

14630

No. _____

Supreme Court of Illinois

Milk

vs.

Moore

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 192

J. W. Middleton & Co., Stationers, 126 Lake St.

Miller vs. Moore

Samuel Milk & Franklin
 Edward Surworn of William
 Howard deceased - Appellants } Appeal
 vs } From
 Foster Moore - Appellee } Progress

The said appellee desires
 to present to the Court in addition to
 his printed brief and argument a few
 suggestions in writing. To wit, he had not the oppor-
 tunity of seeing the Abstract of Record when
 he prepared his printed brief and
 argument and therefore he could
 not determine whether it would be full
 or not, but upon examination of the abstract
 after he arrived at Ottawa he finds it does
 not fully present the evidence taken on the
 part of the said defendant; Therefore
 the defendant refers the Court to
 the evidence of all the witnesses to determine
 the question of the driver of the 424 head
 of sheep which were let to said
 defendant by said complainants - And
 the Court will fully perceive and
 be convinced from all the evidence
 that said sheep which said defendant
 obtained of said complainants, were composed
 of the sheep which Charles Owen drove from the
 State of Ohio in the month of January or February
 1851 to the Middlefork of Vermilion River

and then sold them to Charles Young, who was then
buying sheep for said Complainants, and they
together with other sheep were by said Young driven
to Logan County and delivered to Complainants
and they said Complainants let said Defendant
have 424 head of said sheep upon the terms
as stated in the Mortgage & Condition in
question, that said sheep were diseased
from the time said Drew took them to
Middlefork of Washington River to the
time said Defendant received them and
in consequence of said disease a very large
proportion of said sheep died while they
were in the hands of said Defendant all
of which is abundantly shown by the
evidence -

James Fletcher &

Charles Keeney

Attys for Deft in error

192
Journal of the
by

Fort Moore

Additional Argu.

20,64
23,68
43,72
111,68
155,40

Filed Apr. 20, 1864
L. Wilson
Clerk.

Melk & Nancey } Supreme Court
 7 Moore

April Term AD 1864

In regard to the authenticities cited by the
 appellant upon the instructions given by
 the court below at the request of Moore
 it will be observed that the authenticities
 are uniform that the party making
 false representation in the sale of an
 article must know that the representation
^{were} ~~is~~ false at the time he made them.
 The cases in 3rd Decm and in Bress's
 decision. In the case in 4th Decm 570
 cited by appellee the matter before the court
 was as to representation of the mother itself
 and not the quality. That the represen-
 tations made by the vendor were made
 as to his title and he must have known
 that he had no title as to the particular
 intent — he was bound to know his
 title and of his representations, he sold
 what he did not own and it was on
 account of a total failure of title to that
 particular intent that the court granted
 relief. — This case seems to have been
 decided upon the grounds that the vendor
 must have known that he was selling
 what he did not own, and the question
 whether he ~~is~~ false ~~is~~ representations made
 innocently are equally fraudulent as
 if ^{the party making them} he knew them to be false did not

seem necessary to have been decided
for it was evident that in the case
in 4th Secm the party making them
must have known the representations
were false.

Geo B Jarm.
Att for Appellants

192-
Hick & Howard
v
F. Moore

Additional Argument

Filed Apr 20. 1864
J. Leland C. M.

[Gazette Print, Kankakee City, Illinois.]

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D. 1864.

LEMUEL MILK AND FRANKLIN HOWARD, *Appellants*,
vs.
FOSTER MOORE, *Appellee*.
} *Appeal from*
} *Livingston.*

ARGUMENT OF APPELLANTS.

This is a suit in chancery to foreclose a mortgage given by defendant Moore to secure the delivery by him to complainants of 424 head of sheep leased by said complainants to said Moore or pay \$634.50 in default thereof, as also to secure the payment of the wool rent of 634½ pounds for said sheep for the term of three years. The bill charging that Moore had paid the whole amount of wool rent, but had failed to deliver the whole number of sheep and prays that the land in said mortgage specified may be sold to pay the balance due at the expiration of the time.

The defendant in his answer admits the mortgage and contract and sets up in excuse for the non-fulfillment of his part of the contract that said sheep were diseased at the time he received them, and that Wm. Howard, partner of said

complainants knew they were diseased and fraudulently represented that they were sound and healthy sheep and relying upon said representation of said Howard, he executed said mortgage; that said sheep were diseased at the time he received them, and that they commenced dying soon after he received them and continued so to die up to the first day of January, 1852, when 184 had died of the disease they had when said defendant received them, that he has paid all the wool due for rent and delivered to Milk 146 sheep, and also paid Milk \$111.68 on sheep not delivered; charges that he is greatly damaged in consequence of said sheep being so diseased.

The defendant Moore in his cross bill, sets forth the same matters that are contained in his answer to the original bill; the making the contract; giving mortgage to secure the performance thereof, the same payments being made but charges that Milk give a receipt different from what he wished to have given for the payment made Nov. 18th, 1854. Charges that said sheep were diseased when he received them and that Howard fraudulently represented them to be sound and free from disease; that 194 had died up to January 1st, 1852.

Milk & Howard answer denying all knowledge on part of complainants, or Wm. Howard, that said sheep were diseased, and denies that said sheep were diseased on the 11th day of June, 1851, but charge that said sheep died in consequence of neglect of said Moore to take proper care of them; admit the payments were made as specified in said receipt and endorsed on said mortgage, and in no other manner whatever.

Then inasmuch as said Moore admits the making of the contract; giving the mortgage and receiving the sheep on the contract; the issues seem to be:

First. Whether said Moore has paid the annual rent for the use of said sheep during the said term of three years, and

Second. Whether he has returned the said sheep or paid for the same to said complainants and if not what he has paid and what remains due, and

Third. Whether the sheep were diseased on the 11th day of June, 1851; and if so, did Howard know that they were diseased and fraudulently conceal the same from Moore, and did said sheep die of such disease; and if so,

Fourth. What amount of damages has Moore sustained in consequence thereof.

In regard to the amount of payments of the annual wool rent and the re-delivery of the sheep, there can be no controversy; both parties agreeing as to the amount. The only difference being as to the application of the payment made Nov. 18, 1854, as per receipt on page 23, of record. Moore charges page 55, that he wanted a different receipt; that \$50.10 was to pay balance of wool due, and the residue, to-wit, \$155.10 was to be paid on deficiency of sheep, but that Milk wrote the receipt as specified, to-wit: \$23.68 to be applied on interest due on wool not delivered when due and \$20.04 as interest due on sheep not delivered on said contract when due on said contract; also \$111.68 in part pay for sheep not delivered on contract.

There is no proof as to any of the amounts or application of the payments except the receipts, in the whole evidence in this case, except the deposition of H. H.

Cooley, who testifies that he went to Moore's about the time the sheep became due on the contract, and Moore could not then pay them; that he went to Moore's again in about one month afterwards, expecting to get the whole number of sheep as talked between him, Milk and Moore the month previous, and only got 146 sheep; Moore stating that he had not bought the store sheep to replace, but would see Milk and fix the time with him as to the payment of the balance; that the next time he saw Moore was at Milk's house, Nov. 18, 1854, when the last payment was made, being the day of the date of the said receipt. Cooley states that Milk received at that time nine head of cattle from Moore, and at that time Moore stated that if Milk would wait on him one year longer, he would pay the balance all up; that said cattle were worth between eighty and one hundred dollars.

There can be no doubt but the value of these cattle were included in the receipt of that date as Moore neither in his answer to the cross bill, or in his cross bill sets up such a claim for credit, but speaks of the payments that Milk admits, as being wrongly applied.

Then there being no evidence whatever as to the payments being wrongly applied, the presumption is that the receipt was given in accordance with the agreement of the parties at the time; and that Moore cannot now object to said payments being so applied without some proof that it was not in accordance with his intentions or wishes, and which he admits in his answer to the original bill, (see page 21) as being properly made.

Then we find that of the 424 sheep, 146 were delivered to said Milk in part pay of said contract, which would leave 278 due, which would amount to \$419 at \$1.50 per head, and from which deduct the payment of \$111.68 specified in said receipt would leave \$305.32 and interest thereon from Nov. '54, up to which time Moore had paid interest.

Third. In regard to the issue of the disease of the sheep, there is conflicting testimony, and the evidence as to the knowledge of said William Howard, that said sheep were diseased, is far short of what it should be to make the representation fraudulent, even admitting that said sheep were diseased June 11, 1851.

We contend that Moore, to make the defence set up by him good, he must show that said sheep were diseased June 11, 1851, and that Howard knew they were so diseased and represented them to be free from disease and thereby induced said Moore to enter into the contract; in order to make the transaction fraudulent on part of said Howard, there being no warranty in the contract, the knowledge must be proved on Howard.

See 3d Scam., 504; 1st Johnson, 417; 2d Caines, 161. *13 John 295; 15 Mead 351-357*

The only evidence as to Howard's representation of the sheep being sound, is that of the children of defendant, to-wit: George W. Moore and Lucinda Patterson; both of whom swear that Howard said at the time of making contract that the sheep were sound and free from disease, and that he would warrant them; one of which, to-wit Geo. W. was at the time 12 years old, only, to-wit: 18 on 9th of January, 1857. See page 112 of record. And both of said witnesses are contradicted in several particulars. Lucinda swears that Moore had troughs in which to feed the sheep in the winter of 1851, and fed hay in racks and corn both in troughs and on ground. See page 144, Int. 131, 14.

14 Mead 199, 2d Lutz;
3d Slout Post 322
1st Gen (West) 174
2d Hall (SC) 253
18th John 402

And Geo. W. swears that his father had no troughs in which to feed the sheep the first winter, page 113, interrogatory 11; and Geo. W. says on page 114, Int. 25, that Milk got the residue of the flock that did not die, and H. H. Cooley says in his deposition that when he first went to Moore's to get the sheep Moore wanted to take the best and fattest ones to Chicago and sell, and buy store sheep to fill the contract, and upon Moore's return one month afterwards, Moore said that he had to use the money he received on the sale of these fat sheep to pay a bank debt.

The witness Horricks also swears that Moore had no troughs in which to feed said sheep during the first winter, and from these contradictory statements we contend that the jury ought to have disregarded the evidence of said George W. Moore and Lucinda Patterson. In the whole evidence they manifest a willingness and anxiety to answer the interrogation of defendant in a manner that will be beneficial to him while in the answers to the cross interrogation, they don't know many incidents and matters connected with the case which if truthfully answered might damage the cause of said defendant.

But admitting for the sake of the argument that Howard did make the representation that said sheep were free from disease, &c., what is the proof that they were diseased.

On the part of the defendant he produces many witnesses who say themselves they are unacquainted with the management and diseases of sheep, and who also say that they saw the sheep soon after Moore received them and that many looked poor, thin and sickly; that many of them died during the summer, fall and winter of the first year, and that they believe or think the sheep were diseased on the 11th day of June, 1851, and from the whole course of their testimony is evident that they came to the conclusion that said sheep were so diseased from the fact of so many of them dying the first year.

The only witness who has stated the number that had died up to feeding time was John Paul who states that he don't think that more than ten died before feeding time; page 199, Int. 9. And that that number is not more than the ordinary loss of a healthy lot of sheep in this country of that sized flock; and the witness Horricks says that he remembers of only one dying from the time he went there up to the time they were taken up to feed, a space of a week or ten days as he says.

