You said "Good morning"?
A. Yes.
Q. Do you remember what he said?
A. No, I do not.
Q. Do you know whether he said anything or not?
A. No, I don't know that.
Q. Do you remember the next thing that you did?
A. I told him that Mr. Kubach would like to see him and Herman at our office.
Q. Are those the exact words?
A. Yes, sir.

Q. You are sure that those are the precise words that you used, are you?

A. Yes, I would swear to that..

Q. You would swear to that? Are those the only words that you can swear that you used?

A. Well—

Q. That you remember to that extent?

A. I know I said that. That was my errand.

Q. You know you used those exact words in that exact order?

A. I would take the chance on swearing it, yes.

Q. You are going to take a chance on that now?

A. Yes.

Q. Did he say anything in answer?

A. He said he would be down after a while.

Q. Are those the words?

A. Or words to that effect.

Q. Are those the words he used?

A. I don't know.

Q. Do you know what words he used at all?

A. No, sir.

Q. Why did you use them if you don't know?

A. Because that was what I went down there for and he agreed to come, is the reason.

Q. He agreed to come?

A. Yes.

Q. What else was said down there?

A. Nothing more to my knowledge, that I remember about.

Q. Nothing more?

A. No.

Q. Did you turn and go away?

A. Yes.

Q. Alone?

A. Yes.

Q. Now, did you hear him say anything about getting ready for church?

A. No, sir.

Q. Do you know whether he said anything about it or not?

A. Not to my knowledge.

Q. Do you know as a matter of fact now whether he mentioned going to church that morning or not?

A. No, sir, I don't know.

Q. You don't know?

A. No, sir.

Q. As far as you know he might have mentioned it then?

A. Why he might have, yes; I can't swear to that.

Q. How long after that did you see Freick?

A. I think it was in the neighborhood of three hours.

Q. About three hours afterwards?

A. Yes.

Q. Was that forenoon or afternoon?

A. Forenoon.

Q. About what time?

A. About eleven o'clock. He told me he would be at the office about eleven o'clock, or words to that effect.

Q. I didn't ask you that. Who was in the office besides you when Mr. Freick came there?

A. Mr. Kubach.

Q. Did you meet in the office or outside?

A. That I couldn't swear; I don't remember that.

Q. Don't remember where you met him?

A. No, sir.

Q. You can't tell whether you met him out-

side on the street or in the office, you mean to say that?

A. I am not positive.

Q. Who else was in the office besides you and Kubach?

A. No one.

Q. How long was Mr. Freick there?

A. In the neighborhood of an hour and three quarters.

Q. Do you know how long he was there?

A. Only by my leaving the hotel—the office—I had—

Q. Just answer, do you know how long he was there?

A. No sir.

Q. What?

A. No.

Q. Do you know how long you remained there after he came?

A. Well, only that I got to the hotel at one o'clock, that is all, just time for dinner.

Q. Were you in the office all the time Mr. Freick was in there?

A. Yes.

Q. Who left first, you or Freick?

A. I think we went to the top of the stairs together; quite certain we did.

Q. During all the time they were there were they talking?

A. Most of the time.

Q. Who was talking?

A. All of us.

Q. Mr. Freick was talking?

A. Yes.

Q. Who did most of the talking?

A. Well, I think it was pretty evenly divided.

Q. You think Mr. Freick kept up with you and Kubach?

A. Well, he got his turn.

Q. He had his turn?

A. Yes.

Q. Do you think he did keep up with the conversation with you and Kubach?

A. I think so. He generally done his part.

Q. Pretty good talker, was he?

A. Fair.

Q. Good, fair talker?

A. Made himself generally understood.

Q. You think you made yourself understood, do you?

A. I done my best, yes.

Q. Did you do much of the talking?

A. Yes.

Q. Do you remember all that you said?

A. No, sir.

Q. Do you remember all that Mr. Kubach said?

A. No, sir.

Q. Now, usually the contracts were fastened on to a tablet, were they not?

A. Never saw one that way in my life.

Q. Never saw one in your life?

A. No, sir.

Q. You recognize this one as being signed there, don't you?

A. Yes.

Q. Look at the top of the edge and see if you can not see the remains of the sealing wax there now?

A. The pads are padded when they come on.

Q. Answer the question; can you see—

A. Yes.

Q. Now, you say you never saw one fastened together on a pad that way in your life?

A. I mean after they are filled out. I will correct myself there.

Q. There was no reason why you could not write on the tablet before they were detached, was there?

A. No sir, not that I know of.

Q. You never filled one out before detaching them from the tablet?

A. Always left them on, or most always, because it is nice to write.

Q. Now, usually after you had made it out you pinned something down at the left hand lower margin, at the end, didn't you?

A. Pinned the contracts together, yes.

Q. Pinned the contracts together?

A. And the notes.

Q. And the notes?

A. Yes.

Q. You first had the original contract on the top, didn't you?

A. Yes, and we generally carried them that way, yes.

Q. And the thing below was the note, wasn't it?

A. As a rule.

Q. And down under that a copy?

A. Yes.

Q. That was nearly always the way you did, wasn't it?

A. I think so for convenience.

Q. You fastened them at the end with a pin, didn't you, usually?

A. Usually, yes sir.

Q. The ends and lower side were left free?

A. How is that?

Q. The ends and lower margin of the contracts were left free and not fastened to anything?

A. All three of the sides were.

Q. But the top glued?

A. Yes.

Q. And usually you pinned the note beneath at the lower edge so that the lower edge of the note would be on nearly a line with the lower edge of the contract, as I indicate now?

A. I never paid any attention to that.

Q. Didn't you do that?

A. Didn't I which?

Q. Didn't you usually put the lower edge of the note or margin of the note on the line or even with the lower margin of the contract above, as I now indicate?

A. Where I folded the contract I did, so as not to fold the notes, so as not to mar them.

Q. You had a pin through the left hand margin usually?

A. Yes, usually.

Q. Now, do you mean to say, Mr. Cole, that in every instance parties seen you unpin these papers and separate them?

A. Almost every instance.

Q. Almost always did it, eh?

A. Yes.

Q. Never made a failure to do that?

A. The two reasons or three for that—

Q. I am not asking you for your reasons.

The Court: Answer the question.

Q. You think these men who have given their testimony are all wrong, do you?

A. I know they are, those that I helped deal with.

Q. You met them, didn't you, while at Luverne?

A. Part of them.

Q. And you found them to be to all appearances very respectable, substantial men, didn't you?

A. Well, I didn't have much occasion to judge of that, very little.

Q. Well, as far as you could learn and as far as you could hear that was so, wasn't it?

A. I learned they were financially good. I did not inquire about any other feature.

Q. You did not care whether they were rogues or not?

A. No.

Q. Have you ever been convicted of any criminal offence?

A. Never was arrested in my life.

Q. Never was arrested?

A. No.

Q. How long since you learned that litigation commenced in Minnesota between Mr. Hinkly and this defendant?

Mr. English: I object to it as immaterial and not cross-examination.

The Court: Well, I suppose the object is to affect the credibility of the witness?

Mr. Canfield: Yes.

The Court: I will allow it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

A. You mean this case, may I ask?

Q. Not this particular case, but litigation in Minnesota?

A. I don't think I heard of that for quite a while after it was commenced. I don't remember just when it was.

Q. Do you remember furnishing your deposition or didn't you do so?

A. I don't think so, no sir.

Q. I had forgotten whether you did or not?

A. I don't think I did.

Q. You had heard of it sometime after it commenced, I understood you to say?

A. I am not positive whether it was after it was commenced or after it was completed; I wouldn't swear to that.

Q. Haven't you had communication with Mr. Hinkly or the Rock County Bank in regard to it?

A. Never wrote to me in his life and never heard from him.

Q. Never heard from him?

A. No, sir.

Q. Now, Mr. Cole, during your conversations with Mr. Freick on one or more occasions wasn't there something said about his taking notes from farmers for machines and turning them into company?

A. Him taking them?

Q. Yes.

A. Yes; our contracts read that way.

Q. Wasn't there something said about his seeing the Rock County Bank to have them pass upon the worth or value of the paper?

A. Get them O. K'd. I do that at every town.

Q. There was something said of that kind?

A. Yes, sir.

Q. Was there anything of that kind said down at the Freick house the day you went there?

A. I think I advised him again that the company would take his notes that were O. K'd. if the bank said they were good, or they would take them as cash for payment for obligations.

Q. In other words didn't you tell Mr. Freick in all cases where he took notes from farmers, acting as the agent of the National Fence Machine Company before turning them in he should take them to the Rock County Bank for their O. K., as you call it?

A. Those in that locality, yes.

Q. Those in that locality?

A. Yes; if he wanted us to take them.

Q. When did you first tell him that?

A. Well, I couldn't say that. I tell that to all the men I deal with.

Q. Did you tell him that at all before you saw him the day you left Luverne?

A. Well, I don't know whether I did or not. I was away, you know, until the Sunday before then.

Q. Well do you know if you told him the day you left Luverne that?

A. Yes, sir.

Q. Yes.

A. Yes, I am quite sure of that.

Q. Do you know whether you told him that any other day besides that day?

A. I couldn't swear to that.

Q. Now, on the 28th of September, you went out into the country some distance, didn't you?

A. No sir, I never left the town.

Q. Oh, yes, I guess that is right; I am mistaken. Mr. Freick went out in the country?

A. With Mr. Augustine, yes.

Q. And you remained in Luverne?

A. Yes.

Q. And waited for them to return?

A. Well, not necessarily that. I was waiting for my train. I had some business to see about.

Q. You went out that afternoon on the train, didn't you?

A. Yes.

Q. On the Rock Island,—Chicago, Rock Island and Pacific?

A. Huh! I am not certain about that, I think it was.

Q. You think it was?

A. I think so. The depot east of town anyway.

Q. About 3 o'clock in the afternoon, wasn't it?

A. It don't seem to me like it was quite so late. It was between—

Q. I say about?

A. In that neighborhood, yes.

Q. What time did Mr. Augustine and Mr. Freick return?

Q. About quarter of one—ten minutes of one.

Q. Do you know it was quarter to one?

A. Yes, I was watching my watch because I wanted to see him.

Q. Where did they first go to when they returned?

A. Drove right up the street; came to the house.

Q. Where were you?

A. I was at the house waiting.

Q. And you and Augustine took the train that afternoon and left together, didn't you?

A. Us two and Herman Freick, yes, sir.

Q. At that time you were in considerable hurry to close all the transactions you had with Mr. Freick in order to get that train?

