

No. 13876

# Supreme Court of Illinois

Ferguson et al.

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vs.

Tallmadge.

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# IN THE ILLINOIS SUPREME COURT.

APRIL TERM, 1858.

ALEXANDER FERGUSON, ISABELLA TAYLOR, GEORGE TAYLOR, ELIZABETH PRIMROSE, ELLSPET PORTER, GEORGE PORTER, DAVID CHALMERS, WILLIAM LITTLEJOHN, GEORGE YEATES, ROBERT CATTO, PETER WILLIAMSON, ALEXANDER SMITH, CHARLES CHALMERS, NATHANIEL FARQUHAR, ALEXANDER FOULERTON, ROBERT SMITH, JAMES MONTGOMERY, ELISHA A. KIRK, WILLIAM RALSTON, JAMES E. DENNIS, THOMAS PRIMROSE, AND THE UNKNOWN HEIRS AND DEVISEES OF JAMES DUNCAN deceased, Appellants,

VS.

ASA TALLMADGE, Appellee.

Appeal from Winnebago County Circuit Court.

## ABSTRACT.

Page 1. BILL in Chancery filed 7th February, 1851. It states that May, 1839, a joint stock company was formed at Aberdeen, Scotland, to loan money to persons in the United States, desirous to purchase lands at the government sales, particularly in Illinois, called "The Aberdeen North American Investment and Loan Company." Its affairs were under the direction of D. Chalmers, Littlejohn, Yeates, Catto, Williamson, A. Smith, C. Chalmers, Farquahar, and Foulerton, residing in Aberdeen and its vicinity.

2. On 10th May, 1839, those directors entered into an agreement under seal, with one William Taylor, then of Thomaston, Scotland, appointing him manager of the company's business in America, for the term of five years, and Taylor covenanted to proceed to the United States, and continue in the service of the company for five years, and to act as manager, for a salary stipulated in the agreement, and would not enter into or be concerned with any transaction whatever in business in America, in his own name or that of another, and that all investments in America which should be made in his name or another's for his behalf, should be held to be made with the funds and for the behalf of the company: a copy of the instrument being annexed to the bill, marked A.

The directors furnished Taylor with a large amount of money, with which he came to Illinois, to loan the same to persons desirous of borrowing it to purchase public lands at government sales thereof, upon the security of such lands. For that purpose he attended previous to and at a land sale at Chicago previous to the sale at Galena afterwards mentioned in the bill, and loaned a large number of thousand dollars to a great many persons, to enter lands at the sale at the rate of thirty-three and a third per cent interest to the year or higher, and to secure the payment of the loan and interest, had the lands bid off in his own name, and gave the purchasers thereof contracts to convey the legal title to their lands respectively upon the repayment of the loan and interest, in the same printed form as the contract between Taylor and complainant afterwards mentioned in the bill, the parcels entered lying in McHenry, Boone, De Kalb and La Salle counties.

6. For two or three years previous to the land sale at Galena in the latter part of October, 1839, complainant was settled upon a tract of land in the county of Winnebago, consisting of south half of section thirty-four and west half of section thirty-five, t. 45 n. r. 2 e. 3 p. m., containing 640 acres. He had a pre-emption right to a quarter section of it, by residence, and had improvements thereon of considerable value. The tract including improvements was then worth \$2000; and he held the whole tract as his claim, according to custom. He intended to acquire the legal title by purchase from the government, for his own benefit, when it should be sold, and he held possession for that purpose.

A sale of lands including the section was proclaimed by the President, at Galena, about 24th October, 1839, but the proclamation was known in the vicinity only about six weeks previous to the sale.

7. Complainant had not means to enter the land, nor could raise the same otherwise than by loan, and from the shortness of the time and other causes could not go east where the money could be procured.

Taylor had shortly before lent money at the sale at Chicago; and shortly after the publication of the proclamation, he gave out word that he would attend the sale at Galena,

to lend money in the same manner as at Chicago; and complainant was induced to rely upon borrowing of him, and made no other provision.

8. Taylor accordingly attended at Galena, previous to and during the sale, for the purpose of loaning money as aforesaid, and so loaned \$16,000 or thereabouts.

Complainant went to Galena shortly before the commencement of the sale, for the purpose of effecting a loan from Taylor to purchase the two half sections at the usual rate of \$1,25 per acre. Complainant made application to Taylor to lend him \$800 for that purpose, to which he readily consented, and thereupon a dissension arose as to the rate of interest; whereupon Taylor stated to complainant that he loaned money to all others at the rate of thirty-three and a third per cent or more, and that he would lend to complainant at no lower rate.

9. Having no other resource, complainant was obliged to comply, or lose his improvements, and the chance of entering the half sections, and was forced to and did consent to borrow the \$800 at the rate of 33 $\frac{1}{3}$  per cent by the year, to be paid in four instalments, or 50 per cent for one year if complainant desired to pay it in one year.

Complainant inquired what security he would require, and was informed by Taylor that he in all cases required the land to be bid off in his own name, and the receipts to be given in his own name, and held the title as security for payment, and should require the same of complainant.

10. It was therefore agreed that complainant should bid off the half sections in Taylor's name, that Taylor should furnish the \$800 to pay for them, and that complainant should repay him with 33 $\frac{1}{3}$  per cent interest as follows: \$264 in one year, \$264 in two years, \$264 in three years, and \$1064 in four years: and should covenant to convey the land to complainant on payment. It was further agreed that the payment should be made at Chicago, and that the payment of \$1200 in one year should be taken in full satisfaction of the above sums, and of the \$800 and interest. Taylor showed complainant a printed form, which he stated he required every person to execute, and should require complainant to execute.
11. Complainant with the knowledge and approbation of Taylor employed one Wade to bid off the half sections in Taylor's name, and complainant agreed to pay him one dollar for such service.

Wade on 29th October, 1839, bid off the land in half quarter sections, in Taylor's name, at \$1,25 per acre, the \$800 was advanced by Taylor, the receipts were made out in his name; complainant paid Wade the dollar, and Taylor was not present at the sale.

12. After the conclusion of the land sale a contract under seal was executed by Taylor and complainant in the printed form, in pursuance of the said agreement made before the lands were bid off, dated said 19th October, 1839, whereby complainant covenanted to pay the three sums of \$264, and the \$1064, in one, two, three and four years, and Taylor covenanted to pay the lands to complainant upon the money and interest being paid as above mentioned. A copy is annexed to the bill, marked B; the parts in hand writing being in brackets; and the agreement for payment in Chicago, and that \$1200 would be full satisfaction at the end of one year being inserted in manuscript, in a blank left in the printed form.

Complainant continued in possession of the lands, and resided thereon, until November, 1846, claiming them as his property, subject only to the incumbrance of security for the loan aforesaid.

13. Patents were issued to Taylor; and about April, 1842, he died at New Orleans, having 4th September, 1841, made and published at New Orleans, a paper purporting to be his will, whereby he bequeathed pecuniary legacies to several relatives, payable out of his personal property; and he inserted a clause purporting to leave and bequeath the residue of his estate whatsoever to the defendant Ferguson of St. Louis, and James Duncan of New Orleans, and appointed them and defendants Farquhar, G. Porter, G. Taylor and W. Primrose, his executors.
14. The will was not attested by two witnesses as required by statute of this state, nor by any witnesses whatsoever, so that it was insufficient to convey land or any interest therein lying in this state. A copy is annexed to bill, marked C. The will was not admitted to probate in this state.

At Taylor's decease the three first instalments only had fallen due, and no part had been paid; and after his decease there was no person in this state authorized to receive the money; nor was there any person authorized to release or convey the legal title to the land.

The directors of the loan company 8th Feb. 1845, filed in this Circuit Court their bill in equity, setting forth the contract between them and Taylor, and that Taylor received from them a large amount of money for investment in the United States, with which he came to Illinois as manager; that defendant Ferguson of St. Louis when the bill was filed, was appointed accountant; that Taylor at divers times entered with those monies, divers tracts of land in Illinois, in Winnebago, Boone, McHenry, De Kalb, Whiteside, Rock Island, La Salle, Kane and Madison counties, specified in schedules, including the half sections purchased by complainant as aforesaid, amounting to fifty-three half quarter sections in Winnebago, 45 in Boone, 54 in McHenry, 27 in De Kalb, 17 in Whiteside, 12 in Rock Island, 15 in La Salle, 20 in Kane, and one in Madison; that Taylor in direct violation of the agreement purchased and took the title to those lands in his own name, and not in his and Ferguson's, as manager and accountant, as he ought to have done, and thereby Taylor became trustee of the directors, and was bound to convey the lands as they might appoint; that after the purchase of the tracts, Taylor made several contracts in his own name for sale of portions thereof, which were outstanding and unperformed; that about 4th Sept. 1841, Taylor at New Orleans, made his will, appointing Ferguson, one of said directors, George Porter of Aberdeen, George Taylor of 93d reg't British army, William Primrose of Harrisburgh, Pa., Ferguson and James Duncan of New Orleans, his executors; that he made several bequests in money specified in the said bill; and that the residue of his estate of whatever kind, he left and bequeathed to Ferguson and Duncan, after paying debts and funeral expenses; that he directed his executors in six months to sell sufficient of his personal property to pay the legacies, so as to leave Ferguson and Duncan in the undisturbed possession of the residue of his estate.

