

12415

No. _____

Supreme Court of Illinois

Smith, et al.

vs.

^c
Saxkett, et al.

71641  7

In the Illinois Supreme Court.

Benjamin Smith,
Margaret M. Smith and
Levi Moulthrop

June Term, 1854.

vs.
Simmons Sackett,
Benjamin Sackett,
Erastus P. Moulthrop,
Neville Miller,
Gardner B. Miller and
Hiram Waterman.

Error to Winnebago.

Abstract.

The original bill was filed 22 May, 1846, by Margaret Moulthrop (now Smith) widow of Levi Moulthrop, physician deceased, and Levi Moulthrop, their son, an infant of five years, against all the defendants except the two last.

Several years previous to 24 Oct. 1839, deceased was in possession of the following lands in Winnebago County.

E. $\frac{1}{2}$ S.E. $\frac{1}{4}$ S. 14 T. 43 N. R. 1 E. 3 p. m.

78.65 a.

N. $\frac{1}{2}$ same quarter

78.65

E. $\frac{1}{2}$ S.W. $\frac{1}{4}$ same section

78.65

E. $\frac{1}{2}$ W. $\frac{1}{2}$ same quarter

39.32

N. $\frac{1}{2}$ N.E. $\frac{1}{4}$ S. 19 T. 43 N. R. 2 E. 3 p. m.

80.

Undivided $\frac{1}{2}$ E. $\frac{1}{2}$ S.E. $\frac{1}{4}$ S. 20 T. 43 N. R. 2 =

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23 $\frac{3}{4}$ a. pt. N.W. $\frac{1}{4}$ S. 14 T. 43 N. R. 1

23.75

Acres. 419.02

The lands were sold at a land sale at Galena, about 24 Oct. 1839, up to which sale, deceased had improvements worth \$1000 and more, and a preemption right to a quar-

30 ter section. During all the time he held the land and made the improvements, he intended to acquire the title for his own use, when sold by the government. The proclamation ~~came~~ was known about six weeks previous to sale, and it was necessary to raise the money by loan, \$1.25 to the acre, estimated at \$580. The quarter sections being supposed full.

There was much sickness, and deceased could not absent himself. He therefore commissioned Croston P. Mount-
40 throp his cousin, a defendant whose residence, ^{is} ~~was~~ unknown to go to Connecticut where deceased formerly resided, to borrow the money, and enough more to bear his expenses back on account of deceased, and advanced his expense money thither. Croston went; but in violation of his duty, entered into a negotiation and combination with defendant Benjamin
45 Sackett, of Warren, Connecticut, to secure to himself some share of the benefit of the loan and purchase of the lands. It was agreed between them that Benjamin Sackett should advance the money, and that the legal title to the lands should be holden as security for the repayment with
50 interest.

Defendant Simmons Sackett of Canfield, Brunswick co. Ohio, brother of Benjamin, happened to be on a visit to him at Warren, Ct. and Benjamin proposed that Simmons should, after returning home, accompany Croston to the
55 residence of deceased in Hishwaukee precinct, attend the land sale, and see that the entering of the lands was properly conducted, assigning as a reason that he was well acquainted with land operations, ~~and could~~ and could be confided in to conduct the business properly; that he should bid off the lands in his own name, and hold the
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65 legal title in trust to secure the repayment of the money, estimated at \$530, which it would have been, looking a few cents, had the subdivisions been full measure; and in trust also to some to Benjamin Sackett \$120 in name and under color of a compensation for his expenses, time and trouble, ^{in attending the sale, &c.} making in all \$650; and in trust also to convey the lands to deceased and Erastus when the payment of the \$650 should be obtained. This was agreed to by Erastus and Simmons, and Benjamin placed in hands of Simmons the \$530.

70 Simmons Sackett returned home and came with Erastus to residence of deceased, where they arrived only three days previous to the land sale. Erastus informed deceased that upon such conditions and no other, he could have the benefit of the loan. He was unwilling, but unable to obtain the money from any other source, was forced to comply. Simmons and deceased attended the land sale, and Simmons bid off the lands and took the receipts in his own name, except the $23\frac{3}{4}$ acres, ~~part of a fractional division~~, since the undivided half of 80 acres. The $23\frac{3}{4}$ acres, being part of a fractional division, was bid off by another person, paid for out of the money loaned, and conveyed to Simmons.

80 The undivided 80 a. had been occupied by deceased and Pearley J. Shumway jointly. It was agreed by them and ~~Shumway~~ Simmons, that half the purchase money should be advanced by Shumway; that it should be bid off by Simmons Sackett, and that he should convey the undivided half to Shumway, free of incumbrance. It was accordingly bid off by Simmons; but a mistake occurred in the receipt, so that it did not describe any land in existence; which led to a mischief hereinafter detailed.

90 The sum paid for the lands was \$523.77, less by \$126.23

95 them the \$650 which was to be secured on the land to Benjamin. Upon his return from the land sale, Simmons Sackett insisted, as he had done before, that the \$126.23, was not sufficient to compensate him for his time, trouble and expenses in attending to the business, and claimed \$30 more, which was acquiesced in by deceased, because he supposed himself in the power of Simmons as to the title to the lands. The sum to be paid was fixed at \$680. And it was agreed that the \$650 borrowed from Benjamin Sackett ~~then~~ with interest should be paid to him by deceased and Erastus in two years from 1 Oct. 1839, and also to Simmons \$30 in the same time. A contract in writing was then made under the hand and seal of Simmons Sackett 105 dated 13 Oct. 1839, whereby he bound himself, his heirs, &c. in \$5000 to deed unto Levi Moulthrop or Erastus P. Moulthrop aforesaid, a good and sufficient warranty deed, or to assign over to them or either of them, the duplicates of the lands, so that the said Levi Moulthrop or Erastus P. Moulthrop could obtain a deed [patent] from 110 the government; with a provision that the said Levi Moulthrop or Erastus P. Moulthrop should pay up the said \$650 advanced by Benjamin as aforesaid, and raise a certain note given to him for the amount thereof, by the said Simmons Sackett, payable in two years from 115 1 Oct. 1839, being the date of the said note, ^[with annual interest] and also pay to Simmons Sackett \$30, to be paid within two years from the date of the said note, with a penalty or defeasance, that if the said Moulthrops should fail to raise the note and deliver it over with the \$30, within two years of the 120 date of the note, then the said bond should be void. A copy is annexed to amended bill, marked B. It was but

Upon its execution, it was taken into the possession of the deceased, and kept by him until his decease.

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Subsequently deceased was married to Margaret, and died 12 Sept. 1840, leaving no child, and afterwards was born of the marriage, the complainant Levi.

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At his death, Margaret was about 17, unacquainted with business, and the sudden disappointment overcame her fortitude, her health gave way, and she became sick and despondent for more than a year. In consequence, Crastus possessed himself of most of the personal property, books and papers, including the contract with Sackett, under pretense of settling the affairs of the estate. He mis-
135 conducted himself in relation thereto, ^{and wholly} declined paying up any part of the money to be paid to the Sacketts. He left this state in June, 1841, and engaged in the service of Benjamin as a laborer on his farm, at Warran, Ct., and was in such service when the money became due.
140 Complainants charge that the Sacketts were advised of his delinquencies in regard to the estate.

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The approach of pay day without provision being made, was a source of great anxiety and annoyance to Margaret, in her low health, and fearing that proceedings at law or in equity might be taken, and that the disturbance might be fatal to her life, some George her mother undertook to negotiate with Benjamin for an extension of payments, Margaret being still a minor, and for that purpose, went in Sept. 1841, went to Warran, Ct. On such negotiation, she offered to pay him \$170, on condition that he would wait two years for the residue. He declined, alleging the inconvenience of breaking the entirety of the contract; he made no objection to waiting the two years, but
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155 that such arrangement required the consent of Simmons
Sackett in Ohio, and advised her to apply to him. He
offered to ^{write and} send a letter by her to him, but would not
let her see its contents. She refused to carry a letter without
knowing its contents, stating she feared it might defeat
her purpose. She then proposed to him to go with
160 her to Ohio, to make the arrangement. He answered
that he had brothers and sisters in Ohio, with families,
some of whom he had not seen for several years, and
it would be very agreeable for him to go; but he could
not afford to pay his expenses; and that he could not
165 agree to go at all, until he had consulted his friends.

The next day he offered, that if she would pay him
\$100 down, and apply \$52 of it to pay four per cent per
annum on the \$650, in addition to the interest which would
have accrued on it when it fell due, and allow \$48, the
170 residue for his time and expenses, and would agree to
pay 10 per cent per annum on the \$650 for two years
more, legal interest in Connecticut being six per cent, he
would go with her to Ohio and endeavor to induce
Simmons Sackett to make an arrangement for two-
175 years more to pay up, and have the lands conveyed
for the benefit of complainants.

Mrs. George paid the \$100, and asked him for a
receipt. He declined giving it, on the ground that it
would shew that the receipt of the \$52 was usurious;
180 and gave her a receipt for the \$100, specifying it to be
for his expenses and time in making the journey to
Ohio.

Erastus P. Moulthrop was at the house and in the ser-
vice of Benjamin Sackett, ^{at the time} of this negotiation, and was

185 well aware thereof; and without the knowledge of Mrs. George, delivered up the contract to him.

190 B. Sackett accompanied Mrs. George to Ohio. On their arrival at the residence of Simmons Sackett, it was proposed by them to him that two years more should be allowed to raise the money, for which he expressed himself willing. But he refused to make the necessary arrange-
195 ment therefor, unless Mrs. George would defray his expenses and pay for his time in travelling to Wm. Wa- go county to settle a judgment against him in the Circuit Court, in favor of Shumway, and would pay the costs and expenses of that judgment. The judgment
200 grew out of the mistake at the land office, and was re- covered as hereinafter stated.

Upon this negotiation, Benjamin Sackett insisted that
205 Erastus should have an equal share of the benefit of the lands and extension of payment, with complainants. Simmons refused to accede, alleging that it was a fraud upon the deceased, contrived by Benjamin and his wife, sister to Erastus, that the name of Erastus was ever pro-
210 cured to be inserted in the contract originally; and complainants charge the fact to be so. Erastus at that time had no prospect of being able to pay up any share of the money, which was well known to Benja-
215 min; and Erastus acknowledged to Mrs. George at War- ren, that he had no prospect of being able to pay up his share, and was willing that any arrangement she might make, should inure solely to complain-
ants. He at that time gave up the contract to be can-
215 celled, and thereby renounced any benefit he might be intitled to from it.

220 The judgment happened as follows. When Simmons Sackett bid off the undivided ~~80~~ for half of the 80 for Shumway, his wife was in Ohio, and could not then release her dower. He therefore gave Shumway a bond in \$500 conditioned to convey the undivided half to Shumway in six months, the mistake in the receipt not being discovered. He discovered it soon after his return home, and in consequence did not make the deed within the time. The mistake was rectified at his instance about February, 1841, but he still neglected to make the deed. On 31 May, Shumway sued out a writ of attachment on the bond, from the Winnebago Circuit Court, and attached s.e. 1/4, s. 14, t. 43 n. r. 1 e. 3 p. m. and n. 1/2 w. 1/2 ne. 1/4, s. 14 t. 43 n. 2 - part of the lands held in trust by Simmons as aforesaid. He paid no attention to making the deed until after the next August term, when Shumway recovered \$4.80 damages and \$19.19 costs, to be made of the lands attached; the lien of which he was in equity bound to remove. Shumway's whole object was to induce him to convey the land mentioned in the bond; and he was willing to release the judgment on receiving the conveyance and being paid the costs and expenses of obtaining it.

240 When Simmons Sackett insisted that he would come in person to settle the judgment, and be paid as aforesaid, Mrs. George remonstrated, and assured him that the only ~~object~~ design of Shumway was to get his title, and that the business could be equally well settled without his presence. He still insisted, and Mrs. George was obliged to assent. He came, and the matter was readily settled by his making the deed, and

paying the taxed costs of the suit and \$20 as a counsel fee.

250 Simmons Sackett then claimed the following sums, and insisted that they should be added to the sum charged upon the lands, as a condition of his making an arrangement to extend the time of payment.

	Said counsel fee	\$20.
	Costs of the suit,	19.31½
255	Fee to his counsel in Ohio	2.
	Expense of deed to Shumway	.50
	Two other deeds	1.
	Postage on letters	4.50
	Expenses of travel from Banfield to Kishwaukee	34.12½
260	Expenses of return	34.12½
	For his time and trouble	16.
	Tavern bill at Rockford	62½
		<u>\$132.19</u>

265 Mrs. George acquiesced in this claim, and with her counsel urged Simmons to enter into an agreement so as to continue in force the contract with deceased and Erastus, making no change other than extending payment, and omitting Erastus. He refused to do any thing about it, until he should have consulted his counsel in Ohio, alleging that he was ignorant of law and of business, and had counsel in Ohio upon whom he could rely, and promised to send such a writing as he should be advised to make.

270 On occasion of this visit, Simmons Sackett's conduct was kind and friendly towards complainants; he expressed great sympathy for Margaret on account of her low state of health and unhappy circumstances; and assured her that

275 he would give the said extension of two years for pay-

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ment, and if necessary other two years, and still other two
years; that he would never take advantage of any lapses
280 to deprive her of her home on the premises, and that all
he wished of them was the money due. Complainants ~~have~~
~~no doubt~~ believe he would have conducted himself in ac-
cordance with these assurances, had it not been for the
intermeddling, interference and ill offices of defendant Horace
285 Miller, who has long coveted the lands, and endeavored to
prevent their redemption on part of complainants. Had he
so conducted himself, Margaret would have been far from
willing to break up any of said arrangements in regard
to amount of money, although advised they could not be
290 allowed in equity.

On his return home, Simmons Sackett sent Mrs. George
a contract under his hand and seal, dated 1 Nov. 1841, agree-
ing to sell her the lands in fee, on condition that she should
by 1 Nov. 1843, pay him \$897, with interest at six per cent,
295 subject to any equity between him and the heirs of de-
ceased. It was against her wishes to have her name in
any such agreement, which Simmons well knew. She was
dissatisfied, and submitted it to her counsel, who intimated
that it was improper, but advised her it would do, because
300 it gave an extension of payment, the object in view; and
she acquiesced.

This \$897 is composed of the following sums:
Mentioned in the contract to deceased and Erastus, \$680.
Interest thereon to 1 Nov. 1841, 83.66
305 Allowed by Mrs. George as aforesaid, 132.19
Drawing the contract 1.15
\$897.00

Margaret kept possession and resided on the lands by herself or tenants from her husband's decease till filing of bill. She attained her majority about the expiration of the two years specified in the contract to Mrs. George. And because she could act, Mrs. George did not act further, but ~~left~~ in regard to the contracts or property, but left them to the management of Margaret.

Margaret made divers attempts to raise out of the lands the money and interest mentioned in the writing to Mrs. George, with the concurrence of Simmons, to remove his lien, and to secure to complainants to a great extent the benefit of their rights, but was unable to effect any arrangement until January, 1846. Simmons then offered to sell the lands to one Miles in exchange for lands in Ohio. Miles came to examine the lands and was willing to abide the offer of Simmons and take the undivided half of the lands, for freeing them from the lien of Simmons, and let complainants have the other half. It was so agreed between Margaret and Miles, and he and Sackett would have carried these arrangements into effect, had they not been broken up by the management and intervention of Horace Miller.

The failure to raise the money was caused by the secret and faithless conduct of Horace Miller. Shortly after the time of payment mentioned in the contract to Mrs. George, ^{in order to thwart her} ~~in order to thwart her~~ ^{in raising it} ~~in raising it~~ he entered into a correspondence with Simmons Sackett, and proposed to aid him and Margaret in raising out of the lands the sum, and in disposing of the lands for the benefit of complainants, and obtained his consent: and according to appearance and pretense, acted as such agent, and pretended to assist to dispose of the lands. He

340 by underhanded management frustrated Margaret, and prevented her from raising the money or arranging the claim, which she otherwise would have done, and did so for the purpose of preventing the redemption, until he could purchase the legal title on speculation, hoping to work out complainants and obtain their right for a trifling sum. He misrepresented to S. Sackett the conduct of Margaret, and the value of the lands.

345 When Horace Miller ascertained the arrangement with Miles, in order to interrupt it, he offered Simmons Sackett \$1200, about \$60 more than the amount of the contract to Mrs. George, for the legal title, and Sackett refused to carry into effect the arrangement, and afterwards executed a deed dated 1 March, 1846, purporting for that sum to bargain, sell and release the lands to Miller in fee, without covenant, and on 21 March, acknowledged it, but because the consideration money was not paid, Miller conceded—
350 these transactions, ~~from~~ and Margaret could not get any certain knowledge of them. If she had known of them, she would have raised the money, even at an otherwise unreasonable sacrifice.

355 15 May, 1846, Margaret entered into a negotiation with one Keith, who had several thousand dollars of which Horace Miller knew, to go into possession, and pay the \$1200, and Keith, 18 May, went into possession, and would have paid the \$1200, if it had not been for Miller's misconduct. Having heard of this, Miller took what money he could raise, and hastened away to Simmons Sackett in Ohio to pay him about
360 \$800, and execute a mortgage of the lands for the residue of the \$1200, to obtain the deed in anticipation of Margaret, and was on his way thither at the filing of the bill.

370 Of the lands, the ~~s.e. 1/4~~ e. 1/2 s.e. 1/4 s. 19, is woodland, with a considerable quantity of valuable timber, and the, ~~undivided~~
 half of a half quarter section, ~~undivided~~ is covered with e. 1/2 s.e.
 1/4 s. 20, (undivided) is good timber. The improvements upon
 the lands at present consist of a dwelling house, and barn,
 15 acres formerly inclosed and tilled, ^{and} an inclosed garden. Value
 375 of improvements about \$500. Nearly all the rest of the land
 is uninclosed prairie.

380 There is sufficient timber trees fit to cut to raise the sum
 charged, ~~in~~ and it would be for the interest of the complain-
 ants to have the sum paid ultimately paid out of the
 timber.

The lands are now worth \$3000, and will in a short
 time be worth greatly more.

385 Besides these lands, and another doubtful unavailable
 claim, the complainants have no property or means of
 raising the money charged, or carrying on this suit.