A. Yes; well not necessarily his deals. Dealing with him made me hurry from then on.

Q. You did hurry as fast as you could?

A. Yes.

Q. You told Mr. Freick that you were in a great hurry, didn't you?

A. Well, I told him I had to get that train.

Q. Now, who wrote out this paper marked Exhibit P-10?

A. Let's see. I think I did. I will have to refresh my memory a little on that (examines paper). Mr. Kubach dictated it and I wrote it on the typewriter.

Q. When did you do that?

A. That was done—I think it was about 6:30 Monday morning in the office.

Q. Was that the day before, you mean?

A. Oh, that was the same day?

A. Same day as which?

Q. Same day that you say Freick signed it?

A. That is the same day he signed it right after dinner time, yes—lunch time.

Q. You made out some similar to this for other parties to sign, did you?

A. Yes, sir.

Mr. English: I object to it as immaterial.

The Court: How is that material?

Mr. Canfield: Because we expect to work this up in surrebuttal showing the manner in which this was obtained.

Q. Mr. Freick did not read this, did he?

A. Yes, went over it with me.

Q. Did Mr. Freick read it?

A. He had all that appearance; I don't know whether he was reading or not. He went over it with me.

Q. Do you know whether Mr. Freick read it or not?

A. I have no knowledge of knowing, no sir.

Q. No; you did not hear him read it audibly, did you, aloud?

A. I read it and he followed me.

Q. Did you hear him read it aloud?

A. No, sir.

Q. What?

A. No, sir.

Q. Why couldn't you say so? Did you read it aloud?

A. Yes, sir.

Q. You also added some comments of your own as to what it meant?

A. I did before it was read.

Q. You said quite a little about it didn't you?

A. I don't think so.

Q. You remember telling Mr. Freick he must hurry up because you had to go away, didn't you?

A. No, I don't think so.

Q. Or words to that effect?

A. I don't think so.

Q. Do you know so?

A. No, sir.

Q. You don't know? Can you remember what it was that you said to Mr. Freick about this exhibit? I am asking you yes or no. You can answer it.

A. No.

Q. Don't remember?

A. Not word for word, no.

Q. You knew that the notes in suit were in the hands of the Rock County Bank at the time this exhibit was made, didn't you?

A. The last one was not, the one for Minnesota.

Q. You knew all the others were, didn't you?

A. Yes.

Q. How do you know that the last one was not?

A. Because I had it.

Q. You had it?

A. I discounted the last note.

Q. Oh, you transferred the last note?

A. Yes.

Q. Well, did you make that endorsement on it?

A. Mr. Kubach endorsed it before he gave it to me.

Q. Then you took it to the bank?

A. Yes.

Q. Then your purpose in taking this—in getting Mr. Freick to sign this was to enable you to transfer the last note, was that it?

A. Yes.

Q. To the bank?

A. Yes, and to assure the bank our business was satisfactory.

Q. You wanted to make it look as good as you could?

A. Yes, that is my idea.

Q. Just before you left the State?

A. Not necessarily on that account.

Q. What time of day did you transfer or negotiate this Exhibit P-4 to the Rock County Bank?

A. It was between 1:30 and 2 o'clock.

Q. Was that before you went down to Mr. Freick's house?

A. No sir, it was when I came back after I got the statement.

Q. Didn't you go direct to the depot from Mr. Freick's house?

A. No sir, I went to the bank and then to the hotel for my grip and then to the depot.

Q. How long a time did you spend in the bank?

A. About I should judge ten minutes. I took two drafts and waited until he wrote those out.

Q. Wrote out two drafts?

A. Yes.

Q. While you were in Luverne were you in the office underneath the bank a good deal of the time?

A. Yes, I was, and at the fence.

Q. Now if the cashier of the Rock County Bank testifies that he bought this note on the 26th day of September, 1908, you are mistaken, are you not?

A. He testifies what?

Q. I say if he testifies that he bought the last note on the 26th day of September 1908, then you are satisfied that you are mistaken as to the time?

A. Not necessarily. He may be. The bank books I guess will show.

Q. He may be?

A. Yes, he might be. The deal was not—beg pardon.

Q. Now, at this last interview shortly before you left the State you obtained from Mr. Freick the possession of four different contracts, did you not?

A. Yes.

Q. In form like Exhibit P-9—I mean printed form?

A. I believe it was four. I took up all the contracts we had with him but one.

Q. The same being Exhibit P-7 and Exhibit P-8 and Exhibit P-6 and P-9—obtained those from Mr. Freick that day?

A. Yes.

Q. What did you do with them after you got them?

A. I turned them into the company.

Q. How long were you at Mr. Freick's house that last day altogether after he returned?

A. In the neighborhood of forty minutes, forty-five.

Q. Do you know how long you were there?

A. No sir, not positive.

Q. You have no recollection, have you, Mr. Cole?

A. I haven't any record, no sir.

Q. As a matter of fact you don't know how long you were there at all, do you?

A. Well, only by comparing time at their place. I don't think I looked at my watch just as I went out of the door.

Q. And you under oath here state positively of your own knowledge that you were there fifteen minutes?

A. Yes, I would swear I was there over thirty.

Q. What time did you see Mr. Augustine drive into town?

A. I think it was in—no, about ten minutes of one. I am positive of that.

Q. Ten minutes to one?

A. Yes.

Q. What time did you go to the Rock County Bank?

A. It was about 1:40 or 1:45, near that.

Q. What time did you leave the bank?

A. Oh, I think in there ten minutes, in that locality.

Q. From that you had to run to catch the train, didn't you?

A. I stayed quite a while at the hotel; I had to pack my grip and baggage.

Q. You ran to catch the train?

A. I think we ran the last block and then we waited a while for the train. I had not bought my ticket yet.

Q. In order to set you right here, Mr. Cole, to be sure, Mr. Martin testified as follows, on page 15: "On September 28, 1908, Mr. Kubach presented the same for discount, after endorsing it without recourse, the National Fence Machine Company by Charles Kubach, manager. Q. What did you pay for it? A. Face, less discount of a hundred dollars."

A. That is what the note brought.

Q. Do you still say that you were the one who presented the note and received the—

A. Yes, sir; Mr. Kubach left the town Saturday morning before the bank opened.

Q. Then Mr. Martin, the cashier is in error?

A. He is in error in that one statement, yes.

Q. Did you make any prior arrangement with the Rock Couny Bank for receiving payment yourself?

A. When I first went there, yes.

Q. When you first went there?

A. Yes; the first day I went there.

Q. What papers do you refer to, papers you people were taking up?

A. That we were going to take. I did that before I located, yes.

Q. What was your first transaction with Mr. Freick?

A. Selling a set of moulds.

Q. That transaction has nothing to do with this matter here?

A. No, sir, not a particle.

Q. In other words you sold him a set of moulds and took his note for $12.50?

A. Yes.

Q. That note was payable to yourself, was it?

A. No, sir, the company.

Q. What became of that note?

A. It was—

Q. If you know.

A. It was taken in when the two hundred dollar deal was made that is not concerned here too.

Q. Do you know whether that note was ever returned to Mr. Freick?

A. Yes, it was returned.

Q. Where and when?

A. When this deal was made I gave it to Mr. Kubach and he advised me it was returned.

Q. Do you know that was ever returned to Mr. Freick?

A. No, I did not see it returned.

Q. You gave it to Mr. Kubach, did you?

A. Yes.

Q. Did you hear Mr. Kubach say that there was never any such note, on the witness stand to day?

A. I did not understand it that way, no sir.

Q. You did not understand it so?

A. No, sir.

Q. Well, do you now understand it?

A. Do not remember that point in the testimony.

Q. Don't remember it, and you don't know whether that note ever went back to Mr. Freick or not?

A. That is my understanding.

Q. You don't know?

A. No.

Q. It was on that note that these moulds were delivered to Mr. Freick?

A. That is the first set, yes.

Q. You have never been at Luverne since you left on the 20th day of September, 1908, have you?

A. No, I think not.

Q. You had nothing to do with this transaction in any manner since then, as I understand you?

A. No, sir.

Q. Do you know what has become of Mr. Augustine?

A. I know he is in business, I have forgotten the town though; it is near me there at home.

Q. In Kansas?

A. Yes, I think so.

Q. You don't know what business he is in?

A. Some mercantile business, the way I was informed.

Q. Do you know personally anything about it?

A. No, I haven't heard about it.

Q. Well, that is what I want to know. That is all.

RE-DIRECT-EXAMINATION by Mr. English:

Q. When you were being examined about the note and contract being pinned together you started to say that they were pinned together for the reason, and then you were interrupted. You may finish your sentence. For what reason were those papers pinned together?

A. So as to keep each contract and its note together until we get to our party. As a rule we had several parties to see on a trip. That

was to avoid the wind blowing them away and keeping them together, so each deal would be—so we would have the right note with the right deal. Our deals were most all different; all of them were for different territory.

Q. Now, you have testified that on the last day on which you interviewed Mr. Freick you took from him these contracts which are in evidence as as Exhibits P-6, 7, 8 and 9; was anything taken from Mr. Freick in exchange for those contracts which he then gave up?

A. Anything taken from him?

Q. Yes, did he give you any paper or anything in exchange for those contracts which he then gave up?

A. He gave me the—

(Question repeated.)

Mr. Canfield: I object to it as calling for a mere conclusion of the witness.

Mr. English: It seems to me when it appears now that these contracts which were signed after all this interest was given up, that we are entitled to understand why they were given.

The Court: I will overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Adjourned to June 12, 1912, 10 a. m.

Jersey City, N. J., June 12, 1912.

Trial of the case resumed.

Mr. English: I will read the deposition of Peter O. Goembel.