21. A copy of the will was annexed; that about April, 1842, Taylor died at New Orleans, leaving Isabella Taylor his mother, his said brother George, his sisters Ellspet Porter and Elizabeth Primrose his only heirs him surviving, and sufficient personal individual estate to pay legacies, without resorting to real estate; that the will was 22d April 1842, admitted to probate and record at New Orleans, but no letters testamentary had ever been

22. granted, nor administration had; that after the probate, Duncan died, at New Orleans, leaving heirs or devisees unknown to the directors. The directors insisted that notwithstanding the devise to Ferguson and Duncan, the lands in equity belonged to them as directors and trustees of the company, and they had an equitable and legal right to require them to be conveyed as they might appoint, to be disposed of for the benefit of the company. They made Isabella Taylor, Elizabeth Primrose and William Primrose her husband, Ellspet Porter and George Porter her husband, Ferguson and the unknown

23. heirs and devisees of Duncan defendants; required them to answer without oath, and prayed that the lands might be conveyed to Ferguson.

The defendants were brought in by advertisement only; and at April Term 1845, the bill was taken as confessed; and without proofs, a decree was made declaring that Taylor purchased the lands with the monies of the directors as such directors, and in trust for them; that said persons named as his heirs were his heirs; that the real estate of Taylor was devised to Duncan and Ferguson; that the heirs of Duncan were unknown; that a conveyance of all the interest the defendants might have in any of the tracts ought to be made by them to Ferguson, in trust for the directors; that the trust in Taylor and his representatives for said directors, be established; that what Ferguson had by the devise be held by him in trust for the directors, for their exclusive benefit; and that defendants should by 24th April, release to Ferguson.

No release was made; James M. Wight was appointed commissioner, and in May 1845, executed a deed in conformity to the decree, which was confirmed 19th August 1845.

Under color of that conveyance Ferguson ousted defendant Tallmadge, in November 1846.

In 1848, Ferguson negotiated with defendant Robert Smith, for e.  $\frac{1}{2}$  s. w.  $\frac{1}{4}$  and e.  $\frac{1}{2}$

28. n. e.  $\frac{1}{4}$  s. 35, t. 45, n. r. e. 3. p. m. 160 a. [Tallmadge and Smith have settled, and the case of Smith is out of question.]

About same time Ferguson also made some agreement with defendant Montgomery  
29. for w.  $\frac{1}{2}$  s. e.  $\frac{1}{4}$  s. 34 and n.  $\frac{1}{2}$  e.  $\frac{1}{2}$  same quarter section, under which Montgomery went into possession.

30. On 22d Nov. 1849, Ferguson deeded to defendant Kirk, with general warranty, for a consideration expressed to be \$320, w.  $\frac{1}{2}$  s. w.  $\frac{1}{4}$  s. 35.

About January 1849, defendant Kalston negotiated with Ferguson for s. w.  $\frac{1}{4}$  s. 34, and  
31. w.  $\frac{1}{2}$  n. w.  $\frac{1}{4}$  s. 35, and went into possession of those tracts, and has occupied them ever since; but complainant is not aware what agreement was made.

32. Within a year or thereabouts before filing of bill, defendant Dennis negotiated with Ferguson for the purchase of c. e.  $\frac{1}{4}$  s. e.  $\frac{1}{4}$  s. 34; complainant is not aware what contract was made, and the land has been unoccupied.

33. Complainant avers and insists that it is not true as alleged by the directors in their bill and declared by the decree, that the two half sections described were entered and purchased with the monies of the said company, or in trust for them; but complainant entered and purchased them for his own benefit, and they were paid for with his monies, loaned of Taylor, and not with monies of the directors; complainant had them bid off in Taylor's name, to secure repayment.

34. The other tracts were in like manner purchased by divers persons and paid for with monies borrowed by them of Taylor; and complainant avers that the allegations in the said bill, that the said lands were purchased with the monies of the company, and in trust for them, are not only untrue, but false and fraudulent.

It is not true as declared in the decree, that the real estate of Taylor was devised to Ferguson and Duncan; and he insists that the alleged will is palpably insufficient to convey real estate in Illinois; so that the said lands descended to the heirs of Taylor; and complainant insists that the said allegation was fraudulently obtained to be inserted in the decree.

35. The alleged contracts with Taylor were none other than the contracts of complainant and others with Taylor, to secure to him repayment of monies borrowed, with exorbitant rates of interest, and all of them were mortgage securities.

36. The bill, decree and proceedings under it were fraudulently set on foot by the said directors, unjustly and unlawfully to get the legal title to the tracts vested in a trustee in their behalf, so as to defeat the resulting trust and equity of redemption which the said purchasers had in the same and to defraud complainant and the rest of them of their purchases.

37. And complainant insists that the right of Taylor being only a mortgage interest, and the contract for the payment of the mortgage monies not being assigned to the directors, the supposed conveyance of the legal title under the decree was nugatory and conveyed no right whatever, if it were otherwise legal.

38. It appears by said bill, and is true, that there was no executor or administrator of Taylor, or other person who could receive payment of the contracts with Taylor, or release them; so that if the transfer to Ferguson should stand, complainant is still liable to any  
39. executor or administrator of Taylor who may appear, without means of obtaining title, and the other said purchasers are in the same predicament.

If Taylor were the agent and trustee for the directors, and they were entitled to the proceeds of his operations, the only lawful and honest mode to avail themselves was to cause some person to administer in this state, collect the monies due for the loans, and to procure the heirs or devisees of Taylor to convey title, and to cause the administrator to account to them. The reason why they did not, and why they filed their bill was, they intended by getting the legal title into a trustee for themselves, to defraud complainant and the other purchasers of their equity of redemption; and under color of having the legal title, to extort large and exorbitant sums not due, to get title, or if the purchasers refused or were unable to pay.

40. In pursuance of this plan, Ferguson in September, 1845, demanded of complainant \$2385,60 for a conveyance of the two half sections, and upon complainants refusing, proceeded to oust him, and offered to sell to others.

The bill and decree were fraudulent in this, that the last instalment in complainant's

41. contract was not due at Taylor's decease, and he had not had an opportunity to make payment to any representative of Taylor; and the other purchasers were in the same predicament.

Ever since the time for payment of the last instalment, complainant has been willing and desirous to pay the \$800 with legal interest, and get title; and he is now ready and willing, and offers to do it, and to pay any sum the court may decree.

Complainant was not a party to the bill of directors, nor were other purchasers, and 42. he had no opportunity to defend his rights, or prevent the decree; nor had the other purchasers, although according to rule, he and they were indispensable parties. The omission was fraudulent, and complainant insists the decree was void as to him.

The defendants to complainant's bill, especially Robert Smith, Montgomery, Kirk, Ralston and Dennis, at all times since the entry of the half sections, had notice of the rights and claims of complainant, and of his possession of and residence upon the same under such claim.

43. On 17th June 1850, Ferguson executed a deed of the half sections, except the quarter quarter section he had deeded to Kirk, with divers other tracts mentioned in the decree, purporting in consideration of \$1.00, to release them to defendant William Primrose of St. Louis, with special warranty.

44. Complainant well hoped &c. Charge that the contract was fixed to conceal usury, and give the contract the appearance of a sale and purchase.

45. [The bill in charging part sets out the commencement of the suit on 29th Jan. 1844, of Sutphen vs. Ferguson and others, afterwards appealed to Supreme Court, and reported 3 Gilman 547, on one of the Taylor contracts, says issue was joined in suit, and proofs 49. taken by 19th Jan. 1845, which shewed clearly that Sutphen was entitled to recover, and that at March term a decree was made according to the claim, for the conveyance of the land to Sutphen. Ruled out on exception 22.]

By reason of the Sutphen suit, the directors and their agents became alarmed lest others 50. might avail themselves of their equity of redemption, on 8th February 1845, after proofs taken as aforesaid, filed their aforesaid bill in the Circuit Court of Winnebago County, and fraudulently omitted to make complainant and other purchasers parties, for the purpose of anticipating and forestalling them, and of defrauding and depriving them of their equities of redemption, before they should be aware of the result or pendency of the Sutphen case, and thus prevent their redemption, and the directors obtained a decree by collusion with Ferguson and other defendants, to their bill.

51. Complainants bill required defendants to answer under oath, in the usual form, and interrogates as to contracts of Smith, Montgomery, Ralston, Kirk and Dennis with Ferguson, 52. and the payments made upon them; about claim, residence and possession of complainant, and the time when the defendants knew thereof; about their knowledge of 53. Taylor's transactions and contract with complainant; whether at time of contracts it was 54. not a subject of common conversation in the neighborhood, that complainant had entered the half sections as stated, and intended to insist on his right; whether they were not 55. called "The Tallmadge lands;" and whether Ralston did not come into the neighborhood of the lands, and inquire into the title, and had not been told of complainant's 56. possession and claims.

57. Relief prayed—That said decree as to complainant and the half sections, may be decreed fraudulent, null and inapplicable; that the conveyance of the half sections under it may be set aside, that complainant's equity of redemption may be declared, an account 58. taken; a day be assigned for paying principal interest into court for the use of the persons 59. entitled to it, to be paid out when right to it is established; that Taylor's heirs, &c., and 60. Ferguson and Primrose release and convey; and that possession be given; and for general relief.