390 By reason of these disputes, and the conduct of the Sack-
 etts and Horace Miller, and of the consequent inability of
 complainants to give or obtain a clear legal title to the
 lands without the aid of a court of equity, the money
 cannot be made by them out of the same. If a decree were
 made, establishing their rights, and authorising a sale of
 part, or mortgage, it might be effected.

395 Margaret remonstrated with Simmons Sackett and
 Horace Miller, &c. But they confederating, &c. pretend
 that the original contract had been legally delivered up
 to be cancelled, and was discharged. Charge, the con-
 trary. Margaret could not at the time the contract
 came into the hands of Simmons from Erastus through
 Benjamin, and never in fact gave any consent to have

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it so delivered up. Erastus improperly possessed himself of it after the death of her husband, and before his burial, and refused to give it back to Margaret, and carried it with him to Connecticut, and delivered it up to be cancelled, when Mrs. George was there, for ~~the~~ or with liberty to have it cancelled, when Mrs. George was there, for the purpose of renouncing or releasing any claim he might have out of the lands; and that it was done without the knowledge or concurrence of Mrs. George.

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Charge — that it would appear by the original contract that the money was a loan, if the confederates would set it forth, or a copy. Morane Miller lived within a mile of the duelling house, and had been frequently informed by and on the part of Margaret, that the money obtained of Benjamin was by way of loan for the benefit of deceased, and that the legal title was put into the hands of Simmons as a trustee, to secure the repayment.

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Charge — that the contract to Anne George was put into the form of a sale to her, because Simmons Sackett was advised that as he held the lands in trust for complainants, after the monies charged should be satisfied, he could not, according to the rules of equity he allowed any such charges as compose the \$132.19, and he was in hopes to evade those rules.

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Charge — as proof that Simmons Sackett well understood that he still held the lands in trust for complainants that the letter inclosing the ^{paper} ~~contract~~ to Mrs. George, signed by him, contains a declaration of such trust, in the following words. "I inclose an article" [meaning the said paper] "within, as it is my wish still to take no advantage of the widows or fatherless children, as" [I] "have

not nor neither wish to make any money on the comon,
more than money laid out and paid for my time,
as I thought it not more than right to be kept clear
from all claims and expense."

435 Charge — as against complainants, Simmons Sackett
ought not to be allowed the whole of the \$126.23, nor
the additional \$30. The claim for these sums was extrava-
gant and extortionate, and more than he deserved, and
would not have been allowed by deceased, if he had not
440 been in his power as to the loan and title. In proof,
distances, expenses and time are computed.

Charge — sending Simmons was an expedient to make
money, and as a pretext for a numerous charge. It was un-
necessary. The whole \$126.23 was not paid him by Ben-
445 jamin, nor more than \$80 or \$100.

Complainants insist on an account of the \$100 paid by
Mrs. George, ^{to Benjamin Sackett} and interest. The receipt of \$52 of it for back
interest to 10 per cent, was contrary to the law of bormer-
450 tents; and of the \$48 of it, was against good faith. He ought
to have given Mrs. George a letter, and shown her its contents.
He refused wishing partially to defeat complainants by the
secret contents of the letter he proposed. His journey to
Ohio was against good faith, and to effect the same object
by secret and underhand management.

455 Charge — Simmons has all along insisted that the
\$132.19 and interest from 1 Nov. 1843, should be paid by
complainants before they should redeem the lands. Com-
plainants insist it cannot be claimed according to rules
of courts of equity.

460 Charge — Benjamin Sackett assigned as a reason for
sending Simmons to see to the investment of the money

loaned, that he was used to such matters, and would do the business correctly. Being well paid, he was bound at his peril to do it correctly. It was through his negligence and default that the mistake which caused the judgment happened; and through his neglect that it was not seasonably rectified. And he ought to have removed the lien at his own expense.

Charge—That the fee simple at least in the lands is still in Simmons Sackett, and he has not delivered any deed of them to Horace Miller, on account of claims of complainants is not willing to. In order to tempt him to convey the legal title to Miller, Horace Miller, Miller offered to pay him \$1200 or some sum greater than the principal and interest he ever claimed as due by any contract, and that an agreement to such effect was made between them.

Complainants aver that deceased and themselves have been grievously imposed upon and defrauded.

Prayer.— Defendants to answer upon oath, according to the best of their knowledge, remembrance, information, hearsay and belief. And may set forth the amount paid over or agreed to be, by Simmons ~~to~~ Benjamin Sackett to Simmons in Connecticut, to enter the lands and pay him for his time and expenses, and what part of the \$650 was in reality reserved to Benjamin; and they or some of them to set forth the contract between Simmons, deceased and Erastus. Defendants to discover deeds made by Simmons, the consideration paid or to be paid, and when executed and delivered; in whom the legal title now is; to set forth copies of the deeds; and if any

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contract or understanding for a conveyance has been made, defendants to discover the terms and consideration paid or to be paid, and the condition upon which it is to be paid.

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Relief prayed.— that a decree may be made, declaring and establishing the rights of complements; that an account may be taken of the monies and interests justly chargeable upon the lands; that a reasonable time may be allowed to raise the money found due in order to redeem; that Margaret may be authorised to raise by mortgage of the lands or part, the sum or part of it; that in order to discharge finally the sum to be raised, she may be authorised to dispose of part of the timber; that she may be authorised, in case it shall be found expedient, to sell the whole of the lands, and out of the proceeds to pay the sum ~~to be~~ found due, and invest the residue in other lands. And if not expedient to dispose of the whole, that she be authorised to sell some part to finally pay off the sum or such part as shall not be raised by mortgage. If the money or any part shall not be raised by any of those means, then that the land be sold in parcels on credit, to raise the same: Upon redemption or sale, Simmons Sackett and other defendants to make conveyances; And for general relief.

- Supplemental Bill, filed 8 June, 1848, making Gardner C. Miller and Wiram Waterman, defts.

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After recital of the original bill, the supplemental bill

states, that after Horace Miller's departure, and while he was on his way to Sackett's in Ohio, when the original bill was filed. He arrived 27 May, 1846, and made Simmons Sackett two promissory notes for \$207 each, payable 1 Nov. 1846 and 1 Nov. 1847, respectively, and made a mortgage of the lands, except the 23 $\frac{3}{4}$ acres, to secure the notes, paid \$800 and took the deed. A copy of the deed is annexed, marked A. It is dated 21 March, 1846, was acknowledged the same day, and the certificate of the officinal character of the maker is dated 27 May, 1846. It purports in consideration of \$1200, to bargain, sell, remise, release and forever quitclaim the lands to Miller. It was recorded 11 Nov. 1846. A copy of the mortgage from Horace Miller is also annexed, marked B.

On 10 Nov. 1846, Horace Miller executed a deed, purporting in consideration of \$800, to grant, bargain, sell, remise, release, alien and confirm the lands to Gardner B. Miller (his son) and Miriam Waterman, his son in law, in fee, with covenants of seisin, title, right to convey, against incumbrances, and general warranty; a copy of which is annexed, marked C.

Margaret maintained possession until 20 June, 1846. About the time of filing the original bill, ~~Horace Miller~~ and before the delivery of the deed from Simmons Sackett, Horace Miller, Gardner B. Miller and Waterman entered upon her possession, and commenced ploughing up a large part of the prairie. About said 20 June, 1846, Margaret left the possession of the premises, and they have since been occupied by the Millers and Waterman, and from the cultivation and occupation, ^{they} have made great profits. They have also committed great waste and destruction of the timber, and threaten to commit more.

560 Before and since their entry, they have denied the right of the complainants, and by slanders of their title, and threats and clamors, and the difficulties in which they have involved the legal title, have rendered it impossible to raise the money.

565 Prayer - that defendants may answer on oath; and may set forth the consideration for the conveyance to Horne Miller; that an account may be taken of profits and waste; and the same allowed; for conveyance from the Millers and Waterman; for an injunction against waste of the timber; for covenants against incumbrances by the Millers and Waterman; ^{and} for the relief against J. L. Miller and Waterman prayed by the original bill.

570 After the answers of the defendants were filed; This cause was carried to the Supreme Court by writ of error by Benjamin Smith, with whom Margaret Mowthrop ~~had~~ intermarried, in his own name, that of his wife and Levi Mowthrop, and decided, June term, 1849, in their favor. 5 Gilman 584, and the cause was re-
575 manded.

The answers of the defendants were filed 19 March, 1850. The complainants amended. Most of the amendments are introduced in the foregoing abstract. But they also added the following:

580 These complainants state by way of further amendment, that the contract of Simmons Sackett to deceased and Erastus P. Mowthrop, ^{was} at the time of the negotiation between Erastus George and Simmons Sackett, left in pos-

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session of Simmons Sackett, and complainants pray that he, the Millers and Waterman, may set forth the original contract, answer where the original contract is, and whether it is in the hands of the defendants or any and which of them, in order that it may be produced, if still in existence.

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And further, that on his receiving the deed from Simmons Sackett, Horace Miller executed to him a covenant in the penal sum of \$1200, to secure him against any claim which Margaret Moulthrop or the complainant Levi Moulthrop might assert to the lands; a copy of which is annexed, marked D. Defendants to answer upon oath, and complainants pray same relief, &c.

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it copy of the contract to Mrs. George (see 909 a below) was annexed, marked C. ~~and~~
~~under the~~

Answer of Simmons Sackett, sworn 5
Feb. 1850, filed 19 March, 1850.

Defendant believes Margaret is widow and Levi Moulthrop is heir of Levi deceased.

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Does not know how much of the land deceased possessed prior to 24 Oct. 1839. but believes he had made some improvements on E. 1/2 W. 1/2 S. W. 1/4 S. 14, and in common with others on E. 1/2 S. E. 1/4 S. 14, but utterly denies that the improvements were worth \$1000, or ~~half of it~~ more than half of it.

605

He supposes deceased was in possession of the first mentioned tract, and in common with others, of the other tract. But does not know that he was in possession of any of the balance of the lands, and believes he was not.

610

Defendant admits that the lands described in the bill were sold at Galena, on or about 24 Oct. 1839. Does not know

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deceased had a presumption right to, nor what his intention was in regard to acquiring title to the lands; nor what notice he had of the time of the sale, nor what his circumstances were; knows nothing personally of deceaseds authorising Erastus P. Moulthrop to go to Connecticut and borrow money, never having seen Erastus prior to meeting him in Connecticut in 1839, or deceased until subsequently.

620

He knows nothing either personally or by information, in relation to the alleged combination between Erastus P. and Benjamin Sackett, to secure Erastus P. a benefit in the lands, but denies that any such negotiation was entered into in his presence, or with his knowledge.

625

Defendant denies that any arrangement or agreement was made between Benjamin Sackett and Erastus P. by which said Benjamin was to advance the money necessary to purchase the lands, and that the legal title should be held as security for the repayment of the money thus to be advanced, giving to said Erastus P. a participation in the benefit of such contemplated purchase.

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635

Respondent is the brother of Benjamin Sackett, and was in Connecticut in 1839, when Erastus P. was at Benjamin Sackett's. It is true, or at least he was so informed by his brother Benjamin, that Erastus P. and Leir wished to purchase the lands described in the bill, and for that purpose to borrow the money; but respondent alleges and charges that the said Benjamin utterly refused to lend them the money or any part of it, and that he utterly refused to have any thing to do with the purchase, to advance the money to them or hold the land in security from them for the money.

640

20415-11

It is untrue that ~~the~~ Benjamin Sackett proposed to re-

645 spondent that he should accompany said Crastus to the residence
of said Levi in Illinois and then attend said land sale and
bid off the same in his own name and hold the legal title
in trust to secure to said Benjamin the repayment of said
money, including the amount to be paid for the land, and
also a compensation for his time, trouble and expenses in
going to purchase the lands and also in trust to convey said
650 lands to said Levi and Crastus P. when they should pay the
\$650 and interest. Respondent utterly and positively denies
that any such negotiation or arrangement ever took place,
or that it ever was contemplated or intended that he should
hold the legal title to ~~the~~ said lands in trust for the re-
payment of said money to Benjamin Sackett, or in trust
655 to convey the same to ~~the~~ said Levi and Crastus P. when
they should pay said sum of money or any other sum,
with interest. Respondent says it is untrue that he ever
acceded to such proposition from Benjamin Sackett, or re-
ceived from him \$530 for purpose of purchasing the
660 lands under any such arrangement or agreement as is false-
ly alleged in the said bill.

Respondent alleges that the facts were as follows: He
was in Connecticut in September or October 1834, and for the
first time saw Crastus. He was informed by his brother
665 Benjamin that Crastus P. and Levi Moulthrop pretended
to have a claim for the lands described in the bill; that
they were unable to pay for it, and wished to borrow mo-
ney to enable them to make the purchase; that he had
utterly refused to lend them the money, or have any thing
670 personally to do with the transaction, but proposed to
this respondent that he would lend respondent the mo-
ney supposed to be necessary; that he would have

nothing to do with the transaction himself, and would
hold respondent liable for the money, without looking
675 to Erastus P. and Levi, and without their being in any
manner conneced with the loan. Benjamin suggest-
ed that this respondent might if he saw proper thus to bor-
row the money and become liable for the same, go on
to Galena, or rather first to the precinct where the land was,
680 and view it, and judge for himself upon actual view, whe-
ther the same would be a good investment for ~~the~~ money,
and if upon such view he should think the land of such
quality and character as would make the purchase bene-
ficial or safe, he could enter the same at the land sale,
685 and sell to Levi and Erastus P. upon such terms as he might
think advisable. In pursuance of such suggestion, and to
gratify a desire he had to see the country, respondent
borrowed from said Benjamin, ~~\$650~~ 1 Oct. 1839, \$650, and
gave his said brother his note of that date for said \$650,
690 payable in two years with interest, and immediately left
Connecticut for his residence in Ohio, and from there trav-
elled to Chicago, where he again met Erastus P. and ac-
companied him to his residence in Winnebago County

Erastus P. returned directly home from Connecticut.
695 And respondent was informed and believes that before
respondent arrived in Winnebago County, Erastus P. had
fully and substantially communicated the facts herein re-
lated by respondent to Levi Moulthrop; and respondent
alleges and believes the fact to be true, that Erastus P. in-
700 formed said Levi that he was unable to negotiate a loan,
and that this respondent would if the land agreed with
the description given of it, buy the land and sell to them
upon such terms as would enable them to purchase

705 and pay for it. Respondent denies that he with the said
Erastus informed said Levi that he could only have the
land upon the pretended terms and stipulations set forth
in the bill. He denies that Levi was unwilling to ac-
cede to the terms of purchase offered by respondent. It
710 may be that he was unwilling to accede to such terms as
are set forth in the bill. Respondent never heard of the
terms or the unwillingness, until he saw it in the bill. It is
untrue that Levi was forced by any circumstances known to
respondent, to comply with any terms he offered. On the
715 contrary, Levi knew the object respondent had in view
before he arrived in Illinois, and upon the arrival of re-
spondent at his residence, expressed himself fully satisfied
therewith, and appeared rejoiced and gratified that some one
would buy the land and let him have it upon such
terms as he then thought would enable him to pay for
720 it. Nothing was then said or thought of about this re-
spondent buying said lands and holding the title in trust
for said Levi and Erastus P. Respondent here alleges the
true character of the transaction, i.e., a purchase and sale,
was then well understood and acquiesced in by Levi, and
725 respondent here avers that upon no other condition would
have made the purchase hereinafter stated, than that of
having the absolute title and control of the land. He ad-
mits, because it is true, that he attended the land sale; that
Levi accompanied him but returned home before the pur-
730 chases were completed by respondent.

~~It is true~~ Respondent purchased at the land sale the
tracts set forth in the bill. The 23 acre tract was purchas-
ed by Brentner and conveyed to respondent. E. $\frac{1}{2}$ s.e. $\frac{1}{4}$,
S. 20, was intended to be purchased, but a mistake occurred

735 in the certificate, which was afterwards corrected, so that respondent got a patent. The undivided half of it was subsequently conveyed by him to P. J. Shumway, who had ~~previous to the purchase~~ occupied it jointly with Levi previous to the purchase. Whether the money was advanced by Shumway, or paid immediately afterwards he does not recollect.

740 Respondent supposes the amount paid by him for the land may have been \$523.77, but cannot recollect the precise amount; and if correct, he admits it was 745 \$126.23 less than the sum borrowed by him of his brother Benjamin. He denies that the \$650 was secured to Benjamin by the purchase of the land; and most positively denies that Benjamin had any thing to do with the purchase; or that it was understood or expected that he 750 had any lien on the land.

Upon his return from the land sale to the residence of Levi Moulthrop, respondent informed said Levi that he did not wish to speculate off of him, and that if he would enter into an agreement to pay to respondent the amount 755 of money by respondent invested in said land, the expenses incurred by respondent in travelling and making said purchases together with a compensation for his time and trouble to and from Illinois, within two years from the date of the note given by respondent to his brother Benjamin, respondent would then give him and Erastus P. a 760 bond ^{to convey} to them the land upon their complying with such terms. This proposition was cheerfully acceded to by them, Levi and Erastus, when they went into a calculation of the amount, and estimated that the whole would be about or near \$680. Respondent denies that there was

any unwillingness on the part of Levi, or that he acceded because he supposed himself in any manner in the power of respondents. Respondent admits \$126.23 was not a sufficient compensation, but denies there was any contention or dissatisfaction about the amount. He may have claimed that \$126.23 was not sufficient, because it was not, but denies that any computation or estimate was made for the specific purpose of allowing for any trouble or expense.

Respondent's best recollection of the compensation matter as it was understood at the time was this: When talking over the subject of his going to Illinois to see and purchase the land, and the possibility that it might not suit him, it was agreed, and respondent thinks that Erastus P. gave him an instrument of writing specifying the same, that if respondent did not purchase, the Mouthrops were to pay him for his time and trouble, because their representations were the inducements for the going. If he did purchase, the price of the land was to be fixed without reference to the instrument. He does not know where the writing is. He may have given it up when in Illinois. He has no recollection of having seen it since, and has not a very distinct recollection of its contents; but thinks the substance of it as above was all the understanding on the subject of time and expenses was all that transpired in Connecticut. He alleges that \$680 was fixed upon as the price for which he was willing to let them have the land, because it was supposed that amount would cover all outlays of money in its purchase, and because respondent had no desire to speculate or make money off the said Levi or Erastus P.