"PETER O. GOEMBEL, was called and duly sworn according to law as a witness on behalf of the plaintiff, and examined by A. J. Daley, plaintiff's attorney, testified as follows:

Q. This is an action brought by Ray Benjamin Hinkly as plaintiff against Edward G. Freick as defendant in the New Jersey Supreme Court. Are you acquainted with the plaintiff Ray Benjamin Hinkly?

A. Yes, sir.

Q. How long have you know him?

A. About twenty-five years.

Q. Are you acquainted with the defendant Edward G. Freick?

A. Yes.

Q. How long have you known him?

A. Six or eight years.

Q. Where do you live?

A. Luverne, Minnesota.

Q. How long have you lived there?

A. Four years.

Q. And prior to moving to Luverne where did you live?

A. About four miles east of Luverne.

Q. Do you remember the circumstances of seeing a sample fence made of concrete posts and with wire set up in the street east of the Rock County Bank in Luverne along about September, 1908?

A. Yes, sir.

Q. Did you in the fall of 1908 see any similar fence set up anywheres in Luverne?

A. I did.

Q. Where?

A. In the street near defendant Freick's residence between his house and barn.

Q. Did you see that sample fence near the defendant's premises more than once?

A. Yes, twice.

Q. Now, the first time that you saw that sample fence near the defendant's residence do you know whether or not at that time the sample fence was still standing in the street near the Rock County Bank that you have testified to?

A. I do not.

Q. At the time that you saw this fence near the defendant's house the first time did you or not see and talk with the defendant Edward G. Freick about the fence, or business connected with the fence in question?

A. I did.

Q. At that time had you heard any talk, or did you know anything about anything having been said by any one, in Luverne, about Mr. Freick having given any notes in connection with this fence in question?

A. Yes.

Q. Did you ever learn the name of the company that put up these fences?

A. No, sir.

Q. Now, what time of the year was it that you had this talk with the defendant, near the fence in question, as near as you can give it?

A. About the fore part of March.

Q. Was that the same year or the year following that you saw the fence set up in the street near the Rock County Bank that you have testified?

A. I should think the year following.

Q. Do you remember what year that was?

A. No.

Q. Do you kow whether or iot it was before or after the men who had been here in connection with that fence business had left town?

A. After they had left town.

Q. Now, as near as you can state it, you may state what you said to the defendant Edward G. Freick, and what he said to you at the time ana place you have mentioned talking to him about this fence?

A. I asked him if he didn't know when he signed those notes that they were notes that he signed; he said, I know they were notes, but they told me they were not to be paid until after I had made the amount out of the business.

Q. Now, at the time of that talk had you or not heard or did you know anything about a claim having been made that the defendant had given some notes in connection with that fence of which you saw a sample?

A. Yes.

Q. After this talk, did you have any further talk with the defendant about the matters?

A. I do not think we did about the fence matter.

Q. How did this talk come up between you and the defendant, if you can recall?

A. We were walking from the barn to the house and we came to the fence and stopped and made remarks about it.

The witness was then CROSS-EXAMINED by E. H. Canfield, plaintiff's attorney, as follows:

Q. Did you know that at a later date the Rock County Bank commenced an action against Mr.

Freick on one note given by him to the National Fence Machine Company?

A. Yes, sir.

Q. Did you know that the case was tried in the District Court of Rock County?

A. I did not know it, but I heard that it was tried.

Q. You heard, did you not, that there were three trials of that case before it was finally disposed of, didn't you?

A. Yes, sir.

Q. During all that time you know that Mr. Freick made a claim that his signature to the note was obtained by some kind of fraud or trick?

A. Yes.

Q. During all that time you were quite intimately acquainted with Mr. Hinkly, were you not?

A. Yes.

Q. And during all the time that litigation was going on did you not have conversations with Mr. Hinkly in regard to the litigation?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. You met him frequently, did you?

A. Yes, sir.

Q. When did you first inform Mr. Hinkly of this conversation concerning which you have testified in direct-examination?

A. Early part of fall of 1911.

Q. Did you ever tell anybody about this conversation before you told Mr. Hinkly?

A. I did.

Q. Who?

A. Mr. Canfield. You.

Q. When and where?
A. In his office.
Q. When?
A. About a year and a half ago.
Q. During the progress of this litigation you formed a decided opinion as to the merits of the case did you?
A. No, sir, I did not.
Q. Why did not you tell Mr. Hinkly before and while the litigation was in progress what you knew about it?
A. I did not want to get mixed up in the case.
Q. When did you change your mind in that respect?
A. After the case was over last Court. I supposed it was settled and I went in to jolly him a little about it.
Q. Do you claim, Mr. Goembel, that you are at this late date able to give the exact words used by yourself to Mr. Freick?
A. Yes, sir.
Q. Without the least variation?
A. Not in meaning, possibly in the wording.
Q. Can you remember what other subject was talked about there that day?
A. Yes, sir.
Q. And everything that was said?
A. No, sir.
Q. How long were you there?
A. Fifteen to twenty minutes.
Q. Who else was present?
A. No one.
Q. Did you see any one else around there?
A. No, sir.
Q. What time of the day was it?
A. About ten o'clock in the forenoon.

Q. Now, are you able to say it was ten o'clock?

A. I know it was forenoon I was there on some business.

Q. Where were you living then?

A. Luverne.

Q. Since that time have you seen Mr. Freick frequently?

A. Yes, sir.

Q. Do you now recall what year this conversation was?

A. I think it was in 1909 in the early spring.

Q. Do you know it was 1909?

A. I would not say positively.

Q. Do you know whether that was before or after this suit had been commenced?

A. After.

Q. You knew that the suit was then pending, did you?

A. Yes, sir.

Q. And you then understood, did you, that Mr. Freick claimed that he did not know he signed the promissory notes?

A. Yes, sir.

PETER O. GOEMBEL.

Sworn to and subscribed before me,
Oliver E. Ferguson, this 23d day of May, 1912.
Oliver E. Ferguson,
Commissioner."

RAY B. HINKLY, re-called.

Direct-examination by Mr. English:

Q. Mr. Hinkly, when did you first become acquainted with Mr. Cole?

A. The latter part of the summer of 1908, in August.

Q. You will have to speak louder. In August 1908?

A. Yes.

Q. Where and under what circumstances did you make the acquaintance?

A. Mr. Cole came into the Rock County Bank, of which I was president—

The Court: Is conversation with Cole evidence against the defendant?

Mr. English: No, not that, but what I had in mind to show the circumstances under which he met him with a view to rebutting insinuations which have been made against the character of Mr. Cole and Mr. Kubach, as bearing on the claim of fraud by the defendant.

The Court: You can not rebut insinuations. You rebut the testimony.

Q. How long after you had made the acquaintance of Mr. Cole did you meet Mr. Kubach?

A. Probably about two weeks after.

Q. State whether or not the Rock County Bank Building where these men had their office has any connection with the bank itself as a banking institution?

Mr. Canfield: I object to it as not proper rebuttal, indefinite and calls for a conclusion.

Q. I mean whether it was used by the bank as a part of its banking business?

Mr. Canfield: I object to it as not rebuttal, incompetent, immaterial, and calls for a conclusion.

The Court: Well, you may ask that.

Mr. Canfield: We will admit it has not.

Mr. English: You will admit it? Counsel admits it has not, so that saves time.

Q. Mr. Hinkly, did you ever have any conversation with Mr. Freick in which you recommended to Mr. Freick that he buy this kind of fence?

Mr. Canfield: I object to it as calling for simply a conclusion.

Q. Mr. Hinkly, the evidence of Mr. Freick is that he met you in the street of Luverne—

The Court: Do not put it that way.

Q. Mr. Freick has testified that he met you in the streets of Luverne in the vicinity of this fence and that you said to him that he had better buy some of that fence or words to that effect.

Mr. Canfield: I object to it as assuming something in the testimony that is not in the testimony.

The Court: That is an important point. If it was not in the testimony of course the question is improper. The testimony must be detailed and repeated to the witness if it is called for the purpose of contradiction.

Mr. English: I will adopt the suggestion.

Q. Mr. Hinkly I direct your attention to the testimony of Mr. Freick wherein he said that he had a conversation with you in reference to his

buying this fence. Did you have any such conversation with him?

Mr. Canfield: I object.

The Court: You may ask him what the conversation was and let him detail it.

Q. What was the conversation which you had with Mr. Freick—

The Court: Ask him if he had any.

Q. Did you have any conversation with Mr. Freick in reference to this fence?

A. No, sir; not prior to the—

Mr. Canfield: I object to it as voluntary.

The Court: Just answer the question.

A. Well, I would like to—pardon me—

Q. I will take care of that.

The Court: Your counsel will take care of it.

Q. I will put the question this way. Mr. Hinkly, did you have any conversation with Mr. Freick in reference to this fence prior to the time when the bank discounted the note?

A. No, sir.

Q. Do you remember the occasion when Mr. Freick came to the bank in response to a notice which he had received from the bank and met with you and Mr. Martin, the cashier?

A. Yes, sir.

Q. Did Mr. Martin say on that occasion that they had some notes of Mr. Freick's which had been left there for collection?

A. No, sir.

Q. What did Mr. Martin say?

Mr. Canfield: I object to it as not proper rebuttal and not the proper method of impeaching the witness.

The Court: I will allow it.

A. Mr. Martin said, "We bought the notes. These are your notes, aren't they?"

Q. What did Mr. Freick say to that?

A. "Uh huh."

Q. Did Mr. Freick at that time ask for the notes and say that the fence people had changed the contract on him and he did not like it and did not want to pay the notes?

Mr. Canfield: I object to it as incompetent, irrelevant, immaterial and not rebuttal, and it is not for impeachment.

The Court: I will allow it.

A. Yes, sir.

Q. What else did he say at that time?

The Court: Oh, no, if you are going to contradict the witness, you will have to call his attention to what was said and then ask him. You can not put the whole case in again.

Q. Did not Mr. Freick in connection with this conversation pull a contract out of his pocket and hand it to you?

Mr. Canfield: That is objected to as an attempt to contradict a witness on an immaterial point.

The Court: I will overrule the question.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Have you ever seen the defendant Freick read the newspapers or a newspaper?

A. Yes.

Q. In the city of Luverne?

Mr. Canfield: I object to it as incompetent.