#### SCHEDULE A.

##### *Contract between Directors of Loan Company and William Taylor.*

61. The contract is under seal, dated 8th May, 1839. Its substance is as follows: The directors having engaged Taylor as manager of the company business in America for

five years from 1st June then next, he hereby binds himself to proceed to the United States of America, and to leave this country by said 1st June next, and to continue in that service at such place or places as the directors may from time to time appoint, for five years; during which space he binds himself to act as manager in the business of the company and in following forth to the best of his abilities the whole objects thereof as expressed in its contract of copartnership, declaring he shall invest £2000 sterling in the original capital stock of the company, and shall sign the contract of copartnership with all

64. convenient speed, and to have shares of reserved stock, without premium. It is intended that the investments of the company's funds in America are to be made in the names of the manager and accountant jointly and the survivor of them. Taylor binds himself, his heirs, executors and successors whomsoever, without prejudice to his engagements as manager for five years, instantly to divest himself of the whole or any part of the company property when required by the directors, to any one appointed by them; and for that end he hereby assigns, transfers and makes over to and in favor of the directors of the said company, for the time being, the whole property of whatsoever description, her-

65. itable and moveable, real and personal, which he may afterwards acquire in North America as manager, and to grant all necessary deeds. Taylor shall at all times and under all circumstances, be bound to conform himself to the instructions of the directors, as notified to him through the cashiers and agents of the company. He shall be bound upon his arrival in America, with all convenient speed, to sell and dispose of any property he may at present have in that country; and shall not be entitled to make any fresh investments, or be connected with any transaction in business in America, in his own or other name; and all investments in America which shall be made in his own name, or other

66. name for his behoof, shall be held to have been made with the funds of the company. He shall become naturalized in the United States, as soon as the forms will admit; and generally he binds himself to comply in all respects with the provisions of the contract of copartnership of the company, although not expressly herein mentioned, and to advance its interests to the utmost of his power.

On the other part, the directors as directors for the whole of the partners, bind themselves to pay Taylor a yearly salary of £300 sterling, and commission upon the nett profits of the company, as the said profits shall be ascertained by the half yearly balance sheet, of one per cent if the profits shall amount to six per cent and not to twelve; of two and a half per cent if they shall amount to 12 and not to 25 per cent; and of five per cent if they shall amount to 25 per cent and upwards, over and above expenses, payable at the dates from time to time to be fixed by the directors for balancing the books. In

67. case of war before Taylor shall be naturalized and commence operations, or any thing shall occur in the relation of the two countries or otherwise so as to frustrate the objects of the company and render it expedient for the partners to dissolve by virtue of the power, then the engagement shall terminate, and the parties shall account.

#### SCHEDULE B.

*The contract between Taylor and Tallmadge, the parts written being inclosed in Brackets.*

70. Article of agreement made 29th Oct., 1839, between William Taylor of St. Louis, Missouri, of the first part, and [Asa Tallmadge of Winnebago Co., Illinois,] of the second part, witnesseth, that the party of the first part at the request of the party of the second part, and in consideration of the money to be paid and the covenants herein expressed to
71. be performed by the party of the second part, hereby agrees to sell to the said party of the second part, [the s. e.  $\frac{1}{4}$  and s. w.  $\frac{1}{4}$  s. 34 and also n. w.  $\frac{1}{4}$  and s. w.  $\frac{1}{4}$  s. 35 t. 35 r. 2 e. 3 p. m. 640 a.] And the said party of the second part, in consideration of the premises, agrees to pay to the said party of the first part, his executors, administrators or assigns, [\$1856,00] as follows, viz: [\$264 in one year; \$264 in two years; \$264 in three years;
72. and \$1064 in two years from date.] And also in due season pay all taxes. And party of the first part covenants that upon performance by party of the second part, and payment of principal and interest of sums above mentioned, in the manner specified, he will execute and deliver in person or by attorney, a sufficient deed or deeds, and thereby assign and convey to the said party of the second part [his] heirs and assigns, a perfect and unincumbered title in fee simple to the premises. And it is mutually covenanted, that on

default of payment of principal or interest at any of the times specified, and for sixty days thereafter, this agreement shall be null and void, and no longer binding, at the option of the party of the first part, or his representatives or assigns, and all payments made forfeited; or at the election of the party of the first part, his representatives or assigns, the liability of the party of the second part shall continue and may be enforced, and the said consideration money, with the annual interest as above specified be collected by proper proceeding in law or equity; and in case of default and election to consider contract of sale at an end, the party of the second part [his] heirs, representatives or assigns, who may have possession or right of possession, shall be considered tenant and tenants at will of the party of the first part, his heirs and assigns, on a rent equal to an interest of [ten] per cent per annum on the whole amount of the purchase money above specified, payable quarter yearly from the day of default. And after default and election, the party of the first part, his representatives and assigns, may exercise all the powers, rights and remedies provided by law or equity to collect such rent, or to remove such tenant or tenants, the same as if the relation of landlord and tenant were created by an original absolute lease, on a specified rent payable quarterly on a tenure at will; and in such case the tenant or tenants shall pay all taxes, and will not commit or suffer waste; but will keep and deliver up, on the termination of such tenancy, the premises in as good order and repair (ordinary wear and decay and unavoidable injury by the elements excepted) as they were at the commencement of such tenancy. [And it is further agreed by the parties, that the payments shall be made at Chicago; and that the sum of \$1200 will be considered as full satisfaction for the foregoing bond at the expiration of one year from this date.] Signed and sealed by the parties, and witnessed by John Q. A. Rollins.

79.

SCHEDULE C,

77-78.

*Is the will of Taylor, the substance of which is stated in complainant's bill.*

SCHEDULE E.

79.

*Deed from Ferguson to Kirk.*

Dated 22 November, 1849. It acknowledged 2 January, 1850, bargains and sells w.  $\frac{1}{2}$  s. w.  $\frac{1}{4}$  s. 35, in consideration of \$320, with general warranty.

80.

SCHEDULE F.

*Deed from Ferguson to Thomas Primrose.*

Deed dated 17 June, 1850. In consideration of one dollar, it quit claims several tracts to Primrose, including all the lands in question, except the eighty acres deeded to Kirk.

81.

82.

83.

PROCEEDINGS PREVIOUS TO ANSWER.

1. Writ of summons issued 7 February, 1851, and served the next day upon Montgomery, Kirk, Ralston and Dennis.
85. Affidavit of non-residence of the defendants.
87. Notice and certificate of publication
90. Motion to dismiss the bill and for rule on complainant to bring certain monies into court denied, and defendants except.
- 91 to 96. Defendants file 29 exceptions to the bill October 10, 1851.
99. Master's report on exceptions allowing the 3d, 4th, 6th, 7th, 8th, 9th, 11th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 24th, 26th, 27th and 28th, and disallowing the 1st, 2d, 5th, 10th, 12th, 13th, 14th, 23d, 25th and 29th.
101. Order of the court on exceptions to the master's report. This order finally sustained the twenty-second exception to the bill, relating to the allegations concerning the Sutphen suit, inclosed in brackets, and referring to record page 48.

THE ANSWER OF THOMAS PRIMROSE.

110. Admits the existence of a company in Scotland with directors as stated in the bill, and that the business of the company was to invest their capital in property and securities, real or personal, in the United States, and that they contracted with William Taylor, as stated in the bill.

Said Taylor proceeded to the United States, located at the city of St. Louis, and carried on business for said company, and among other things, he made large investments of

money in the purchase of lands in Illinois; attended the land sales at Galena and there purchased large tracts of land, taking the title in his own name. That after the purchase said Taylor made contracts with persons to sell them the lands purchased by him at said sales, but did not make loans to any person at that time.