Respondent denies the agreement with mutual covenants stated in the original bill before amendment, and says that 30 Oct. 1839, he executed and delivered to Levi and Erastus a title bond in \$5000, with this condition: "The conditions of this bond are such, that if Levi Moulthrop or Erastus P. Moulthrop shall raise a certain note now in the hands of Benjamin Sackett jun. dated at Warren October 1, 1839, against Simmons Sackett of the amount of 54 hundred and fifty dollars, payable in two years from date with annual interest, and also pay to the said Simmons Sackett thirty dollars, to be paid within two years from the date of the said before mentioned note, And if said Moulthrops shall fail to raise the said note and deliver it over with the thirty dollars, to the said Sackett within two years of the date of the said note, then this bond shall be null and void and of none effect; otherwise it shall remain in full force and effect." A copy of the bond is attached to the answer as exhibit A.

It was made part of this condition that the Moulthrops should lift the note, because the sale to them was a mere matter of favor on the part of respondent, and he wished to have no further trouble with it.

Respondent does not recollect whether he took a copy or not, that exhibit A. is taken from a copy left with him by Ann George, and copied by her in September 1841. She had with her the original at the time. He does not know what she did with it, but supposes she carried it with her home.

Respondent does not know when Margaret was married to Levi Moulthrop, nor when he deceased, but supposes they are correctly set forth, in the bill. He is unacquainted

830 with the condition or circumstances of Margaret for a year
subsequent to his decease, and does not know about the
misconduct of Crastus, nor whether he was in the ser-
vice of Benjamin Sackett when the note became due, nor
what knowledge Benjamin had of his irregularities, but
835 denies he was advised of them, and charges that they are
falsely alleged in the bill. He does not know how much
anxiety Margaret felt, nor how nearly fatal it had been.

Respondent does not know about the negotiations be-
tween Anne George and Benjamin in Connecticut, but
averts that he had no right to make any arrangement
in relation to the land as he had no interest therein or any
840 control over the contract. Crastus B. may have been in the
employ of Benjamin, but whether he had possession of the
bond and gave it to Benjamin, he does not know.

845 Benjamin Sackett accompanied Anne George to Ohio. A
proposition was then made to respondent to extend the time
of payment two years, or rather that she would buy the land
and pay for it in two years, as she expressly refused to take
any contract or extension of time, save in her own name.
Respondent proposed to give her a contract to convey
the land to her within two years, provided she would pay
850 him the \$680 with the annual interest thereon from 1 Oct.
1839, and also pay him his expenses and compensation for
his time in a trip to Illinois, together with the costs in a
certain suit of Shumway as set forth in the bill amounting
as afterwards computed to about \$132.19, and in all to
855 about \$847.

Respondent knows nothing about Anne George agree-
ing to pay Benjamin ten per cent interest. He denies
that any altercation took place in his presence between

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her and Benjamin about allowing Crastus P. an interest; nor has he any recollection of saying that Crastus became a party to the first contract through fraud and by the contrivance of Benjamin and his wife, and he denies having said so, or having any knowledge of fraud or combination between Crastus P. and Benjamin about it. It is

865

probable Crastus had no means, and that it was known to Benjamin. He knows nothing about any acknowledgment by Crastus to Mrs. George, ^{in Connecticut} or whether Crastus gave up the bond to be cancelled, but supposes it ^{altogether probable from the fact that} ~~probable~~ because Mrs. George was able to give him a copy of it which she could not have done unless she had possessed herself of the original.

870

The proceedings in the attachment are correctly set forth. Respondent denies that Mrs. George remonstrated against his going to Illinois, to settle with Shumway, but alleges she offered to buy said land, and pay respondent therefor a sum sufficient to discharge the original bond, and cover the expenses incident to this second trip.

875

Upon arriving in Illinois, respondent readily settled with Shumway, and the costs and expenses were as stated. He did not immediately set up a claim to the \$132.19, and insist that the items thereof should be charged upon the land, as a condition or consideration for extending payment. Before he left Ohio, Mrs. George had agreed to purchase said land and pay therefor as aforesaid; which agreement expressly included the sums making the \$132.19. The bond ran out while he was in Illinois, if not before cancelled by Crastus or Mrs. George in Connecticut. He denies that she urged him to enter into an agreement so as to continue in force the bond, making no other change than extending the payment, and omitting the name of Crastus P. It is probably true, although he has no dis-

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trict recollection, that he refused to execute an agreement such as Anne George desired, without consulting his counsel in Ohio, and that he promised to send such an instrument as he should be ~~desire~~ advised to make. He did express sympathy for Margaret, but denies that he promised to extend the time of payment of said land without limitation.

895

Respondent denies that Horace Miller interfered in any with the arrangement between him and Mrs. George, or to his knowledge interfered to prevent him from completing ~~or~~ or fulfilling any contract made by him with Levi Moulthrop or the said Anne George, or any other person.

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905

Respondent believes Margaret remained in possession from the decease of her husband until the filing of the bill. He does not know when she attained her majority, or why Anne George did not fulfil her contract. It may have been because Margaret was able to attend to business, or for want of ability on the part of Mrs. George.

910

On his return home he executed a contract to Mrs. George, substantially as set forth ~~in the bill before it~~ ~~was~~ except that if payment was not punctually made 1 Nov. 1863, it was to be void. ^{It was in immediate money D. K.} He denies that her name was inserted contrary to her wishes; but it was according to her often expressed wish and direction, and it was understood to be a sale to her. The consideration of \$897 is correctly set forth by items.

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Respondent denies that he ever assented to any arrangement for exchange of lands with Miles. There were two brothers named Miles, one in Illinois and the other

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* This copy marked B. is as follows

910 a

"This agreement witnesseth that Simmons Sackett with this first day of November A.D. 1841, agreed to sell to John George, her heirs and assigns the following described lands, upon the following conditions and subject to any equity (if any such should exist) between the said Sackett and Erastus Moulthrop and the heirs of Levi Moulthrop growing out of a contract between the said Sackett of the one part and Erastus Moulthrop and Levi Moulthrop of the other part entered into on ~~thirtieth~~ day of October 1839 for the sale of the same lands, hereby intended to be sold, which contract has not been complied with by said Moulthrop and I do not consider myself under any obligation in law or equity to convey said lands, (to wit) all the following parcels, &c.

910 b.

910 c.

[Here follows a description of the lands.]

910 d.

The conveyance to be made by assignments of the government certificates of all the above parcels of land with the exception of the last which is to be by deed in fee simple, all to be done at my dwelling-house in Canfield Township County Ohio. The consequences all to depend upon said John George her heirs or assigns shall on or before the first day of November

910 e.

A.D. 1843 pay to the said Sackett or his representatives the sum of eight hundred ninety seven dollars and interest annually at the rate of 8 1/4 per cent and pay all taxes if any shall be assessed on said land. If payment is not punctually made as is stipulated, this contract is void

910 f.

and of no effect. Given under my hand and seal this first of November A.D. one thousand eight hundred and forty-one.

(Sd.)

Simmons Sackett, L.S.

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in Ohio. One of them in the absence of respondent in the fall of 1845 called and left a proposition to exchange lands in Ohio for said lands in Illinois. Respondent afterwards went to see the lands in Ohio, but did not like the lands in Ohio, and thereupon the matter was dropped.

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Respondent knows nothing about the conduct or representations of Horace Miller to complainant Margaret, or what means or contrivances were resorted to by him to thwart the endeavors of Margaret to raise the money. He denies that said Horace ^{Miller} ever misrepresented the character or value of the lands to respondent, or the conduct or circumstances of Margaret, either by letter or otherwise. He not only assumed to act as the agent of respondent, but in fact was ~~the~~ his agent to pay taxes, and take a general supervision of the land, and respondent is informed and believes that while acting as agent he faithfully discharged his duty, and endeavored to benefit complainants and respondent.

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It is true respondent sold the lands to Horace Miller. Mrs. George had wholly failed to complete her contract, and respondent was compelled to pay taxes, and did pay those up to and for 1845. He wanted his money, and saw no disposition on the part of Anne George to discharge the amount due on said contract. He

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wrote to Mrs. George that he would be under the necessity of selling the lands to raise the money, and to Horace Miller as his agent to find a purchaser. In November 1845 he received from said Miller, ^{a letter} proposing to purchase the land for \$1200. \$800 in hand, and the balance on time, with mortgage security; to which respondent replied sometime in December, 1845, agreeing

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955 to the proposition. This proposition and acceptance
by letter constituted the only contract between him
and Miller for the purchase of the land. Miller then
contemplated coming to Ohio during the winter to complete
the contract, but finding himself unable to do so, forwarded
a draft for \$600, and agreed to come as early in the spring of
1846 as the roads and navigation would permit, to pay
the balance of the \$800 yet a conveyance and give the se-
960 curity for the residue. Because respondent did not know
but he might be absent when Miller should arrive, he had
the deed marked A. to the supplemented bill executed and
deposited with his attorney, so that the contract might be
fully completed whether he should be at home or not,
965 and for no other purpose whatever.

In May, 1846, said Miller came to Ohio, paid \$200 bal-
ance of the \$800, and executed the mortgage attached to
the supplemented bill as B. for the residue.

970 The sale to Miller was in good faith without any
fraud, as far as respondent is concerned or had any
knowledge. Respondent considered complainants had
long previously forfeited all right. The deed to Miller was
not delivered as an escrow. It was not executed or de-
975 livered to Horace Miller in trust, nor under any secret
agreement that he should carry on or defend law suits.
Respondent intended to divest himself of all title and vest
in Miller the fee simple, and no other agreement, directly,
indirectly, secretly or otherwise, arrangement or understanding
in relation to the sale and title exists or ever did, or was
980 contemplated between Horace Miller and him, except a bond
given by said Miller to respondent, to secure him against
liability to complainants and Irtne George, for any fra-

tended or supposed or pretended claim they might have,
a copy of which is attached marked E.

485 [This instrument recites that Margaret Moulthrop and
Strom George, and the heir of said Margaret, pretend to
have some claim in the tracts of land described in the
mortgage; and Horace Miller binds himself in the penal
sum of \$1200. to save Simmons Sackett harmless from those
490 claims.]

All allegations and representations in the bill contrary
hereto and different therefrom, are untrue, where soever found
in the bill.

Respondent knows nothing about the negotiations be-
tween Margaret and Keith. Neither of them paid or
495 offered respondent \$1200 or any other sum. He knows
nothing about the causes of Miller's flight from Kewawa-
kee, save that of completing a previous contract. He is
unable to state the value of the lands, or what the timber
would bring. Margaret never remonstrated with him
1000 about selling the land. He was always willing Mrs.
George should make the money out of the lands or
in any other way, and never opposed it. He denies
combination. He denies that the contract to with Strom
George was executed to her because he was advised that
1005 the \$132.19 could not be allowed in equity according to
the rules of equity, and that the contract was a device
to evade such rules, and obtain said money. Both re-
spondent and his counsel believed he had a right
1010 to sell that which was his own, &c.

The contract with Strom George was made because
she directed it, and complainant well knew the fact,
and only claimed thereafter to hold possession under her

1015
mother, and not by virtue of any previous interest, and
in proof he attaches a letter from her, dated 3 Feb. 1845, in which
she says to him, "My mother Mrs. George to day re-
ceived a letter from you dated 11 Jan. last in which af-
ter remarking that nothing had been done in the land
matter, you state that you must proceed to sell the land.
1020 My mother desires me to answer you, and in answer
I have to state, that I have kept possession of the
land with her approbation, and am still in pos-
session and that I am in negotiation with several per-
sons for the sale of it, and expect to accomplish the
1025 sale of the whole, or of so much, as with other arrange-
ments, is to enable us to satisfy you, and that we ex-
pect to conclude the matter in the spring."

Defendant also appends a letter from Mrs. George, ac-
knowledging the receipt of the contract to her, and ex-
pressing her thanks.

1030 It is probably true that ~~in writing to Mrs. George~~ Re-
spondent in writing to Mrs. George, although he has no
recollection of the letter, said he had no wish to take
advantage of the widow and fatherless or to make money
by speculating off of them. He still says he never had
1035 ^{such a desire, and his long indulgence of the plaintiffs and the said Mrs. George ought to}
~~such desire, of which his indulgence is proof.~~ Horace Miller
tempted him by the offer of \$1200 to convey to him the
legal title.

1040 In answer to such of the interrogatories as he is able
to answer, respondent says, the amount of money borrowed
of him by him of Benjamin Sackett was \$650. No particu-
lar agreement was made about compensating respond-
ent for his time and trouble except as herein set forth. The
amount was afterwards computed and made a part of

1045

the consideration of the bond for the bond to Levi and
Erastus P. Moulthrop. No part of the \$650 was reserved
by said Benjamin. A copy of the bond is attached as ex-
hibit A. The note to Benjamin was never considered a
lien on the land. It never was intended to be a lien on

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the land, and the payment of this specific amount to
Benjamin Sackett was required of said Moulthrops by
respondent, because respondent had agreed to sell to
them for the actual investment and expenses as a
mere matter of favor to said Moulthrops, and not
for the purpose of gain, and he therefore wished to
have no more trouble with it. The money advanced

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to respondent by said Benjamin Sackett was not ad-
vanced as a loan to said Moulthrops. They never had
the money in ~~the~~ or any part in possession or under their
control. It never was treated as a loan to the Moul-

1080 a.

throps by Benjamin or respondent. It was a loan ex-
pressly made to respondent to use, control and invest
as he saw proper, and after having purchased the
land therewith, the sale to said Moulthrops was a mat-

1035 b.

ter of favor and not of obligation, although he expected
if the purchase should be made that he would sell to
said Moulthrops. His sale to ~~some~~ George and subse-
quent indulgence were because his sympathies were
appealed to by Mrs. George.

1040 a

Answer of Benjamin Sackett, sworn
in Litchfield county, Conn. 20 Feb. 1850.
filed 19 March, 1850.

1045 a

Defendant says that it is untrue that he ever lent any money to said Levi Montthrope deceased, and said Erastus P. or either of them, or to either of them as agent for the other, to pay for land as set forth in ~~the~~ said bill, and he avers that he never in any manner or form had any interest in lands in Illinois in which said deceased or said Erastus P. had any claim.

1050

Answer of Erastus P. Montthrope, sworn
at same place 20 Feb. 1850, filed 19 March,
1850.

1055

Defendant says it is untrue that he was sent as the agent of said Levi deceased to Connecticut to make a loan for his exclusive benefit, nor did said Levi deceased furnish and provide money to defray his expenses to Connecticut. It is however true that he did go to Connecticut in the autumn of 1839 for the purpose of raising money for the joint benefit of himself and said deceased, to enable them to enter the lands specified in the bill at the public sale thereof, and which they had together occupied; and respondent avers that on arriving at Connecticut, he made various efforts among his friends to borrow said money without suc-

1060

1065 cess. Afterwards he made an arrangement with Simmons Sackett to proceed to Illinois and purchase said lands, and that he should subsequently sell and convey said lands to them, respondent and deceased, on receiving from them the amount he might pay for said lands, his expenses and disbursements, and the sum of two dollars per day for the time by him spent in said business, to be computed from the time he should leave ~~home~~ his house in Ohio, to the time of his return thereto, amounting so nearly as could be estimated to \$680. Respondent immediately after making this arrangement, returned to his residence in Illinois, where he arrived on or about 7
1070 Oct. 1839, when he informed his joint partner in said lands, the said Levi deceased, of the arrangement he had made with the said Simmons Sackett, and requested said deceased if he was not satisfied to say so, that respondent might so inform said Simmons at Chicago, so that said Simmons might return home instead of proceeding to Helena, but deceased acquiesced.

1085 It was always understood between himself and deceased, and agreed that respondent should have and hold as his own individual estate, the s.e. 1/4, s. 14 t. 43 n. r. 1 e 3 p. m. and also w. 1/2 n. e. 1/4, s. 19 t. 43 n. r. 2 e. 3 p. m.; but the contract made by said Simmons with deceased and respondent, dated 30 Oct. 1839, was between said Simmons on the one part and deceased and respondent jointly or severally on the other.

1090 Respondent avers that this contract during the life of deceased, was in the joint possession of himself and deceased. Both at all times had access to it, and upon

his decease I took it into my exclusive possession, claiming I had a right to do so.

1095

He admits he brought said contract to Connecticut on his return to that state in August 1841, and finding he could not raise the money, he delivered it to Benjamin Sackett, who was going to Ohio, to be surrendered to Simmons Sackett.

1100

As to all the irregularities, improprieties or fraudulent conduct charged against him, respondent says they are untrue; and that he had conducted honestly and fairly, &c.

1105

The money he took to bear his expenses to Connecticut, he furnished from his own individual resources.

Answer of Horace Miller, sworn 12 March,
1850, filed 19 March, 1850.

1110 Defendant admits the character of original complain-
ants. Levi Moulthrop deceased was for some time in
possession or occupancy of a small part of the lands
previous to 24 Oct. 1839; but he insists and charges that
deceased and Erastus had up to and previous to that time,
the joint possession or occupancy, and as defendant ~~sup-~~
1115 then supposed, were equally and jointly concerned in what-
ever improvements had been made, and had a joint
and equal interest.

The land belonged to the government, and neither de-
ceased nor Erastus had any interest or right except
that they had made some improvements by erecting a
1120 house and barn, and had inclosed a small portion of
e. 1/2 s. e. 1/4 s. 14; which improvements he denies have been
worth \$1000, but he thinks may have been worth \$500.
Whether either of them had preemption right, defendant nev-
er knew. Deceased had never pretended to take the steps to
1125 entitle him to a preemption right, and defendant believes
he never had any.

Defendant denies knowledge of purpose of deceased to
acquire title for his own use, but supposed Erastus had
as much interest as he.

1130 Proclamation was known but a short time before the
212415-317

1135 side, and there was considerable sickness, and defendant thinks it probable it was necessary for deceased to effect a loan to purchase the land, and that it was more convenient for Erastus to go east to effect it than for deceased; but defendant denies that deceased had such practice as to prevent his being absent as alleged; but defendant has been informed and believes that it is untrue that Erastus ever went to Connecticut or any where else as the agent of deceased, to effect a loan for him, or that deceased advanced money to pay his expenses; but he has been informed and believes that he furnished from his own means his expenses. and that he went to his friends in Connecticut to effect a loan intirely upon his own responsibility, because he claimed to have an equal interest, and supposed he could procure the money easier than deceased; and that ~~the~~ one reason why he could not obtain the money by a loan was, that the interest deceased and Erastus claimed was joint and equal.