It is true that Moore's children swear that many of the sheep died daily from the time he received them up to the first day of January, 1852, which would make about two hundred days, and Geo. W. Moore says at that time 184 had died and who is the only witness that states the exact number that had died; and he makes his estimate of the dead ones by counting the balance of the flock.

It will be recollected that all the witnesses in this case agree that the greater number of the sheep that died the first year, died after feeding time, and in the language of witness Foreman Moore, there were large piles of them that looked like snow; and the witness asked defendant why he did not pull the wool off, he replied that they frequently froze before he could do so; no one but the two children of Moore state much about the sheep dying during the first summer, and they say that they continued to die almost daily up to January 1, 1852, which could not

be the case when the greater portion of the sheep that did die died after feeding time, and in the fall and winter of the first year, as all the witnesses agree on part of the defendant who testify as to the time said sheep died. The witness Horricks says (page 157,) that when he went to Moore's, about the middle of the fall of 1854, Moore then had about 400 sheep, might be some over and some less; from which evidence it is evident that the sheep died mostly after they were taken up at feeding time in the fall.

I believe there is only one witness of the whole number of defendant's who professes to be acquainted with the management and diseases of sheep, and that is John Paul; and he admits himself that he is not so good a judge and well acquainted with sheep and their diseases as John Streat, Hiram Vennum and C. C. Vennum and John Axtell, four of the complainants' witnesses.

John Paul says (page 188) that about one-fifth of the sheep were very indifferent sheep, and he thought they were not in good health; and on page 193 he says he don't profess to be a judge of the diseases of sheep or their causes; but thinks a few of the indifferent sheep had the scab and the balance had the rot, and on page 194, (Int. 40) says he never saw a flock before or since that had the rot, and on page 199, he says that he formed the opinion in part of the diseases of this flock of sheep from their appearance, general opinion of the neighbors, and what one Thomas Vanmeter told him about their being the sheep he saw on Vermillion that were diseased.

This is the sort of evidence by which the defendant seeks to prove that the sheep were diseased on June 11, '51. We think we have proved by men experienced in sheep business and in the diseases of sheep, that a flock of 424 sheep that have the rot, scab or any other diseases mentioned, could not do so well as those did from June 11, in '51, up to feeding time in the fall; that if they had been diseased at that time many more would have died before feeding time; that these witnesses are mistaken in their opinion of their being diseased June 11th, evidently predicating their opinion upon the fact of so many of them dying during the first year; and the fact that some were running at the nose and coughing which are symptoms of both rot and common cold; and the complainants contend that the cause of the death of so many of said sheep was the want of care and proper management of them after they were taken up from the herding ground; that the sheep were free from disease on the 11th day of June, 1851; and did as well as sheep commonly do up to the time that Moore took them up in the fall; that the sheep, and about the only sheep, that died before feeding time were seven or eight old ones which Moore said that Howard had given him; thrown in and not counted.

In support of this position we have the deposition of the neighbors of Moore, who are acknowledged as good judges of sheep and their diseases in the neighborhood, and in the language of John Paul—there are no better judges.

We first introduce the evidence of Alfred Beckett, who says that he had a conversation with Moore soon after he got the sheep, that Moore was well pleased with them; and nothing said about their being diseased. He also says that he saw the sheep in August or September following; they were covered with dust—looked bad, everything along where they were was burnt up and a poor

chance for sheep to live; that driving sheep in the dust will make them run at the nose, &c.

Hiram Vennum says that the first time he saw said sheep to notice them particularly, was during the first summer; his sheep, Moore's and John Strean's got mixed, they then noticed the sheep particularly and thought they were fine wool and had been well wintered, and considered the flock looked very fine; a few looked rather scaly and Moore told them they were thrown in; there was nothing about said sheep to indicate disease, as he could see.

He told Moore that if he took good care of the sheep he might do well, but if not it would be a bad job, as sheep required more attention than any other stock, Moore replied that he had his pick out of nine or ten hundred.

Vennum says (page 238) that he saw the sheep in the fall in the stubble-field where the sheep seemed to be suffering for want of something to eat; they had eaten it all up and looked hollow and bad; this was a while before feeding time; in this he is corroborated by John Strean and John Axtell, who also saw the sheep in the same circumstances.

Vennum says that he was at Moore's during the first winter and took particular notice of the hay, and did not consider that it was fit to winter sheep on; it was not the right kind of grass, and had been cut too late and stood too long in the cock; that while the sheep were kept up but little more than half of the sheep could get to the rack at once; that he remarked to Strean that if those sheep had to eat that hay they would die before spring.

And from his knowledge of Moore—his manner of farming, &c., he does not think Moore could have taken a lot of sheep and done well with them; that he thinks from what he knows of Moore as above stated, that the cause of so many sheep dying during the first year was want of care, right kind of feed, and want of a proper place to keep them; that the reason that he took so particular notice of things about Moore's was that it was in every one's mouth that those sheep would break Moore up; and he had a curiosity to see if he was taking proper care of the sheep; that Moore's boys done the bigger part of the work on the farm, and taking care of the stock; and no boys of their ages were capable of taking care of that number properly.

In these statements Mr. Vennum is fully sustained by the other three witnesses, John Strean, John Axtell and C. C. Vennum, of whom their witness Paul says there are no better judges of sheep and their diseases; Strean and Axtell both testify of having a conversation with Moore late in the fall, informing him that he was neglecting his sheep and that he must not let them run down in the fall; that in their opinion they were then running down, and if he did not take better care of them they would die before spring; also informing him that his hay was not of good quality and not the kind for sheep; and both saw the sheep confined in the stubble field where they appeared uneasy and running down; all agree that no man who was unacquainted with raising sheep, and had no better improvements and conveniences than Moore, and so small a farm as his, could take that number of sheep and do well with them, and Vennum told Moore that if he wanted to experiment with sheep he must begin with a less number; that he ought to have at least 100 acres of tame pasture for them, and many other con-

veniences that Moore had not; that they had been acquainted well with Moore and his premises over 20 years.

These four witnesses don't hesitate to say that there was nothing about said sheep to indicate disease, that a man who is acquainted with raising sheep can easily see the difference between a diseased sheep and one that has run down for want of care, though they cannot easily explain it to one not acquainted with sheep; that they could not be easily mistaken in the health of a lot of sheep by examining them as closely as they did Moore's.

Strean and Hiram Vennum say their sheep got mixed with Moore's and there was no bad effect from it.

John Axtell says the sheep were at his house three days and he assisted in handling and separating said sheep; and thought they looked extraordinarily well for that season of the year, and told Moore so, except a few which Moore replied were given to him by Howard; that he saw the sheep in the stubble-field in the fall several times; the first time in August when they looked well.

That the disease called the scab will very soon run through the whole flock; when it once gets into the flock they will die rapidly; that rot and scab are contagious; that neither disease will remain in a flock but a few days before it will become destructive to sheep if not cured.

In this he is also sustained by R. W. Andrews, who swears he is a regular sheep doctor; that the causes of rot is pasturing in low, flat land, and that sheep that had the rot cannot live more than six weeks; that the first symptoms of the rot is a reddish yellow appearance about the eyes, a paleness of the lips, take on flesh for about six weeks, then go onto a decline and six weeks or two months finishes them.

There are none of these symptoms proved; he also says that the result must be disease and death of a large number of a flock of 400 kept as Moore is said to have kept these sheep: that one-third of the flock were diseased June 11, 1851, at least one-half of the flock would have died before feeding time if pastured and kept on low, flat land.

Axtel further says that he saw the sheep during the first fall and winter at Moore's, mired down, and he informed the boys of it who replied in a manner that showed a carelessness and recklessness of duty, which may well account for the great destruction of the flock.

The witness S. S. Amos also saw the sheep in such a condition that convinced him at once that the sheep must inevitably die before spring, if not better cared for, though he never saw the premises before.

It is true Horricks swears that he took good care of them and that they had what they wanted to eat, &c., but with this is the extraordinary statement that he fed the sheep on an average of two ears per day each, during the winter, and in the spring Moore had 400 or 500 bushels left from 35 acres, of an inferior lot of corn, and he and Geo. W. Moore say his father bought no corn that year. The witness Wm. Sopp swears as to the amount of corn being 35 acres that year, and that Moore had 10 head of cattle; 4 head of horses, and 12 or 15 head of hogs, (page 180,) and Axtell, Strean, Hiram Vennum and C. C. Vennum swear that they never saw a fair crop of corn raised on Moore's farm.

Wm. Sopp also says (page 127) that Moore's racks in which he fed the sheep were—one 56 feet long and the other 42 feet long, which would make 98 feet of racks for over 400 sheep to feed from; and John Streat says each sheep ought to have at least one foot of rack, and the racks should be sufficient for all the sheep to eat at once, or the weaker ones which need the most nursing will be crowded away until the best feed is selected by the stronger sheep; consequently the weaker ones must inevitably run down and die.

These are the witnesses upon whom we rely to show the condition of the sheep when Moore received them, and the careless and reckless manner in which they were cared for, and we think them much more reliable than the class of witnesses introduced by Moore to prove that they were diseased, and Howard fraudulently represented them to be sound; from the acknowledged experience of the complainants' witnesses in sheep raising, and the acknowledged inexperience of the defendant's witnesses; their contradictory and most extravagant statements.

But further, to show the good faith of the complainants in the matter we go back to where the sheep were bought and proven by the persons who bought and gathered them up, to-wit: C. S. Young, and Wm. Thurman; they bought the very best of the several flocks, from which they made their selections; that they bought nothing but good, sound and healthy sheep, and delivered them to Howard at John Axtel's, in Iroquois county in the forepart of June 1851; that they had never known a diseased sheep in the neighborhood where this flock was purchased until several years after this flock was purchased; that they are both experienced men in the sheep business.

C. S. Young saw some of the sheep the first fall after Moore got them and asked Moore how they were doing, and Moore remarked that they were doing very well; that he heard a conversation between Milk and Moore in April, 1854, when Moore stated that he had had bad luck with the sheep the first winter, but he thought it a good deal owing to his feed; that his feed was not put up as early as it should have been; that he would have the sheep ready for Milk on the day they were due, and he must be there to receive them.

This certainly does not look like Milk's agreeing to make a deduction of the number of sheep to be delivered to him, or of there ever being any conversation prior to that time on the subject as set up in Moore's cross bill.

Witness Wiggins heard a conversation between Moore and Howard, during the summer of 1851; Howard asked Moore how the sheep were doing; Moore replied very well; Howard asked how many that he gave him had died, and Moore replied two or three of them had died.

The defendant's counsel relies with apparent confidence upon the depositions of D. S. Holbert and Nelson Moore to prove that the Chas. Drew flock went into the flock from which Moore obtained his 424, but there is no evidence that the Drew flock went into that flock, except hearsay evidence.

D. S. Holbert says he understood from C. S. Young, that he was going to drive them to a flock of his near Kerr's, and then the flock was to be taken to Iroquois county and the residue to Chicago; but there is no evidence that they went there or what finally became of them, more than Young took them away;

and Young states in his evidence that he has been in the habit for the last 15 years of buying sheep, cattle and hogs for any person who calls on him for assistance.