112. Defendant denies having any knowledge or information of complainant ever having resided on the lands in question, or of having any dealings with Wm. Taylor.  
Admits that Taylor purchased the lands in controversy at the public land sale and gave the contract set out in the bill to complainant, but denies any loan having been made.
113. April 20, 1846, a judgment was rendered in the Winnebago Circuit Court in favor of said Ferguson against said complainant in an action of ejectment, in consequence of which complainant abandoned said premises about November, 1846. Denies that complainant did the ordinary acts of ownership, such as cultivating, improving, &c.  
Admits that Wm. Taylor died in March or April 1842, having made a will as stated in the bill.
114. When Taylor died there were two instalments due and unpaid on complainant's contract; from that time until the title of the lands became vested in said Ferguson complainant might have paid either to Alexander Brand in Chicago, or said Ferguson in St. Louis, who were authorized to receive the money due on said contract. Said complainant had not paid the taxes accruing on said land while he resided on it.
118. Admits the proceedings in chancery, decree, and conveyance to said Ferguson as stated in the bill, but that testimony was taken in the suit, and the proceedings were all in good faith, without fraud, and that complainant remained in possession of the land a long time after he had forfeited all right to the same by his contract.
116. Said Ferguson made a written contract with defendant Montgomery dated June 26, 1848, to sell to him the w.  $\frac{1}{2}$  of the s. e.  $\frac{1}{4}$  of said s. 34 for the price of \$480, payable, \$150 00 Nov. 1 thereafter; \$165 00 Nov. 1, 1849 and \$165 00 Nov. 1, 1850, with interest and the taxes; that said Montgomery paid all of the said purchase money prior to the commencement of this suit, except \$114 63-100 which was paid Aug. 28, 1851, when a deed was executed to said Montgomery by this defendant, in whom the title then was. Montgomery had had possession of and had cultivated and made improvements and paid the taxes on said land since the date of his contract.
117. Said Ferguson made a similar contract with William Ralston, April 27, 1849, to convey to him the s. w.  $\frac{1}{4}$  of s. 34, and the w.  $\frac{1}{2}$  of the n. w.  $\frac{1}{4}$  of s. 35, for \$960, payable \$320 down, \$320 in one year, and \$320 in two years with interest and the taxes; that said Ralston at that time paid the \$320, took possession of the land—paid afterwards and before this suit was commenced \$358 40-100; May 5, 1851 he paid the balance, and Aug. 28, 1851, took his deed from defendant. He made a similar contract with defendant Kirk, Nov. 26, 1847.  
June 27, 1849, Ferguson contracted to convey to Jas. E. Dennis the s. e.  $\frac{1}{4}$  of the s. e.  $\frac{1}{4}$  of s. 34, for \$200; \$50 was paid down, the balance payable \$75 00 in one year, and \$75 00 in two years with interest and taxes. Dennis paid before the commencement of suit \$114 00, and since \$102 50-100 together with the taxes—has had possession since the date of his contract, and received his deed from defendant.
118. Defendant was not advised of the suit or proceedings in Chancery until after the termination, but denies all fraud and insists upon their legal effect to vest the title of the lands in the trustee appointed by the decree.
120. Complainant never paid or offered to pay the amount specified in the contract of sale of said Taylor, and after Ferguson became vested with the title he brought a suit in ejectment against complainant and obtained judgment, and complainant abandoned the premises, never having paid nor offered to pay anything, even the taxes thereon. Soon after Ferguson advertised the lands for sale until the lands were sold, and complainant took no steps to prevent a sale, or to assert his claims.
121. Ferguson conveyed the lands to defendant in good faith, and he never had any notice of complainant's claim until the commencement of this suit.
121. Defendant claims the benefit of the act entitled "an act concerning conveyances of real estate," passed January 31, 1827, also an act of Congress entitled "an act for the relief of purchasers of public lands," &c., passed March 31, 1830. Also that more than six

years have elapsed since the making of the contract, before the bringing of this suit.

123. By the terms of the contract, Taylor or his grantees had the right to declare it forfeited, and Ferguson had so declared it long before the sale to said defendants. Sworn to.

THE ANSWER OF WILLIAM RALSTON.

145. Denies any knowledge of complainant's residence on the land in dispute, or of his desire or purpose to purchase it. Admits that it was originally entered by Wm. Taylor;  
146. that said Taylor died, and proceedings in chancery were had in behalf of David Chalmers and al. vs. Alexander Ferguson and als. to vest the title of the land in said Ferguson. On the 27 day of April, 1849, defendant purchased the land in question of Alexander Ferguson and Thos. Primrose for the sum of \$960: paying for it \$320 May 21, 1849, and agreeing to pay \$640 in two annual payments, with interest and taxes; said Primrose executing to him an agreement in writing to convey the land on payment of said amount. On the 26 day of May, 1850, defendant paid to Ferguson on the contract \$358 40-100, and May 5, 1851, he paid the balance, \$339 73-100, to Primrose the  
147. grantee of Ferguson, and received from him a warrantee deed dated Aug. 28, 1851.

Defendant entered into possession of the land about May 20, 1849, and before he had any intimation of complainant's claim he had paid for purchase money \$698 40-100 and for permanent improvements \$320; and since service of the summons in this suit \$220 for improvements, and \$22.02 for taxes.

147. Denies all knowledge of fraud in the chancery suit, and insists that it was instituted rightfully for the purpose of determining the title of the land, and defendant claims the benefit of the same as constituting a part of his chain of title.  
148. Denies any knowledge of complainant having any claim to the land until the service of the summons and until defendant had paid out \$998 40-100; at the time of the purchase the land was unoccupied and unimproved; defendant before purchasing carefully examined the public records of the county of Winnebago, which showed the title in said Ferguson, and there was no indication on record of complainant or any other person  
149. having any conflicting title or interest. Defendant claims the benefit of the statute entitled "an act concerning conveyances of real property, approved January 31, 1847," complainant not having had his contract with Taylor recorded within thirty days nor before defendant's purchase.  
150. Defendant also claims the benefit of the act of Congress entitled "an act for the relief of purchasers of public lands," &c., passed March 31, 1830. Defendant claims the benefit  
151. of the lapse of more than six years—Ferguson had declared the contract forfeited.

THE ANSWER OF JAMES E. DENNIS.

Admits that complainant some time resided on some part of the tract of land mentioned in the bill, but denies all knowledge of the existence, nature or extent of complainant's claim, or of his dealings with William Taylor.

104. June 27, 1849, defendant bought of Alexander Ferguson the land in question for \$200, paying down \$50 and taking from him a contract for a deed on the payment of the balance with interest in two equal annual payments together with the taxes.  
105. Previous to the commencement of this suit defendant had taken possession of the land and had paid to Ferguson \$114 of the purchase money, and afterwards he paid the balance \$102 50-100 to Thomas Primrose the grantee of Ferguson, and received from him a warrantee deed of it dated April 22, 1851.

There was no improvement on the tract purchased by defendant; complainant had abandoned his residence in the neighborhood—the whole tract of land had been advertised for sale a considerable time before defendant's purchase.

In all other respects same as the answer of William Ralston. Sworn to.

126. The answer of James Montgomery states the purchase of the land being made by him  
127. June 24, 1848, and that he paid Nov. 18, 1848, \$150; Nov. 21, 1848, \$60; Oct. 2, 1850, \$100; Nov. 1, 1850, \$100; and the balance \$114 63-100 Aug. 1851, and received  
184. his deed. In other respects mainly the same as the answer of Ralston. Sworn to.  
187. The answer of defendant Kirk shows that he purchased his land of Ferguson Nov. 22, 1848, and paid for it \$320, and took his deed Nov. 2, 1849.  
189-190. He built a house and made other permanent improvements on the land to the amount

of about \$1000. Previous to making the purchase defendant had examined the records of the county and found no appearance of title in other person than Ferguson; and complainant had abandoned the land and told defendant that he had abandoned his claim to it. He admits the conveyance from Wight to Ferguson, and insists that the chancery proceedings were valid and cannot be impeached.

144. In other respects same as answer of Ralston. Sworn to.

COMPLAINANT'S EVIDENCE.

167. *Deposition of John Bray taken 23 March 1852.*

168. Witness saw William Taylor at Galena, 29 Oct. 1839, at land sale. Became acquainted with him by employing him to enter a tract of land for me. What was Ferguson's business at that land sale? (Objected to.) The business that I had with [him] and some others that I knew, was to loan money of him to enter land. I understood from him that his business was to loan money to settlers to enter their lands, and that he did not want the land, he wanted his money back again.

What were the terms and security? &c. (Objected to.) His terms with me and others was  $33\frac{1}{3}$  per cent. He had the land bid off to him to secure him, and they had to pay the amount to him and  $33\frac{1}{3}$  per cent by the year until they had all paid up. I heard that he was there for the purpose of loaning money to the settlers to enter their lands and take them for security. I made application to him. I asked him his terms. His reply was that he deeded and took the land for security and gave a bond for a deed when they paid up the principal and interest. He said his rate of interest was  $33\frac{1}{3}$  per cent.

Esq. Cross was hired to bid off the lands by the settlers in Taylor's name. Complainant was one who hired him. All had to pay him 50 cents.

*Deposition of Daniel Piper taken 23 March 1852.*

169. Witness knew Taylor at Galena at the land sale. I understood that he had money to loan, and I went to him for the purpose of loaning money. I asked him if he had money to loan. He said he had. I then asked him what interest he charged. He said he was letting money at  $33\frac{1}{3}$  per cent. I told him I had a lot of land I wanted deeded. He said he would advance the money to deed the land, and that he invariably took the deed of the land for security, and I made a bargain with him to that effect. Witness got sick of the bargain, and went and told Taylor he would not have it entered.

161. Knows of complainant's making arrangements with Taylor for money at  $33\frac{1}{3}$  per cent. Taylor told me he had made arrangements with Tallmadge to enter his land at the rate of  $33\frac{1}{3}$  per cent a year, and Tallmadge was to have the privilege of keeping the money four years.

Was present when the bond between complainant and Taylor was executed. Taylor told Tallmadge that as fast as he got money to pay for a lot of the land he would make him a deed of it. There was to be no reduction of interest below  $33\frac{1}{3}$  per cent.

Tallmadge lived on the land at the time. He had a house on it, and some 20 acres were under cultivation.

162. Cross examined.—Is sure Taylor used the word interest at that land sale. He said he would deed the land [of witness] in his own name, and give me three years to pay it in at  $33\frac{1}{3}$  per cent. Thinks Taylor used the word security in some of the conversations.—Taylor told witness about the arrangement with Tallmadge when witness went to see him about entering his own land.