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1150 Defendant has no knowledge except from information about the negotiations between Erastus P. Moulthrop, Benjamin Sackett and Simmons Sackett. but he has been informed and believes, that said Erastus never made any agreement or arrangement with the Sacketts or either of them for money to purchase the land for the benefit of deceased or said Erastus or either of them. 1155 Defendant is informed and believes the only one he could make with either of them was, that he prevailed upon Simmons Sackett as a matter of special favor to him to come to Illinois, and if upon examining the land he should find the investment would be perfectly 1160

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safe and satisfactory, then he would purchase it in his own name, and entirely on his own account, and would give the said Erastus P. and Levi Moulthrop the chance of purchasing it of him for the amount it should cost him.

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Defendant supposes Simmons Sackett came to the county for the purpose of purchasing the land, in consequence of the arrangement with Erastus, but denies that he accompanied him. ^{Defendant charges that} Erastus P. returned to his residence (also the residence of deceased) on the land, 7 Oct. 1839, about two weeks before the commencement of the land sale; and defendant believes deceased was entirely satisfied with the arrangement.

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Simmons Sackett and deceased attended the land sale, and Sackett bid off the land in his own name; the 23 3/4 acres were purchased and transferred as stated; and the arrangement about the half quarter section and the mistake, are correctly stated.

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Defendant has no personal knowledge how Simmons Sackett and the Moulthrops fixed upon the amount specified in the bond; nor whether Simmons Sackett claimed more than he was intitled to; defendant however from what he has been informed, and from what he knows of the nature of the transaction, ^{believes} that no altercation or dissatisfaction occurred; that Simmons Sackett voluntarily and as a mere matter of favor and good will, executed the bond, a copy of which is attached to his answer; that he never executed to them any other con-

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tract; that it was executed in one part only, and Sackett did not keep a duplicate or copy; that the Moulthrops regarded it as an agreement to sell, depending

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entirely upon performance of the condition; and that far from being dissatisfied, they were grateful to him for giving them so favorable a chance to purchase the land.

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Answer admits the marriage and death of deceased and birth of heir, and passes ^{rightly} over matter of sickness of Margaret. It denies knowledge of the alleged irregularities of ~~Erastus P. Moulthrop~~ and misconduct of Erastus P. Moulthrop. Defendant well knows he did in several instances take an interest in the settlement of the estate of said Levi, and paid debts by making himself personally responsible; and from information defendant believes he did not waste the personal property of deceased, or misconduct himself in relation thereto; and that the Sacketts did not suspect or have reason to suspect it.

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Erastus P. Moulthrop left this state about the time stated, and defendant supposes he took with him the contract, and is advised he had a right to.

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As to anxiety and annoyance of Margaret and fears of true George, defendant is ignorant. He admits Mrs. George left this county about the time stated, with the avowed intention of going to Ohio or Connecticut; and from the account given by her upon her return of her doings and sayings, defendant supposed she went to Benjamin Sacketts in Connecticut and induced him to accompany her to Simmons Sacketts in Ohio, and induced him Simmons to accompany her to her residence on said lands; and while there Simmons Sackett made an agreement with her in substance the same with what purports to be a copy thereof, ^{attached to his answer} As to the various conversations, negotiations, conversations, propositions,

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arrangements and agreements stated, defendant from information disbelieves them.

Answer admits the statement of the mistake and its consequences and the settlement with Summway.

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Defendant believes Simmons Sackett never agreed or was solicited by Mrs. George to extend the contract executed to the Mouthrops; but that the only agreement made by him was for the sale of the lands to her, because the contract to the Mouthrops had become forfeited; that Mrs. George did not endeavor to obtain an extension of time merely without securing a contract to herself; that Simmons Sackett did not include in the

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consideration items against which she protested; but she herself insisted upon purchasing the lands in her own name and the price was her own offer. And defendant again refers to the copy thereof annexed to Simmons Sackett's answer. Defendant charges and insists that Mrs. George after her return, and for two years or more, continued in possession and exercised entire control, and held out that she had the exclusive right. She continued in possession to 1 Nov. 1843.

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Defendant admits Margaret resided with her mother in the premises, but denies that she maintained possession. If any arrangement different was made in 1843, defendant is ignorant of it. He computes that if Margaret was 17 in June 1840, she attained her majority in 1841.

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Defendant is entirely ignorant whether Margaret made attempts to raise money; had some personal knowledge of Mrs. George's pretending to make efforts after 1843, to raise money and thus to secure to her

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Defendant is entirely ignorant whether Margaret made attempts to raise money; had some personal knowledge of Mrs. George's pretending to make efforts after 1843, to raise money and thus to secure to her

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self the lands, and he believes Margaret never made any attempts.

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Defendant denies he was ever guilty of intermeddling, interference, fraud, concealment, contrivance or improper practice to prevent or thwart complaints or Mrs. George in raising the money; and his whole conduct was ever fair honest and irreproachable.

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When Simmons Sackett was here in 1841, he stated that if Mrs. George should fail to fulfil the contract with her he might need an agent for the lands, and desired to depend on defendant, to which defendant assented. Not long after the expiration of the time of payment, he wrote to defendant that Mrs. George had entirely failed to make payment for the land, and therefore he desired to make sale of it as soon as possible, and requested defendant to act as his agent, pay taxes, make sale or find a purchaser, and exercise necessary supervision. He consented, but did not request to be appointed. He denies he ever made use or pretence of the agency to circumvent or thwart Margaret or any other person; but understanding that Simmons Sackett was

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willing that Mrs. George should have the benefit of the sale of the lands, if she would make immediate disposition thereof and pay him the amount due him on the contract, and perhaps a small sum for his additional trouble and indulgence, did from time to time for nearly two years, avail himself of every opportunity within his reach, to induce persons desirous to purchase farms in this country, to purchase said lands, and in several instances took much pains to seek purchasers, and could and would have sold the premises at their fair value, and

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and so as to have left some balance to Mrs. George; but the sale was prevented he believes by the arrogant pretensions ~~of~~ Mrs. George. It is absolutely untrue that he had "long coveted said lands and endeavored to prevent the redemption thereof" on part of complainants; or that he ever had any intention to purchase the same until late in the fall of 1845, and a short time before he made a proposition to Sackett.

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Defendant met Miles, named in the bill at Janesville, Wisconsin, in July, 1845, and importuned him to purchase the lands. Miles went his way, and defendant knew nothing of his doings, for several months after defendant made his contract for the land. But Miles did not make any arrangement with Simmons,

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Sackett or Margaret. Defendant denies that he ever did or said any thing whatever, to thwart or prevent Mrs. George or Margaret from raising money out of, or disposing of the lands in any manner they had a right to; nor does he believe any transaction of his influenced Miles.

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He had no idea of purchasing until Nov. 1845, when Hiram Waterman his son ^{in law} and Gardiner C. Miller his son, ~~the latter~~ being desirous to purchase a farm jointly, proposed to this defendant that if he could purchase the said lands of Simmons Sackett at such price as they were willing to pay, and upon such terms of payment as they could meet, they would gladly make the purchase. Accordingly defendant wrote Simmons Sackett offering \$1200, payable \$800 in hand, and the balance on time, to be secured by mortgage. In December defendant received a letter accepting the offer, which fact ~~he is~~ ~~immediate~~

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1320 he ~~fact~~ immediately communicated to Waterman and Gardner C. Miller, and they forthwith commenced making arrangements to get together the \$800. Defendant designed to go to Ohio in a few weeks and pay the \$800 and take a deed; but finding he could not conveniently leave home, and ~~that~~ Waterman and Gardner C. not being able just then to raise but \$600, he advised them to forward that amount by mail, and have the deed executed, and in the spring defendant would go and complete the matter. Accordingly Miriam and Gardner C. under direction of this defendant, in February, 1846, sent to Simmons Sackett \$600, and advised him defendant would come in the spring and pay the balance of \$200, and execute a mortgage for the other \$400, and requesting him to execute the deed. Defendant has been informed he did execute the deed of which a copy marked A is attached to the supplemental bill. In May, 1846, he paid the \$200, took the deed and executed the mortgage, a copy whereof is attached to the supplemental bill, marked C.

Defendant denies that he ever by letter or otherwise misrepresented the conduct and intentions of Margaret.

1340 What negotiations Margaret may have had with Adam Keith, and what he was or not willing to do about paying the \$1200, defendant cannot answer further than that he disbelieves it. Keith occupied the house a short time, simply because he was obliged to leave the house he had formerly occupied, and could not find another convenient place.

1345 Defendant denies that Simmons Sackett in consequence of his offer of \$1200, refused to carry into ef-

fect any arrangement between him and said Margaret.

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Whether Margaret knew of his purchase previous to May, 1846, or whether she would or could have raised the \$1200, defendant does not know. She did not pay the taxes; and defendant as agent in the fall of 1845, paid about ~~\$500~~ \$8, the first tax assessed.

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Defendant was on his way to Sackett's in Ohio about the time of the filing of the bill; but whether he hastened away, that being indefinite he is unable to answer. He took only \$200 to pay Simmons Sackett, having long previously paid him \$600.

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While defendant was acting as agent, and while Simmons Sackett was very willing and anxious to have said lands sold, and to let Mrs. George have the surplus over the \$1200, although he did not acknowledge any right in her or any other person, and while defendant carefully watched every opportunity to make sale, he found one person who would give \$1800, the highest price he knew of being offered; but generally the estimated value was much less. And when Waterman and Gardner C. Miller proposed to defendant to buy the lands for them, the most they would give was ~~twelve hundred dollars~~ \$1200.

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Defendant denies he had knowledge of complainants having any rights legal or equitable in the land. He admits he knew of the contract of Simmons Sackett to Levi and Erastus P. Moulthrop, but had been informed and confidently believed it had long ceased to operate.

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Waterman and Gardner C. Miller took possession

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at the time mentioned, and have since continued in possession; but he denies they have committed waste and destruction; on the contrary they have added value by various improvements, worth in his opinion at least \$1200.

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Defendant admits Waterman and Gardner C. Miller may have said and insisted that the complainants had no right to redeem or recover the lands; and he presumes they may have found it very difficult, if not impossible to raise money on lands of which they had not the shadow of title; but he denies that he ever raised any clamor at all about it; and he submits that he was guilty of no slander merely because he insisted that the lands rightfully belonged to Waterman and Gardner C. Miller.

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Defendant submits and insists that he purchased the lands for Waterman and Gardner C. Miller in good faith, and paid an honest and fair equivalent, without expectation that he was interfering with any rights of complainants, and he insists he had no reason to believe they had any such rights.

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Defendant denies combination with general traverse.

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Answer of Horace Miller to amended bill, sworn 5 Dec. and filed 9 Dec. 1850.

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Defendant asks that his answer to the original bill may be taken as his answer to the substituted allegations of the amended bill.

He has been informed that the original contract to the Mouthrops was in possession of Erastus up to the visit of Mrs. George to Connecticut, and he then delivered

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it to Benjamin Sackett to be delivered by him to Simmons and Erastus requested that Simmons would send him a copy; ^{and that} after its delivery by Benjamin to Simmons a copy was made by Mrs. George to be sent; but by mistake the original had been sent to Erastus, and a copy retained by Simmons. Defendant says he was informed

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as above stated on occasion of his visiting said Simmons and said Erastus for the purpose of their putting in their answers to the original bill, by them, and that each of them delivered to him two several papers purporting to be said contracts or copies. The one from Simmons

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he discovered to be a copy; and the one from Erastus he supposed to be the original, and fully believed the above information, until he produced it to his solicitor to make out this answer, when he discovered it was a copy. He does not know in whose possession or where

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the original is. When he received those papers from Erastus and said Simmons, he was informed by them that they were the only papers purporting to be the contract or copies, and he does not believe the original is in possession of either of defendants, or that its whereabouts is known to them. From both those copies being in

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the handwriting of Mrs. George, defendant believes she prepared a copy for herself, but instead of it retained the original and left the copy, and that ~~she or complainants~~ have it is in possession of Anne George or of one of the complainants, or is lost or destroyed.

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Defendant when he executed the mortgage, executed a paper to Simmons Sackett, substantially the document marked D to the ~~original bill~~ amended bill; but whether this is a literal copy, he cannot answer.

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Several answer of Miriam Waterman and
Gardner C. Miller sworn 12 March, 1850,
filed 19 March, 1850.

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Defendants have no knowledge of the possession of
deceased prior to land sale; but have been informed and
believe he and Erastus P. Moulthrop in fall of 1839 and
some months previous had been jointly possessed of some
of the lands, and that there was an understanding and
agreement that they should acquire the legal title to the
lands or part thereof for their joint and equal benefit,
and that their possessory interest in those lands were
joint and equal.

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The improvements were not worth \$1000; and accord-
ing to the best estimate they can now make they were
worth but \$300; and they have no knowledge of the pre-
emption right. The lands were sold at the time men-
tioned, and the notice reached the neighborhood only
about six weeks before.

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Defendants have been informed and believe that a
short time after it was known when the land sale
would take place, it was arranged between the Moul-
thrope that Erastus P. should proceed to Connecticut
and endeavor to borrow the money for the joint benefit
of himself and deceased; that he accordingly visited Con-
necticut, and paid his expenses from his own; that upon
his arrival there he made divers efforts to borrow the
money of Benjamin Sackett and divers other persons,
and that such efforts were entirely unsuccessful, and
that Benjamin Sackett absolutely refused to lend him

1475 the money upon any condition whatever, or in any manner to furnish him with the money.

1480 Defendants have been informed and believe that while said Erastus was at Connecticut, Simmons Sackett was at so there; that an arrangement was made by and between them that said Simmons after his return home should visit the lands, and if he thought the same would be a good investment for the money, he would buy them at the land sale, and would sell them to the Moulthropes for the amount necessary to enter them, and his expenses in visiting the lands, entering them and returning home, and two dollars a day for his time; that he was to sell said lands to them for such sum ~~and~~ as would cover the sums and charges above specified, to be paid ~~in two years~~ with interest in two years from 1 Oct. 1839; that the arrangement was contingent, at the option of said Simmons when he should have seen the lands; that Benjamin Sackett was in no sense a party to this arrangement; that he refused to have any thing to do with any such arrangement or be connected with it in any way; and defendants insist that it was expressly understood between said Simmons and Erastus P. that the said arrangements and the transactions to grow out of them, should not be a loan of money but a purchase of said lands of the government by the said Simmons, with an agreement to sell them to the said Moulthropes, after said purchase, and that said Erastus assented to the terms because he had been unsuccessful in his efforts to borrow money, and because the terms were highly favorable to the Moulthropes.

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1515 Erastus P. Moulthrop arrived home before 9th Oct. 1839, and defendants have been informed and believe on 7th, about two weeks before land sale; and that said Simmons arrived there but a few days before; ~~that Levi~~

1524 Defendants have no knowledge of negotiations between said Simmons and Levi Moulthrop after their arrival; but they have been informed and believe that said Levi was willing to accede to the arrangement; and that said Simmons after seeing the lands became satisfied they would be a good investment of money, and was willing to carry out the arrangement, and said Levi readily and cheerfully acquiesced, and was anxious that the same should be carried into effect for the reason that the same was highly favorable to the said Moulthrops, and that the means could not otherwise be obtained upon as favorable terms, and he did not express or manifest any reluctance.

1530 Simmons Sackett attended sale and acquired title as stated; the mistake occurred; and the amount paid was about the sum mentioned. Said Levi ~~attended~~ was at the sale, but returned home before it was ended, and several days before Simmons left.

1535 Defendants have been informed and believe that upon his return, Simmons Sackett made no claim that was not embraced in his previous arrangements with the Moulthrops, and that there were no disputes between said Simmons and Levi; but that by an estimate made by Simmons and Erastus in Connecticut, they had ascertained that the amount to be paid to said Simmons would be about \$680; and when they were about

1545 entering into the contract, the said Simmons and the Moulthrop's, amicably and without dispute, agreed upon the \$680.

1550 Defendants have never seen the original contract; but from a copy in their possession which they have no doubt is correct, and from other information, they insist that it was as they set out, substantially as in Simmons Sackett's answer; and they believe it is correctly attached to his answer; that all the contracts entered into by the Moulthrop's ~~did not~~ imposed no obligation to pay the money unless they should choose; that the reason why the name of Benjamin Sackett ^{in the contract} appears, is that Simmons had when in Connecticut borrowed of him \$650, and gave his note for it payable in two years, 1 Oct. 1839; and that because the money was expended in purchasing the lands; and because Simmons Sackett had received no advantage to himself, and

1555 had undertaken the matter principally for the advantage of the Moulthrop's, and wished to ~~not~~ save himself the trouble of making the remittance, he therefore made it a condition that they should take up the note, and save him the expense and trouble of doing

1560 so.

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Defendants admit the marriage, death of ~~deceased~~ Levi Moulthrop deceased, and birth of complainant Levi, as stated.

1580 Defendants have been informed and believe that Erastus P. Moulthrop was jointly and equally interested and a joint owner of all the personal property and debts and papers of deceased, and partner with him in divers business operations, and that after his decease said

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Erastus possessed himself of the effects of said Moulthrop as the sole surviving owner, and honestly and in good faith settled up the said business of himself and the said Levi as far as the effects were sufficient, and then went to Connecticut about 1 Aug. 1841, and took the contract with him because he was intitled to the possession of it, and probably had hopes of raising the money, and that the reason he did not pay up was because he was unable to obtain money.

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Defendants have been informed and believe that Anne George visited Connecticut and Ohio to endeavor to negotiate with the Sacketts, and did not propose to extend the contract between Simmons Sackett and the Moulthrops, but to make a new contract in her own behalf by which she might become the purchaser; and that with that view she prevailed upon Benjamin Sackett by the payment of \$100, to visit his brother Simmons in Ohio; that the said visit was proposed by her, and the \$100 was to pay his expenses and for his time; that it was in consequence of her own voluntary offer that he went, much against his will, and defendants are not are not aware of her object in urging him; that upon her arrival she proposed to buy the land for herself of said Simmons, and that it was agreed by them that she should buy the same, and pay the amount to have been paid by the Moulthrops, with the expenses of the said Simmons to Illinois, and the costs and expenses of the suit in Winnebago Circuit Court, with interest in two years; and that the expenses of the trip were put into the purchase money, and Mrs. George did not object to the visit, but encouraged it.