The witnesses Holbert and Nelson Moore state that the Drew sheep looked bad, were poor and many of them died about the last of feeding time, though they both say that the cause of so many dying was want of feed and proper care. Holbert says they were turned out to grass 10 or 12 days too soon, and thinks there was no disorder among the sheep though they were poor and thin.

C. S. Young, Wm. Thurman, J. Kerr, John Axtell, C. C. Vennum, H. Vennum and John Streat swear positively that the flock that were driven to Axtell's by Young, all looked sound and healthy, and some thought they looked extraordinarily well and were fine wool sheep also, and all say they believe them to be sound and healthy sheep.

Now these last witnesses are either mistaken in their opinion in this matter, or the Drew sheep never went into the flock that went to Axtell's, and what is the evidence of their being mistaken?

There can be no question but that many of the Drew flock died about the latter part of feeding time and became much reduced in flesh of being turned out to grass too soon, and want of feed and proper care from February, 1851, up to that time, and could not be easily mistaken by good judges of sheep for good, sound, healthy, hearty sheep.

There is certainly a doubt about the Drew flock going into the flock which were driven to John Axtell's, and inasmuch as it devolves upon the defendant to prove that the sheep were diseased sheep or diseased sheep among them, from which he selected, we claim the benefit of that doubt, even had there been no evidence that the Axtell flock were good sound, healthy and hearty sheep.

But we think the Drew sheep were not diseased, that from the evidence of the defendant's witnesses alone, it appears that they were not properly cared for from the commencement; that the whole 800 or 900 were kept as Holbert says in a nice dry lot, but not more than large enough for 100 sheep. Holbert also says only about sixty of that number died from February 1st, until May last or June first, and Nelson Moore says he thinks 100 or 150 died during that time. We can account for this difference only in the different opportunities of knowing about the matter. The man who attended the sheep boarded with Holbert, while Nelson Moore was within three-fourths of a mile of them only 10 days, when the sheep were moved further away from him. Holbert says he saw the sheep a great many times; saw them nearly every day from the time they came there until they were taken away. Holbert also says that he thinks it was want of feed that caused so many to die.

Young and Thurman who bought the sheep for Howard, say they bought between 1,700 1,800 sheep for Howard, when Moore and others who state as to the number that were at Axtell's, say that there were 900 or 1,000 sheep from which Moore selected his 424.

From this state of the facts and circumstances it is evident that the Drew flock could not have been among the number of those at Axtell's and from which

Moore selected his 424; they were too much reduced in flesh to pass for the kind of sheep that Howard received at Axtell's of C. S. Young. Had there been only a small number they might have been mixed with a flock of 800 or 900 and all passed for good, sound, healthy sheep; but when there were 800 or 900 sheep so reduced as the Drew sheep were proved to be, put with others to make up the number at Axtell's, it does not look reasonable that so many good judges of sheep should mistake them for good, sound, healthy, hearty sheep, and sheep too which Hiram Vennum says must have been well wintered from their looks.

In regard to the sheep which A. Wilson received of Howard out of the same lot, we contend that the evidence clearly shows that it was on account of bad management that so many of his sheep died.

It certainly showed good faith in Howard in going with Wilson to examine the flock when first told that he thought they had the scab; he went immediately and examined them and became satisfied it was not the scab, but as Wilson himself says he knew nothing about sheep, and he was "very scary," he thought they had all sorts of diseases, and he wanted to get rid of them, and did do so; and we follow that flock up to where they were well taken care of and find they did well afterwards.

The agent of complainants, Enos, says he was at Wilson's in Jan. or Feb., 1852, from sundown one day until 10 or 11 o'clock the next day, and the sheep had not been fed up to the time he left; the sheep appeared hungry and uneasy, and were all in one yard; he also says that he received the sheep of Wilson and took them to Milk's, and put them with his other sheep and they all did well; there was no disease among them. The remark of Howard to Wilson that there was one lot that he was "jubilous about, himself" was relied on somewhat by defendant, as showing knowledge of Howard that the sheep were diseased; but the answer is exceedingly vague and uncertain; if the word "jubilous" means doubtful; there is nothing in the answer to show whether it refers to the condition, health, soundness or number of the sheep, or whether he referred to this flock, the one he let Moore have, or any other lot he had let out.

The evidence of the witnesses John Streat, John Axtel, Hiram Vennum and C. C. Vennum as to the health and general condition of the sheep when Moore took them; the good condition they were in up to feeding time; and their knowledge of the manner that Moore cared for them from the early time they were taken up, corroborated with other evidence of extreme bad management and total disregard of their condition; together with the evidence of the agents who purchased the flock that they procured none but sound, healthy sheep, ought certainly to be entitled to greater credit in regard to the condition of the sheep than the witnesses of defendant who all say, except John Paul, that they knew nothing of the business of raising or managing of sheep only on a small scale, of from 15 to 50 sheep; and even Paul admits that the sheep were badly cared for and apparently predicated their opinion of the sheep being diseased upon the fact of so many of them dying during the first year.

There can be no doubt but that the defendant's witnesses are mistaken in their

opinion, those who detail any of the circumstances of the care and keeping of the sheep are contradicted in several particulars; while on the part of the four principal witnesses of complainants they detail minutely many circumstances and incidents upon which they predicate their belief of the soundness of the flock as well as the circumstances upon which their belief is founded that the sheep died the first year from want of care; proper feed and keeping the sheep in an improper location; and in none of these statements are they contradicted, except the quality of the feed given by Moore to the sheep, and in this particular the complainants' witnesses state of having seen the hay before it was hauled or stacked, and while Moore was putting it up, as also seeing it in the racks and some of them called Moore's attention to the fact of its not being of the proper quality; that if he had no better hay the sheep would die before spring. They are also corroborated in this statement of the improper quality of the hay by the admission of Moore made to Milk at the house of C. S. Young, in March, 1854, that through sickness or some other cause he did not get his hay put up as soon as he would like to have done; that the cause of so many dying the first year was a good deal owing to his feed. Paul also states that the hay in the racks looked very indifferent.

There is one other witness whose testimony ought to have some weight in determining this cause, and that is H. H. Cooley, who testifies of being at Moore's when the sheep became due in 1854, of Moore's excusing himself for not being ready to deliver the sheep then, but would in one month's time; of his being again at Moore's at the end of the month and then only got 146 sheep, at which time he again excused himself for not being able to then deliver the whole amount of sheep; that witness again saw Moore at Milk's, Nov. 18th, 1854, when another payment was made, and Moore again asked further time which was given to him by Milk, and in none of these instances did Moore urge as an excuse for not delivering or paying for the sheep; that they were diseased when he received them, or even intimated such a thing, but only wanted time and he would pay the whole matter up.

Now if there be any truth in the statements that Moore was so greatly damaged in consequence of said sheep being diseased when he received them, why does he go on making payment after payment with so much difficulty, and not a word said about the sheep having been diseased.

It is quite evident that such a thing was never thought of until after the suit was brought to foreclose, as stated by Hiram Vennum or John Streat, that he never heard of its being contended that the sheep were diseased when Moore received them; until after suit was brought in Nov., 1855.

We have also the evidence of C. S. Young that Moore in the spring of 1854, was making his arrangements to pay the whole amount when they became due—that Moore said that he had bad luck with the sheep the first year, but he thought it was in consequence of his hay not being put up in season, and in this opinion John Streat, Hiram Vennum, John Paul, C. C. Vennum, and others agree with Moore. He had not yet discovered that the sheep were diseased

when he received them; if he had he did not take the course that a prudent man would have taken.

When Wilson fancied that his sheep were diseased he like a prudent man immediately sent for Howard who came at once to set the matter right. Had Moore fancied his sheep diseased when he received them, and had gone to Howard and informed him, he has no right to conclude that Howard would not have gone as willingly to see his sheep also and rectified any fancied wrong or fault, and no doubt Moore would have done so had he thought them diseased.

In regard to the amount of damages Moore has sustained, if it be considered that Moore has fully sustained his defence, we wish to refer only to the evidence of John Paul, one of defendant's witnesses, and who testifies (page 196,) that Moore's damages are not more than one and a half dollar per head for the sheep that died; that sheep could have been bought for that amount the first year; that sheep could have been bought in the spring of 1854, at \$1.25 per head—his estimate of the damages is the proper estimate—the estimate of the other witnesses as to the damages were wholly speculative.

There is no proof that Moore was at any extra expense, save giving them tar on one occasion, which had a beneficial effect. The witness Horricks says he was at some more trouble in putting the sheep in the barn, carrying them over the fence; and his time was principally occupied in taking care of the sheep, for which purpose he was hired. And Paul says the wool from the dead sheep ought to and would have paid the extra expense. This would make the damages \$276, even admitting that all the sheep that died up to Jan. 1st, to-wit: 184 head died of the disease, which was not proven. Geo. W. says he got the number that died by counting the balance of the flock; this would leave a balance due the complainants \$29.32, and interest.

We also contend that the 3d, 4th, 5th, 6th, 7th, 9th, 10th and 13th instructions given to the jury on part of defendant are not the law as applied to this case and are calculated to mislead the jury. There being no warranty in the contract it must be proved that Howard fraudulently represented the sheep sound, and the fraud consists in representing them to be sound when he knew they were unsound. See 3d Scam. 504; 1st Johnson, 417; ^{and others} above referred to.

In regard to the instructions given by the Court on its own motion—the first one is right—what amount is due complainants on contract.

2d. Whether complainants practiced fraud or deceit on defendant as charged in answer to bill and in cross bill selling sheep for sound, knowing them to be unsound; or with a warranty that they were sound and they were not. There has been no warranty, the latter clause of this 2d instruction is erroneous, the first part is the law. The latter clause of the 3d instruction is erroneous for the same reason.

The 5th and 6th instructions of the court are erroneous for the reason that they have been previously instructed, what issues to find and how to find them and these do away with the former instructions.

We also contend that the verdict of the jury did not determine for which party the issues submitted to them were found. The issues were not whether there was or was not a cause of action. The court had already entertained it as a cause of action; and the matter submitted to them by the issues made up, was

whether or not the sheep were diseased when Moore received them, and if so diseased did Howard know it; and knowing them to be diseased did he represent them to be sound and free from disease, and if so what amount of damages has Moore sustained in consequence of such fraudulent representation. The issue as to the amount that was due to complainant *on the contract*, was not and ought not to have been submitted to the jury.

It was for the Court to determine that matter, and then with the aid of the finding of the jury on the issues of fraud and damages to make such decree in the premises as should seem equitable and just.

The finding of the jury would justify the conclusion that the defendant had fully paid the complainants the full amount due on the contract, it is as follows: "We the jury find no cause for the complainants' action against the defendant."

The defendant neither in his answer to the original bill, or the cross bill contends that he has fully paid up all that was due on the contract but sets up other issues in accordance of his fulfillment thereof and these were the issues submitted to the jury, and they were not authorized to find the verdict they did in the case. The issues should therefore have been submitted to the jury.

The court below evidently granted the decree for the defendant upon the finding of the jury solely; and that verdict being unauthorized the Court should have either submitted the issues to the jury, or should have granted a decree of foreclosure for the amount due on the contract.

May it please your Honors, We think in the whole evidence in this case the defendant has wholly failed to prove the issues tendered on his part to the Court, that he has neither proved the sheep to be diseased when he received them; though there is evidence that some of them looked bad at that time, but as a general thing the flock looked fine as stated by the best of judges, and there is no evidence that Howard ever thought they were diseased; never having seen them until they were delivered to him at John Axtell's in Iroquois county.