167. *Deposition of Horace Dyer taken 10 March 1853.*

Witness first became acquainted with the lands in question in 1837. There was some breaking on s.  $\frac{1}{2}$  s. 34, done in 1837. In 1838, there was some fencing made on the land. There was a house built on n. w.  $\frac{1}{4}$  s. 35, in 1837 or 1838.

168. Always understood that the two half sections were included in one claim. Tallmadge was on the claim working on it, and I supposed he was in possession of it. He told me it was his claim, and I never knew of any other's claiming it.

The land was sold in Galena in October, 1839. The notice was very short. Witness attended, and saw William Taylor there. I hired \$100 of him to deed 80 acres of land.

169. Knew that he had money to loan for that purpose by hearsay. I called at his office and

asked him if he had money to loan. He said he had. I then asked him how he let his money. He said he asked  $33\frac{1}{3}$  per cent per year. I then asked him for what length of time. He told me for three years. I then asked him in what way he took security. He said he took the duplicate in his own name, and gave a bond for a deed. The interest was to be paid yearly for the first two years, and the last year the whole amount of the bond was to be paid.

The land I wished to enter cornered on the northeast corner of the Tallmadge claim, on section 32. This conversation occurred some two or three days before the lands in that neighborhood were sold.

170. Has known defendant R. Smith about 9 years; Montgomery about 9; Kirk 10 or 12; Dennis about 9. Does not know Ralston. These parties whom he knows have resided in the neighborhood of the Tallmadge lands, since he became acquainted with them.

Previous to the land sale these lands were designated as the Tallmadge claim, and since that time as the Tallmadge lands. Knows Tallmadge lived on the lands after the land sale, but how long he cannot say. He had a family and was living with them on the land as early as 1837 or 1838, and continued to reside there some years after the land sale.

Cross examined.—Should think between 18 and 20 acres were broken by Tallmadge. At one time previous to land sale, the breaking was all fenced in. Don't know how long it remained fenced in, or when the fence was removed.

The house was a log-house, 16 by 18 or 18 by 20. Has stated the conversation with Taylor as it actually took place, as near as he can recollect; in the same words as near as he could. May have used different words, but still they convey the same meaning.— Asked him how he let money, and what per centage he asked. Will not be positive whether he used the word let, or asked him what per centage he asked for money. He told me he would let me have the money for thirty-three per cent per year for three years.

173. *Deposition of Samuel Cook, taken 9 March 1853.*

Witness is acquainted with the lands in question, and has been a good many years, and was as early as the winter of 1836 or 1837.

174. Should think there was some breaking done on the s. e.  $\frac{1}{4}$  s. w.  $\frac{1}{4}$  s. 35, in the fall of 1836 or 1837. In 1837 or 1838, he broke some prairie on e.  $\frac{1}{2}$  s. e.  $\frac{1}{4}$  s. 34, for Tallmadge. There was some fencing on the piece last described. There was a house on the w.  $\frac{1}{2}$  n. w.  $\frac{1}{4}$  s. 35, previous to land sale in 1839.

Before the land sale, Tallmadge told me he claimed the two half sections, and I supposed he did as no other person claimed to hold them. I claimed the whole or a greater part of the half sections, and sold it to Mr. Spoons for 1000 rails in 1836 or 1837. Afterwards in 1836 or 1837, Mr. Spoons came to me with Tallmadge and said if I would take him (Tallmadge) for the rails, he would give up the trade to him. I told him I would. Tallmadge furnished me the rails, and I considered the claim his. Tallmadge took possession in 1836 or 1837, built a house and put on the fencing before referred to, and lived on the premises with his family up to and for a number of years after the land sale. He commenced living on the land in the latter part of the years 1836 or 1837. (Answer objected to.)

175. The sale commenced in October 1839. The notice was very short. Witness attended, and saw Taylor. He said to witness and to other settlers, he would enter their lands provided they would have them bid off in his name, and he would give a bond to deed after a certain number of years, in case they would pay him according to the stipulations in the bond. The rates as he gave them to me and some others, were that we should pay him \$33 per year for each eighty, and at the end of the term \$133. Taylor said to me and other settlers, that he would furnish us the money to enter our lands for 33 per cent, if we would get the land entered in his name, and he would give us a bond for a deed. Taylor made such a contract with me and others in my presence. Was not present when Tallmadge's contract was made.

176. Witness has known defendant Robert Smith about 10 years; Montgomery 10; Kirk 12 or 14; Ralston 3, and Dennis 8 or 10. They have all of them resided, except Rals-

ton, in the neighborhood of the lands above referred to, since he became acquainted with them. Ralston has lived most of the time since I knew him on the premises above described.

One of Montgomery's boys some eight or nine years ago worked for Tallmadge on the premises. The boy lived with his father at this time.

The lands were designated and called before the land sale as the Tallmadge claim, and since then have been called the Tallmadge lands or place.

Tallmadge resided on the lands some five or six years after the land sale.

178. Cross examined.—Should think there was something over eighteen acres broke on the section claimed by Tallmadge before he left it. At one time the whole breaking was fenced in two fields, by rails and poles some five or six rails high. Tallmadge cultivated the land that was broke, some two or three years, thinks in 1838, 1839 and 1840 and thereabouts.

The house was a log house, hewn down on the inside. It was some 16 by 18 or 18 by 20 feet. It was not over and above well finished, but was quite comfortable. It was burnt down three or four years since.

The fences Tallmadge built are not standing now. It is some years since they were taken away; should say it was from three to five.

Tallmadge does not reside in the neighborhood. Has not he thinks for five or six years.

179. *Deposition of William Magoon, taken 10 March 1853.*

180. Witness is acquainted with the lands. First knew them in 1838. There were two fields broke and fenced and a house on the land in 1838. Tallmadge was living with his family in the house in 1838 or 1839.

Witness went into that neighborhood in fall of 1838, and has resided there to the present time. Never knew of any other person claiming the land but Tallmadge. Both half sections so far as he knew, were called one claim, and were called the Tallmadge claim.

181. The notice of the land sale was short.

Has known defendants Robert Smith, Montgomery, Dennis and Kirk about 12 years, and Ralston some 3 or 4. Since he knew them, they have resided in the immediate neighborhood of the Tallmadge lands.

182. Has had conversations with Smith, Montgomery and Kirk about Tallmadge's claim to the lands. Has had several conversations with Montgomery on the subject. The first was some year or two ago. The conversations were as to whether Tallmadge could get any thing from Taylor or not. Had a conversation some year ago with Kirk while riding from Rockford with him home. Kirk said he had bought eighty acres of the Tallmadge land, and had built a good house on it, and if Tallmadge got the land he would get a good house.

The lands have always been called the Tallmadge lands since he knew them.

183. *Deposition of John Conway, taken 10 March 1853.*

Witness is acquainted with the two half sections. There were two fields broke and fenced, and a house built on the lands when I first knew them in 1838. Thinks one of the fields was on the s. w.  $\frac{1}{4}$  s. 34, and the house on n. w.  $\frac{1}{4}$  s. 35.

The two half sections were all included in one claim, and Tallmadge claimed it, and I never knew of any other person's claiming it. It was always called Tallmadge's claim.

184. The notice of the land sale was short. Witness attended and knew Taylor there.—Had no conversation with him, except with reference to entering witness' own land. I went to him and asked him for money to enter my land. He said he would take the duplicate in his own name, and I must pay him so much interest yearly, and pay him up in three years. He charged me thirty per cent yearly for the money. Witness got money from him on these terms to purchase lands with at that sale.

Taylor said he was letting settlers have money to enter their lands at 33 per cent, the interest to be paid yearly; and that he took the land in security.

Don't know what the Tallmadge claim on those lands was worth, at the time of the

land sale. Talked with Tallmadge about purchasing one half the claim, and offered him about \$400 in property for it. Should think the value of the improvements at the time of the land sale, was between \$250 and \$300.

186. Cross examined.—Don't know what was the value of the house. It may have cost \$60, and perhaps more. Tallmadge was the last person he knew living in the house.

Tallmadge cultivated two fields on the land, thinks, all the time he lived on it.

Does witness recollect whether the word interest was used by Taylor? Asked him where we should pay the interest. Is sure he used the word interest. Don't recollect whether Taylor did or not. Had an idea at the time that he was borrowing money of Taylor.

187. *Deposition of John Dyer, taken 11 March 1853.*

Witness is acquainted with the half sections. Thinks he first knew them in 1837.— There was some breaking made on s. w.  $\frac{1}{4}$  s. 34 in 1837, in July or August—ten acres. There was also another piece of breaking done on s. e.  $\frac{1}{4}$  s. 34 in 1837 or 1838. Both pieces were fenced. There was a house built on n. w.  $\frac{1}{4}$  s. 35, thinks in 1837.

The two half sections were considered as one claim, and Asa Tallmadge was in possession of it, and claimed the same. He lived on the claim with his family as early as 1837, and had possession and lived on the premises up to and after the land sale.

The notice of the sale was very short. Money could not be obtained in Illinois at the legal rate of interest as far as witness knew. The rate usually given was from 25 to 50 per cent.