The Court: I will overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Have you ever seen Mr. Freick write?

A. Yes.

Q. Where and under what circumstances?

Mr. Canfield: I object to it as incompetent and immaterial, and not proper rebuttal.

The Court: I will overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Did you have any other conversation with Mr. Freick after the conversation in the bank when Mr. Martin was present?

Mr. Canfield: Yes or no.

Q. When was that conversation and where was it held?

A. I had more than one conversation with him.

Q. Well, tell us the first one after the meeting in the bank?

Mr. Canfield: I object. I don't know what the purpose of this is.

Mr. English: The purpose is to show a conversation in which Mr. Freick admitted he signed the notes.

The Court: Well, you may ask it.

Mr. Canfield: I ask that the witness first be confined to some specific time.

The Court: Yes.

Q. Did you have a conversation after the meeting in the bank with Mr. Martin and Mr. Freick—did you after that have a conversation with Mr. Freick in which anything was said by him in reference to the signing of these notes?

A. Yes, sir.

Q. When and where was that conversation held?

A. At the bank.

Q. When relative to the earlier meeting?

A. Very shortly after that.

Q. What was the conversation?

A. I said to Mr. Freick, "You gave a letter to these people asking us to purchase your notes," and I asked Mr. Martin, the cashier to hand me that letter. Mr. Martin handed me the letter. I showed it to Mr. Freick; asked him if that was not his letter. He said it was. He said he knew that he had signed the notes, but they had changed the contract on him and he did not like the new contract they had given him, and he took the contract out of his pocket and handed it to me and I read it.

Q. Now, aside from the contract did he say anything else in reference to the payment of the notes?

A. Not at that time.

Q. Did he at any other time, any other conversation?

A. Yes.

Mr. Canfield: I object to it as calling for a conclusion, and not proper rebuttal.

The Court: That is no admission of a legal liability.

Mr. English: Well, I will put it this way.

Q. Did he at any other conversation which you had with him after that make any other statement in reference to his having signed the notes?

The Court: That is not the proper way to put it.

Q. Did he at any other conversation after that say anything else in reference to the notes?

Mr. Canfield: Yes or no?

A. Yes.

Q. When was it?

A. In the bank.

Q. When?

A. About two or three days after the first conversation.

Q. What did he say?

Mr. Canfield: May I be permitted to ask a question?

The Court: Yes.

Mr. English: I do not think that is proper.

The Court: It may be that under your examination of this witness testimony will be brought out which is utterly irrelevant. Now, what did you want to ask?

Mr. Canfield: I want to ask if that conversation related to some effort to obtain a settlement of this matter, and if the talk was in regard to that.

Mr. English: I do not think that is a proper question.

The Court: Oh, it is a proper question, but it may not be a proper question now. You can go on.

Mr. English: I pray an exception.

Whereupon the plaintiff, by his counsel prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

The Court It would not necessarily preclude suit being brought upon the note, the mere attempt to effect the settlement of course does not bind the defendant to pay unless they offer to compromise.

CROSS-EXAMINATION by Mr. Canfield:

Q. Now, Mr. Hinkly, did you call Mr. Freick into the bank?

A. For this conversation we are just speaking about?

Q. Yes.

A. No, sir, I did not. May I state the circumstances under which he came in?

The Court: No.

Q. Did you begin the conversation with him?

A. No, sir.

Q. Was his talk in relation to procuring a settlement, can you say?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. You are an attorney, are you not?

Mr. English: I object to that as going too far.

Question withdrawn.

RE-DIRECT-EXAMINATION by Mr. English:

Q. What did he say in this conversation?

A. Want me to give the whole conversation?

Q. Yes, as far as it bears on the note.

A. I said that—or he asked permission—perhaps that don't—

Objected to.

Q. No.

A. Perhaps I ought not to put that in. He said he was sorry we had bought the notes, and I asked him—I said to him, "You understand of course that the bank bought the notes, and that you gave the notes, and that you are holden for them."

The Court: What is that?

A. And that you are holden for them. "Yes," he said, "I suppose I have got to pay them." I said, "What did you do about the contract?"

Mr. Canfield: I object and move to strike out all of the statements of the witness as irrelevant, incompetent, immaterial and not proper rebuttal.

The Court: I will allow it to stand.

Mr. Canfield: And also it contains a mere statement by Mr. Freick, that is a mere legal conclusion which might be wrong or right.

The Court: No; he says that the defendant said, "I suppose I have got to pay this," I will let this stand for what it is worth.

Q. Do you know Ole Olson?

A. Yes.

Q. Are you the owner of any of his notes?

A. Yes.

Q. How many?

Mr. Canfield: Objected to as irrelevant, incompetent and immaterial.

Mr. English: I was going to follow it up.

Q. To whose order were the notes made which you hold?

Mr. Canfield: I object to it as improper rebuttal and not the best evidence, incompetent, irrelevant and immaterial.

The Court: I will overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. English: If your Honor please I offer to show—

The Court: No. Then you are getting in your testimony.

Mr. English: Haven't I a right to make an offer to prove it so the Court can pass on the materiality of it?

The Court: No; you can ask questions.

Q. Are the notes which you hold notes made by Ole T. Olson to the order of the National Fence Machine Company and endorsed by it?

Mr. Canfield: I make the same objection.

The Court: Overrule the question.

Whereupon the plaintiff by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Do you know Edward Biss?

A. Yes.

Q. Do you know whether he is any relation by blood or marriage to the defendant?

A. Yes.

Q. What relation?

A. Son-in-law.

Mr. Canfield: I object to it as incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: Well, it is not proper rebuttal, but I will allow it to stand.

Q. Do you hold any of the notes of Edward Biss?

Mr. Canfield: I make the same objection as before.

The Court: Same ruling.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Do you hold any notes of Edward Biss made by him to the order of the National Fence Machine Company and endorsed by it.

Mr. Canfield: I make the same objection.

The Court: Same ruling.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

No cross-examination.

Mr. English: I offer in evidence the case of Mackey vs. Peterson, as reported in volume 29 of the Minnesota Reports, page 298, so much of the book as covers the report of that case.

Mr. Canfield: Now, if your Honor please, I remember this case. It is objected to as first, not proper evidence to go before the jury and not proper at all for the Court alone. In the second place this decision does not in any manner relate to the statute of the State of Minnesota now in force and which is before the Court, but is based wholly upon the common law rule as interpreted by the Courts of Minnesota in 1882.

The Court: I overrule it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Mr. English: I offer in evidence the contract which is marked for identification G, and signed "Edward G. Freick & Son," and I offer it, your Honor, because I think it is material for these reasons. Now, in the first place Mr. Freick has denied on the stand emphatically that his son was in any way connected with him.

Mr. Canfield: No.

Mr. English: Let me make my address and then you reply.

The Court: He did not say that. He said that at the time these notes were signed, and afterwards that he was.

Mr. English: Yes, at that time and in that general connection. Now this contract specifically refers to Edward G. Freick and son, and the evidence of the witness yesterday is that the son is his son Herman, whom he denies was associated with him.

The Court: He did not deny it at the time when the notes in suit were signed; he said he became interested with him afterwards. That was his testimony, but at the time when that contract was signed, and that was dated subsequent to the last notes on which you have brought suit.

Mr. English: This is the next day—it is subsequent. It is the next day. My recollection differs from your Honor's. My recollection is he said at that time his son was not associated with him. That is my recollection.

The Court: That is what he did say, that at that time he was not interested with him at all, but afterwards he was.

Mr. English: I say that inasmuch as this was signed Edward G. Freick and son it was material to contradict him, and that is my recollection of the evidence. Now the reason why I think it is material is that it has already appeared in evidence on cross-examination that on this Monday when Mr. Cole was at the Freick home, Mr. Freick surrendered to Mr. Cole the four contracts which had previously been signed—

The Court: Exactly; you are getting right back to the contract.

Mr. English: Yes, I know I am. I want to make an offer in evidence, and I want to state my reasons.

The Court: I think I have consistently and persistently ruled out those contracts, so far as this case is concerned.

Mr. English: They are in evidence on concent of counsel.

The Court: They are evidence, but as far as this case is concerned in my view of it they are—

Mr. English: I do not want to be disrespectful to the Court, but I want to give your Honor the benefit of my views. If they are all wrong they can be overruled.

The Court: You do not want to recite what is in that contract and thus get it in evidence, when I have overruled—

Mr. English: I don't know how else to present it.

The Court: I have read it.

Mr. English: Then I will try not to refer to the subject. Your Honor will remember the witness Cole said on cross-examination that Mr. Freick had surrendered those four contracts; he also said he had figured up the total amount of these four contracts—not the four contracts, but of the notes which were given in connection with the contracts, and as your Honor will remember in this contract which I am now offering the figures tally. That was another reason why it seemed to me to be material. Then this contract which I propose to offer specifically refers, as your Honor knows, to notes. It

seems to me that any papers signed by the defendant which seemed to acknowledge or admit the signature of the notes was material under the evidence in this case, for the consideration of the jury. And further, because the contract, as your Honor remembers, specifically recites the existence of the earlier contracts that are in evidence and which the witness testified were surrendered when this was given. It seems to me it was all part of the general transaction which was material for the consideration of the jury in this case. If I am wrong all right, but that is my offer and that is the reason for it.

The Court: The offer is overruled.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

(Seal.)

Plaintiff rests.

Defendant's Testimony in Surrebuttal

EDWARD C. FREICK, re-called:

Direct-examination by Mr. Canfield:

Q. Mr. Freick do you remember the circumstance of Mr. Cole coming to your house on or about September 28, 1908?

A. Yes.

Q. When did you first see him that day?

Mr. English: I object. Counsel objected in my rebuttal to anything outside of the bare negative.

Mr. Canfield: This testimony is to be confined exclusively to the manner in which this letter was signed.

The Court: You may proceed.

Mr. Canfield: Only to show the surrounding circumstances.