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The mistake, Shumway suit and its result are correctly stated. Defendants believe the items ~~in the bill~~ of \$132.19 which make up the \$897 constituted the items claimed by Simmons Sackett, and ~~agreed upon by him and Mrs. George~~ as the amount of purchase price to be paid for the lands by Mrs. George. ^{that} The item of \$132.19 was made up as stated; and that \$897 was the amount agreed upon by said Simmons and Erastus George.

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Defendants have been informed and believe that Simmons Sackett did not enter into any written contract with Mrs. George until his return to Ohio; that it is probable he delayed, to have it drawn by his counsel in Ohio; that he sent her a contract in substance as set forth, except that it was subject to any equity if any such there should be between the said Sackett and the said Erastus P.

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Moulthrop and the heirs of said Levi Moulthrop deceased; and also there was a condition that if payment was not made punctually, the contract should be void; ~~and~~ ^{of which contract} defendants believe a true copy is attached to Simmons Sackett's answer; that Mrs. George did not urge him to continue the contract to the Moulthrops in face, leaving out the name of Erastus, and she was not unwilling to have her name in said contract, and for some reason known only to herself, wished to take a contract in her own name, and was not desirous of continuing the old contract, ~~and~~ but expressly directed the contract to be made to her. And defendants insist that the contract to the Moulthrops, and all equity under it had expired.

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Defendants have no knowledge of the expressions of sympathy by said Simmons to said Margaret, or of

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1650 less of indulgence; but they have been informed and believe that he did manifest and express sympathy for her, but insist he did not say he was willing to wait the length of time stated, or any other length of time, or promise the indulgence stated; and therefore deny the same.

1655 Mrs. George about spring of 1845, ceased to exercise control over the property; defendants suppose because she had ascertained she could not pay as agreed; and they insist it could not be because Margaret had just attained her majority, because she had done that in 1841.

1660 Margaret and Mrs. George or one of them made some efforts to dispose of the lands, and failed defendants believe because she asked a greater price than any person was willing to give; and defendants deny it was owing to any interference of Horace Miller; but insist he did on several occasions in good faith endeavor to aid them.

1665 Defendants think it probable Simmons Sackett up to the time of his sale to Horace Miller in December, 1845 or thereabouts, would have been willing the lands should be sold, and after paying him the price mentioned in the agreement to return George with interest, that complainants should have any overplus, on account of his wish to indulge and aid them, and not because he supposed he was under any obligation; and defendants insist he was under no such obligation.

1670 Defendants from information and belief, deny the arrangement with Miles.

1675 Defendants ~~do~~ say Horace Miller did not interfere to thwart Margaret in her efforts to sell, nor intermeddle under a pretended agency to prevent such sale, or that

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he had long coveted and desired to buy said land on speculation; but they have been informed and believe that Horace Miller at the solicitation of Simmons Sackett, did in truth act as his agent, and paid for him the taxes on the land for one or more years, and endeavored to aid said Margaret or some George in finding a purchaser, and honestly and in good faith used his best endeavors by recommending the said lands and shewing them to persons wanting to purchase; and for a considerable time after the expiration of the contract to some George did all in his power to make sale in such manner as would be for the interest of all concerned. He did not break up any arrangement with Miles; and the first defendants knew of the wish of Miles to purchase, was sometime in January, 1846; and at that time said Horace had already purchased the lands of Simmons Sackett.

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Defendants deny that Horace Miller purchased the lands on speculation, or for such wrongful purpose as is alleged. In November, 1845, defendants had concluded to purchase a farm to cultivate; and knowing Simmons Sackett was anxious to sell the said lands, and the same being contiguous to said Horace Miller's place of residence, said Miller at their instance and request proposed to buy said lands of him, and offered \$1200: ~~down~~ \$800 in a short time and the balance in two equal annual payments in one and two years from 10 Nov. 1845, the whole to draw interest until paid. In December the proposition was accepted by letter, and defendants immediately commenced collecting the money, and in February remitted \$600. It had been their expectation and

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and intention that early in the winter Horace Miller should go and complete the purchase; and they have been informed and believe that such was the expectation of said Simmons; that upon the receipt of the \$600 he had the deed executed and placed it in the hands of his counsel, expecting to leave home, with authority to complete the arrangement if said Miller should arrive in his absence.

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In May, 1846, Horace Miller visited Ohio, and paid the \$200, with the interest on the \$800, after 1 Nov. 1845, the day from which it was to draw interest, and received from said Sackett the deed, and then executed the mortgage; of which the copies annexed to the supplemental bill to be substantially correct, though they believe there are some trifling errors; The mortgage was given for the balance and the interest that had accrued on \$400 after 1 Nov. 1845. The lands were bought for cultivation.

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Said Horace, as defendants have been informed and believe, did not practice any undue concealment in respect to his negotiations with said Sackett, and did not unduly publish the same; but whether said Margaret was able to obtain any certain information on the subject, defendants have no precise knowledge or information.

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Reith entered into possession of part of the dwelling house as tenant of said Margaret, and so continued a short time. But defendants have been informed and believe he never had any intention of buying the land or any part, or of letting her have any money to pay to said Sackett; but he went into the house, because he could not readily find another. While he was in the house, according to the best recollection of defendants, Horace Miller went to Ohio, and was on his way there when the

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original bill was filed; but they deny that he hastened away in consequence of Keith's occupation of the house, or from an apprehension that he would furnish money. He took a little over \$200.

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Defendants know nothing about the delivery of the contract to Moulthrop from Simmons Sackett, and they believe Erastus had a right to the possession thereof; and under that right took it to Connecticut, and with the concurrence of Anne George while there, and from the conviction that it would be impossible for him or complainants ever to perform the conditions, delivered it up to said Simmons, by the hands of Benjamin Sackett, to enable him to contract with Mrs. George, and for the purpose of releasing and cancelling it.

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Defendants deny that the lands when purchased by said Miller were worth \$3000, or any such sum; they might possibly have been worth \$1500; though they do not believe any such sum in cash could have been obtained. Defendants paid all they could afford; and could have made a much more profitable investment of the money in buying government land. They have made improvements worth \$1500 or thereabouts. From

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the mere rise of land, the value of said land has increased but little. The improvements at the time of their purchase, were worth not exceeding \$200, and were two dilapidated buildings and a part of a garden fence. No part was inclosed; the fences were decayed and taken off, and no improvements were of any value except the house and barn. The house was never finished inside, and was dilapidated and ruinous, and entirely unfit for a family to live in, and

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the barn was a small one, and in the same condition.

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Defendants admit the conveyance to them as stated; and that the deed set out is correct; and say the conveyance was made in pursuance of their rights; that the purchase was made for their benefit, and that the money belonged to them.

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Margaret continued to have a tenant in ~~possession~~ the house until about the time Horace Miller obtained the deed; but about 1 March 1846, a tenant of their entered into a part of said house and remained therein as long as any tenant of the said Margaret; and about 10 May 1846 they commenced ploughing and cultivating the land, and have continued to cultivate it hitherto. About 15 June 1846, the tenant of Margaret left, and defendants have since had peaceable possession.

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Defendants deny that they have committed great waste and destruction as charged; but aver that they have used the timber in a careful and prudent manner.

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Defendants had never received any notice that the rights of the parties were different from their above answer or from what the contract to the Moulthrop's would by its terms imply; and they deny any knowledge that any person had any right adverse to Simmons Sackett, though they had heard it claimed that some George had some interest adverse to him.

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After their purchase, defendants did on some occasions insist and contend that they were owners of the land; but they deny that they asserted their right in any unusual or uncalled for manner, or took any considerable pains to publish their claim, or that they in any

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manner slandered the complainant's title; but suppose Margaret found it difficult to raise money on lands belonging to others.

Answer of Waterman and G. B. Miller to amended bill, sworn 5 and filed 9 Dec. 1850.

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Defendants answer the substituted allegations as they did the matters struck out, and pray that their said answer may stand.

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They have no knowledge or information where or in whose possession the original contract is, or whether it is in existence or has been destroyed; but believe it is in possession of Anne George or complainants, or has been lost or destroyed.

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Defendants have been informed and believe that Horace Miller executed some sort of an indemnity to Simmons Sackett against costs growing out of claim of complainants; and they believe it may have been set forth in the document annexed to the amended bill.

Disclaimer of Anne George, filed 21 March, 1850.

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Defendant does not know that to her knowledge or belief she ever had, nor did she claim to have or pretend to have, nor does she now claim, any right, title or interest of, in, to or out of the lands and premises, or any part. And she disclaims all right, title and interest, direct or indirect, of, in, to and out of the same, and every part thereof.

An order was entered 21 March, 1850, reciting in substance the disclaimer of Anne George, and dismissing the bills as to her.

Evidence for Complainants.

Deposition of Anne George, taken before C. H. Spafford, 21, 22 and 23 Jan. 1851.

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Witness is 51, and resides in Rockford, Winnebago co. Knows complainants Margaret is her daughter. Has known Smith ever since his marriage, and Levi since his birth. Became acquainted with Benjamin Sackett at his residence in Connecticut in Sept. 1851, and with Simmons some month at his residence in Ohio. With Erastus P. Moulthrop and Horace Miller in 1838, and Gardner L. Miller about same time. Is not acquainted with Waterman.

1840
1845
Was acquainted with Levi Moulthrop deceased. Knew him from 1837 to his death. Knew of his having claims and improvements on public lands. He had claims on a quarter section, an eighty and a forty of prairie, 23 acres of timber and prairie, 40 acres of good timber and 80 acres of timber rather inferior to the 40. On the quarter section, he had an improvement of from 12 to 16 acres; on the 80 of prairie he built a barn; on the 40 adjoining he built a frame house; on the 23 acres, he built a log house. The field of 12 or 16 acres was made in 1837, about the time I first became acquainted with him. The log house was built in 1838; the barn in 1838 or 1839. The house was commenced in 1839, and he commenced living in it in 1840. A log cabin was put up on the forty on which the barn stands

1850

in 1839, in the spring, according to her recollection. He had a garden on the 40 with the frame house.

1855

Did Levi Moulthrop deceased reside on the premises? He went into the log cabin on the 23 acres, in the spring of 1838. He then built the cabin near the barn and went there to reside himself, and to the best of witness' recollection he resided there in 1839, at the time of the land sale. He went into the frame house in the spring of 1840, and resided there until his death.

1860

Witness should think the improvements at the time of the land sale were worth \$1000. If they had belonged to her, she should not have been willing to have taken that sum. The improvements must have cost him much more at the time they were made. The land and improvements she should think were worth about \$3000. The land was of the very best quality, well and pleasantly situated, well adapted to a good farm, well watered and well situated as to roads. It is on the road from Rockford to Dixon, about 5 miles from Rockford. Do you know what value deceased put upon the farm and improvements? Has

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1870

heard him say before the land sale that he would take \$3000.

Did deceased keep house on the premises? He commenced keeping house in the log cabin in the spring of 1838, and from that time to the time of his death, he was either keeping house himself or had families in with him. He found his own provisions and had families to do his cooking some part of the time. He claimed the right of possession to all the lands to himself. Do you know whose claim those lands and improvements or any of them were understood and reputed generally in the neigh-

1875

1880

(1841-23)

brotherhood to be? It was understood by every one to be Levi Moulthrop's (deceased) I know this fact from having heard the neighbors often speak of them as being his claim.

1885

Deceased was a physician. It was unusually sickly in the fall of 1839. His practice was then so extensive that he had hardly time to rest. He was riding night and day.

1890

After the deceased left the cabin on the 20 acre piece, it was occupied by a family.

1895

The object of Dr. Moulthrop in keeping possession of the lands was to enter them. How do you know the fact? He told me at different times that this was his object while he was in possession of them. He told me this before the land sale. He was intimate at my house in the fall of 1837, and he frequently made his arrangements known to me from that time up to the land sale, and during that time he frequently spoke of entering all the lands he had possession of for his own benefit. He expressed it to be his intention to enter them for his own benefit.

1900

It was his intention to go himself to Connecticut previous to the land sale, to borrow money to enter the lands he claimed. But in consequence of the great sickness and the press of his professional engagements he sent his cousin Erastus P. Moulthrop. By what means do you know his intention? He told me repeatedly ~~that~~ before the land sale that he intended to go east to enter ~~the~~ obtain money to enter lands he was in possession of. By what means do you know that he sent Erastus P. Moulthrop east for that purpose? I knew it both from the Doctor and Erastus P. Moulthrop himself. When

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did Erastus P. Moulthrop inform you of this fact? Soon after the Doctor's death. When did you learn it from Dr. Moulthrop? ~~When did you learn it from Dr. Moulthrop?~~ At the time when Erastus went.

1920

The money was obtained of Benjamin Sackett. ~~Witness went to Connecticut in 1841, to see Benjamin learn~~ ed this fact from Doctor Moulthrop, Erastus, Benjamin Sackett and Simmons. Witness went to Connecticut in 1841 to see Benjamin Sackett and to try and prevail on him to extend the time of payment. Dr. Moulthrop was not then living. He died in September, 1840, leaving complainant Margaret his widow. For a year or more after his death, she had a continued succession of sickness, arising from fevers and mental suffering, on account of her youth and the loss of her husband. During that time she was not capable of doing business. Had her sickness and condition any thing to do with your going to Connecticut? It had. Her fear was great that she should not be able to pay for the lands at the time the money was due to Mr. Sackett, and it affected her so much that she was at times delirious. She was in her eighteenth year at the time of the Doctor's death.

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On ~~my~~ ~~an~~ her arrival at Benjamin Sackett's, witness stated to him her business, and proposed to pay him a part of the money down. He refused to take a part, saying he was to have the whole. He asked me how much I could pay. I then told him I would pay him \$170. I then asked him if he would give us two years longer in which to raise the money. He replied that he would have no objections, but that he would like to consult his brother Simmons Sack-

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ett in Ohio. He then told me he would write to his brother in Ohio by me. I asked him if he would allow me to see the letter. He replied no, that it was business between his brother and himself. I then declined taking the letter, and proposed to him to accompany me to his brother's in Ohio. He said it was inconvenient for him to leave home, but he would go and consult with another brother who lived close by. He then left and went as he said to his brothers, and on his return he said he had consulted with his brother. He then proposed that if I would then pay him four per cent down, in addition to the 54 per cent the money was then drawing, amounting to \$52, and \$48 more, amounting in all to \$100, he would go with me to his brothers, in Ohio, and prevail on him to extend the time two years. I then told him I would accept his proposition, and paid him the \$100, for which he gave me his receipt, saying at the same time he did not wish to specify the \$52, the amount of the additional 4 per cent, in the receipt, as it would come under the head of usury, but would give the receipt for \$100 for his time and expenses. The receipt is made an exhibit as follows:

"September 10th 1841.

Received of Mrs George one hundred dollars for my expenses and time to go to Ohio with her on business concerning a Bond held by my Brother Simmons Sackett. As witness my hand,

Benjamin Sackett, jr.

Witness Mary Ann Montthrop."

The witness (Mrs George) wrote the receipt, and

1975 it is in her own hand writing. After giving me the receipt, he remarked that it would be very pleasant for him to visit Ohio, as he had a brother and I think two sisters there, the latter of whom he had not seen for several years.

1980 Saw Crastus P. Moulthrop at that time, and inquired of him if he had any prospect of raising any money to pay a part of the money borrowed of Benjamin Sackett. He replied that he had not, nor should he have at any future time, even if I should ~~get the time~~ succeed in getting the time for payment extended to two years. I
1985 then remarked to him that I supposed he had relinquished all claims that he had ever claimed to have to the lands in question. He replied that he had. He said he had the original bond in his possession.

1990 On the way to Ohio, Benjamin Sackett conversed with witness freely about the matter of advancing the money. ~~He did converse~~ and remarked that had Dr. Moulthrop himself gone to borrow the money, he would have loaned it to him, and considered his note sufficient security for it, but as he sent Crastus after
1995 it, he felt that it would not be safe. And as his brother Simmons Sackett from Ohio was there on a visit, and his residence being nearer Illinois than Connecticut, he preferred sending it by his brother than to send it by Crastus. He said that one reason why he had loaned the money to the Doctor was, that the Doctor had been very kind and attentive to him as physician, and that he felt under obligation to render him any assistance he could. He also stated to me that through
2000 the entreaties of his wife, who was sister to Crastus

[24535]

2005 That the name of Erastus P. Moulthrop was to be equally inserted with the Doctor in the contract respecting the money and the land, or he could not have the money.

2010 At Warren Ct. Benjamin Sackett proposed that should ~~that should~~ they agree to extend the time two years, I should pay to his brother Simmons 4 per cent in addition to the 4 per cent the money advanced by him was then drawing. He stated the amount he had advanced to be \$650, which he had placed in the hands of Simmons Sackett, for the purpose of entering the lands held by Dr. Moulthrop. He said his brother was in the practice of dealing in lands, and understood much better than he did how to manage such business. Witness should think from what she heard Simmons Sackett say, he was a speculator in lands.

2020 On their arrival at Simmons Sackett's, they stated to him their business, which was to get the time of payment of the money on the bond extended two years longer. He replied that he could not say what he would do until he had gone to Rockford, Illinois to see what could be done with

2025 Pearley J. Shurnway relative to a mistake made in the land office; that Shurnway had commenced a suit against him and attached the east quarter of the land in question, for the purpose of getting a title to land he bid off for him; that Shurnway had a judgment against him. I

2030 told him I could inform him all about this suit, and that it would not be necessary for him to go to Rockford on that account. Mr. Shurnway desired me to say that if he would pay the costs of the suit and his lawyer's fees, and deed ~~for~~ ~~to~~ to him the land he had entered for him, he would release his judgment. I told him of this, and objected to his coming. He

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then refused to do any thing about extending the time until he should go to Rockford and see this matter settled. I then consented that he should come out for the reason that I could do no otherwise. He then said if I would pay all the expenses of the lawsuit, and pay him for his time and expenses to and from Illinois, and the expenses of the deeds to correct the mistake, he would then extend the time by making a contract in the form of a sale of the lands to me, for the benefit of the Doctor's widow and heir. The discussion was protracted for a long time. Some of the time Simmons and Benjamin Sackett would talk together with me a short time, and then retire from the room to consult together, and seemed anxious to keep me in the dark as to their real designs. During a part of the time they had a lawyer with them as counsel. I objected to the contract in the form of a sale to me, and wanted them to extend the time on the bond, as I did not wish to be made a party to the contract.