We think the complainants are fairly and justly entitled to a decree for the sum of \$304.68 and interest thereon, from the 18th day of Nov., 1854, and that such a decree will be fully sustained by the evidence in this case.

GEO. B. JOINER,
Solicitor for Complainants.

192 14
Chuck & Harold
Horn

Burt & August

Given April 20, 1864
J. Leander M

GAZETTE PRINT, KANKAKEE CITY, ILLINOIS.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

LEMUEL MILK AND FRANKLIN HOWARD, SURVIVORS OF WILLIAM HOWARD, Deceased, vs. FOSTER MOORE, Appellee.	} <i>Appeal from Iroquois.</i>
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ABSTRACT OF RECORD.

On the 23d day of November, 1855, the complainants filed their bill in chancery against said defendant setting forth that on the 11th day of June, A. D. 1851, being the owner and seized of the s w $\frac{1}{4}$ of the n w $\frac{1}{4}$ and the n e $\frac{1}{4}$ of n w $\frac{1}{4}$, of section 27, the n w $\frac{1}{4}$ of the s w $\frac{1}{4}$ of sec 22, T 26, R 12, applied to complainants for the use, rents and profits of four hundred and twenty-four sheep, for the term of three years, for the use of which he agreed to pay to said complainants six hundred and thirty-four and a half pounds of wool yearly, to be delivered on the first day of July, of the years 1852, 1853 and 1854; and at

the expiration of said term to deliver unto said complainants 424 head of sheep, of as good quality as those received, or in default thereof to pay unto said complainants \$634,50; that complainants furnished said sheep to said Moore upon the terms proposed.

And for the better security of the performance of the contract on the part of said Moore, he then and there gave a mortgage to said Milk & Howard on the premises above described, which was duly acknowledged and recorded upon the records of deeds of said county. The consideration as expressed in said mortgage being \$634,50, and is made an exhibit marked A, and which was to become void upon the full performance of the condition of the agreement marked exhibit B.

That said Moore did not deliver all the yearly payments of wool, but paid in cash for the deficiency in the yearly wool payments; that said Moore wholly
5 failed to deliver the sheep at the expiration of the term of three years, and that there was then due complainants \$634,50 for said sheep.

7 Prays that an account may be taken of what is due complainants and in default of payment said Moore and those claiming under him may be foreclosed from equity of redemption and the lands be sold to pay said amount found due.

8 Exhibit A contains the Mortgage.
9

10 Exhibit B, the Agreement, to secure the performance of which the mortgage
11 was given.

11 Subpoena in chancery and service.
12

15 Defendant answers, admitting that he made the mortgage A and agreement B, denies that he solicited complainants, but avers that complainants applied to
16 him to take the sheep, assuring him they were sound and healthy sheep, and respondent being ignorant of sheep and their diseases, and trusting to the assurance and warranty of complainants, entered into the contract. Avers that complainants well knowing the bad condition and unhealthfulness of said sheep, fraudulently warranted and assured said sheep, when said complainants then and
17 there knew they were unsound and diseased. That said sheep soon after commenced to die and continued to die, notwithstanding care and feeding. Commenced dying within three days and at end of year 198 had died.

18 Avers that he paid all the wool due, and would have returned sheep before expiration of term, and when he discovered their unsoundness, but complainants were non-residents.

21 Avers that after 11th day of June, A. D. 1854, did deliver to complainants
146 sheep and \$111,68 paid toward sheep not delivered on contract, and did not
22 deliver the balance for the above set forth in his answer, and prays that bill may
be dismissed, &c.

27 Replication filed to answer of Moore.

41 Defendant, Moore, files his cross bill against complainants Milk & Howard, set-
42 ting forth the entry into said contract and mortgage as in this bill and answer
specified.

43 That said Moore at first declined accepting the first proposition, believing said
sheep were not a good flock, and fearful they were diseased, from the fact that
some were poor, lame and had a cough. But said William Howard, in order to
induce said Moore to take said 424 head of sheep, warranted them to be sound
and healthy, and nothing wrong about them, more than they had been driven
through mud and water ; and believing said Howard to be an honest man I
would not deceive him, accepted the proposition. That sheep commenced dying
50 within three days thereafter, of a disease which Howard fraudulently concealed
from said Moore ; and at the end of year 195 had died. That Howard selected
the location for pens and racks and informed me how to build them, and that
Howard pointed out and selected the sheep for Moore and that he kept them
and took good care of them.

53 Shows manner of payment as stated in answer of bill.

55 Took a receipt marked A, different from what Moore wanted it to be given,
56 also paid H. H. Cooley 146 sheep on contract; that in November, 1854, he paid
Milk \$155,40 as stated in said answer.

61 Alleges the filling the original bill of complainants.

64 Prays that said agreement and mortgage may be delivered up to be cancelled
and that he may have damages, &c.

67 Lemuel Milk and Franklin Howard answer Nov. 6th, 1857, to said cross
bill, they deny that said Wm. Howard applied to Moore for the purpose of in-
ducing him to take the sheep, but are informed that Moore applied to Wm. How-
ard, and insisted upon him letting Moore have sheep, and that said Howard did
thereupon on the 11th day of June, 1851, let him have the 424 sheep to keep on
the terms specified in said contract, and deny all knowledge that said Wm. How-
ard knew the sheep to be diseased and deny that they were poor, lame or had a

68 cough, deny that said Wm. Howard warranted said sheep to be healthy for the purpose of inducing said Moore to take them, deny that said Moore entrusted the selection of the 424 sheep to said Wm. Howard, but believe said Moore selected said sheep to suit himself, uninfluenced by said Wm. Howard, but selected them, influenced by his own judgment solely, and so expressed himself to his neighbors, deny that any portion of said sheep were diseased at the time they were delivered to said Moore, but they are informed and believe they were in good
69 order for sheep at that season of the year, and deny that any of them died until the fall of the year, deny that any of said 424 died before June 14th, 1851. Aver that said Howard at the time of letting said sheep, gave to said Moore some seven or eight sheep, which were old and poor, and not in any wise diseased. And said defendants admit that some of said seven or eight might have died soon after they were delivered to said Moore, deny all knowledge that 180 of said sheep died on or before the first day of December, 1851 of the scab, or rot, or grub, or any other disease contracted at time they were delivered to said Moore. Aver that said sheep began to die in the fall of the year from unskillful management and neglect on the part of Moore, that early in the fall said sheep were destitute of proper food and water for a good portion of the time, until they became very poor, and early in the forepart of the winter of 1851,
70 began to die off from said neglect. Deny that said Wm. Howard in order to induce said Moore to take said sheep assured him that his farm was well adapted for raising sheep, or that he went on to a piece of land and assured said Moore that it would be a proper place to build pens and racks in which to keep said sheep, or that he directed said Moore how to build racks or pens. Aver that they are informed, and believe that Moore never built racks or pens as he should have done, they were wholly insufficient and improper for said sheep. That
71 they are informed and believe that said sheep were not properly cared for during the fall and forepart of the winter of 1851 and 1852. That said sheep became diseased and died of pure neglect, want of care, food and water. Deny that said sheep were herded on good pasture during the fall of the year 1851, and deny that said Moore fed them on good healthy food and in sufficient quantity.

Aver that said Moore during the first winter after he got them, kept said sheep on coarse prairie slough grass hay, of the poorest quality for sheep; that he had
72 no sheds for them, or other convenience to shelter them from the weather. That the racks which said Moore prepared to feed said sheep in were so clumsily and poorly and scantily made that a good portion of said sheep only could get to the racks, and that thereby the others were kept away, so that those that needed the most nursing and best feed had to subsist on the poorest feed that was furnished them, in consequence of which said sheep died if at all.

73 Admit that said Moore paid said Milk on the 18th day of November, 1854, \$50,10 in full satisfaction of the balance on wool, and paid in all \$205,50, including said \$50,10, but deny that it was to be applied as charged in said cross

bill, but to be applied as specified in said receipt and credit, to-wit: \$50,10 for balance of wool; \$23,68 as interest on wool not delivered at time of contract; \$20,04, as interest on sheep not delivered on contract, and \$111,68 to be applied on sheep not delivered, and that said receipt was given at the time to the entire satisfaction of said Moore.

- 74 Admit that they were non-residents, but aver that they have always had agents in said county to transact business for them. Deny that Moore offered to return said sheep in 1852 or 1853 to said Milk. Admit that Moore related to said Milk that he had had bad luck with the sheep, and that he thought or believed it was in consequence of his not having hay or other food provided for them of a good quality, and that he then knew more about taking care of sheep, and thought he would yet do well with them. They positively deny that said Moore even intimated to said Milk that said sheep were diseased at the time he received them of Howard, or that said Moore had been wronged, cheated or defrauded by said Howard, and deny that said Moore desired said Milk to take back said sheep or said aught about damages.

Deny that said Moore went on to perform said contract from any inducement held out by Milk, or any other inducement whatever than those set out on the contract.

Admit that Moore made payments to save litigation as he was bound by law to do. Deny that Moore made any of said payments in full discharge of said contract, but at each time of payment he only asked and requested time to pay the residue, and in no instance did he claim damages or set up any such defence until after he was sued.

- 76 Deny any damage to said Moore in consequence of disease among sheep when he received them and believe that said Moore fully intended at the time he made each payment he would not give defendants trouble to sue for balance as he would be able to pay the balance in a short time.

- Deny that Moore thought defendants would make an allowance for any number whatever of sheep which were not delivered but aver that Moore on the 18th of November, 1854, told Milk he would pay the balance due them in a short time, and he would pay it all up. Deny all unlawful combination. Admit that they commenced suit as servitors of Wm. Howard on contract, vs. Moore.
- 77

- 78 Deny that they knew said sheep were diseased; deny that Moore ever made payments on said contract, save such as are admitted in said answer; deny bad faith on their part and pray cross bill may be dismissed, &c.

- 83 Replication to answer to cross bill.

85 On motion of defendant Moore, cause to be tried by jury.
86

87 Change of venue to Livingston Circuit Court.
88

92 Exceptions to defendant's depositions.

96 Jury called and sworn, and complainants submit the following evidence to the
97 jury; bill and answer and replication; cross bill, answer and replication, also the
mortgage and exhibit marked A and B, in cross bill.

I.

98 Defendant then read the depositions of Elijah Sopp, who testifies, as follows:

69 Did not consider them a healthy lot of sheep; went there to get 100 head,
provided I could get them on good terms, but did not get them because he
thought them an infirm lot and the terms too high.

101 In answer to 17th interrogatory Moore told him that he was to keep the sheep
three years and give three pounds of wool a head each year, and return the old
stock as good as when he got them.

104 Sheep had a cough; supposed they had the rot. Never kept many sheep at a
105 time, averaged fifteen head at a time. Never took sheep to keep, or let out any.

II.

George W. Vennum says: Not very well acquainted with the business of tak-
ing care of sheep. Saw these sheep; thought one half were in good condition;
106 the other half thought they looked in bad condition; don't know anything
about them dying; saw a number dead I think in the fall or winter of 1851.