A. In the afternoon.

Q. When did you first see any of these men that day?

A. In the morning I seen Augustine come up to my house and want to take me out in the country.

Q. Then did you go out in the country with him?

A. Yes.

Q. How far out in the country?

A. Seventeen miles.

Q. To see whom?

A. To see Ole Baake.

Q. What time did you leave Ole Baake's place?

A. About 11 o'clock.

Q. Where did you first stop on your way home?

A. It was 1 o'clock we drove in to Hardwick and got dinner.

Q. Is Hardwick a village nearby Luverne?

A. Yes.

Mr. English: I object to it as not cross-examination not material and not rebuttal.

The Court: Just bring it down to the the time of the finding of the letter.

Q. You stopped at Hardwick, you said?

A. Yes.

Q. What did you do there?

Mr. English: I object.

A. Took dinner and feed the horse.

Mr. English: I object.

The Court: I suppose the object of this is to account for the time that he was away and to show when he got back.

Mr. Canfield: Yes.

The Court: If so it is competent.

Q. You got dinner there?

A. Yes.

Q. How far is it from Hardwick to Luverne?

A. Ten miles about.

Q. About what time did you eat dinner at Hardwick?

A. About 12 o'clock, a little after that; it was late.

Q. How did you go out to Baake's place and back to Luverne?

A. By team.

Q. Well, team; what kind of team?

A. Well, we left Hardwick about 1 o'clock.

Q. What kind of a team was it, an ox team or a horse?

A. Horse, slow team.

Q. What kind of a team?

A. Buggy and two horses.

Q. What time did you get into Luverne?

A. About half-past two.

Q. Where did you go first?

A. Right up to my house.

Q. When you reached your house whom did you find there, anybody?

A. I found Mr. Cole standing on the sidewalk waiting for us.

Q. Near your house?

A. Yes.

Q. Now, what did he say to you when you reached the house?

A. He told us how you didn't—

Mr. English: I object to it as not proper rebuttal, as I understand the ruling.

The Court: No; you must come now to what was said of the signing of that letter.

Q. Well, did you go into the house with Mr. Cole?

Mr. English: I object.

A. Yes, sir.

Mr. English: I object to it as a leading question.

The Court: It is leading.

Q. After you went into the house with Mr. Cole was anything said by Mr. Cole to you and if so what?

A. Yes.

Mr. English: I object.

The Court: Go on, I will allow it.

Mr. English: I understand he is to get down to the—

The Court: Go on.

Q. What did Mr. Cole say to you?

A. He changed the contract.

Q. What did he say?

A. He had a little notice from the bank.

Mr. English: Did Cole say that?

The Court: Just detail all the conversation.

Q. Just go on and tell what he told you as near as you can?

A. "And to do it quick and pretty near train time now."

Q. Did he produce any papers there?

A Yes.

Q. You may look at Exhibit P-10, do you know whether that is the paper or not?

A. Yes, something like that, yes.

Q. Something like that. Well, what did he say about this paper? What did he say about it?

A. It was a notice—

Mr. English: I object. It seems to me he is required to specifically deny what Mr. Cole said he said.

The Court: You should recite Cole's testimony that you desire to contradict.

Mr. Canfield: No, my purpose is to show that he fraudulently led him to believe that that particular paper was a notice from the bank that they should approve paper taken from farmers, and that he signed it under those circumstances. This is not an impeachment, but simply to show that he did not intelligently and understandingly sign that paper.

The Court: Well, I will allow it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. What did Mr. Cole say to you about that paper?

Mr. English: I object.

The Court: You can not take an exception to Mr. Canfield's statements.

Mr. English: No, an exception to this question.

Q. What did he say?

A. We got the notice for you to the Rock County Bank, and about notice, he said.

Q. About notes?

A. About notice—notes.

Q. About notes?

A. Yes.

Q. Go on and tell what you said?

A. I told him, "What notes,—I never give no notes." "Well," he said, "the notice when you make sales to the farmers and taking any notice, take them to the county bank and get them examined and have them marked and send up to the company. They are just as good as cash."

Q. Did he read that paper over to you?

A. No.

Mr. English: I object.

The Court: I will allow it.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. Did you read it?

A. No.

Q. Did he say anything more than what you have said about what that notice is?

Mr. English: I object.

A. No.

Mr. English: I object,—don't be so willing to answer.

The Court: Question allowed.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. When he told you it was what you have just stated, did you believe what he said was true?

Mr. English: I object. I want to object to that. I move to strike it out.

Mr. Canfield: Strike it out and make your objection.

Mr. English: Because the evidence about this which was admitted was specifically under the contract which related particularly to notes. There is no contract or anything—certainly not in this case—relating to a paper of this character.

The Court: You have offered this in evidence to show that he knew, that he signed it and he had given the note which he now seeks to recover. Now he has a right to say if he signed it and he didn't know what he was doing—signed it under a misrepresentation.

Mr. English: I think he can give the fact. This did not go to that—it went to his state of mind.

The Court: He said that. He is detailing what was said at the time he signed it, and he said what he thought it was when he signed it. I think that is competent.

Whereupon the plaintiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Q. How did Mr. Cole act, that is what was his general—

A. He was so much—

Mr. English: I object.

Mr. Canfield: I will withdraw the question.

Q. What was Mr. Cole's manner or how did he act while you were there with this paper at the time you signed it?

Mr. English: I object.

The Court: Allowed.

Whereupon the plaintiff by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

A. He was awful much in a hurry. He said, "We are going to take the 3 o'clock train, and pretty near train now. Mr. Angustine—Mr. Kubach left at noon; he got a letter, his wife was operated on for appendicitis and we have to go this afternoon on 3 o'clock train."

Q. After you had signed your name to this paper what was done with it?

A. Well, he picked it right up and asked me for the old contracts.

Q. Then what did Cole do?

A. He went out of my house.

Q. Where did you go, anywhere?

A. Well, I stayed a little bit in the house.

Mr. English: I object to it as immaterial.

The Court: No.

Q. Did you see Mr. Cole anywheres after that day?

A. I seen him when he left on the train.

Q. Do you know how he reached the train?

Mr. English: I object to it as immaterial.

The Court: He says he went out in a hurry.

Q. When did you first see this paper, Mr. Freick, after you gave it to Mr. Cole?

A. I seen it in the bank, in the Rock County Bank.

Q. Rock County Bank. Now, did you hear Mr. Hinkly's testimony of a talk that he had with you in the bank two or three days after this transaction?

A. I could not hear—I could not understand.

Q. He stated in substance that he said to you, "These are your notes, aren't they?" and you said "huh, huh."

Mr. English: I object.

A. I never done it.

Q. Did any such thing occur or was anything of that kind said?

Mr. English: I object. Wait, wait.

A. No.

Mr. Canfield: Strike out.

Mr. English: I object. That was all gone into on his cross-examination yesterday and he denied those very things, and it is all in the case.

Mr. Canfield: If it is I do not care to prove it.

The Court: I think he denied it yesterday.

Mr. Canfield: I am not quite sure how much of this has been covered. I will put the question.

Mr. English: Tell him not to answer.

Q. Do not answer if there is any objection. If they object to my question do not answer until the Court passes on it. Mr. Hinkly testified here in substance, that at another time, two or three days later, after this transaction, you went into the bank and that he showed you this letter and

you said that you signed the note all right, and that they changed the contract on you and you did not want to pay them.

Mr. English: Wait a minute, that was gone into, your Honor.

Mr. Canfield: Wait until I finish.

Q. Was anything of that kind said?

Mr. English: I object.

A. No.

Mr. Canfield: Don't you understand?

Mr. English: I don't think that is right. My objection is that was all gone into yesterday, asked him that very question. I have it down on a memorandum.

The Court: That is my recollection, Mr. Canfield, that it was. Well, I will allow the answer to stand now.

Mr. Canfield: I was not quite sure. I do not want to impose on the Court.

Q. Do you remember saying to Mr. Hinkly on that or any other occasion that you supposed that you would have to pay the notes?

A. No.

Q. Did you ever say that to him? Did you ever tell him you thought you would have to pay the notes?

A. No.

Both sides rest.

Motion to Direct a Verdict

Mr. English: If your Honor please, before I come to sum up, I would like, on the authority of

the case of Mackey vs. Peterson, to overrule the defense, on the ground that it is not under the Minnesota law such a defense as entitles the defendant to go to the jury. Now, this Minnesota case was if anything stronger against the defendant in that case than it is in the case at bar.

The Court: The motion is overruled.

Whereupon the plantiff, by his counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.

(Seal.)

Court's Charge to Jury

Gentlemen of the Jury:

The plaintiff in this case is the holder of four promissory notes which were signed by the defendant. It appears from the evidence that both the parties were residents of the State of Minnesota. The transaction upon which this suit was founded was also in the State of Minnesota, and it would be the most natural thing to suppose that the suit would have been tried in the State where the parties live and where the cause of action arose, but they had a right to come into a foreign jurisdiction, and they are here now, having brought this suit in New Jersey, and of course we have to deal with it and your verdict must be rendered according to the law as I shall give it to you, regardless of the fact that the parties come a good ways to try the case. I

ought to say now that it is utterly unwarranted for counsel to say that justice could not have been obtained in a foreign state, in the State of Minnesota, where this cause of action arose. All states pass laws for the purpose of administering justice and it is fair to presume that laws are passed for that purpose, and it does not become anyone to say that justice can not be obtained in the state by complying with the laws which the legislature of that state has passed.

It appears that the defendant had some business transactions with a fence company which was represented by one Kubach. The fence company was the National Fence Machine Company, incorporated under the laws of Kansas. The defendant, as the testimony shows, was a farmer living in the neighborhood of Luverne, and Mr. Kubach, who was the general manager of the fence company, first sold him a section of fence which it appears cost twelve dollars and a half, as I recollect it; he says that no note was given to him by the defendant at that time, but Mr. Cole, who was a witness offered on the part of the plaintiff, says that a note was given for that section of fence and that the note was paid. That was foreign to the matter we are litigating here. The first of the notes in controversy in this case was signed on the 14th of September, 1908. They were time notes, that is, they were due some time, some date after the date of the notes. The ordinary law in relation to commercial paper is that no matter how much fraud may have been perpetrated in obtaining the note or whether there was any consideration for the note or not, if it gets into the hands of an innocent holder before maturity, the maker of the note has no

defense to it whatever. That would be the law governing this case if it was not for a statute which was passed by the State of Minnesota, which has been read to you and which I will read to you again.