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Simmons Sackett when witness was at his house, spoke about Erastus P. Moulthrop's name having been put in the original contract with Levi Moulthrop deceased. He said that when he was in Connecticut at the time Erastus went to borrow the money for Dr. Moulthrop, it was through the interference of Benjamin Sackett's wife, that Erastus P. Moulthrop's name was to be joined in the bond, and that he considered it very unfair.

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~~Witness saw the original contract while at the house of Simmons Sackett. He showed it to me, and said he~~
After Benjamin Sackett left, Simmons Sackett told me that at the instigation of his wife, Benjamin Sackett was anxious to have the time extended for the benefit of

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Erastus Moulthrop as well as for the benefit of Dr. Moulthrop's widow and heir.

2070

Witness saw the original contract while at the house of Benjamin Sackett. He showed it to me and said that Erastus P. Moulthrop gave it to Benjamin Sackett in Connecticut, to take to him in Ohio. I then told him I found I had been paying Benjamin Sackett for doing business for Erastus Moulthrop instead of my own, and that I did not consider myself bound to keep from him the circumstance of having paid Benjamin Sackett while in Connecticut the sum of \$52, it being four per cent in addition to the six per cent the money was drawing, and also the sum of \$48 for his time and trouble in going with me to Ohio. He seemed very much displeased, and said it was an imposition.

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The contract was in the hand writing of Dr. Moulthrop. I had seen it before. I saw it in the trunk of Dr. Moulthrop, with his private papers, soon after his death. Does not recollect whether a copy or copies was taken. I did a great deal of copying for Simmons Sackett, and I might have copied this contract. If I copied any, I suppose Simmons Sackett took them. Witness has no copy. Does not know of complainants having any, and is confident they have none. Knows Margaret never had any, and complainant Levi was an infant.

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Do you know what became of the original contract? Simmons Sackett gave me this contract either in Ohio or in Rockford, does not distinctly recollect which. Just before he left Rockford for Ohio, witness gave him back the contract, and he placed it in his pocket book. Witness has never seen or heard of it since, and witness firmly believes Simmons has it in

2095 possession, or it has been destroyed.

2100 As near as witness can remember, the paper attached to the answer of Simmons Sackett is a true copy of that contract, with one exception. "In the sum of \$3000" in the original was \$3000, according to the best of her recollection. Do you recollect whether in the original it was expressed to be on condition that Levi Moulthrop or Erastus P. Moulthrop should raise a certain note then in the hands of Benjamin Sackett, expressed in the alternative or how otherwise? In the original it was Levi Moulthrop or Erastus P. Moulthrop. Do you recollect whether your
2105 attention was first called to this point when you first saw the contract? It was. When I read it after the death of the Doctor, I observed that the word, or, was there, and to my understanding it gave it a different meaning from what it would have had, if the word, and, had been in place of or.
2110

2115 Simmons Sackett resided at Canfield, Trumbull Co. Ohio. He came with witness to the residence of her daughter on the land. He seemed to be very much interested in her affairs, and sympathized with her in her bereavement and sickness, and assured her that he never would turn her out of her home; that he would extend the time of payment two years longer and if necessary two years more, and again if necessary two years more. The next day they
2120 went to Rockford to settle the Shumway judgment, and paid \$39.31, for the costs and attorney's fees. The deed from Sackett and wife to Shumway was delivered, ~~and~~

2125 We went to the office of J. B. Miller, who was my counsel, and I handed the original contract to Mr. Miller to examine. Mr. Miller advised Mr. Sackett to extend the

time on the original contract, and to strike out the name of Erastus P. Moulthrop, in order that the widow and heir of Dr. Moulthrop might have the full benefit of the contract. Mr. Sackett said he was willing the widow and heir should have the benefit of the extension, ^{of} but was not willing to make any contract until he returned to Ohio, where he could get the advice of a lawyer in whom he could confide. He said he was unacquainted with law, and could not depend upon himself. Mr. Miller then advised me in the presence of Mr. Sackett to accept of his proposition, as I could do no better, for an extension of time of payment.

Witness at that time objected to having her name in the contract which he should give, on the ground that she was only acting for her daughter and her infant son.

Mr. Sackett claimed that \$132.14 should be added to the original sum. For expenses of travelling from Canfield, Ohio, to residence of the widow in Illinois. \$34.12½

Expenses in returning 34.12½

Time and trouble 16.00

Expenses at Rockford 62½

Costs and lawyer's fees in Sturmwag's suit 39.31½

Fee to his counsel in Ohio. 2.00

Expense of three deeds executed in Ohio 1.50

Postage of letters 4.50

He also claimed that the interest which had accrued on the original contract should be added.

He said that part of the \$650 which was over the price of the ~~land~~ entering the land, was not sufficient to pay his expenses, and in consequence \$30 was added to it.

State whether Simmons Sackett informed you whether it was agreed between him and Benjamin Sackett

that the lands should be entered in his name; and if yes,
what did he say about it? He said he was unwilling to
come to Illinois to enter the lands, unless they could be
2160 entered in his name to secure him for the note he had
given to Benjamin Sackett for \$650. He also said he came
out to oblige his brother's wife's relations, and assured me he
had no personal interest in the transaction, nor had ever
wished to have, except a fair remuneration for his time and
2165 services, and it was finally agreed between them that he should
come on these terms.

The expenses for which he should be paid the \$30, were his
expenses in coming to Illinois, to attend the land sale. He in-
formed me that Dr. Moulthrop accompanied him to the
2170 land sale.

I informed Simmons Sackett of the proposal made to me by
Benjamin Sackett in regard to the additional interest, and he
refused to have any thing to do with it, and said it was un-
just.

2175 After he returned to Ohio. I received a letter with an
agreement inclosed, from him. ~~Thereby~~

[The agreement is made exhibit B. It is dated 1 Nov.
1841, and agrees to sell the lands to John George, subject to
any equity (if any such should exist) between him and
2180 Erastus Moulthrop and the heirs of Levi Moulthrop growing
out of a contract between him and the said Moulthrops of 13
Oct. 1839, for the sale of the same lands "hereby intended to be
sold which contract has not been complied with by said
Moulthrop, and I do not consider myself under any obliga-
2185 tion in law or equity to convey said lands." The convey-
ance to depend upon the said John George paying to said
Simmons Sackett, on or before 1 Nov. 1843, \$897 with interest

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annually at 4 per cent. and pay all taxes. If payment is not punctually made, this contract is void and of no effect.]

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[The letter inclosing the agreement is also made exhibit C. Its substance is set out in the bill. State line 428. Do you recollect observing the date of that letter? and if yes what do you recollect about it? I do. I observed it was dated in 1840 instead of 1841, and supposed it was a mistake.

2200

Who had possession of the lands when you received the contract? My daughter Margaret and myself were living in the house on the premises. My counsel advised me to go and hold possession for her until she was of age, and accordingly I went on to the premises and remained with her until she was twenty-one years old, which was in March, 1844.

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Margaret held possession alone about six weeks after she was of age. She then took in Mr. McBomb as a tenant to hold possession for her; and after that she had a succession of tenants, as I believe, up to the time of the filing of the bill.

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Witness never claimed a beneficial interest in the premises for herself. I made a good many efforts to raise the money, but all proved useless. Margaret made effort. I believe she made a good many.

2215

She received the letter marked D. by mail, and believe it came from ~~him~~ Simmons Sackett. I do not think it is his hand writing. I received several letters from him, and all seemed to be in different hand writing.

Erastus P. Moulthrop came to Winnebago county, witness thinks, in 1838. She is positive he did not claim any possession of the lands in question, previous to the land sale.

2220 He resided with Dr. Moulthrop after he came, and assisted him in his farming operations. She is positive he did not claim any possession of the lands in question previous to the land sale. ~~After the land sale,~~ there appeared to be a misunderstanding between them, in consequence of Erastus having obtained the money in the way he did. and after the land sale, Erastus appeared to keep about his work without consulting the doctor.

2225 Erastus Moulthrop took possession of Dr. Moulthrop's personal property after his death, and disposed of it without taking administration. Witness urged him to take letters, but he refused. Do you know how he possessed himself of the original contract? He took the key to the trunk of the Doctor's, immediately after his death, and took possession of all his private papers. When witness was in Connecticut, he was working on Benjamin Sackett's farm as a hired man.

2235 When the bill was filed, the defendants had no other property in their possession but the lands in question. Heard Benjamin Sackett say, when in Connecticut that the legal rate of interest was six per cent. Horace Miller never avowed to witness that he was Simmons Sackett's agent.

2240 After Dr. Moulthrop's death, before she saw the contract, was about three months. My daughter had a key which opened the trunk, and she took it and took out the contract. The key was mine, and I had given it to her to use.

2245 What was the state of things between Erastus P. Moulthrop and Dr. Moulthrop for some time previous to his death? (Objected to) I should think from appearances they had hard feelings towards each other from

the time of the land-sale up to the time of his death.

2250

Look upon the letter signed Simmons Sackett, marked E. and state what you know or recollect about it if any thing. This letter was in reply to one which my daughter wrote to Simmons Sackett about the money due to him. I was present when she opened the letter, or when she broke the seal. After reading it herself, she handed it to me to read. Witness believes it came from the post-office. What can you say of the hand-writing of the post-mark? I believe it to be the post-mark of the post-office at Canfield, Ohio. She received letters from there shortly afterwards. This post-mark is the same with that on some of the letters I received.

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Horace Miller, witness thinks lived about half a mile from the premises. Some time previous to the filing of the bill in this cause, Margaret made efforts to find out what he was doing in regard to the lands in question, but could not ascertain.

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Adam Keith was in possession at the time the bill was filed, as a tenant for Mrs. Moulthrop. I was present and saw the lease executed, but did not see him go into possession. It was generally reported in the neighborhood that Adam Keith had sold his farm for cash, and had agreed to pay the debt due to Simmons Sackett.

Witness when she left for Connecticut, had apprehensions for the life of the complainant Margaret.

2275

Letter D. is dated Canfield, Nov. 27, 1843. It is addressed to Mrs. George and signed Simmons Sackett. He says, "I have received a letter from R. Squires saying he had offered to give \$2000 for the property, pay \$1000 between

2280

this and the first of April next, and the balance in two or three years with annual interest. I am going to write to him that if he will pay me \$1100 on the first day of April next, and secure to yourself and heirs \$900, payable at such times as you may fix with him, he may have the land." "I am willing you should receive the benefit after paying myself, as you will perceive by looking at the article, \$1100 will be but little more than is due upon it, and not any more than will pay myself and the incidental expenses I am put to together with counsel fees."

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Letter E. dated Canfield July 26, 1841, is addressed to Mrs. Margaret Moulthrop by Simmons Sackett. It states that he received a line from J. B. Miker Esq. dated Rockford, Feb. 12, 1841, which only advised of the course Erastus P. Moulthrop was pursuing, and the course that he thought he would follow &c. and that it being only a friendly advisory letter, he thought it did not require an answer.

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2300

It acknowledges the receipt of a letter from Mrs. Moulthrop postmarked July 12; and in answer says, "The amount of the obligation on my part as expressed in the bond is in amount this viz. That on the presentation of my note given to Benjamin Sackett of Connecticut, and the payment to me of monies to cover my costs, expenses, &c. attending this transaction, I am to assign to said Moulthrops the land certificates or give a deed or deeds, provided the obligation is fulfilled on the part of Moulthrops within two years from the date of my note to said Benj. Sackett or bond. It is immaterial to me how you obtain my note, so that I legally obtain possession of it. The cash that may be due me for expenses time and trouble, I am willing to receive in good Ohio paper."

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[29415-40]

Deposition of John G. McComb, taken before C. H. Spafford, 23 Jan. 1851.

2315 Witness resides at New Milford, Winnebago Co. and is 48.
Has known the Millers 7 years and Waterman & Margaret Smith
7 or 8.

2320 Witness was in possession of premises about seven years ago
next spring, as a tenant, and worked the land on shares with
widow Moulthrop. Widow George and widow Moulthrop had
been in possession previous to this time. Who had possession
after you left? Mr. Chappel moved into the house
before I left it. Mrs. Moulthrop came and said he might
occupy one of the rooms in the house.

2320a Seven years ago last spring, Mr. Craske and myself went
to the widow Moulthrop's to purchase the premises. We
agreed on the price. Mrs. George appeared to do the most
of the business and talking. We were to pay Mr. Sackett his
demand, and could not agree as to the balance of the
payment. She wanted it to run 18 years at 12 per
2325 cent, to pay the interest 4 months in advance, and I
wanted to pay it sooner, and we split on that. We
were to pay \$2000. (Answer objected to.)

2330 Thinks that about two or three years after this, he
had some talk about the purchase of the premises with
Horace Miller. He came to my house and asked me if
I would sell my farm, and said he would find a man
who would pay me \$13 an acre in cash down for it.
I told him I would not take \$13, and asked him \$15. At
this time, he asked witness if he would finish a piece of
2335 breaking he had commenced. I told him I would not.

2338

Soon afterwards I went to Miller's house and told him I would take \$13 an acre for my farm, and finish the breaking. He asked me where I should buy again if I sold. I told him my object in selling was to buy the

2340

Moulthrop farm. He told me I was too late. I then told him I did not want to sell. He said they had wrote on, and calculated to have that property themselves. Witness thinks this conversation was in the fall.

2345

I expected to pay \$2000 for the farm. I had had no conversation with her about it for perhaps a year. I understood from her when I first talked with her about it, that I could have it at any time for that price.

2350

Thinks Horace Miller at that time knew the sum he intended to pay. I had talked with him about the balance which I would have to pay her over and above what my farm would come to at \$13 per acre, to make out the \$2000.

Deposition of Benjamin J. Hoyt, taken
before C. W. Spafford, 23 Jan. 1851.

2355

Witness is 34, and resides at New-Milford, Winnebago Co. Knows the Millers and Waterman, and Benjamin and Margaret Smith.

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I was present at the time Mr. Crush and Mr. McComb tried to negotiate for the Moulthrop farm, and was concerned in that negotiation, as I was to have a share with them in the purchase. It was the same negotiation mentioned by Mr. McComb. It was six years ago

last spring. They were to pay two thousand dollars for the farm.

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After this Horace Miller advised me not to have any thing to do with the purchase; that it was too high, and he thought the Widow Moulthrop would be glad to sell it cheaper by and by.

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I often heard him say during that summer that he meant to have that farm himself. This was 4 years ago last summer. I worked for Miller that season. He said he meant to buy this farm, and have a street of Millers from his farm to the Big Woods.

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Witness heard the proposition of McComb to Horace Miller to sell his own farm and purchase the Moulthrop farm, at the time they were at McComb's house, but did not hear what was said at the time McComb went to Miller's house. It was in the spring, before Miller went to Ohio. He went to Ohio some time in the fall or winter after this conversation. Knows the time of year of this conversation from the fact of Mr. Green's being then breaking for Mr. McComb.

2380

Does not know as Horace Miller endeavored to prevent other persons from purchasing.

2385

I was present when Horace Miller, Gardner C. Miller and some hired men went on to the premises and commenced breaking. It was at an early season for breaking. They went two or three times around a land with their breaking plow, and made a good deal of noise about it, and kicked up a good deal of fun over it. The widow Moulthrop requested her brother to go and forbid them from doing any further breaking. Horace Miller said he would show the widow who had the best right there.

2390

2395 What was their motive in going there on that occasion?
(Objected to.) From what they said, I took it to be for the
purpose of harassing and aggravating her. (Answer objected
to.) Witness thinks this was three years ago last spring.

2400 Witness has heard the Millers and Waterman all three of
them talk about Mrs. Moulthrop's title after the filing of the
bill. They said they had taken the best counsel they could
obtain, and they were sure they could obtain their cause, and
that the widow could not. I have frequently heard them
say this; they have said this to me, and I have heard
them say it to others. (Objected to.)

2405 Are you aware whether it was commonly reported in
the neighborhood, when Adam Reith was in the house that he
had agreed to pay up the Sackett debt, or how otherwise?
(Objected to generally, and as leading.) It was the common
report, and was in every body's mouth that he was
2410 going to pay up the Sackett debt, and was to pay the
widow something, but how much I do not know. (Ob-
jected to.)

2415 Cross examined. There is a circumstance from which
he has a distinct recollection that the conversation with
Miller about his intention of purchasing took place six
years ago. I worked for him that season. Is sure those
conversations took place that season. Has not had much
chance to hear such since. The Moulthrop farm lies be-
tween Miller's farm and the Big Woods.

2420 In stating the conversations of Miller, do you pretend
to have given his precise words? In some of the con-
versations I did, and in others I did not. In saying that
Miller said he would shew the widow who had the

2425 best title, I did use his words. In saying that Miller said he meant to have the premises himself, I used his words; and as regards the Miller Street, I think I used his exact words. He made the remark that he would shew the widow who had the best right, to Sampson or George George.

2430 There is no particular hardness between witness and Horace Miller. We don't care but little about one another. Have you not had considerable difficulty with Horace Miller? No sir.

2435 Direct. Heard Horace Miller speak of purchasing the Moulthrop farm a number of times but cannot say how many.

Deposition of David S. Sturtevant, taken before E. H. Spafford, 23 Jan. 1851.

2440 Witness is 47, and resides at New Milford. Has resided in the neighborhood of the Moulthrop property 15 years. Whose claim was that property previous to the land sale in 1839? It was the claim of Dr. Moulthrop. He erected the buildings on this claim. How do you know the fact? I furnished the Doctor the lumber for the buildings. They were put up in 1837 or 1838. Furnished lumber for a frame house and barn. 2445 Has no means of fixing the time only that he sold his saw mill before the land sale, and sold the lumber while he owned the mill.

Does not know any thing of Erastus P. Moulthrop hav-

2450

ing any thing to do with the claim. It was reported and understood in the neighborhood to be Dr. Moulthrop's claim.

2455

What became of the personal property of Dr. Moulthrop after his decease? Erastus P. Moulthrop sold his medical books, surgical instruments and medicines to Dr. Jones. He sold a carpenter's axe to me. The rest of his personal property, I know nothing about.