107 On cross examination he says, sheep cough and lame somewhat from being
driven in the dust in the summer season and are as likely to take cold and cough
as the human family, and get over it in a few days. Moore's improvements
were not so good as other men in the sheep business.

III.

108 George W. Moore says, was present when the contract was made, it was re-
duced to writing, can't state the contract exactly, but Moore was to keep the
sheep three years and then return them in as good condition as he got them;

and if he failed to pay the sheep, he was to pay one and a half pounds of wool per head each year, is all he remembered about it.

109 There was something said about the soundness of the sheep. Howard said he would warrant and insure them to be sound and healthy sheep, and no disease among them. Moore said he was afraid they were diseased; saw the sheep when they were delivered; they were in pretty bad condition, some coughing, &c.; about one-third of them good sheep. Howard said he got the sheep in Vermilion county.

110 By 1st day of January, 184 were found dead; some of the sheep had the snots,
111 some the foot evil; don't know as they had any other disease.

112 Cross examined. I am 18 years old this month, to-wit: January, 1857, and son of Foster Moore.

113 Howard had over 1,000 head of sheep in the flock; Moore had no sheds or
troughs to feed in; bought no hay, corn or oats until last of feeding time
114 when he bought hay. In answer to 25.: Milk got what of the flock did not die;
can't tell how many died in any month.

115 In answer to interrogatory 32. Got the number of the dead ones by counting the flock.

Studied arithmetic this winter and went through division. Father saved
116 what of the wool was worth saving; can't tell whether the sheep lost their wool or not.

Re-examined. All the shelter they got was around the racks, which were made with stakes set up across pieces, with room for sheep to get the hay out.

117 Sheep had all the hay, corn and oats they wanted, all they could eat.

Piled the sheep up that died and hauled them away on a sled; don't know that said sheep needed anything that they did not get.

118 Cross examined. Put the hay in racks and fed the corn and oats on the ground.

IV.

- 119 Jacob Hoel. Saw the sheep the evening before Moore got them, and saw them shortly after at Moore's house; did not examine them particularly, think half were in good order.

120 Saw some dead sheep in the summer and many through the winter, that was piled up; should think about 100 in a pile and around the place; never in the sheep business much; never had over 50 or 75 through the winter.

Cross examined. Nothing about the sheep when he first saw them to indicate disease as he knew of; sheep do much better on high dry ground and Moore kept these on low flat ground.

- 121 The feeding lots in which Moore kept the sheep were middling low and level; not much water stood on them.

V.

- 123 William Sopp saw the sheep next day after Moore got them; some lame; part looked poor and scrawny in his estimate; he was no judge; did not profess to be; could not say a great deal about it; looked as if they had been scoured from some cause or other.

124 Had dry ground, both high and low. Moore had wood pasture for sheep
125 in fall; 60 acres of east field, thirty-five of which was in corn, five in buck-wheat, five in meadow, and the west field of 25 or 30 acres, 10 of which was in meadow; balance in oats; in all both fields, 15 acres meadow; 35 acres corn, some fair, some not so good; 15 or 20 acres oats.

- 127 Two racks for feeding, in one 56 feet, the other 42 feet; sheep kept in two lots; how racks made.

- 129 Moore had about ten head of cattle; four head of horses that year; had three lots, one for cattle and two for sheep; had about ten or fifteen head of hogs also; am Moore's nephew.

VI.

- 131 Alexander Wilson. Had a conversation with Howard about the time he let Moore have the sheep, and Howard said he had let Moore have some and would like him to take the balance and throw in the old ones, eight or ten, except what was not sheared, which he wanted to take home.
- 132 In answer to 5th interrogatory he says they commenced counting when a lame one came along and we did not count it, &c.; think I took five hundred head; considerable conversation occurred; a number were lame, and running at the nose, and looked poor. H. said they had been out in the rain, that they would be all right in a few days; proposed as it was the tail end of the flock, to give one and a quarter pounds per head which he agreed to, thinking I would do a good part by them, and we can make it all straight if you should have bad luck with the sheep. There is one lot I got of one man that I was dubious of myself; and if you should have bad luck he would make some reduction; don't know as these were his words, but something like it; I told him I did not know anything about sheep raising.
- 133 7. Some of these sheep looked very well; some looked bad; several snotty, and two or three were left on the edge of the prairie that were lame; those not sheared looked fine, and Howard said if they were sheared I might have them.
- 134 I had bad luck with them; some of them the wool came off the back; I sent for Howard and told him I thought they had the scab, he caught three and afterwards said that it was nothing, but the sun had burnt them, and I need not feel uneasy about the scab.
- Can't tell how many died through the course of the summer and fall, but several.
- 135 I made a contract with Mr. Enos the agent of Howard, and I sent them over to Enos; I got some money for keeping the sheep.
18. In the neighborhood of 100 died before Enos got them; don't know what disease they died with.
- 136 23. I am not skilled in the diseases of sheep; never had but a few for family use.
- 137 Cross interrogatory. A good many of the sheep died in the fall, and in the spring, before cold weather set in and after grass come in; when cold weather

commenced I thought they were going to do well, but when grass came they commenced dying again.

Had a conversation with Moore after he got the sheep of Howard, about the quality of the sheep he got; I was talking about having some old sheep and sheep thrown in; he stated he had got young sheep; that he was a judge of sheep and that they could not poke an old sheep onto him.

VII.

140 Lucinda Patterson. Was knowing to Moore's getting 424 sheep of complainants about 1st of June, 1851; saw the sheep when they were delivered; think they were in poor condition at that time; could not say further as to health and soundness.

141 Saw the sheep almost daily during the first year; lived at Moore's house, and that said sheep continued poor and sickly during that time.

5th. Many of said sheep died during the summer, fall and winter of 1851, and winter and spring of 1852.

Most of them died in the fall of 1851; died with a disease called the rot which was occasioned by the poor condition the sheep were in when Moore got them and were so diseased.

142 6th. Was present when contract was made; complainant warranted the sheep to be sound; defendant hesitated saying he feared the sheep were unsound, they looked so bad when complainant said he would warrant them healthy and sound.

Cross examined. Am daughter of defendant Moore.

143 Answer 5. Guess they were all unhealthy and unsound; could not say how many died during the summer and fall of 1851, but think about 200 before Jan. 1st., 1852.

144 Many of said sheep died in 1853; could not say what month, but died almost daily and many died in 1853.

14th. Moore had some troughs to feed and salt in in 1851 and 1852; fed the sheep hay and corn both in troughs and on the ground.

- 145 Sheep could go from one lot to another during the fall and winter of 1851 and 1852.

VIII.

- 147 Aaron Patterson. 3d interrogatory. Knew of Lemuel Milk leaving some sheep at defendant's fore part of June, 1851; saw the sheep, they looked poor and sickly, as if drove a great distance.

- 148 5. Knows that some of said sheep died in the summer, fall and winter of 1851 and spring of 1852; thinks about 200 died the first year; thinks the cause was being driven so far they became poor and thereby diseased; thinks the disease was what was called the rot; were diseased when Moore got them; large portion were worn out, lame and sick.

- 149 Interrogatory 8. My business is planting corn in summer and swapping horses in winter.

Cross interrogatory. Am son-in-law to Foster Moore; don't know what disease said sheep had, only they had the appearance of being driven a great distance.

- 150 Think the sheep were worth at time 75 cents per head; good sheep were worth \$1.00 and \$1.50 per head; don't know how many sheep died in summer or October, November or December, but many died in each of these months; wool was worth 34 cents per pound in spring of 1852.

- 151 Said sheep died during every month of 1852 and during the year 1853, but don't know how many.

Foster Moore had some troughs to feed and salt in in 1851 and 1852; can't say how many; Moore fed the sheep hay, corn and oats, the hay fed in racks; corn fed in trough, he had rails crossed filled with hay on edge of thicket for shelter in 1851 and 1852.

- 152 Moore had four lots in which to keep said sheep during the winter of 1851 and 1852; no sheds in all of them; the rack above described was in one lot and the thickets in the other; one lot contained 1½ acres, one of ½ acre, one of 50 acres and one, the creek lot, 35 acres, and sheep could go from one lot to the other.

- 153 Never in the sheep business.

IX.

157 Henry Horricks. Am acquainted with Moore and hired to him about the middle of the fall of 1851 to attend to his sheep; remained there about eight months, when I went there he had about 400 sheep, may be some over or some under, and 250 when I left; the others died of disease; were dying from the time I went there until the middle of March; they were herded on the prairie for a short time after I went there and then taken up and put into yards and fed hay and corn, hay put into racks and corn scattered on the ground in the
159 yard; mostly in the stalk; about an ear each sheep night and morning; only about three feeds of husked corn; were first put into three yards, then into two.

164 Cross examined. I went to Moore's to live about the middle of October and the sheep run out about one week after I went there.

165 Interrogatory 11. Don't remember of but one dying while they run on the blue grass pasture.

168 Don't remember of giving but one feed of oats to said sheep that winter, and that was fed in the straw in the racks; I generally had the care of the sheep; never took care of sheep but very little until then.

169 Not acquainted with the diseases of sheep; think said sheep died most rapidly in December and January; corn was cut up when I went there that was fed to said sheep except three feeds which was husked from the stalk.

171 It appears to me that said sheep were turned out to grass about the last days of April when he had some hay and some four or five hundred bushels of corn left.

Interrogatory 50. Moore did not employ any one to doctor said sheep.

172 55. Moore daubed tar on the sheep's mouths the last of December or first of January.

X.

176 Foreman Moore's evidence. Interrogatory 10—I saw the sheep only occasionally until the latter part of winter, the last of February or 1st of March; I staid at Foster Moore's all night; saw Horricks feeding them and saw a stack of

dead sheep that looked like snow, at least 50 in the pile, some had the wool pulled off and some had not; I asked him why he did not pull the wool off, and he said they frequently froze before he could get the wool off.

- 176 14. Don't consider my knowledge of sheep raising as good as those who follow sheep raising and growing wool.
- 177 17. I believe said sheep was diseased when I first saw them, they were snotty and had a cough and the disease was what is generally called the rot.
- 178 I think the damage to Foster was \$689,50.

Cross examination. I am a brother of Foster Moore's, have generally kept from 15 to 30 sheep; my sheep never had the rot.

Interrogatory 8. John Paul, John Sterean, Hiram Vennum, Columbia C. Vennum and Daniel Kirkpatrick have been more extensively engaged in raising sheep than I have for the last 20 years..

Interrogatory 11. The disease that I call the rot makes its appearance by coughing and running at the nose.

Interrogatory 15. Do not know that a large flock requires any more attention through the winter than a small one in proportion to the number.

Interrogatory 18. Don't know how many sheep one ton. of hay will winter from the first of November to the first of April.

- 181 Interrogatory 19. Could not say how much less the indifferent sheep was worth than the good ones, when I first saw them, from my observation I am not capable of judging. Did not examine them enough to tell whether they were worth one third less; do not know what it is worth per head to winter sheep; don't know whether 75 cents was a large price or a small price.

Int. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, }
34, 35, 36, 37, 38, 39, 40, 41, 42, 43, }

On the subject of
damages..

- 184
185
186 Examination in chief resumed..

XI.