> "No person, nor the heirs or personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms."

That is the law, gentlemen—although we are trying the case in New Jersey—which governs this case, because the cause of action having arisen in Minnesota we are controlled by the law of Minnesota, and consequently you must apply that law to the facts which you will find have been established in this case.

It also appears in the case that the bank which first took these notes from the fence company, discounted them in the regular course of business. The cashier says that at the time he took them he knew of no taint affecting the notes whatever; he supposed they were regular notes and he discounted them. They afterwards passed into the hands of the plaintiff; he claims to have been an innocent

holder, but he says when he was upon the stand, that before he took the notes, "I knew about what the defense was or something about it;" so although in the eye of the law, having taken the notes from an innocent holder for value, if the case was in New Jersey he would be deemed an innocent holder although at the time he took them he knew there was some taint attached to the notes, and although morally perhaps, he took these notes, knowing there was some taint attached to them, and although legally he is in the position of an innocent holder, it is a circumstance you have a right to take into consideration in deciding this case, whether at the time he took them they were tainted with fraud or not.

The defendant says that he had some negotiation with the fence company through Mr. Kubach, and you will notice the contracts which you will have before you, four of which he signed at the same time at which the plaintiff says he signed the note and he did sign the notes at the same time the contract was signed. The contracts are somewhat peculiar in their form and there is nothing in the contract which refers to any note whatever excepting the last clause of the contract: "It is hereby further agreed and understood that as a part of the above consideration the said company agrees to furnish said agent all additional machines and sets of moulds at $2.50 each on board the cars at factory. The agent shall make a report to the company at the end of each month. The company hereby further agrees to take notes for machines and moulds when same are quoted good by local banks." But they say by their claim that by a provision

in the contract, in this particular one I am reading, that in the first place they agree to make Mr. Freick their agent, then he agrees under this contract to transact $1,152 worth of business in a territory, and then they say for the sum of $1,152, the receipt whereof is hereby acknowledged, they sell him eight machines and eight sets of moulds. The defendant says at the time that he signed this contract and the others which are in evidence he thought he was taking an agency for the sale of the product of the fence company and that he had no knowledge that he was signing a note. Now whether he had such knowledge or not is a question that you gentlemen must determine. You recollect his testimony, as to the way in which he says this second paper, which turned out to be the note, was signed; that the contract was upon the top and this note was under it and they turned the edge of the contract up so that he saw nothing but the line and he was told that that was a duplicate contract which had to go back to the company, and on the strength of that he signed it and that he did not know, his testimony is, that he had signed the notes until afterwards when they turned up in the Rock County Bank. Now if he knew what he was signing at that time, that it was a note, no matter whether he ever got any consideration for the notes or not—the evidence in this case is he did not—they got in the first place in the hands of a bank as an innocent holder, and the bank had a right to recover and anyone else who took them from the bank would have a right to recover as an innocent holder, unless the defendant can invoke the protection of this statute. The statute says, "it

his signature was obtained by a fraudulent representation, trick or artifice." Now if his signature was obtained to the notes in the way in which he says it was—and of course you must believe his testimony before you can relieve him from the obligation on these notes—if his signature was obtained in that way; if the corner of the contract was so turned up that he could not see the whole of the paper he was signing and he was merely told it was a duplicate contract which had to go back to the company, then it is for you gentlemen to say whether that was a fraudulent representation, trick or artifice. If it was any of those three and he was induced to sign it by reason of that, then he has a right to invoke the protection of this statute. Now the persons who took these notes from him say that statement is not true; that at the time he signed the contract and signed the notes he also knew what he was signing; that the note and the contract were laid on the table together and he saw them both and signed them knowing what he was doing. So if the evidence rested entirely upon the testimony of the defendant and these other two people, it would be a question whether or not their testimony would outweigh his, as being two against one, if you think that all of them were equally credible and believeable; but there is other testimony in this case which is admitted as competent, and it was competent, that is, the transactions which Kubach and Cole had with other people in the neighborhood of Luverne in relation to the sale of fencing. Several of them, you recollect, testified that they signed contracts and afterwards they discovered they had signed notes in the same way in which the defendant says he signed

these notes. That evidence you have a right to take into consideration in deciding whether or not the defendant tells the truth in this case or whether Kubach and Cole told the truth, and if you find the defendant tells the truth and that he signed these notes in the way in which he says he signed them, by false representation, trick or artifice, no matter how innocent the holders of the note may be, he has a right to come in and say, "I got nothing for my signature. I have a right to come into Court and say that I signed those notes by trick or artifice or false representation," and it is no reflection upon the man who comes into Court and sets up that defense; he has a perfect right to set it up and it is his duty to set up that defense if he has been defrauded in signing papers which he thought he was not signing. But there is another question which you have got to consider in this case and that is whether or not, if he signed by false representation, trick or artifice, he was guilty of negligence, because this statute says that they must show that he was not guilty of negligence in signing such a paper without knowledge of its terms. Now you must take all the testimony into consideration and say whether or not he exercised the ordinary prudence which a reasonable business man should do in signing a paper without having spread it before him to see just what he was doing. The mere fact that he signed four different sets of notes can be no reflection upon the defendant in this case unless the evidence shows that before he signed some of the subsequent ones he knew he had been tricked in signing the prior ones. There is no evidence of that sort in this case, because the

evidence is that he knew nothing about any of the notes until he had signed them all and they all turned up in the hands of the Rock County Bank. So that is a matter you have a right to take into consideration in saying from the testimony in this case, with the defendant's knowledge of the business, with his knowledge of the world, whether he was acting as a careful, prudent man would do in signing these notes which he says he signed in such a way as would make him unable to see the whole paper to which he was putting his name, because if he was negligent the statute says he can not come into Court and set up the defense. Then there is a letter admitted in evidence in this case which was typewritten and signed on the 28th day of September. The last of these notes was given on September 26th. That paper you will have before you.

(Paper produced by Mr. English and handed to the Court.)

The defendant admits that he signed this paper. "This is to certify that I had some business dealings with Charles Kubach, general manager of the National Fence Machine Company of Abilene, Kansas, also of the company for which I give my notes. This will advise you that the business done is entirely satisfactory with me and that it will be perfectly agreeable with me if you handle my notes." It is addressed to Mr. Martin, Cashier of the Rock County Bank, Luverne, which held the notes. But at the time this letter was written the bank already had the notes in its hands, unless it was possibly the last note which was given on September 26th; there is some confusion of testimony about that. Mr. Martin, the cashier of the bank and the one of all others who ought to know, says he got that

note from Mr. Kubach, who endorsed it in the bank "without recourse" and that he gave him credit for it in his account or gave him the money. Mr. Cole says he took it to the bank on the morning that he got it, before he took the train in the afternoon to go away from the town. As there is a conflict of testimony between these two people and between the cashier, it is for you to say whether you think the cashier, who is disinterested in this case and whose duty it was and who is evidently—presumably—testifying as he did under this commission with his books before him, ought to know when he took the note or from whom he took it or whether these people would know who gave it to the bank. Then again the defendant says that when he signed this paper it was given to him typewritten and he did not read it and he did not suppose that it referred to notes which he had given. He thought, he says,—and I think I am stating his testimony correctly—that it referred to the notes which he was to take under these contracts from the farmers to whom these machines were to be sold, because at that time the notes, unless it was the last one, as I said, were all in bank, and that Mr. Colt came to him only about a half hour before the train left and said, "I am in a great hurry; sign this; I must go." That you have a right to take into cosideration. Mind, at the time this was given, if the notes had already been obtained by fraud, this did not help the plaintiff at all, because the defendant had a right to invoke the protection of that statute—and if in your judgment those notes were obtained by fraudulent representation, trick or artifice and if the defendant was not guilty of negligence in

signing them in the way in which he signed them there, no matter what happened afterwards, under the Minnesota statute the defendant has the right to ask you to give him a verdict. That is all there is in this case, the question of fraud. If you find fraud was perpetrated by Kubach or Cole or either of them in procuring those notes, that ends this case and your verdict must necessarily be for the defendant; but if you find that the defendant knew what he was signing or if he did not know, he was guilty of negligence, then I say to you under the law the plaintiff is entitled to a verdict for the full amount of the claim. You will have all the notes before you and you will have the contracts before you. If you should find for the plaintiff you will calculate the interest upon each note from the time it is due by its terms at eight per cent interest, because they were drawn with eight per cent interest, they were drawn with eight per cent interest, which is according to the law of Minnesota; but if you find they were obtained by fraudulent representation, trick or artifice, then your verdict must be for the defendant.

Mr. English: Your Honor told the jury to calculate interest to next November?

The Court: Yes. What is it? Have you calculated it?

Mr. English: Yes; $5,736.40 was our figure; that is up to the first of November.

The Court: If you should find that the plaintiff is entitled to a verdict, your verdict would be $5,736.40. If there is any error in calculating interest it can be fixed afterwards.

I refuse to charge the plaintiff's requests other than as I have, and give an exception to each one; also the defendant's.

Plaintiff's ~~Defendant's~~ Exceptions

Mr. English: If the Court please I ask an exception to the refusal of the Court to charge each of the requests other than as you did charge.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

I also ask an exception to that part of the charge of the Court where the Court said that counsel said that justice could not be done in Minnesota; inasmuch as at the request of the Court I withdrew that remark. As a matter of fact, I said it in the heat of argument without any wrong intention.

The Court: I did not want the jury to be misled by it.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Mr. English: I also ask an exception to that part of the Court's charge in which he discussed whether or not Mr. Hinkly, the plaintiff, was an innocent holder, and commented on the fact that morally knew he was not an innocent holder and that was a circumstance which the jury could take into consideration.

The Court: I said legally he was, and that is all; that was sufficient.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Plaintiff's ~~Defendant's~~ Exceptions

Mr. English: I also ask an exception to that part of the Court's charge where he left it to the jury to say whether or not Mr. Freick had knowledge that he had signed the notes—whatever the Court said on that subject.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

I also ask an exception to that part of the charge in which the Court said that if the signature was obtained by the turning up of the corner in the way as described by the defendant, that that would constitute a complete defence—whatever the Court said on that subject.