Attended the land sale and knew Taylor there. His business there was lending money to men to buy their lands. He loaned money at 33 per cent. He let the money for three years, the interest to be paid yearly, and took the duplicate in his own name for security and gave the settler a bond for a deed.

189. Knew of a loan being made by Taylor to Tallmadge the complainant; and I made a loan for my brother of him. Also of a loan by Taylor to one Bray, and to one Barker witness' brother-in-law, to enter his lands. The lands of my brother and Bray were in the immediate neighborhood of the Tallmadge land. The loan to Tallmadge was to enter the land in question.

Made application himself for a loan. I told him first I wanted \$50, and would give him 87 acres of land for security. I wanted the money for one year. He said he would not loan money for one year, but would loan it to me for three years, at 33 $\frac{1}{3}$  per cent per year. Declined taking the money, as he wanted it for only one year.

Is not positive how long Tallmadge resided on the lands after the land sale. It was over three years.

190. Has known defendants Robert Smith, Montgomery, Kirk, and Dennis since 1841 or 1842; Ralston, some 3 or 4 years. All of them except Ralston have resided since he knew them in the immediate neighborhood of the Tallmadge lands. Ralston lived about three miles from these lands previous to and up to the time he moved on the Tallmadge land, where he now resides.

Has had some conversation with defendants Kirk, Ralston, Smith and Montgomery about Tallmadge's claim to the lands. Ralston said Tallmadge had forfeited his bond, and he did not think he could hold the land. He said Tallmadge had never paid any thing on the land, and had forfeited it, and he did not think he could hold it. The duplicate had been taken in Taylor's name, and he could hold it. Don't recollect what was said with Montgomery. Kirk seemed to carry the idea that Tallmadge stood a good chance to get the land back.

State whether Ralston in any conversation with witness ever pretended that he purchased in ignorance of Tallmadge's claim? (Objected to.) He never did. Did he say any thing about his knowledge of the claim of Tallmadge before he made his purchase? If so state fully what he said. Has no recollection that he did. He always carried the idea that Tallmadge had forfeited his title or claim, had never paid any thing on the bond, and the duplicate was taken in Taylor's name.

192. First learned at the land sale that Taylor had money to loan to settlers, by hearsay, and went with others to him to get money. Was present when Tallmadge applied.—

When Tallmadge first went to him he said he wanted to hire money to enter the lands in question, and asked what terms he would enter it on, and what interest he asked.— Taylor said he should want  $33\frac{1}{3}$  per cent per annum for three years; said he would take the duplicate in his own name, and give him a bond for a deed. Tallmadge objected to giving so high a rate of interest, and tried to beat him down. Taylor said that was his rate, and would not let it go for a less rate; that he had the lands bid off in his own name, and gave bonus for deeds.

Cross examined.—There was a small inclosure about the house besides the two fields.

194 to 196. Contract of sale from Taylor to complainant, dated Oct. 29, 1839, same as attached to bill.

197. *Deposition of John Q. A. Rollins, taken 12 March 1853.*

Witness is about 38, and resides in Belvidere, Boone county. Was acquainted with Taylor in 1839 and 1840. Became acquainted him first in 1839, at Chicago. There was a land sale at Chicago, in Sept., I think, 1839. Understood a man named Taylor was to be there to loan money to settlers to enter their lands. Found him at the Lake House, and inquired of him if he intended to be at the land sale at Galena. He told me he should be there to loan money to the settlers. I then made arrangements with him for money to enter my lands, and to assist him in making locations and loans at the Galena land sale.

Mr. Taylor told me that he had loaned about 9 or \$15,000 at Chicago sale. It was either \$9,000 at Galena, and \$15,000 at Chicago, or \$15,000 at Galena and \$9,000 at Chicago. His rate of interest was  $33\frac{1}{3}$  per cent per year, and he loaned his money for three years, sometimes for four. He let the settlers have the money and took the deed of the land in his own name for security. He told me that was his mode of taking security for the money. He took the land in his own name, and gave to the settlers a bond to deed to them when they paid him the money and interest. He referred to his intended operations at Galena, as well as to those at Chicago, and he made an arrangement with me to assist him at the Galena land sale. He said he had been misled at Chicago, in some instances, and had entered some tracts for settlers he thought not worth government price. He said he did not want the land, all he wanted was his money and interest, and he did not want to enter poor lands for any person.

198. Witness then resided at Belvidere, in the district of lands sold at Galena in 1839, and attended that sale. Knew Tallmadge there. Knew of a negotiation between him and Taylor for a loan of money. Introduced him to Taylor. Tallmadge made an arrangement with him to enter his lands, s. e. and s. w.  $\frac{1}{4}$  s. 34, and n. w. and s. w.  $\frac{1}{4}$  s. 35, t. 45, r. 2 e. 3 p. m. Tallmadge was to pay Taylor  $33\frac{1}{3}$  per cent per year for four years.— Tallmadge was to take a deed of the lands from the government in Taylor's name, which was done, and a bond was given back to Tallmadge by Taylor. It was further agreed between them that if Tallmadge should pay Taylor \$1200 in one year Taylor would deed him the land.

199. Mr. Tallmadge said he wanted to get the money at a less rate of interest. Taylor told him he had but one rule to go by with all, and that was to loan his money to every one at  $33\frac{1}{3}$  per cent. He stated to Tallmadge that his rule was to take the deed of the land in his own name for security, and gave back a bond to deed when the money and interest should be paid.

Thinks this arrangement was made before the lands in question were bid off. Tallmadge agreed to have the lands bid off in Taylor's name, and I know that Tallmadge caused the lands to be bid off in Taylor's name.

200. Thinks he took out the receiver's receipts for complainant's lands, in company with Tallmadge. It was my business to take out the receipts for lands bid off in Taylor's name. He gave the receipts to Taylor and a bond was then made out to Taylor. The

201. bond, same as schedule B attached to bill, is produced and made an exhibit. Witness says this is the bond there given by Taylor to Tallmadge. He was present at its execution, and at the request of the parties witnessed it. At the negotiation nothing was said

about charging interest upon the price of the lands. The bonds given to other settlers by Taylor were all like the one given to Tallmadge, and were all printed forms.

Did Taylor to your knowledge state whether the money he lent at that sale, belonged to himself or not? (Objected to.) I never heard him represent to any one but that the money was his. He called it his own money, and used it as such. Witness loaned of Taylor about \$1000 to enter land.

Cross-examined. Mr. Taylor paid the money to the land officers for this land. Witness received the receipts for Taylor at his and Tallmadge's request.

204.

*Deposition of Asahel C. Bemis, taken May 1853.*

Is acquainted with the lands in question. First knew them in 1838 or 1839. Complainant had possession of them at that time, and until 1842, but how long after he cannot tell.

Has lived within  $1\frac{1}{2}$  miles of the lands sixteen years. They have always been called the Tallmadge lands.

Defendant R. Smith has lived on land adjoining the Tallmadge lands since 1842.—His house is about half a mile from them. Kirk lives about 100 rods from the Tallmadge lands, and has at least 8 years. Dennis about half a mile off sometime. Saw Kirk at the land sale in 1839.

206.

Tallmadge was offered \$1500 five or ten days before the land sale. Neighborhood has been settled for six or eight years, but he should call it thin.

*Deposition of Ezekiel Dennis, taken May 1853.*

206.

Witness is acquainted with the lands in question, called the Tallmadge lands. Is acquainted with Kirk, and heard him say he was about to purchase a part of that tract of Robertson & Holland for \$4.00 per acre, thinks. Heard him say he thought the title he was to have would be good when he got it. Said he expected the title from Alexander Ferguson. He said the land was entered by Taylor; that Taylor's title came from the

208.

United States; that he bid off the land and got the duplicate. I heard him say he did not believe Taylor ever furnished Tallmadge one cent of money to enter those lands; he had understood Taylor's practice was when application was made to him for money to loan, his reply was that he had no money to loan; but if the land was well situated and of good quality, he would enter it, and enter into an article to make a deed when they fulfilled.

Heard him say after Tallmadge left the land, that if he ever had any title he had forfeited it. Tallmadge had been residing on the lands, and his leaving them gave rise to these conversations.

Heard James E. Dennis say he was about to purchase a part of the Tallmadge lands. He said he thought it best to purchase it because it lay adjoining our farm. He said if Tallmadge had any claim, he supposed he had forfeited it. Don't know as he said anything about how. He depended upon the opinion and judgment of others. He is my son, and when he heard that Tallmadge had left the land, it confirmed us in our opinion that he had forfeited his claim.

Cross examined.—State when it was a subject of conversation in the neighborhood, that Tallmadge had forfeited his title, and if it was, how general was that conversation? (Objected to.) It was very frequently talked about at the time he left, and afterwards.

209.

*Deposition of Jonathan H. Kirk, taken May 1853.*

Witness is acquainted with Elisha A. Kirk. I recollect hearing him say that he calculated to purchase a part of the Tallmadge lands. He said he thought the title was good. I heard him say that Tallmadge had forfeited his claim. I had been talking with him about Tallmadge's title to the lands. He said Tallmadge had forfeited his claim to it.

210.

Is acquainted with Ralston, and heard him say that he had purchased three eighty acre lots of the Tallmadge claim. Did he say anything about his title to these tracts? and if he did what did he say about it? He said he never knew of such a man as Tallmadge when he purchased. (Objected to as not being responsive to the question.