187 John Paul. I saw the sheep the first week after Moore got them and saw
 them often during the summer and fall following, as often as once a week; I
 188 looked pretty particular at them the first time I saw them; think there were 500
 of them; one fifth of them I think were very indifferent sheep, the balance
 were a fair average lot of sheep, the indifferent sheep were stupid, they had a
 cough; a few of the number I speak of had lost their wool, resembling what
 I was taught to believe was the scab.

190 Interrogatory 23. John Strean, Hiram Vennum and C. C. Vennum, were in
 the habit of keeping sheep in the neighborhood of Moore prior to 1851.

193 Interrogatory 35. I believe I do not profess to be a judge of the diseases of
 sheep or their cause; I think I can tell when a flock of sheep are diseased; I
 think a small portion of Moore's had what I term the scab, others the rot.

194 Interrogatory 40. I never saw a flock of sheep before or since I saw Moore's
 that had the rot.

Interrogatory 41. I believe I had seen these sheep or a portion of them be-
 fore I saw them at Moore's; if I ever did see them it was on the Middlefork of
 the Vermilion in April, 1851, at which time Thomas Vanmeter and myself
 195 so poor and apparently diseased, we would not buy them; Vanmeter told me
 that Milk had bought those sheep that we went to buy, and had let Foster
 Moore have them; I don't know any thing further about it; I could not recog-
 nize the sheep as being the same.

196 Interrogatory 51. Moore's damage \$1,50 per head for the sheep that died.

Int. 52, 53, 54, 55, }
 56, 57, 58, 59, } In relation to damages.

Cross examined. Sheep generally look dull and stupid to some extent from
 being driven in the dust, and exposed to rain and wind soon after shearing.
 these indifferent sheep I speak of at Moore's, looked a little different from sheep.
 199 with ordinary colds, being poorer. I founded my opinion that a portion of them
 were diseased from the appearance of them in part, and a part from Jeremiah
 Hoel and Aaron Hoel's conversation, and Thomas Vanmeter having told me
 they were the same sheep we saw on the Vermilion, strengthened my belief.

Interrogatory 9. There was not more than ten sheep of Moore's nor I don't know that there was that many died through the summer up to feeding time, in the fall, to my knowledge.

200 Interrogatory 10. There was about four acres blue grass pasture, west of Hoel's farm open to the commons, during the first fall Moore got said sheep, and would last said sheep not more than four days.

Interrogatory 13. It is indispensable to have high rolling land to raise sheep advantageously. Moore's premises are rather low, flat land, the grazing was low, flat land. I saw Moore's pens as often as once a week, where he kept his sheep.

201 I never saw any troughs at Moore's to feed sheep out of that I recollect of, the conveniences of some of Moore's neighbors for sheep raising were better than Moore's, they were better situated than Moore, they had better locations; Moore is not a very good farmer.

202 Interrogatory 23. I have never seen a fair average crop of corn since 1850 on Moore's farm. I do not think I have. I noticed Moore's hay that he fed to his sheep the first winter, it looked like rather indifferent hay to me from the road, it did not look suitable to feed to sheep for them to do well.

202 Interrogatory 29. About two or three out of each one hundred, of a flock of sheep is a fair average of the loss from shearing to feeding time.

Interrogatory 30. Think a flock of sheep of four or five hundred confined in small pens, on low wet land and improper food given to them the forepart of winter will be likely to take disease of some kind and die pretty rapidly.

203 Interrogatory 32. A man with a flock of 424 sheep ought to have from fifty to seventy-five acres of tame pasture, from the time the frost kills the prairie grass up to feeding time.

Interrogatory 33. John Strean, Hiram Vennum and John Axtell are good judges of the nature, quality and condition of sheep as any in the neighborhood; there are no better judges.

- 204 Interrogatory 43. I do not believe that Foster Moore with the knowledge he had of sheep raising in 1851 could have taken a flock of 424 healthy sheep with the improvements he had and done well with them.

Cross examination resumed.

- 207 Interrogatory 1. I never knew a flock of 300 or 400 head of sheep in a low fiat situation in this country to do well.

Interrogatory 2. I never knew any man except Hiram Vennum in this county to do well with sheep taking the whole into consideration.

XII.

Deposition of B. F. Holbert.

- 211 Interrogatory 2. I know that Charles F. Young, seven years ago this spring, the last day of May or the first day of June, purchased of Charles Drew, as well as I recollect, six or seven hundred sheep on the Middlefork of the Vermilion.

- 213 Interrogatory 9. I noticed the sheep particular from February, 1851, till the time they was taken away; I helped wash and shear them; I don't think they were disordered, there might have been a few of them had what is commonly called the rot, a running at the nose; a great many of said sheep died, could not say how many, they died about the time they quit feeding; it is common for some to die every few days where there are so many together.

Residue of testimony relating to manner of keeping said sheep, amount of wool, &c.

XIII.

- 219 Deposition of Nelson Moore. I was acquainted with Charles Drew in the winter and spring of 1851; he boarded with Mr. F. Holbert, and in feeding time he attended to his sheep I saw said sheep some days three or four times a

day, some days I did not see them as I did not pass the place ; I first saw said sheep in February, 1851.

Rebutting evidence of the complainant.

XIV.

Deposition of Alfred Beckett.

231 Interrogatory 2. I had a conversation with Foster Moore soon after he took the sheep ; he stated to me that he had taken a lot of sheep, some over 400 ; he seemed to think from what he said to be well pleased with the selection, and stated they were all young sheep, with the exception of a few that was thrown in and not counted ; said that there was not one among them that was over two or three years old ; he said nothing in regard to their health or condition, more than that they were thrifty sheep.

Interrogatory 4. I saw the same sheep in dry, dusty and hot time in the year, in August or September ; they were in the lane south from Foster Moore's, they were covered with dust and looked bad ; it was a dry season of the year ; everything burnt up along the road and a poor chance for anything to live ; I 34 noticed many of them at that time running at the nose ; think the lane was half a mile long.

XV.

235 Deposition of Hiram Vennum.

Interrogatory 2. Moore told me he got 430 of Milk and Howard ; I saw them a short time after he got them ; I saw them frequently as long as he kept them.

Interrogatory 3. Moore's, Stream's and my sheep got mixed when I noticed Moore's particularly ; Stream and I talked about the sheep when we went away and thought some of them were very fine wool, which looked remarkably fine ; I 236 consider the flock of sheep looked very fine ; there was a few that looked rather scaly ; I think Moore told me they were thrown in ; nothing about said sheep that indicated disease.

Interrogatory 5. I had a conversation with Moore about the time he got them, he asked me what I thought about his taking them, I said if he had got a good flock of sheep and took good care of them he might make a good job of it, and if he did not a very bad one, as sheep required more attention than any other stock; he replied that he had a good flock of sheep; that he had his pick out of, I think 900.

237 Interrogatory. Moore's location is low and wet; sheep do the best on high ground.

238 I saw said sheep running in a field at Moore's, I can't say more than twice; the sheep were suffering for something to eat, they had eat it all up; they looked bad and hollow, it was a good while before feeding time; Moore had no other tame grass pasture, other than the field I saw them in, to my knowledge.

Interrogatory 15. It has a bad effect upon a flock of 400 sheep to be herded and wintered in a low wet situation; I never knew a flock of that number to be kept long in that situation without becoming diseased.

241 Interrogatory 21. I have been well acquainted with Moore's premises for the last twenty years; I am a farmer; was engaged in sheep business ten years up to 1853; I commenced with 150 and when I sold out I had 900 lambs and all.

Interrogatory 23. I do not think any flock of 424 sheep would do well under the circumstances in which Moore kept them; I have known where sheep was tried on low, wet ground with the best care and never knew them to do well.

242 Interrogatory 24. My opinion is that it is necessary to have sheds for sheep to do well; feeding troughs are very necessary in muddy weather; the location ought to be high and dry, and it is necessary that they should be fed regularly twice a day.

Interrogatory 26. It is an injury to sheep to drive them through the dust.

243 Interrogatory 27. A man that is not acquainted with sheep, will say that is a

fine lot of sheep to look at them before they are sheared, and after they are sheared he would not know them, he will say they look bad.

Interrogatory 29. I should say that Moore is a rather slovenly farmer, his stock look bad in the spring of the year.

Interrogatory 30. I think the cause of so many of Moore's sheep dying, was for the want of the right kind of feed; the right kind of care; sheds and the proper place to keep them. When sheep are going down from disease, they will droop their head and ears; not so from want of care and feed; the symptoms of cold and driving in the dust, are running at the nose and cough like a person.

Cross interrogation.

248 Interrogatory 15. The first dead sheep of any account I saw at Moore's was in the winter of 1851.

Direct examination resumed.

252 Interrogatory 1. In the winter of 1851 and 1852, that I noticed the hay particularly, it was in every body's mouth that that flock of sheep would break Moore up, and the fact of the sheep dying made me take more particular notice, it was very poor hay in the racks, very dark colored.

My object in looking about the premises was to satisfy my own curiosity; I always thought it would break Moore up, from the fact that his boys done the biggest part of the work on the farm and taking care of stock, and no boys of the age of his that I consider were capable of taking care of a flock of sheep of that size, and I did not think the sheep would be properly taken care of. This is what led me to notice matters more particularly.

XVI.

256 George Martin.

Interrogatory. The hay that Moore fed his sheep in 1851 and 1852 was rath.

er indifferent prairie hay ; suppose it was damaged a good deal by rain by the looks.

257 Moore had about 5 acres of tame meadow ; Moore's farm is rather low, wettish land ; frequently seen the boys driving the sheep out to pasture pretty late in
258 the day. Moore's boys generally took care of said sheep ; Moore is rather a slovenly farmer and takes indifferent care of his stock.

266 Cross examined. Never went into the field and examined the hay ; I saw it in the cocks before it was hauled and stacked ; it was mostly prairie hay.

XVII.

268 John Strean. Know of Foster Moore getting sheep of somebody about that time ; saw the sheep the day he got them ; thought the sheep looked very well in general ; did not think and don't now think there was anything to indicate disease about them.

Interrogatory 5. Had a conversation with Moore about the sheep, about the time he got them, he said something about their looking well ; I told him I thought they looked well with some exceptions ; he said he thought they did look well ; those that did not look well were thrown in and not accounted for, some three or four.

269 Don't think Moore's location is the best for keeping sheep ; it is low, flat land ; as for lodging at night, think it important to have high, dry and airy places, and think sheep do the best in a high place in winter.

270 Interrogatory 11. I saw the sheep in a field at Moore's the first season he got them ; it was after harvest ; it was in a stubble field after the grain had been hauled off, perhaps in August, might have been later. I thought there was not sufficient of keeping for them there ; that they would have done a good deal better on the prairie at that time ; they did not look bad but seemed very uneasy, and I could not see any thing for them to eat there ; thought he was doing
271 a great injury to the flock, and would see the effects of it before spring ; could not say how many times I saw them there, but two or three at least, perhaps more.

Whenever stock begins to run down in the fall, it is nearly impossible to get them over it in the winter; it is more important to have stock, especially sheep, in thriving condition in the fall; then it is easier getting them through the winter; sheep are more tender than any other stock.

- 273 Interrogatory 18. No water in said stubble field in dry weather; have a bad effect to winter sheep in low, wet locality, gives the cough and running at the nose.

Moore lives close to the side of a very public road; I passed the road very frequently during the forepart of the winter of 1851 and 1852; only saw the hay from the road; I was in the yard, I saw some tame hay, the hay I saw in the rack I did not think looked very good.