The Court: I said if the jury found it was turned up and if they found it was by false representation, trick or artifice, that would be a perfect defense. I did not undertake to decide the testimony.

Mr. English: Whatever the Court said about that, where you discussed the evidence about the turning up of the note or the paper.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

I also ask an exception to that part of the charge in which the Court said that the evidence is that Mr. Freick knew nothing about the signature of the notes until they turned up in the hands of the Rock County Bank— whatever the Court said about that.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Also to that part of the Court's charge where the Court was discussing the letter Exhibit P-10 and commented on the fact that Mr. Martin of all men ought to know, and said that the cashier presumably had his books before him when he testified.

The Court: That was not in reference to P-10; that was in reference to his taking the notes, because it don't appear from the testimony that he ever saw that last.

Mr. English: No, I think not. My recollection is we were discussing this letter. Well, however P-10 may figure in it, I ask an exception to that part of the charge where he said Mr. Martin presumably had the books before him when he testified.

The Court: That is in relation to discounting the last note.

Mr. English: Yes, in relation to discounting the last note, whatever the Court said about it.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Also pray an exception to that part where the Court said if the notes had been obtained by fraud, trick or artifice under the terms of the statute that the signing of the letter Exhibit P-10 by the defendant makes no difference.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Also ask an exception to that part of the Court's charge at the close, where the Court said that the jury would be justified in finding for the defendant if they found fraud, without further commenting on the fact that the statute says they must also find the defendant free from negligence.

The Court: I said it two or three times before that. I do not have to repeat it.

Which exception is hereby allowed and sealed accordingly.

(Seal.)

Plaintiff's Requests to Charge

1. There should be a verdict for the plaintiff.

2. It is the policy of the law to protect commercial paper, especially in the hands of third persons, and the jury can not find that the defendant was not guilty in signing notes in suit if the jury find that he failed to exercise such diligence and care as a man of ordinary care and prudence would have used under similar circumstances to ascertain the contents of the papers which he signed.

3. In considering whether or not the defendant was negligent in signing the notes in suit, the

jury can not acquit him of negligence if the jury find the fact to be that he trusted another person to fix the form and measure of the obligation which he was signing without exercising that supervision which was in his power of observing the character of the paper which he was signing.

4. There is no evidence in the case of any force, intimidation or compulsion practiced upon the defendant to compel him to sign the notes in suit, and if the jury find that he signed the notes voluntarily, even though carelessly, and through trust imposed in another, he is nevertheless guilty of negligence and the verdict should be for the plaintiff.

5. If the jury find that the defendant through neglect of precautions within his power affixed his name to the notes in suit without knowing their character, the consequent loss ought not to be shifted from him to the plaintiff, but the defendant should bear the loss as between him and the plaintiff in this suit.

6. The fact that the defendant claims that he could not read the form of the notes is not sufficient to acquit him of negligence in signing them unless the jury find that there was some compulsion or threat practiced upon him sufficient to compel him to surrender his voluntary judgment in signing said notes.

7. Under the law of Minnesota the plaintiff is entitled to the benefit of the innocent purchase of the notes in suit by the Rock County Bank and if the jury find that the Rock County Bank did in fact purchase said notes *bona fidely* and without knowledge of any infirmity in them, the plaintiff is entitled to the benefit of such innocent pur-

chase by the bank and the fact that at the time he purchased them he knew of the infirmities now claimed by the defendant is of no avail to the defendant as against the plaintiff in this suit.

8. The defendant admits having signed the letter addressed to the bank, which is Exhibit P-10, and the evidence further is that this letter was
10 presented to the Bank at the time the last note, Exhibit P-4, was discounted, the effect of all of which is to estop the defendant from denying his liability on the said note, Exhibit P-4, and a verdict for the plaintiff, for the amount of the said note $1,152.00 with interest, must be awarded in any event.

Exhibit P-1

Luverne, Minn., Sept. 14, 1908.

On or before the first day of January, 1908, I or we promise to pay to the NATIONAL FENCE MACHINE Co. or bearer, Five hundred seventy six and no/100 dollars $576.00 for value received, payable at Luverne, Minn., with 8 per cent interest from date until paid.

(Signed) ED. G. FREICK.

P. O. Luverne, Minn.
Witness #23667.

(*Endorsed*)
Without recourse,
The National Fence Machine Co.
By, Chas. Kubach, Mgr.

Pay to the order of:
R. B. Hinkly,
without recourse,
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas.
Exhibit C.
C. C. N.
Oliver E. Ferguson, Commissioner.
Ex. P. 1.
6/10/12.

Exhibit P-2

Luverne, Minn. Sept. 18th, 1908

On or before the First day of April, 1909, I or we, promise to pay to The National Fence Machine Co. or Bearer, Fourteen hundred forty and no/100 Dollars $1440.00/100, for value received, payable at Luverne, Minn. with 8 per cent interest from date until paid.

ED. G. FREICK.

P. O. Luverne, Minn.
Witness 23673

(*Endorsed*)
With recourse
The Natl Fence Machine Co.
By Chas. Kubach
Pay to the Order of
R. B. Hinkly
Without Recourse
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas.
Plaintiff's Exhibit D.
Oliver E. Ferguson
Commissioner
Ex. P-2
6/10/12

Exhibit P-4

Exhibit P-3

Luverne Minn. Sept. 24, 1908.

On or before the First day of April, 1909, I, or we, promise to pay to the NATIONAL FENCE MACHINE Co. or bearer, ELEVEN Hundred fifty two and no/100 dollars $1152.00 for value received, payable at Luverne, Minn. with 8 per cent interest from date until paid.

(Signed) ED. G. FREICK.

P. O. Luverne, Minn.
Witness: 23679

(*Endorsed*)
Without recourse,
The National Fence Machine Co.
By Chas. Kubach Mgr.
Pay to the order of:
R. B. Hinkly,
Without recourse.
Rock County Bank,
Luverne, Minn.
By, C. J. Martin, Cashier.
Plaintiff's Exhibit "E"
Oliver E. Ferguson, Commissioner,
Ex. P-3.
6/10/12.

Exhibit P-4

Luverne, Minn. Sept. 26th, 1908.

On or before the First day of April, 1909, I, or we promise to pay to The National Fence Ma-

chine Co., or Bearer, Eleven hundred, fifty-two and no/100 Dollars with 8 per cent interest from date until paid.

ED. G. FREICK.

P. O. Luverne, Minn.
Witness 23684

(*Endorsed*)
Without Recourse
The Nat'l Fence Machine Co. by
Chas Kubach Mgr.
Pay to the Order of
R. B. Hinkly
Without recourse
Rock County Bank,
Luverne, Minn.
By C. J. Martin, Cas.
Plaintiff's Exhibit F.
Oliver E. Ferguson
Commissioner
Ex. P-4.
6/10/12.
C

Exhibit P-5

CHARTER
OF
The National Fence Machine Company.

The undersigned, citizens of the State of Kansas, do hereby voluntarily associate ourselves together for the purpose of forming a private corporation under the laws of the State of Kansas, and do hereby certify:

Exhibit P-5

First

That the name of this corporation shall be The National Fence Machine Company.

Second

That the purposes for which this corporation is formed are to transact a manufacturing and mercantile business to manufacture and sell fencing machines and other agricultural implements, to lease and sell territory for the sale of the same.

Third

That the place where its business is to be transacted is any where in the United States of America except in the State of Iowa but its principal office shall be at Abilene, Kansas.

Fourth

That the term for which this corporation is to exist is Twenty Years.

Fifth

That the number of directors of this corporation shall be Ten and the names and residences of those who are appointed for the first year are:

Charles A. Hodge,	Abilene, Kansas.
George C. Sterl,	Abilene, Kansas.
Charles H. Pattison,	Abilene, Kansas.
J. E. Neisley,	Abilene, Kansas.
F. E. Nottorf,	Abilene, Kansas.
J. S. Hollinger,	Abilene, Kansas.
Thomas Kirby,	Abilene, Kansas.

Exhibit P-5

Charles Kubach,	Abilene, Kansas.
P. H. Holleck,	Abilene, Kansas.
A. J. Poor,	Chapman, Kansas.

SIXTH

That the estimated value of the goods, chattels, lands, rights and credits owned by the corporation is Dollars.

That the amount of the capital stock of this corporation shall be Fifty thousand dollars ($50,000.00), and shall be divided into Five hundred shares, of One hundred ($100.00) Dollars each.

SEVENTH

That the names and residences of the stockholders of said corporation, and the number of shares held by each, are as follows, to wit:

In Testimony Whereof, We have hereto subscribed our names, this 24th day of January, A. D., 1895.

J. S. HOLLINGER.
G. C. STERL.
C. H. PATTISON.
J. E. MISSLEY.
F. E. NOTTORF.
C. A. HODGE.
THOMAS KIRBY.
CHAS. KUBACH.

State of Kansas, }
Dickinson County. } ss:

Personally appeared before me, a Notary Public in and for Dickinson County, Kansas, the above named, J. S. Hollinger, G. C. Sterl, C. H. Pattison, J. E. Neisley, F. E. Nottorf, C. A.

Hodge, Thomas Kirby, Chas. Kubach, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal, this 24th day of January, A. D., 1895.

P. L. FRIZ,
Notary Public.

(Seal)

My commission expires Jan. 7, 1897.

Exhibit P-6

G. S. Crawford, President,
Chas. Kubach, Gen. Manager.
G. G. Wyandt, Sec. and Treas.

THE NATIONAL FENCE MACHINE COMPANY,
of Abilene, Kansas.

Capital Stock $50,000.00
(Incorporated)

Luverne, Minn. Sept. 28, 1908.

Mr. Martin, Cashier,
Rock County Bank,
Luverne.

Dear Sir:

This is to certify that I have had some business dealings with Chas. Kubach, General Manager of the National Fence Machine Co., of Abilene, Kans.; also with the Company for which I have given my notes.

Exhibit P-6

This will advise you that the business done is entirely satisfactory with me and that it will be perfectly agreeable with me for you to handle my notes.

Very respectfully,
(Signed) ED. G. FREICK.