211.

Is acquainted with defendant Dennis, and heard him say he was calculating to purchase a piece of the Tallmadge lands. He said he considered the title good.

218.

*Deposition of Robert Montgomery, taken May 1853.*

214. James Montgomery resides about one mile from the Tallmadge land, and has lived there six or seven years. He is my father. Witness has lived with him since he resided there. Tallmadge had not left the lands when his father came into the neighborhood; and his father knew that Tallmadge lived on the land when he first came. Don't recollect working on these lands, unless in the garden. His father got timber from the grove on the Tallmadge land to build a house. Don't know of whom it was purchased.

Is acquainted with the defendant Ralston. He was in the neighborhood but a few weeks before he purchased a part of the Tallmadge lands.

216.

*Deposition of James Ralston, taken May 1853.*

William Ralston (defendant) is witness' father. He has resided on what is called the Taylor lands, about three years—the lands sometimes called the Tallmadge lands. He went there from about half a mile this side of Roscoe in this county. He went to examine the lands before he purchased; thinks one or two days. Robert Smith and John Smith, brother to Robert, went with him to shew him the land.

Cross-examined. Defendant Ralston lived in Hamilton county Ohio before he moved to near Roscoe. Left there four years ago last March, and had lived there about ten years.

*Testimony of George Pratt.*

256.

Witness has been present at several times at conversations between complainant and defendant Kirk. Heard one at Kirk's house in fall of 1851. I heard them talk about this suit. I heard each one say that they would not disturb each other about the property; that they should have no difficulty about the property. Kirk said he would not do anything to prevent complainant from getting the the property if complainant would not disturb him. Kirk said complainant ought to have some of the land or some pay.—Complainant said Kirk would not have any trouble from him from the fact that he had told him to buy the land before he bought it. Don't recollect what was said about future prosecution of the suit.

Cross-examined. Tallmadge said he would not disturb Smith. I think he said he would settle *with him*. He said Smith and Kirk were fine people, and he would not disturb them.

Direct. These conversations were about two years ago, [two years previous to hearing.] I think Kirk and Tallmadge were good friends. Cannot say as to Smith.

810.

Stipulation of the parties attached to the record that the bill of Tallmadge correctly sets out the original bill filed by said company; also, the will of said Taylor; the deed from Jas. M. Wight, commissioner, to said Ferguson, and the deed from Ferguson to said Primrose, and that the same were in evidence in the Circuit Court, as set out, and that the tables in said bill are to be used on the argument in this Court.

72.

The affidavit that the heirs of James Duncan are unknown.

DEFENDANT'S EVIDENCE.

*Depositions taken Sept. 15, 1853.*

221.

William Magoon testified that defendant Kirk was in possession of one eighty of the s.  $\frac{1}{2}$  of sec. 34 and w.  $\frac{1}{2}$  of sec. 35, T. 45, R. 2. Montgomery of one eighty and forty.—Dennis of one forty, and Ralston of some part. Complainant was in possession of the lands at time of land sale.

222.

Kirk first entered into possession four or five years ago. Do you know whether Tallmadge before Kirk purchased, knew that Kirk intended to buy, and if so state what you know on that point, and how your knowledge is derived. (Objected to.) Mr. Tallmadge rode up with me from Rockford to Mr. Kirk's house, and on the way we got into conversation about the land Kirk had bought, and at that time Tallmadge said to me that Kirk had told him he wanted to purchase that piece of land, and he said to him to go ahead and get it if he wanted it. This conversation was a year ago this fall. Have you had any conversation with Tallmadge about that conversation since? Not much, if any.

Cross-examined. When did Tallmadge say it was that he told Kirk to go ahead and get the land if he wanted it? He did not say when it was. How did you happen to get into conversation with Tallmadge on that occasion? I do not now recollect how it was. When we were together, we were always talking about that land, and I was frequently saying to him that when he got the land, I wanted to be his tenant. Witness often joked with complainant about this land. How happened you and Tallmadge to be talking about Kirk's getting some of the land at that time? I do not now recollect.—Did not Tallmadge on that occasion say that Kirk had been trying to settle with him about the land? I do not recollect that there was any such conversation at that time or not. Do you not recollect whether Tallmadge, when he said he told Kirk to go ahead and get the land if he wanted it, referred to going ahead in this suit? I do not recollect, he might, and might not.

Direct.—Understood or took it to be that he referred to the time when Kirk first got the land.

Cross.—Did Tallmadge state to you when it was that he had told Kirk to go ahead and get the land if he wanted it? I do not recollect that he did. Did Tallmadge in that conversation which you mention, state whether or not he meant to have the lands in question in this cause? I don't know as he said so at that time; he might and might not.

225. Thomas Lake testified. Complainant lived on some part of said land previous to the land sale in 1839; can't say when he left there; it was before Kirk took possession—understood he removed to the Kishwaukee, 16 or 18 miles distant. Same lands are now occupied by Kirk, Michael, Ralston and Montgomery.

228. The improvements on the land at the time complainant left consisted of a field that had been fenced, but the fence had been removed and a house that he had lived in—of no value.

Kirk has made improvements, worth \$600 or 700, two-thirds broke and a good frame

229. house on it. Enclosing and improving the land worth \$200 to \$300. These improvements have been made about three years. Ralston has built a house and enclosed a large

229. field about three years since, improvements worth \$100 or \$500.  
The house built by Kirk was a frame house worth about \$300; the fence was worth

281. \$175, and the breaking \$125. The estimate of Ralston's improvements was for his fencing and breaking.  
282. Samuel Hovie testified that defendants Ralston, Kirk, Montgomery, Smith and Michael had occupied the lands four or five years. Complainant left them in 1846. Were no improvements on the land when complainant left. Witness estimates the improvements

334. made by the defendants about the same as the last witness. Complainant took rails from that land. Tallmadge told witness once before he left the land, that Mr. Kirk had said to him Tallmadge that if he did not want to buy that land, he Kirk wanted to buy an eighty of it, and as near as I recollect Mr. Tallmadge said he told him he might. Thinks

236. this conversation was at witness' house, but is not certain. Cannot tell what introduced the conversation. Do you recollect clearly what was said in that conversation? I have mentioned already all I can remember. It is my impression that what I have stated, was said. It is now some time ago, and I did not pay much attention to what he did say.

237. Ezekiel Dennis testified that he had known the lands 11 years; that complainant had left them over five years. When he left there was no improvement on the land except an old log house, of no value; during the year previous complainant had sold some rails from there to witness, and others were removed.

288. Kirk commenced making improvements the same season he purchased; broke between

239. 60 and 70 acres; made 400 rods of fence; built house, &c., worth for all \$700; the principal part was made before the commencement of this suit.  
240. Montgomery had broke 50 acres and built 250 rods of fence worth \$250; more than half of it had been done previous to the commencement of this suit. Ralston has broke 140 acres, built a log house, and made 480 rods of fence, worth \$385. About half was done before this suit. Kirk finished and occupied his house previous to January 1851.

242. Wm. T. Kirk testified that he lived on the farm adjoining complainant in DeKalb county; complainant had lived there six or seven years last fall, and came there from his

243. former place in Winnebago county; he was intimate with witness and conversed freely about his affairs; he said he had once given up all hope of getting the land, but now was going to try for it; he had struck a new lead; this was about four years ago; he said Kirk was on the land and was improving it.
244. Complainant was in the habit of visiting the lands frequently about five years since; he advised me to buy the quarter north of Kirk. About five years ago, witness said to complainant that Elisha Kirk wanted to buy the lot north of him. I do not recollect the precise answer he gave, but he said that Elisha had better go and buy it, or something to that effect. He once said that there was an understanding between him and Elisha Kirk, that he should never disturb him.
245. Cross-examined. He did not state what kind of an agreement it was, nor that he had received any consideration for it, any more than that Elisha had always used him first rate. Don't recollect when this conversation occurred; has talked the matter over many times. Don't think it occurred last spring.
247. Harry Doolittle testified that he had known the lands 14 years. Complainant left him seven years ago. There was no improvement on the land except a log house, worth perhaps \$50.
248. One year ago last March complainant said there would be no difficulty between him and Kirk about the land because there was an understanding between them. He was frequently in that neighborhood for the first five years after he left.
252. Jason Marsh testified that he was attorney for Ferguson in an ejectment suit vs. complainant. After judgment was rendered complainant came to him and wished him not to issue a writ to get possession for a certain time, and then he would leave voluntarily; to which witness consented.
- W. D. Michael testified that he heard a conversation between complainant and R. Arthur in 1846 about some rails in a fence on the line between him and complainant—afterwards in passing the place complainant said that was all the improvement left on the land and he had now left the land and had done with it. Witness was taking a load for complainant to his place on the Kishwaukee.
253. Witness related the conversation to defendant Kirk. Complainant has told witness that he had pre-empted the land he lived on, on the Kishwaukee; he moved there in the fall of 1846; talked about the pre-emption last spring, in March or April. Complainant said he had given notice of his pre-emption, but he let it run out and entered the land.
253. Robert Smith testified that complainant told him that he was going to leave the land and go on to a claim he had on the Kishwaukee, and that witness might and had better buy it if he wished to buy land. This conversation was in the spring of 1846, and he communicated it to defendant Montgomery before he purchased; also to defendant Kirk soon after complainant told him; but he does not recollect whether it was before or after Kirk bought.
255. Witness went over the land with defendant Ralston before he purchased, and told him that Ferguson had the sale of it. Ralston was in the country about 10 days before he purchased. There was no improvement on that part.
- Elias Martyn testified that he bought of complainant some of the floor boards of the cabin where he had lived. After they were taken away the cabin was of no use for a house.
259. John Smith testified that he had known the land about eleven years. In the spring of 1846 complainant and defendant Smith were walking over the land and complainant told him if he was going to buy land to go on and buy some of this, for he (complainant) did not intend to have any thing more to do with it. Complainant was then residing on the land; he remained there about six months afterwards. Defendant Kirk went on to the land in 1846 or 1847. Complainant moved to DeKalb county, and was in the habit of coming back into the neighborhood of the land for several years; he knew of the land being occupied and cultivated.
264. Defendant Montgomery purchased in 1847 or 1848. Witness told him what complainant had said about leaving the land before he purchased; he has made improvements