2460

There was a cultivated field on the premises previous to the land sale. The field was inclosed in 1836. Crops were raised on it in 1837 and 8. The part of the field on the premises ~~on the premises~~ belonged to Dr. Moulthrop.

2465

Cross-examined. First knew Erastus Moulthrop in the summer of 1839. I don't know where he boarded. He worked with Dr. Moulthrop; I don't know in what capacity. The Doctor lived at that time in a log house on the land. Thinks the barn and house were being inclosed at that time. Did ^{see} Erastus P. Moulthrop working in the field.

Deposition of Reuben Squire, taken before C. H. Spafford, 23 Jan. 1851.

2470

Witness is 52, and resides in Rockford. I did go to the house of Mrs. Moulthrop with a view to purchase the Moulthrop farm in the fall of 1843, in October I think. I told Mrs. George that if I could raise the money as I expected, I would pay her \$2000 for it.

2475

Horace Miller was with me. He was very anxious I should have the farm. He advised me to go home

2480 by way of Sackett's in Ohio, as Mrs. George was not ready
to sell it without hearing from Mr. Sackett. After this
witness went back to New York, and returned in about a
year. He then had a conversation with Mr. Miller, which
he does not recollect distinctly. He had been disappointed
in getting money. Some time afterwards, some of the neigh-
2485 bors spoke to me about purchasing the farm, and I
asked Mr. Miller if he would sign a paper with me
stating that the farm would be good security for the a-
mount of money I wanted. Mr. Miller said he would
sign such a paper, if it was drawn up to suit him.
After this, at a school meeting, Miller and myself and
some of the neighbors were talking about it, and Mil-
2490 ler said that whoever bought the farm ought to give
the widow an 80 of the prairie, and a 40 of the tim-
ber. I wanted \$1000. I think that was the amount we
talked of. He ^{witness} did consider the premises good security
for that sum.

2495 Did Mr. Miller sign such a statement? and if not,
how did it happen? He did not. I never asked him
to. I made up my mind that I would give up the
idea of getting this farm, and leave the neighborhood.
Mr. Miller had offered if we would come here he would
2500 either rent or sell a part of his farm to me; and
after I came he treated me with a degree of coldness,
and said he would rather I would get some other
land to work, rather than his; but if I could not I
should have part of his to work. And from this I
2505 made up my mind that I would give up buying the
place and leave the neighborhood.

Deposition of Benjamin J. Root taken
before C. H. Shafford. 4 Sept. 1851.

2510 Some time about the middle of May, 1850, I was plant-
ing corn with Horace Miller for Mr. Waterman, and Miller
said he had been to the state of Ohio and the east for
the purpose of getting the answer of one or all the
defendants in this suit, and that he had purchased
a piece of land belonging to Gustus P. Moulthrop while
2515 he was gone. He said that the answers were more
favorable than he expected.

Deposition of William Nulin taken
at Rockford. 4 Sept. 1851.

2520 Witness thinks the subject of the immediate com-
pletion of the rail road now in progress from Chicago
to Galena began to be agitated in this county in the
year 1845. The effect was to induce holders of land
in this county to think their lands were becoming
more valuable very rapidly. Such was the effect
upon myself individually so far as I was a land hold-
2525 er. Government lands were rapidly entered with the
expectation as I suppose that they ~~expectation~~ would
rapidly increase in value. People were anxious to
get hold of land as a safe and sure property, and
as the best form of investment in view of their ex-
2530 pected rise in value under the influence of the

rail road improvement. I cannot ~~repent any~~ ~~decision~~

2535

The usual effect of such excitement is to increase the price of land rapidly, and often to give it an inflated value, which rapidly falls as the excitement dies out.

Witness was recorder of deeds, and was thereby enabled to know pretty well how the matter of buying and selling lands was progressing.

Deposition of Emerson S. Miller, taken at Rockford, 5 Sept. 1851.

2545

A charter for the rail road had been granted previous to 1845, and the immediate commencement of the work of the railroad began a good deal to be agitated during that year. It was discussed in the course of said year, and a public meeting was held at Rockford some time in the latter part of said year, recommending a general convention at Rockford to take measures for the early completion of the road. The agitation of the subject had the effect to raise the price of and increase the demand for land in the counties through which it was to pass, and in northern Illinois generally.

2550

2555

Does not recollect the precise date of the preliminary meeting. The convention was held at Rockford, thinks in the early part of January, 1846.

2560

Thinks there has not been a decline in the price

2560

of lands in this county since 1845. They have gradually and constantly advanced in price since that time. Witness has been a dealer in lands in this county about ten years past, either for himself or others.

Evidence of Spafford C. Field taken at the hearing.

2565

Witness resided in the county of Winnebago in 1839. Before the land sale at Galena, he was a claimant of land in Township 43 range 2 east of 3 p.m. After notice of the land sale, the settlers in that township held a meeting and appointed a committee of three to pass upon disputed land claims, and a committee of nine to hear appeals.

2570

Witness attended, and was appointed to bid off lands for the settlers, at the land sale, and did so. Dr. Mouthrop was one of the committee of nine. The proceedings of the meeting were in witness' hand writing, and he produces them and they are made an exhibit. Levi Mouthrops name is signed to those proceedings, but whether in his hand writing, witness cannot say. Maps of the township were made, and the names of settlers and claimants were entered on the map on the lands they claimed. The witness produced one of these maps, and said it was in his own hand writing. The names of claimants were entered therein by witness upon inquiry. He could not state from recollection whether Dr. Mouthrop claimed any land in that township, without the help of the map. The witness is then allowed by the court to be asked whose names are inserted in that map as claimants

2575

The witness is then allowed by the court to be asked whose names are inserted in that map as claimants

2580

2585

[12415-45]

2590 of w. h. n. e. q. s. 19 and e. h. s. e. q. s. 20, and answers that the name of Levi Moulthrop is marked on the first tract part of section 19, and "Moulthrop and Munday" on the other tract, part of section 20. He did not know whether "Moulthrop" on this tract meant Dr. Moulthrop or not. He does not know that Erastus P. Moulthrop claimed any land in that township.

2595 Cross examined. The names of all the claimants in the township were not subscribed to the proceedings of the meeting.

Proceedings of the meeting, exhibited by Mr. Field, the last witness.

2600 These proceedings consist of a preamble and resolutions purporting to be passed by settlers of the township, concerning the approaching land sale, and providing for the settlement of disputes about claims. One res

2605 One resolution ^{contains articles} providing that a committee of three persons should settle all disputes in claims, and that two out of three might legalise a decision; that an appeal might be made to a further committee of nine, or the parties might agree upon two out of the nine to be added to the committee of three; that five out of the nine should be a quorum; and "there shall be a register, whose duty it shall be to make a map of this township, and record in a legible manner all the claims of the citizens which must be reported to him forthwith."

2610 At the foot of the resolutions and articles appears the names of the committees and register and bidder, followed

by signatures, as follows:

2615 Daniel Barnum
Julius Warner
Sidney Dugood } Committee of 3.

2620 S. b. Field
Anthony Burk
Wm Dugood
Eldridge G. Jones
Joseph Briggs
Elijah L. Herrick
Wm. H. Vaughan
2625 Levi Moulthrop
Isak Bortright. } Committee of 9.

S. b. Field, Recorder and Bidder.

2630 Elijah L. Herrick
Isak Bortright
Joseph Briggs
Daniel Barnum
James Beuntain
John Galloway
Peter B. Johnson
2635 Williams Pepper
Frederick Holdingsworth
J. B. Johnson
B. J. Shumway
Jacob Brown
Levi Moulthrop

2640 S. b. Field
Wm. Mulford
J. Hitchcock

Leases exhibited.

2645 The complainants produced and made exhibits of four several leases of the premises, granted by Margaret Mont-
throp to different tenants.

2650 The first lease, dated 21 Feb. 1845, between Margaret Montthrop and ^{David S. Chappell} ~~Peter R. Clark~~, and by it she demised, leased and let "unto the said ^{David S. Chappell} ~~Peter R. Clark~~, all that certain messuage, dwelling-house and farm by her lately occupied near Kishwaukee, in the county of Winnebago, ^{State of Illinois, and was in possession of the said} ~~and this day surrendered to her by David S. Chappell,~~ ^{late tenant thereof under her,} with the appurtenances," with habendum until 1 April then next ensuing, for ~~rent~~ at the rate of ten cents by the month ~~and~~ the monthly rent of ten cents. And Chappell covenanted to maintain possession till said first day of April.

2660 The second lease, dated 21 Feb. 1845, is between Margaret Montthrop and Peter R. Clark, and by it Margaret Montthrop demised the same premises, "this day surrendered to her by David S. Chappell late tenant thereof under her, until 1 May then next; at the like rent, and with the like covenant for possession.

2665 The third lease, dated 13 May 1845, is between Margaret Montthrop and Lewis Blegston, and by it she demises to Lewis Blegston the same premises "by her lately occupied, and by David S. Chappell and Peter R. Clark as her tenants," until 13 July then next, at like rent, and with like covenant.

2670

The fourth lease is dated 18 May 1846, and is between Margaret Mouthrop and Adam Keith, and by it Margaret Mouthrop demised to Keith the same premises and now occupied by John Shappell as her tenant; with habendum for six months, at a rent of ten cents by the month, with a covenant of Keith to maintain possession, with a proviso that he might relinquish after two months upon one month's written notice.

2675

Testimony of Francis Burnap,
taken at the hearing.

2680

Witness was the subscribing witness to the three first leases, and saw them executed by the parties thereto on the premises, the tenants being in possession. He drew the lease to Adam Keith; the signature of Margaret Mouthrop thereto he knows to be her hand writing, and he thinks the signature of Adam Keith to it is in Adam Keith's hand writing. Those leases were made in consequence of the advice of witness to preserve documentary evidence of the possession.

2685

2690

The original bill in this cause was prepared some time before it was filed, and its filing delayed because complainants and witness were unable to

2695 ascertain what Horace Miller was doing in regard to the premises. Upon the hearing that Horace Miller had taken his departure for Ohio, the bill was immediately filed.

Affidavit of Horace Miller

2700 This affidavit was made and filed 25 Dec. 1849. It sets out that Erasmus P. Montthrop had for several years resided in the county of Litchfield, Ct.; that about two years since deponent was informed that Montthrop had changed his residence to the state of New-York, and he thinks to the county of Chenango, but is not certain, and he has not since heard where he resides and does not know. He states the residence of the Sacketts, and says he has been advised and believes that it may become necessary for him or some one for him to make a visit to said defendants in order to prepare proper answers in this cause.

2810 Upon this affidavit, time was given to the defendants to answer.

The writ of summons upon the original bill was served on Horace Miller by leaving a copy at his house, 23 May 1846.

Evidence for Defendants.

[Set aside.]

Deposition of Simmons Sackett, taken 20
Aug. 1851.

Witness is 62.

2720

Has no interest in the result. Is not interested directly or indirectly to sustain the defence of Millers and Waterman.

2725

The original contract between Levi and Prastus P. Mountthrop and myself was not a loan of money by me to them. It was a sale of the land upon the terms and conditions expressed in the contract or title bond, and not otherwise.

2730

Witness bid off and took the title to the lands at the land sale. Dr. Mountthrop according to his recollection did not remain until all the purchases were made. I paid for said lands. The money paid by me never passed from me to either of the Mountthrops. The money remained in my possession from the time I left home until I paid it to government.

2735

His negotiations in Connecticut were had with Prastus P. Mountthrop. He did not pretend that he was acting as agent of Levi Mountthrop, but claimed that his business was on the joint account of himself and Levi Mountthrop, and he so acted as far as witness has any recollection.

2740

~~Both before and after the land sale, I expressly refused to have any thing to do with the matter except to purchase on my own account and for my~~

2745

~~self and then sell to the Moulthrop by contract. After I visited the land and satisfied myself in relation to its value, Levi Moulthrop proposed if I would lend them the money, and allow them to receive the certificates of purchase, they would give me a certain number of acres, and repay me in two years with interest; but I then told him as I had done before, that I would purchase the land myself and then sell to them, and in no other way would I consent to have any thing to do with the transaction.~~

2750

2755

At the time of making the original contract to the Moulthrops, and before that while viewing the land, I understood Levi Moulthrop, that Erastus was to have a share of the land, and never heard to the contrary until Mrs. George in 1841 claimed otherwise. Did not to his recollection hear Levi Moulthrop claim that Erastus had acted unfairly, or represent that Erastus was not intitled to an equal joint interest.

2760

2765

Ann George visited me at my residence in Ohio, in company with Benjamin S. in 1841. Her business was in relation to the land and suit of Shumway. It was some time after the expiration of the payday in the original contract to the Moulthrops. She represented the old contract as run out, and desired witness to give her a contract for the land in her own name, fixing the payment at two years, in which she said she could raise the money. That her daughter was young and inexperienced, and wanted the contract in her own name, because she could manage better than her daughter, and that she intended the contract to be for the benefit of her in-

2770

2775

fant grand child. According to witness best recollection, she did not on her visit to Ohio request an extension of payment on the original contracts, but witness distinctly recollects he had it with her, and said it had run out and was not worth a pin, and was no better than a piece of brown paper,

2780

and offered to give it up as entirely worthless. She insisted upon his giving her a contract in her own name, stating that she could pay for it in two years. It is so long since he cannot pretend to give the language. Except as to the value of the bond, which he thinks he has given in her own language. The contract to Mrs. George was drawn up in Ohio after my return. It was made in accordance with her request when in Ohio.

2785

^{Mrs. Montthrop wrote him an explicit letter in July 1845, as he supposes from the fact in 1845.}
I sold the land to Mrs. George at her request, and all subsequent negotiations were in relation to the contract with her, and no attempt was made to fulfil the old contract.

2790

Has no recollection of stating to Mrs. George that it was through the influence of Benjamin Sackett's wife that Erastus P. Montthrop's name was to be joined in the bond, and that ^{he} ~~you~~ considered it unfair? Is pretty sure, because he never knew it to be the fact. Never heard her or Benjamin say a word about such interference.

2795

2800

Has no recollection of conversation with Mrs. George, that at the instigation of his wife, Benjamin Sackett was anxious to have the time extended for the benefit of Erastus P. Montthrop. Never knew of such interference, and thinks he

he never told Mrs. George any such thing.

2810

When ~~Mrs. George~~^{witness} was in Rockford in 1841, Mrs. George called with him on her counsel Mr. Miller. He drew up papers for Shumway to sign. After which Mrs. George urged witness to close her business. Witness refused to make any contract until after his return to Ohio, where he could get the benefit of his own counsel. Recollects her attorney saying that the old contract had died a natural death, and witness had as good right to sell that land to Mrs. George as any land I owned in Ohio, ~~and~~ as far as this contract was concerned, and they both urged me to make the contract there to Mrs. George, stating if I should die on my ~~return home~~ way home, or any accident should happen to me, the land would be lost to them.

2815

2820

2825

2830

Has no recollection of Mrs. George's saying to him that she had paid B.S. \$52.00 or any other sum as extra interest. Thinks she told him she had paid B.S. \$100 for accompanying her to Ohio, and witness probably sure she had paid him pretty well. Knows of no transaction of the kind between Mrs. George and B.S.

In answer to the general interrogatory he refers for a history of the transaction as far as he is concerned, to his answer

2835

The letter of Margaret Montmarph appended, without date, postmarked in July 1841, says "Sir - you would receive a letter last spring from J. B. Miller, Esq. of Rockford, a lawyer and my legal ad-

2840

viser, relative to a bond which was granted between you and Levi Montthrop or Eustas P. Montthrop, he having received no reply desires me to write to you again. I also wish to inform you that we have made a division of the property contained in the said bond, and I wish to know from you, if you will take the money on the part which I claim in right of my late husband Levi Montthrop, comprising [Here follows the description as in Eustas P. Montthrop's release, Vol. 342B.]

2845

The remaining two hundred acres in the bond I have released to E. P. Montthrop by his paying his part of the money on the bond. Now my object in writing to you again is to be informed if you will take my part of the money which will be about \$360 with interest, and give unto me a good and warrantee deed of the aforesaid lands, (which by applying to the court of chancery I can obtain, but which application I deem unnecessary if you comply with my request.) I also wish to be informed if it is necessary to go to Warren, Conn. to pay the money to Benjamin Sackett, before you give unto me a deed. I have been informed by E. P. Montthrop that you agreed to take any paper money, that was of good credit, and not specie, now I wish to be prepared to meet your demand that should you request specie, I may procure it before I pay you.

2845 a.

2845 b.

2845 c.

I shall give my mother power to transact this business for me not being able to leave home myself on account of my baby, and I will thank you to reply to this as soon as possible, as I am making preparations for the immediate payment of the money.

I am, Sir, Yours respectfully,

Margaret Montthrop."

[Proved by Mrs. Porter]

2840

Sackett is the one to which a letter ~~attached~~
 to Mrs. George's deposition is an answer. It
 states she had made a division of the land
 with C. P. Montthrop on condition by his pay-
 ing up his part of the money on the bond,
 and she inquires whether he will take her
 part of the money about \$360, and give
 her a deed of her part. She inquires whether it
 was necessary to go to Warren St to pay the
 money to Benjamin Sackett, and whether he
 will require specie.]

2845

1

Deposition of Ben Newton taken
 21 Aug. 1851.

2855

Saw Mrs. George at Mr Sackett's, and at his
 office in fall of 1846. Understood she came to
 get a contract for the land. Heard her and
 Simmons Sackett talk together about the busi-
 ness. Was counsel for Mr. Sackett. He applied
 to me for advice. Advised him not to have
 any thing to do with the original contract, but
 if he did any thing about it to sell it.

2860

Understood Mrs. George that she did not
 wish the original contract extended, but wish-
 ed a new contract in her own name. She
 wanted to purchase the land of Mr. Sackett
 out and out, as I understood her. Believes he
 drew the contract, but does not distinctly
 recollect.

Deposition of Benjamin Sackett
taken at Hitchfield Ct. 30 Aug.
1851.

Has seen Horace Miller but once, when he was in Warren in February 1850.

1870

Deposition 15

Has no interest in result, and is not directly or indirectly interested to sustain the defence of the Millers and Waterman. ~~Saw Mrs. George at his house eight or ten years ago.~~

1875

Saw Mrs. George at his house eight or ten years ago. Her business was to induce me to wait on my brother Simmons Sackett for about two years as to a note I held against him. I mean to say she wished me to forbear payment for ~~about~~ that time.