- 274 Interrogatory 22. I think the rack was 30 or 40 feet long; don't think the sheep could all get to it at once; it is always considered to require one foot to each sheep.

Interrogatory 23. Moore had neither sheds nor troughs for said sheep.

- 275 Interrogatory 25. I have lived within some two miles of Foster Moore for twenty-three years, and have known him and been acquainted with his premises during all that time.

Interrogatory 26. I have been a farmer all my life, and assisted in taking care of sheep since my earliest recollection; at the age of eighteen an older brother and myself went onto a farm, with about five hundred sheep, and continued with that number until we increased to two thousand old sheep and four hundred lambs. (Residue of his answer in sheep raising up to the present time.)

- 276 Interrogatory 27. I think it would have bad effect on the health and condition of any flock of sheep, of 400 to be kept where they were and the manner I thought they were kept the first fall and winter.

266 Interrogatory 28. The cause of so many of said sheep dying the first winter, was they were kept too long in the dry stubble field, until I thought they were running down, and being run down in the fall, want of sheds, want of room in the lot they were kept in, for some times it was very muddy, and sheep will never go into or lie down in mud of their own accord. I think there are very few men can take that many sheep and do well with them, that have had no experience in sheep raising; my brother and I would never let any man who had had no experience in sheep raising have no more than fifty head to keep; when Foster Moore got the sheep, knowing him as I thought I did, not to be a very particular farmer, I thought a great many of those sheep would die before the next spring.

Interrogatory 29. (Description of improvements, conveniences and location for sheep raising.) I believe when you put food before sheep or anything else that they will select the best first then they don't like to eat the refuse; consequently to put more hay into the rack than they would eat at one time they would not do so well.

Interrogatory 32. My sheep, Hiram Vennum's and Foster Moore's got mixed together the first fall Foster Moore got his, some of Moore's and my sheep's ear marks was the same and the sheep looked much alike; Moore's was also marked with red keel down in the wool which could not be seen without catching them.

Interrogatory 33. It had no bad effect on our sheep getting with Foster Moore's, and I discovered nothing to indicate disease among Foster Moore's sheep, they looked very well.

281 Interrogatory 37. I have seen Moore have very good crops of oats, don't think I ever saw a good crop of corn on his place, near an average of the neighborhood.

Cross examined.

282 Interrogatory 1. The first time I saw said sheep I met them in the lane some three rods wide, they were passing one way and I the other; I was riding along in the wagon, I looked over them as well as I could expressly for the purpose of examining the quality of the sheep, this was the next day after Moore got them; they were in very good stock order.

Interrogatory 4. There were as many as four and might have been ten or a dozen that looked very badly ; I considered them old ewes that were just ready to die of age ; when a sheep gets old it loses its front teeth and can't eat grass to do any good and will dwindle away and die.

283 From the appearance of the sheep and my experience in sheep I could not come to any other conclusion than that I have above stated ; I examined them as particular as I could without taking hold of them ; I was looking to see what for a lot of sheep Foster Moore had got ; the few that looked bad might have been diseased but it was not my opinion.

283 A man that is acquainted with sheep will not often be mistaken in the appearance of an old sheep and a young sheep.

286 Interrogatory 17. There were two fields that had some tame pasture in them, here were forty acres in the field east of the road and the other two fields embraced forty more, to-wit : the stubble-field and woods pasture, I know so near where the lines run the fence was aimed to be on the line of each forty.

290 Interrogatory 26. I know Foster Moore had some prairie hay that was cut too late the first winter he had the sheep, it was not a good quality any how, had some first rate timothy stacked up by the stable ; I have seen hay in the rack that I thought was rather dark looking for good hay.

291 Interrogatory 28. I have not had sheds in this country for my sheep, although I always had a stable to put my ewes in in lambing time, my sheep did not do as well as some of my neighbors did who had shelter, I had the best place to keep sheep out of doors that could be found in the country.

XVIII.

Deposition of John Axtell.

Interrogatory 2. Foster Moore told me he got 400 sheep of Howard and.

Milk, I think about that many in June, 1851; the first time I saw them they was at my house, they were brought there by Mr. Young, they were at my house three days; they looked well; I thought they looked the best for that number I had seen on the road; nothing about them that I notice to indicate disease; I got some of them they did well.

Interrogatory 5. I was with them and helping them all the time they were there; helping separate them and building pens for them.

302 Interrogatory 6. Had a conversation about the time he got them with Mr. Moore; his boys were bringing the sheep in from the prairie, and driven past Moore and myself into the lot; I observed to Moore that the sheep looked extraordinary well, except some eight or ten; he said he thought so too, that the five or six, or ten, had been thrown in.

Interrogatory 8. I saw said sheep in the stubble field in October 1851, they were dwindled down poor, that is a number of them, the field was bare, the weeds was trimmed as high as they could reach.

303 Interrogatory 9. In November that year, I was along there and saw the sheep; had a conversation with Moore and told him he was letting his sheep run down, that he ought to keep them up, that he should have tame pasture for them or feed them, he stated that he had no tame pasture for them and that the prairie grass was about done, I told Mr. Moore if he wanted those sheep to do well, if he let them run down he would raise no lambs; that a great many of them would be likely to die; they looked bad, they were in the field east of the house except about twenty down below the house that looked very bad.

304 Interrogatory 11. First saw said sheep in the enclosure in August the last at Moore's, prior to that time the sheep looked well.

Interrogatory 13. I saw Moore and boys stacking hay late in the season of 1851; I told Moore that it was very poor hay, he said he knew it was but he had plenty of shock corn and sheaf oats; I told him he would have to have a good deal to have enough for those sheep, it was little wire grass hay and had been frost bitten before it was cut, it was not good for anything; I told Mr. Moore it would not do for sheep, they would not live on it.

305 Interrogatory 14. Moore's farm is low, flat land ; sheep always do the best on high land.

16. To let sheep run down the forepart of feeding time about half of them will die before spring.

306 Interrogatory 17. Should not want less than one hundred acres of tame grass pasture for a flock of 400 sheep from 1st of October to common feeding time.

Interrogatory 19. Sheep will begin to look bad in three days after being confined on low wet muddy land.

Interrogatory 21. I never saw a winter but what it was muddy about half the time.

307 Interrogatory 24. Don't think Moore had any sheds, and I never saw any troughs there.

308 I have been acquainted with Foster Moore and his premises for the last twenty-two years ; I am a farmer ; the highest number of sheep I have ever had in this country was three hundred, and have been engaged in the sheep business for the last thirty-five years, and about seven years in this country ; began here with ten sheep and kept on till I had three hundred.

309 Interrogatory 31. 100 head of sheep is the most I want together in the winter to do well ; 200 together will do very well.

310 A flock of 400 healthy sheep kept as I knew Moore's were the first winter would not be healthy, by spring ; I think they did not have enough to eat ; think the cause of so many of said sheep dying during the first winter was want of food and want of care, both.

312 Cross examined.

Interrogatory 9. The reason why I examined the sheep particularly when at my house, Mr. Young wanted me to take a portion of them on the shares, and I examined them to see if they were diseased.

Interrogatory 11. I did not suspect they were diseased, it is natural for me to look for diseases amongst sheep; I don't think I ever went into a flock of sheep in my life but what I looked at them to see if they were diseased.

313 Interrogatory 13. There was ten or twelve and may be twenty that was rather thin in order; they had not the scab nor the rot; the balance looked well as I stated before, and the greater portion of them looked extraordinary well.

Interrogatory 16. I have seen sheep with what they call the scab and some with what some call the worm in the head, and some with the rot; these are all the diseases I know anything about.

314 Subject of diseases of sheep.

315

316 Interrogatory 21. I suppose I saw Moore's sheep during the first summer, and fall some fifteen or twenty times.

318 Interrogatory 29. When Moore first got the sheep there was nothing said by the neighbors about them breaking him up, after he had had them awhile and they began to run down they talked about it breaking him up.

Interrogatory 30. The reason I know that Moore fed the hay I saw him and his boys stacking as spoken of in interrogatory 13, in chief; I saw Moore putting it into the rack; can't say how often, more than twice, and more than three times; never saw him feeding them any timothy hay.

Direct examination resumed.

Interrogatory 1. Perhaps two or three weeks after Moore got said sheep, Moore told me he got them of Howard; he further said that he had a great mind to come up to Strean's, Hiram Vennum's or my house to get our opinions in regard to taking them; he finally concluded to go according to his own judgment; I told him I thought they were a fine lot of sheep; he said he thought so too; I told him I thought it was a pretty hard bargain; but if he could keep the wolves from them he might do well; his reply was that he had boys that would take care of them.

Interrogatory 2. His reasons for wishing to consult me, Hiram Vennum and John Strean in regard to taking the sheep, was because we had been in the habit of keeping sheep and taking care of them.

325 Interrogatory 10. With that bad hay that I saw Moore stacking and ten acres of corn fodder, those sheep would require ten dozen sheaf oats twice a day; feeding time for sheep lasts about six months.

326 About thirty dozen oats per acre is a fair average per acre in the neighborhood; I consider Moore is a poor farmer, and the neighbors likewise say so; his crop of oats in the summer of 1851 I know was poor.

Interrogatory 16. I saw two sheep hanging in the rack at Foster Moore's during the first winter as I was passing, as I went back there was two sheep mired in the mud by the rack; I came up to the house and told the boys to go down and take those two sheep out of the mud that two were mired in the mud at the rack, the boy replied d—n the sheep, I wish they were all mired.

327 Interrogatory 17. It was a bad case, a bad situation, it was very muddy around the rack, the sheep were in poor condition.

XIX.

Deposition of Charles S. Young.

332 Interrogatory 2. I understood from Howard and Moore both, that Howard let Moore have four hundred and twenty some sheep in June, 1851; I saw the sheep last before Moore got them at John Axtell's in Iroquois county, Illinois, I drove them there myself, with the assistance of John Wait and Samuel Williams.

333 I bought them sheep myself for Milk & Howard, in the month of May, 1851, there were between seventeen and eighteen hundred of them, all sheared excepting about three hundred.

Interrogatory 7. I bought those sheep of some thirty different persons; I bought the choice of their flocks; I never bought but one flock clear through; I bought nothing but sound, good thrifty sheep, free of that one lot of sheep there were thirteen indifferent sheep; that lot of sheep that spring averaged three pounds and seven ounces of wool per head; I delivered the lot to Wm Howard at John Axtell's on the 9th day of June, 1851.

334 Interrogatory 10. I saw said sheep twice after Mr. Moore got them in the year 1851. The first time was in the latter part of August; I had some talk with Moore concerning the sheep; there was no complaint; I rode in among them and took a good look at them, they looked fine; I saw them also the forepart of Oct. 1851. I saw a portion of the sheep and Mr. Moore at the same time; he was in search of sheep; I asked him how his sheep was doing, he answered they were doing well but they had become very much scattered, and he was under great fear they would be driven among a lot of sheep near where we stood; the sheep looked unwell when I saw them in October.

Interrogatory 11. In March or April, 1851, Mr. Moore and Mr. Milk staid all night at my house; conversation took place concerning the luck with

said sheep; Moore stated to Milk that his luck with those sheep the first winter was hard, he lost a good many of them, but he thought it a good deal owing to his feed; it was not put up as early as he would have liked.