265. worth between \$200 and \$300; those made before this suit worth a hundred and thirty or forty dollars. Kirk's improvements were worth \$800 or \$900; those made before this
266. suit were worth about \$800. Ralston's improvements were worth about \$700; those made previous to this suit were worth \$400 or \$500; there were no improvements on the land when Kirks purchased. Complainant told witness since the commencement of this suit that when he and the company got through he would not disturb the occupants of the
267. land, and would get his money back from the company. He removed all the rails from the land before he left.
274. Thos. D. Robertson testified that as the agent of defendant Primrose, he sold the land to defendant Kirk Nov. 26, 1847, according to the terms stated in a letter delivered to Kirk, and received from him the several payments endorsed thereon.
275. Witness sold the land to defendant Montgomery as indicated in the letter C, June 26,
276. 1848, and that in letter D to defendant Ralston April 27, 1849. Payments were made by them as endorsed on said letters. The tract as mentioned in letter E was sold to defendant Jas. E. Dennis, June 27, 1849, and payments made as endorsed thereon.
278. Witness had been agent for Primrose to sell these lands since 1845, and was authorised to do so.
280. The contracts of Primrose to Kirk, dated Nov. 26, 1847, was for the sale of w.  $\frac{1}{2}$  of s. w.  $\frac{1}{4}$ , sec. 35, T. 45 n., R. 2 E., for \$320; payable \$160 down, \$80 in one year, \$80 in two years, at six per cent. interest and taxes. Endorsed in payment Feb. 10, 1848, \$220; Nov. 24, 1848, \$20; June 27, 1849, \$42 33-100; Nov. 6, 1849, \$42 20-100; Dec. 22, 1849, \$10 17-100; (balance and deed delivered)=\$334 47.
283. To Ralston, dated April 27, 1849, for the s. w.  $\frac{1}{4}$ , sec. 34, and w.  $\frac{1}{2}$  n. w.  $\frac{1}{4}$ , sec. 35, T. 45, R. 2, E., for \$960; payable \$320 down, \$320 in one year, and \$320 in two years, with interest at ten per cent. and taxes. Endorsed in payment, May 21, 1849, \$320; April 26, 1850, \$358 40-100; May 25, 1851, \$339 73-100, and deed given=\$1018 13.
282. To Montgomery, dated June 26, 1849, for the w.  $\frac{1}{2}$  s. e.  $\frac{1}{4}$  and n. e.  $\frac{1}{4}$  of s. e.  $\frac{1}{4}$ , sec. 34, T. 45, R. 2, E., for \$480; payable \$150 Nov. 1, 1848, \$165 Nov. 1, 1849, \$165 Nov. 1, 1850, with interest at 6 per cent. and taxes. Endorsed as payments, Nov. 18, 1848, \$150; Nov. 21, \$60; Nov. 1, 1850, \$100; Oct. 2, 1850, \$100, Dec. 10, 1851, \$114 63-100, (balance,) and deed given=\$524 63.
284. To Jas. E. Dennis, dated June 27, 1849, for the s. e.  $\frac{1}{4}$  of s. e.  $\frac{1}{4}$  of sec. 34, T. 45, R. 2, E., for \$200; payable \$50 down, \$75 in one year, \$75 in two years, with interest and the taxes.
285. Endorsed as payments, June 27, 1849, \$50; April 20, 1850, \$20; Sept. 7, 1850, \$10; Oct. 7, 1850, \$34; Sept. 12, 1851, \$102 51-100=\$216 51-100, and deed given.
286. Record of a suit in ejectment in favor of Alexander Ferguson vs. Asa Tallmadge, in the
287. Winnebago County Circuit Court, commenced Nov. 11, 1845. Narr filed Nov. 24, 1845. Defendants plea filed Dec. 13, 1845.
289. At the August Term, 1846, the defendant Tallmadge withdrew his plea and judgment rendered against him.

#### FIRST DECREE.

301. That the bill be dismissed as to defendants Kirk and Smith. That complainant be allowed to redeem the lands as against defendants Montgomery, Ralston and Dennis, by paying to them the monies paid by them before the filing of the bill to Ferguson or Primrose, and for taxes paid by them, and the value of permanent improvements made by
302. them before that time, charging them with the rent of the premises, and that it be
303. referred to the master to take proofs and state an account.
306. Master's report made and filed April 25, 1855, shows that Dennis' account stood for
313. cash paid, taxes and interest,-----\$161.10  
Improvements since commencement of this suit,-----\$121.  
Value of the rents,-----76.
- Leaving a balance for improvements over and above the rents, \$45. Amount to be
314. paid by complainant,-----\$161 10-100
314. Montgomery's account stood—for cash paid, taxes and interest, \$542 13-100; improvements and taxes since filing the bill, \$304.26; value of the rents, \$305; balance of \$0.74

315. over and above improvements and taxes; leaving the amount to be paid to Montgomery, \$541 39-100.
316. Ralston's account stood—for cash paid and interest, \$901.11; improvements and interest, \$343 64-100; rents over and above taxes, &c., \$500 87-100; leaving a balance to
317. be deducted, \$157 23-100; amount to be paid to Ralston, \$743 88-100.
320. Order for further reference to the master to report an account for rents subsequent to 1854.
322. Master's report made and filed May 6, 1857, showing Ralston chargeable for rents over
325. and above the taxes for the years 1855 and 56,-----\$886.67.
326. Montgomery same, \$262 42-100; Dennis same, \$93 37-100.
- Order of the court on exceptions to master's report, deducting from Ralston's amount
327. \$70, and from Dennis' \$8.00.
329. Order of reference to the master to take further account of rents.
- Master's report made and filed February 26, 1858, showing a balance due from complainant
336. May 3, 1858, to defendant Dennis for monies paid over and above rents, &c., \$1.21.
- From defendant Ralston to complainant for rents, &c., over and above monies paid for the land,-----\$396 70-100
- To defendant Montgomery for monies paid over and above rents, &c.,---219 10-100
338. Master's report confirmed.

FINAL DECREE.

343. Finding that the amount reported by the master (\$1.21) to be due from complainant to defendant Dennis was paid into court.
- Decree—That defendant Ralston pay to complainant \$396.70; being the amount for rents over and above the purchase money paid by Ralston, and that execution be issued for that sum May 1, 1858; that said Ralston convey said lands to complainant and give possession to him by said 1st May, or that a commissioner be appointed by the court to
344. make the conveyance; that the defendant Dennis convey said land to complainant in the same manner; that defendant Montgomery make conveyance of his said land by the same time and manner, on condition of said complainant paying him the said sum of \$219 10-100 and interest by the said 1st May, and in case of the default of complainant to make such
346. payment, then he to be foreclosed of all equity of redemption in said premises; and that the complainant recover his costs against said defendants Ferguson and Primrose, and one third of his costs against said defendants Ralston, Montgomery and Dennis severally. If Montgomery, Ralston and Dennis take appeal complainant to have thirty days after it is disposed of to pay balance to him.
- Order allowing an appeal by defendants Ralston, Montgomery and Dennis. Stipulation for the same record to be used by appellants and plaintiffs in error.
345. Appeal bond.

ERRORS ASSIGNED ON THE RECORD BY APPELLANTS.

The Circuit Court erred—

1. In not requiring the complainant to bring the monies into Court, and in not dismissing the bill.
2. In not allowing the defendants exception's to the bill.
3. In allowing to complainant rents and profits on improvements made on said lands by defendants.
4. In rendering a decree for said lands to be conveyed to complainant without requiring him to pay any purchase money.
5. In rendering a decree in favor of complainant against defendants Ralston, Montgomery and Dennis.
6. In rendering a decree for costs against defendants Ferguson, Primrose, Ralston, Montgomery and Dennis.
7. In not rendering a final decree in favor of defendants.
8. In not rendering a final decree in respect to the rights of defendants Ralston, Montgomery and Dennis, as against defendants Ferguson and Primrose.

JASON MARSH, for Appellants Ralston, Montgomery and Dennis.

JAMES M. WIGHT, for Appellants Ferguson and Primrose.