Ex. P-10.
6/11/12
Plaintiff's Exhibit "B"
JJH.

(*Endorsed*)
Exhibit "F."
C. C. H.
Filed Apr. 30, 1909.
O. E. Ferguson, Clerk.
H. for indent.

Exhibit P-6

C. S. Crawford,
C. C. Wyandt, Sec.-treas.

Chas. Kubach,
Gen. Mgr.

THE NATIONAL FENCE MACHINE COMPANY
Incorporated under the laws of the State of Kansas.
CAPITAL $50,000.00

SPECIAL GENERAL AGENCY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS: That the National Fence Machine Company, of Abilene, Kansas, has this 14th day of Sept. 1908, constituted and appointed ED. G. FREICK of Luverne, Minn. their true and lawful Special Gen-

eral Agent to sell The National Fence Machine and Molds, to manufacturer the Reinforced Concrete Fence Post, also to appoint agents to sell the said Machines and molds in the following territory to wit: Nobles County, Minn.

THIS INDENTURE WITNESSETH, that said agent hereby agrees to transact $576.00 worth of business for the said company in the above named territory and for the sum of $576.00 receipt of which is hereby acknwledged, we, the said National Fence Machine Company, hereby agrees to give and does give to the said agent 4 machines and 4 sets of molds, and the exclusive agency to sell machines and molds in the above-named territory as long as his business shall amount to twelve sales per year, not to exceed five years.

AND IT IS HEREBY FURTHER AGREED AND UNDERSTOOD, that as a part of the above consideration the said Company hereby further agrees to furnish to the said agent all additional machines and sets of molds at $2.50 each on board the cars at factory. The agent shall make a report to the Company at the end of each month. The company hereby further agrees to take notes for machines and molds when same are quoted good by local banks.

By CHAS. KUBACH, Mgr.
ED. G. FREICK.

Ship to Luverne, Minn.
P. O. " "

(*Endorsed*)
Exhibit D.
C. C. H.
"C" for ident.
Ex. P-6
6/11/12

Exhibit P-7

C. S. Crawford, President — Chas. Kubach, Gen. Mgr.
C. C. Wyandt, Sec.-treas.

THE NATIONAL FENCE MACHINE COMPANY
Incorporated under the laws of the State of Kansas.

CAPITAL $50,000.00

SPECIAL GENERAL AGENCY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS: That the National Fence Machine Company, of Abilene, Kansas, has this 18th day of Sept. 1908, constituted and appointed ED. G. FREICK of Luverne, Minn. their true and lawful Special General Agent to sell The National Fence Machine and Molds, to manufacture the Reinforced Concrete Fence Post, also to appoint agents to sell the said Machines and molds in the following territory to wit: All of the State of North Dakota in the United States of America.

THIS INDENTURE WITNESSETH, that said agent hereby agrees to transact $1440.00 worth of business for the said company in the above named territory and for the sum of $1440.00 receipt of which is hereby acknowledged, we, the said National Fence Machine Company, hereby agrees to give and does give to the said agent 10 machines and 10 sets of molds, and the exclusive agency to sell machines and molds in the above-named territory as long as his business shall amount to twelve sales per year, not to exceed five years.

Exhibit P-8

And it is Hereby Further Agreed and Understood, that as a part of the above consideration the said Company hereby further agrees to furnish to the said agent all additional machines and sets of molds at $2.50 each on board the cars at factory. The agent shall make a report to the Company at the end of each month. The company hereby further agrees to take notes for the machines and molds when same are quoted good by local banks.

By CHAS. KUBACH. Mgr.
ED. G. FREICK.

Ship to Luverne, Minn.
P. O. " "

(*Endorsed*)
"D" for ident.
Ex. P-7.
6/11/12

Exhibit P-8

C. S. Crawford, President — Chas. Kubach, Gen. Mgr.
C. C. Wyandt, Sec.-treas.

The National Fence Machine Company
Incorporated under the laws of the State of Kansas.

Capital $50,000.00

Special General Agency Agreement

Know all Men by These Presents: That the National Fence Machine Company, of

Exhibit P-8

Abilene, Kansas, has this 24th day of Sept. 1908, constituted and appointed ED. G. FREICK of Luverne, Minn. their true and lawful Special General Agent to sell The National Fence Machine and Molds, to manufacture the Reinforced Concrete Fence Post, also to appoint agents to sell the said Machines and molds in the following territory to wit: All of South Dakota, Except Minnehaha and Moody Counties.

This Indenture Witnesseth, that said agent hereby agrees to transact $1152.00 worth of business for the said company in the above named territory and for the sum of $1152.00 receipt of which is hereby acknowledged, we, the said National Fence Machine Company, hereby agrees to give and does give to the said agent 8 machines and 8 sets of molds, and the exclusive agency to sell machines and molds in the above-named territory as long as his business shall amount to twelve sales per year, not to exceed five years.

And it is Hereby Further Agreed and Understood, that as a part of the above consideration the said Company hereby further agrees to furnish to the said agent all additional machines and sets of molds at $2.50 each on board the cars at factory. The agent shall make a report to the Company at the end of each month. The company hereby further agrees to take noted for machines and molds when same are quoted good by local banks.

By CHAS. KUBACH, Mgr.
ED. G. FREICK.

Ship to Luverne, Minn.
P. O. " "
E. for ident.
Ex. P-8
6/11/12.

Exhibit P-9

C. S. Crawford, President, Chas. Kubach, Gen'l Mgr.
C. C. Wygandt, Secretary-Treasurer.

THE NATIONAL FENCE MACHINE COMPANY
Incorporated under the Laws of the State of Kansas.

CAPITAL $50,000.00

SPECIAL GENERAL AGENCY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS: That the National Fence Machine Company of Abilene, Kansas, has this 26th day of Sept., 1908 constituted and appointed Ed. F. Freick of Luverne, Minn., their true and lawful special general agent, to sell the National Fence Machines and Molds to manufacture the reinforced concrete fence posts, also to appoint agents to sell the said machines and Molds in the following territory to wit: All of the State of Minnesota excepting eight counties named on back.

THIS INDENTURE WITNESSETH, that the said agent hereby agrees to transact $1152.00 worth of business for the said company in the above named territory and for the sum of $1152.-00 receipt of which is hereby acknowledged, we, the said National Fence Machine Company, hereby agrees to give and does give to the said agent 8 machines, and 8 sets of molds and the exclusive agency to sell Machines and Molds in the above-named territory as long as his business shall amount to twelve sales per year, not to exceed five years.

Exhibit P-10

And it is Further Agreed and Understood, that as a part of the above consideration, the said Company hereby further agrees to furnish to the said agent all additional machines and sets of molds at $2.50 each on board the cars at factory. The agent shall make a report to the Company at the end of each month. The company hereby further agrees to take notes for machines and molds when same are quoted good by local banks.

(Signed) CHAS. KUBACH, Gen. Mgr.
ED. G. FREICK.

Ship to: Luverne, Minn.
P. O. Luverne, Minn.

(*Endorsed*)
Counties previously assigned, Rock, Nobles, Jackson, Martin, Pipestone, Murray, Cottonwood and Watonevan Counties.
"F" for ident.
Ex. P-9
6/11/12.

Exhibit P-10

Exhibit P-10, which is the same as Exhibit H for Identification, appears in full at pages 243-244.

Exhibit G for Identification

SPECIAL GENERAL AGENCY CONTRACT

ARTICLES OF AGREEMENT: By and between the National Fence Machine Co. of Abilene, Kans. and Ed. G. Freick & Son, of Luverne, Minn., WITNESSETH: that the said Company has this 28th day of September, 1908, constituted and appointed the said Ed. G. Freick & Son, their true and Lawful SPECIAL GENERAL AGENTS to sell the National Fence Machine and molds to manufacture the reinforced concrete fence post, also to appoint agents to sell the said machines and molds anywhere in the United States where the territory has not been previously assigned.

THIS INDENTURE WITNESSETH, that in and for the sum of $4520.00 receipt of which is hereby acknowledged, we the said Company hereby agrees to give and does give to the said agent 38 machines and 38 sets of molds and the SPECIAL GENERAL AGENCY to sell machines and molds at wholesale and retail as long as their business shall amount to $500 not to exceed five years; and as a part of the above consideration the said Company hereby further agrees to furnish to the said agents all additional machines and sets of molds to supply their trade or demand at $2.50 each on board the cars at factory.

It is hereby further agreed and understood that after the business shall have amounted to $20,000.00 by the said agents, then the said company shall receive twenty-five per cent (25%) of the proceeds of the business less $2.50 each for all machines and sets of molds used by the said agents in transacting the said business.

Exhibit G for Identification

It is hereby further agreed and understood that the said agents shall not assign more territory in any one assignment, or contract, than two counties without they shall first obtain the written consent of the said Company. They shall also make monthly reports in writing to the said Company of the conditions of their business; also make monthly remittances at the end of each and every month of all amounts due to the said Company.

It is hereby further expressly agreed and understood that the said Company shall bear no part of the expense or pay any expenses whatever relating to the said agency; and all assignments of contracts and notes by the said agents shall be made without recourse on the said Company.

It is hereby further agreed and understood that the said agents hereby reassign to the said Company, all rights, grants and privileges previously assigned to them by the said Company, and release the said company from all prior contracts.

(Signed in duplicate)

THE NATIONAL FENCE MACHINE CO.

By, Chas. Kubach, Gen. Mgr.

ED. G. FREICK & SON,

Special Gen. Agts.

Plaintiff's Exhibit "D"
J. J. H.

(*Endorsed*)
Contract
The National Fence Machine
and
Ed. G. Freick & Son.
Filed Apr. 30, 1909
O. E. Ferguson, Clerk.
G. For Ident.

Exhibit I for Identification

Luverne, Minn. Sept. 19th, 1908.

Rock County Bank,
Luverne, Minn.
Gentlemen:

I have done considerable business with Mr. Chas. Kubach, general Manager, of the National Fence Machine Co. and also with the said Company and wish to advise you that the business is entirely satisfactory with me and it will be perfectly agreeable with me for you to handle my notes.

Very Respectfully,
OLE T. OLSON.