335 Interrogatory 12. Moore stated that at that time he was agoing down to Georgetown to buy sheep; that he intended to have those sheep ready for Milk when due.

Interrogatory 13. He made no objection at the time to delivering the said Milk the whole number of the sheep he received of them; this conversation took place about two months and one week before they were due.

Cross examination.

336 Interrogatory 1. I was employed by Howard and Milk to purchase those sheep.

Interrogatory 2. For the last ten years I have bought and sold upon an average a thousand sheep per year. I have little knowledge of the diseases that attend sheep; we have had no diseased sheep for the last twelve years in our country that I have any knowledge of, until the last eighteen months. I consider myself a tolerable judge of a stock of sheep. I have been in the habit of assisting stock dealers for the last ten years, in buying horses, cattle, sheep and hogs.

Examination in chief resumed.

337 Interrogatory 15. For the last fifteen years I have handled more or less sheep every year; if I would go among a flock of sheep, scabbed, foot-evil or rot, I could tell whether either of these diseases were among them.

Interrogatory 16. William Thurman assisted me in buying a portion and collecting all that lot of sheep; I consider him a good judge of sheep, of thier age and grade.

XX.

338 Deposition of Wm. Thurman.

Interrogatory 1. I assisted Charles Young in June 1851 in collecting a lot of sheep at Joseph Kerr's, eleven or twelve hundred old sheep, besides some lambs.

Interrogatory 2. I consider them a good, healthy, hearty lot of sheep; we thought them the first quality of sheep in the country.

2. James Davidson and Joseph Kerr got some out of that flock; I have known them ever since we let them have them; they have done well; no disease among any of them.

339 Interrogatory 5. I know every man and woman those sheep were bought of. I have been acquainted with them ever since we bought their sheep, and I know their flocks of sheep too; all these flocks of sheep from which those sheep were taken have done well; they were all bought in this county, excepting twelve head which was bought in Warren county, Indiana.

I have traded and trafficked more or less in sheep for the last ten years; I have sheared from four hundred to one thousand head of sheep a year for the last ten years.

XXI.

Deposition of Joseph Kerr.

- 340 Interrogatory 1. I got from Mr. Young ten lambs and five ewes ; out of the flock that he collected at my house in 1851 for Mr. Howard ; they have done very well ; James Davidson got some sheep out of the same flock ; I never heard any complaint from him about said sheep ; I live half a mile from Davidson's.

XXII.

Deposition of Wm. Leonard.

- 341 Interrogatory 1. Six years ago last June, Chas. S. Young and Wm. Thurman went over onto the Middlefork and bought a lot of sheep ; I went out and helped them bring them in ; I marked the sheep at Kerr's at that time, they were in good health to my notion.

XXIII.

Deposition of Valentine Wiggins.

- 342 Interrogatory 2. I heard a conversation between Moore and Howard in 1851 ;
343 Howard asked Moore how the sheep were doing ; Moore answered they were doing very well ; Howard asked Moore how many of the sheep he had given him was dead ; Moore replied there was two or three of them dead.

XXIV:

Deposition of C. C. Vennum.

347 Interrogatory 2. I have been acquainted with Foster Moore about twenty years and lived about three miles from him; I know of Foster Moore getting a flock of sheep about the summer of 1851; I saw the sheep about two or three weeks after he got them.

349 Interrogatory 9. My father kept sheep from my earliest recollection from 200 to 700; when I became of age I commenced with ten and from that up to 150, whilst I was in Pennsylvania; I came to this country twenty-three years ago; three years after I came here I commenced a flock of sheep on a small scale, I increased them by degrees till I had 350 and kept them on till about 5 years ago; my age is 53 years.

349 Interrogatory 11. I did not think the sheep diseased when I first saw them; I am acquainted with Foster Moore's farm, it is rather low and wet and rather bad for sheep raising, in my opinion a flock of 400 healthy sheep placed in the care of Foster Moore upon his farm under the circumstances in which those sheep were kept would decrease one half by death, or nearly so; Moore is rather a rough, bad farmer.

351 Interrogatory 18. This farm is too small for a flock of 400 sheep, he had not the tame grass necessary; he was unacquainted with the handling of so many sheep; his location is too low, and unprovided with shelter.

Interrogatory 19. I never heard Foster Moore or any person say that said sheep were diseased when he got them, prior to the commencement of this suit, as I recollect of.

Interrogatory 20. I had a conversation soon after he got the sheep. I told him if I had seen him before he got them I would have put him out of the no-

tion of it; that if he wanted to experiment with sheep to begin with a less number; he said if he had any he wanted enough worth attention.

352 Interrogatory 21. I don't believe said sheep had any disease when I first saw them.

356 Cross examination.

Interrogatory 13. I passed Foster Moore's late in the fall; I thought the sheep was in a bad fix to commence the winter; saw the sheep again in the winter; part of them were dead and part living, thought those that were living would die.

Interrogatory 17. I formed my belief of the decrease of said flock, one half as spoken of in interrogatory 16 in chief from my general opinion of said Moore; condition of his farm and general condition of things around him.

357 Interrogatory 19. Conversation of Moore's neighbors about the sheep.

The reason why I and the neighbors came to the conclusion that it would break Moore up, were that no farmer could afford to pay the rent that he paid for the sheep and he was unprepared with feed and farm to take so big a flock of sheep; he was unacquainted with sheep business, and his slovenly mode of farming would not do to keep sheep; these were the reasons why we came to that conclusion; we made no allowance for disease being among said sheep at the time he got them.

XXV.

359 Deposition of R. W. Andrews.

Interrogatory 1. Ever since I was old enough to carry a fork full of hay for

the last 20 years up to five years ago, I have been in the habit of feeding and raising, and buying and selling sheep; have read all works I could get hold of in regard to management of sheep, and cured, and tried to cure all diseases among sheep.

360 Subject of diseases amongst sheep.

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Interrogatory 10. From my knowledge and experience in sheep raising, my opinion is that the inevitable and certain result of a man of no experience in sheep business, and sheepraising—no shelter—no feed troughs to feed them in; to take a flock of 400 healthy sheep under such circumstances would be the disease and death of a great many of them in this climate; I am 33 years old and stock raising has been my occupation.

Cross examination.

364 Interrogatory. Opinion as to diseases.

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Examination in chief resumed.

369 Five per cent. loss of a healthy lot of sheep through the summer up to feeding time, would be a heavy loss, in a flock of 424 sheep with one-third of them diseased, on the 11th day of June, being pastured on low, wet land; I think one half of them would die up to feeding time under such circumstances.

XXVI.

Deposition of Stephen Amos.

373 Interrogatory 2. Six years ago last winter I became acquainted with Foster Moore's farm in December 22d, 1851.

Saw Moore's sheep in a lot north of the house; it was on a middling low piece of ground I saw the sheep; I considered them in a bad condition in consequence of their being on low, wet ground; there was one or two racks in the lot.

Interrogatory 5. I would be afraid I could not get through with half such a flock; I told Foster Moore that I had said they would all die with the rot if kept where I had seen them.

374 Interrogatory 6. I am 46 years old, past; had to do with sheep raising.

Interrogatory 7. A flock of sheep will become diseased in a month in such a location, they would be most likely to take the rot.

XXVII.

Deposition of Henry H. Cooley.

379 Interrogatory 2. I first became acquainted with Foster Moore, about the 12th of June, 1854, at his residence in Iroquois county.

Interrogatory 3. I went there at the request of Lemuel Milk for some sheep due Milk from Moore.

Interrogatory 4. Did not get the sheep at that time; one reason they were not all sheared; another reason Moore wanted the privilege of picking out the fat wethers, and taking them to Chicago to sell and buy store sheep to put in their places, and that he would have them all ready in the course of a month he said.

Interrogatory 5. He further said he had sheep enough to fill the contract, but they were scattered about the neighborhood and on the prairie, and that he would get them together, shear them, pick out the wethers, &c., as above stated.

380 Interrogatory 6. I was also at Foster Moore's about a month afterwards and I got between 100 and 150 sheep of him.

Interrogatory 8. Moore was not at home the second time I went there; he said he had been to Chicago; he stated that he had not got all the sheep to fill the contract nor could not get them then.

Interrogatory 11. Said he would see Milk and arrange the matter with him as to time.

381 He stated also that the reason why he did not purchase sheep to fill the contract with the proceeds of those he took to Chicago was that the sheep was disposed of at a very low price, and that he had used the proceeds to pay a bank note that was then due or past due.

Interrogatory 13. I next saw Moore at Milk's farm on the 18th of November, 1854, he then stated that he was not able to fill the contract that year, but
379 if Milk would extend his time one year from that time he would pay the thing up.

385 Cross examination.

Conversation between Milk and Moore:

Interrogatory 19 and 20. Moore stated that he had bad luck with the sheep.

386 Interrogatory 26. Moore said nothing about Milk's making up any damage in consequence of Moore's loss in sheep.

XXVIII.

Deposition of R. H. Enos.

Interrogatory 2. I am acquainted with the parties.

393 Interrogatory 3. I am acquainted with Alexander Wilson, and have been acquainted with him since the fall of 1851; I know of Wm. Howard having let Wilson have some sheep in the year 1851; he kept them until the spring of 1852.

Interrogatory 5. I received the said sheep from Wilson as agent for Milk & Howard, and kept them on their farm till fall; some of the poorest were sold in November; the wethers was stall fed till the following spring and then sold.

394 Interrogatory 6. When I received the sheep of Wilson they were rather thin in flesh; some of them had shed their wool, caused I think for want of feed, proper care and management.

Interrogatory 9. I saw said sheep in Jan. or Feb., 1852, and examined them, some looked decently well and some were thin; were all in one yard together and appeared to be uneasy and hungry.

395 Interrogatory 10. I did not see them receive any care at all whilst I was there; I arrived there at night about sun down, came away next morning between 10 and 11 o'clock, they were not fed to my knowledge whilst I was there, and I know they were not fed.

395 Interrogatory 11. The sheep that I took away from Wilson's did well, considering the condition they were in when I took them; they had no disease to my knowledge; I am 44 years old and had the care of large flocks of sheep for the last ten years.

396 Cross interrogatory.
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Diseases, &c.

406 Instructions by the Court unasked by either party.

408 Instructions given by the court to the jury, on the part of complainants.

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411 Sixteen. Instructions to the jury on part of defendants.
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Verdict of jury and motion for new trial; motion overruled.

Motion for decree in favor of complainants on the evidence; motion overruled.

417 Appeal bond.

481 Decree and appeal.
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421 Certificate of Clerk.
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423 Stipulation as to evidence and record.

424 Assignment of errors.

1st. The verdict of the jury is not supported by the evidence.

2d. The verdict of the jury did not determine for whom or how they found the issues submitted to them.

3d. The Court below gave improper instruction to the jury on part of defendant as also of its own accord.

4th. The Court below admitted improper evidence to the jury on part of defendant.

5th. The Court below erred in overruling exceptions to the depositions of defendant.

6th. The Court erred in overruling motion for new trial.

7th. The Court erred in not rendering a decree in favor of the complainants on evidence in the case.

8th. The Court erred in giving a decree in favor of defendant and against complainants, and in dismissing the bill.

192

Samuel Moore
As

Grover Moore

abstract

Filed April 20, 1864
S. H. Moore