1880

Deposition 16

She did not offer to pay witness money due from the Mouthrops to witness, for they owed him nothing. She wished me to extend time of payment two years on that note. Witness said he would oblige her if S.S. was willing. Said nothing to her about extending the time of payment for the land, as I had nothing to do with it, but on said note.

1885

Proposed to write a letter to his brother about it. She did not propose to see the letter, nor did witness write such. She told me it would be of no use to write a letter.

1890

She paid witness ~~one~~ \$100, for the purpose of paying for his time and expenses in going to Ohio, to see his brother and persuade him

2895

to extend time of payment on land contracts. She said she thought I could induce him, and that it was necessary for me to visit him personally, and that it would do no good for me to send a letter. The expenses at that time of going to where Simmons Sackett lived and back again, were about sixty dollars, and owing to sickness in his family and the state of his business, his time was counted at forty dollars more; the \$60 were to cover the whole expenses. Did not propose to ~~pay~~ Mrs. George to pay him four per cent; nor was any thing said about the \$48; nor did he receive the \$100 for any other purpose than as here stated.

2900

2905

Q. B. { Never loaned Dr. Moulthrop money to enter land, either directly or indirectly.

2910

Did you at any time state to Mrs. George that you had loaned any money to said Dr. Moulthrop, or that one reason why you had loaned the money to ~~him~~ the Doctor that he had been kind and attentive to you as physician; that if Dr. Moulthrop himself had gone to borrow the money you would have loaned it to him; that you did not feel safe to

2915

Exposition 18.

send the money by Erastus P. Moulthrop, and proposed sending it by your brother; or did you make any statement to her substantially like these? I never made such a statement to her, nor any statement importing any thing in form or substance like any of the statements inquired of in the interrogatory.

2920

Had no conversation with Mrs. George about future interest, nor proposed to her to pay four per cent in addition to six per cent.

2925

Deposition 19.

Did ~~not~~^{wife} inform Mrs. George that he had placed \$650 or any other sum in the hands of his brother to enter lands held by Dr. Moulthrop? I did not so inform her.

2930

Deposition 20.

What do you know of any effort having been made either by yourself or your wife to secure an interest to Erastus P. Moulthrop in the lands in question, contrary to the right of Dr. Levi Moulthrop or of his widow and heir? I know nothing of any such effort, either on the part of myself or of my wife.

Deposition of Erastus P. Moulthrop, taken at Litchfield, Ct. 30 Aug. 1851.

2940

Is 35. Are you interested in the event of the above named suit, or are you directly or indirectly interested to sustain the defence of the said Horace Miller, Gardner C. Miller and Hiram Waterman? I am not so interested. Resided in Winnebago County during 1839 and 1840.

2945

Deposition 21.

Were you jointly interested with Dr. Moulthrop in the lands? if so state whether as equal joint owner or how otherwise, and whether before and after they were purchased of the government, or how otherwise. I was jointly interested with him in the lands, and I think we were equal joint owners, though it is possible he was to have a few acres the most. He was so interested both before and after the lands were purchased of the government, and the same before as after.

2950

2955 { While residing in Illinois witness labored in com-
pany with Levi Moulthrop in cultivating and making
improvements on the land, from the time he first went
there to the time of Dr. Moulthrop's decease, in the capac-
ity of joint owner, and had a joint interest and
benefit in such cultivation and improvements.

2960 { I did go in 1839 from said county of Winnebago
to Connecticut to procure money in the ~~joint~~ capacity
of joint owner of said lands—but I did not succeed
in making a loan of money. I made an arrangement
with Simmons Sackett to go to Illinois and purchase
said lands, and that he should subsequently sell
and convey said lands to me and the said Levi Moul-
throp deceased on receiving from myself and the said
Levi Moulthrop deceased, the amount which the said
Simmons might pay for said lands, his expenses and
the sum of two dollars per day for the time so spent
by him, which was to be computed from the time
he should leave his home in Ohio to the time that
he should return thereto. I paid expenses of journey
out of my own funds.

2975 { The contract was in the joint possession of witness and Dr.
Moulthrop during his life, and we both had access to it. I de-
livered it to Benjamin Sackett, thinks in fall of 1844, to carry to Ohio
and deliver to Simmons Sackett.

2980 { If you delivered up said contract for the purpose of relinquishing
whatever interest you once had or might have had in said lands,
to whom and for whose benefit did you make such relin-
quishment? I made such relinquishment to the said Simmons
Sackett for the benefit of him the said Simmons Sackett.

The last question was excepted to because it proposes a question
of law, ^{of law, and}

and to establish a title to land by hard; and to the answer
for the latter reason. Grinnell.

Deposition of Mander Bone, taken be-
fore C. H. Spafford, 11 Oct. 1851.

2940 Witness became acquainted with Levi Moulthrop in
1838. He was then a practising physician in Irish-
wauke, Winnebago Co. Thinks he became acquainted
with Erastus Moulthrop in the fall of 1839 in same place.
They lived together on what was called the Moulthrop
place from the year 1839 to the decease of Levi Moulthrop
2995 in Sept. 1840. Erastus Moulthrop had been living with
Levi Moulthrop about six months before witness became
acquainted with him. They were building a house
and farming some. The house was being built on
the premises in controversy.

3000 Do you know ~~whether they were partners~~ in what
manner they carried on their business, and whether
they were partners or not? They carried on their busi-
ness together, and were partners in it. I considered
that they were partners in the land in question. I
3005 understood from both parties that they had an equal
interest in the lands in question. (Objected to)

Dealt with them. In what capacity, whether as part-
ners or otherwise? I dealt with them as partners. I
lent them money, and they signed over property to me
3010 jointly to secure me, and gave their notes to me joint-
ly.

It paper marked it, is shown to witness, and he is
asked whether the Moulthrops executed it. (The complainant

3015 unto except to the paper.) The paper was written by Phineas Johnson and signed by them, and was by them delivered to me.

3020 [This paper is a ~~real~~ chattel mortgage from Levi Mouthrop and Erastus P. Mouthrop to Mander Bone. It sets out that the Mouthrops in consideration of \$1, and of their indebtedness to Mander Bone, by a promissory note of which the following is a copy

"Kishwaukee Co. 17th 1839.

3025 "For value received we jointly and severally promise to pay Mander Bone or bearer two hundred and thirty dollars one year and six months from date with interest at twelve per cent as witness our hands.

"Levi Mouthrop

"Erastus P. Mouthrop."

3030 have granted, &c. unto the said Mander Bone, his executors administrators and assigns 1 mare colt of the value of \$20, 1 horse colt of the value of \$25, 1 sow of the value of \$10, 1 sow of the value of \$8, 8 pigs of the value of \$12, 1 boar of the value of \$6, 1 bay horse of the value of \$75, 1 mow of wheat supposed 50 shocks of the value of \$16.50, 1 double harness of the value of \$10, 1 cow of the value of \$25, in all amounting to \$207.⁵⁰/₁₀₀ as appraised by

3035 J. E. Clark and P. M. Johnson according to the annexed schedule, now on the premises of the said Levi and Erastus P. Mouthrop. With habendum and covenant of title, and proviso to become void upon payment, and an agreement that in case of default it shall be lawful for Mander Bone to come into and upon the premises of the said Levi and Erastus P. Mouthrop wherein the said hogs, horse and

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other property are or may be held or placed, and theme to fetch, carry and drive away the hogs, &c. and to sell, &c. and with agreement that the Moulthrop should have possession until default. Dated 1 Jan. 1840, signed Levi Moulthrop and Erastus P. Moulthrop; witnessed by P. M. Johnson and B. H. Basford, acknowledged before P. M. Johnson as justice of the peace, but not recorded.]

3050

The deed of Margaret Moulthrop set out in the last supplemented bill is produced, and the witness is asked to state what he knows about its being executed. (Objected to) I know that such a deed was executed from hearing Mrs. Moulthrop and Erastus Moulthrop talk about such a deed's being given. It was talked about in the division of the lands between Mrs. Moulthrop and Erastus Moulthrop after the doctor died. (Objected to) [The deed was annexed.]

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Papers marked C. and D. are produced, and complainants object to them; and the witness says, I think the signatures are those of Erastus and Levi Moulthrop, and that they executed them. The papers are annexed, and are as follows:

3065

"Kishwaukee Oct 17 - 1839

"For value received we jointly and severally promise to pay Samuel Brown or order Mander Bone or bearer two hundred and thirty dollars one year and 34 months from date with interest at twelve per cent
"Its witness our hands

"Levi Moulthrop

"Erastus P. Moulthrop"

Indorsed - "Jan. 21 1840. Recd on the within note one hundred dollars."

Rishwakee April 7 1839.

3075

"For value ~~received~~ recd we jointly and severally
promise to pay Samuel Brown or order fifteen dollars
by the first of Oct next.

"Levi Moulthrop

"Crastus P. Moulthrop."

Papers marked E. and F. are produced, and the wit-
ness says I do know the signatures, and believe the
paper marked E. to be the signature of Parley J. Summ-
way, and the paper marked F. to be the signature of
Phineas M. Johnson. These papers are as follows:

3085

"Received Rockford 16th January 1841 of Crastus P.
Moulthrop a note of one hundred and fifty dollars in
full of all demands against the estate of Levi Moulthrop
decd or Crastus P. Moulthrop up to this date.

"Parley J. Summway."

3090

"Levi & Crastus Moulthrop to

Jan 1840

Glenn Bank Mill

Dr.

To 234 feet lumber

3 51

" Balance due on note given to Bassford for
for work just done & lost so that it cannot be
found

5 50

\$8.01

Dr.

By Levi Moulthrop's medical bill against
the estate of P. Johnson

\$11.00

Patrick English work some years since 3 days 3 00

14.00

3000

(12415-54)

One above account is settled in full
Rishwakee Oct 23, 1840.

P. M. Johnson"

Witness thinks the paper marked G. is in the hand writing of Levi Mendenhall. It is as follows.

Rishwaukee-Winnabago County-Minns
Dec. the 27-1887.

Dear Cousin

3110 I received your letter a long time ago, but pardon my neglect in not answering it sooner. A new country and bad climate is apt to make one rather dull and negligent. I have received no particular news of late from the east neither have I any very interesting for you but such as I have give I unto thee.

3115 You wished me to inform you as to getting employ in a store and the price paid for clerking. Wages in that business has been good from 25 to 40 dollars per month much better here than east. Goods sell readily here and a much greater profit. But if you were here you could do a much better business than clerking. There are but very few who continue in that business long after getting acquainted with the speculations of the country. I should be much pleased to have you come out here and I think you would be highly pleased with the appearance of the country. I am satisfied young men with small capital are much better off here than east. 3120 but old people say to the young we have always got a good living here and you can if you are prudent and industrious, and if you go to the west you may be taken sick and suffer for the want of friends to take care of you. All this is good reasoning. 3125 It is a fine thing to have friends in time of affliction but friends cannot make a man

content unless they can furnish him with a for-
tune.

3135 But I am truly anxious for you to come out
here, although I do not wish to advise you against
the wishes of your better friends but if you were
here you would think you had gained a most
blissful paradise.

3140 I flatter myself that I have got one of the best
farms in all America but I will not go to making
out any large story altho I could tell you truths which
you would consider incredible. I have also a large
tract of land claimed more than one settler is al-
lowed to ~~claim~~ hold and some considerable im-
3145 provements on it, and would like you to have a
part of it. I have had a number of offers for it
but would not dispose of it until I heard from you.
If you should conclude to come out here next spring
I would make you a present of 200 acres and two
3150 shares in the town of Kish wakee which would be
about 18 lots. Those shares sell very readily at 250
dollars pr share. This town is handsomely situated
on Rock River which is navigable for steamboats
some distance above this place.

3155 If you come I want you to hire me two first
rate hands that have been use to farming and
chopping and get them for as reasonable price as
you can. I have paid 20-26 dollars a month
for hands ~~during the winter~~ through the winter
3160 season. I think you can hire hands much
cheaper east, say from 12 to 15 dollars a month
for twelve months and have their wages cover

3165

me when they start. If you come on start by the first of March so as to get here by the first of April—or start the last of February so as to get here before the spring emigration gets on and the roads get bad. There will be a great rush of emigration here next spring and those who get in first will have the best chance for selecting lands. If you hire any

3170

hands put them under contract so they will not fly the bargain. Perhaps you can hire them in Woodbury. I should prefer them from some other place besides Milton for fear they would be inviting some of their friends on here which we should not want if you were here. I have had a number of letters from people about Milton and Eatonfield enquiring about the country; but I leave them as wise as I found them in keeping my own counsel and not answering their letters.

3175

I have had a number of letters from people about Milton and Eatonfield enquiring about the country; but I leave them as wise as I found them in keeping my own counsel and not answering their letters.

3180

It was my intention to have visited old Connecticut last fall, but I have been busily engaged in building and could not leave.

3185

I wish you to write me immediately on receiving this and let me know for a certainty whether you come or not. Direct your letters and papers to

Rockford

L. Moulthrop
to E. P. Moulthrop

Winnebago Co.

Illinois

Directed to Milton, Eatonfield & Co.

3190

Witness knew William Good and Levi and Prastus Moulthrop had deal about a span of horses they bought of Good. One of the horses and

the wagon was turned out to a Mr. Brentner for a claim, the other horse was sold to H. Miller

3195

Cross examined. Do you know whether Erastus brought any money into this country with him? Don't know positively, but understood he did (Objected to) He said he borrowed money of his sister and paid it by work after he returned to Connecticut

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What did Erastus Moulthrop do about building the house referred to in direct interrogatories? He worked on the house some and drewed timber for it.

3205

What did you hear Dr. Moulthrop say about Erastus Moulthrop's being in partnership with him in farming business? I don't recollect hearing him say any thing in particular, but ~~he~~ I supposed that as they were in partnership in every thing else they must be in farming. They had but ten or twelve acres under cultivation. How do you know they were in partnership in any thing else besides farming? I judged so from their deal and giving joint notes.

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Direct. What did you hear Levi Moulthrop say in relation to the interest of Erastus in the land and about building a house for Erastus? (Objected to.) I heard Levi say that he was to help Erastus build his house as much as Erastus helped him. Erastus was to have the east quarter section and eighty acres of the timber, and Levi was to have the balance of prairie and forty acres of timber.

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Cross. When was it that Erastus Moulthrop was to have these pieces of land? I don't know when he was to have it. I mean I don't know when the division was to be made. When did you hear Dr. Moulthrop say this? I think it was the same year he died.

Direct. There was no administration. Erastus settled all that ever was settled.

Documents given in evidence by defendants.

3235

I. Three justice judgments recovered before William H. B. Potter at Rockford, 17 Jan. 1840, by William Boogood vs. Levi Moulthrop and Erastus P. Moulthrop, and certified transcripts of those judgments. They were each on notes dated 5 May 1839; two for \$50 each, and one for \$60.56.

3240

II. Three executions out of the Winnebago Circuit Court, dated 28 April 1840, in favor of William Boogood against Levi Moulthrop and Erastus Moulthrop for debts of a little larger amount, said to be recovered at the then last April term of that court, with the bills of costs, which shew that the executions were on the justice judgments.

3245

To these executions and bills of costs is attached the sheriff's return to all of them, also given in evidence, dated 19 May 1841, setting out that the sheriff had levied the executions on the southeast quarter of sec.

tion eleven (11) in township forty three (43) range one
(1) east of the third principal meridian also on the
3250 east half of the northwest fractional quarter of section
eleven (11) township (43) r. 1 e. 3d principal meridian;
that after advertising 20 days he sold all the right, title
and interest of the defendants ~~to the lands~~ in and to
the lands ^m 17 Aug. 1840, to the plaintiff the highest bidder,
3255 and struck them off to him 10 Jan. 1841. That "the said
defendant" redeemed said land by paying the amount
bid and 10 per cent interest, and a balance of \$4.66
on the executions, whereby the money was made in full;
and that he had paid the plaintiff and the justice
3260 and clerk's fees.

3. Receipt of the sheriff dated 16 Jan. 1841, "~~Received~~
"William Doogood vs. Erastus P. Moulthrop and Levi Moul-
"throp. Received of Erastus P. Moulthrop four dollars and
"seventy seven cents in full of an execution issued in the
3265 "above intitled cause being a balance yet due on said
"ext."

4. Also the following receipts,

"Rec^d Rockford Dec. 24th 1840 of Erastus P. Moul-
"throp in full of all book accounts against the estate of
3270 "Levi Moulthrop deceased. A. M. Catlin."

"Kishwaukee 9th March 1841,

"Received of Erastus P. Moulthrop one dollar in full
"of all demands against the estate of Levi Moulthrop.
"Robt. P. Bradshaw."

3285

\$29.64.

Iktishwankee 18th March 1841.

"Received of Erastus P. Moulthrop twenty nine dollars sixty four cents in full of all demands against the estate of Levi Moulthrop decd on Erastus P. Moulthrop up to this date

Orvin B. Smith."

3280

"Rockford Illinois June the 3 1841

"Received of Erastus P. Moulthrop ten dollars which is the pay for a coffin that I made for Levi Moulthrop.

"John Phelps"

5. The following letter.

5. The following letter.

"Sanfield Tumbull Co. Ohio April 8 1841.

"Dear Sir,

"Yours mailed March 18 is at hand. I send inclosed an imperfect deed. I want a perfect deed of the lands—have it written by a person who understands the law of conveyance. Send by return of mail the imperfect deed that I sent to you, and I will make out a perfect one and send it to you on the reception of the imperfect one. Also at the same time send to me a copy of the bonds that I gave Summway.

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W.B. I want a true copy of the bond and on my part if life is spared it shall be fulfilled to a letter.

"Respectfully yours.

"E. P. Moulthrop, Esq.

"Simmons Sackett."

3300

A motion was made to set aside the depositions of Simmons Sackett, Benjamin Sackett and Erastus P. Moulthrop on the ground of interest. The question of interest ~~was reserved to the hearing~~ as to Benjamin Sackett and Erastus P. Moulthrop was reserved to the hearing. Simmons Sackett's was set aside.

Abstract of second Supplemental Bill,
filed 8 May 1852.

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This bill sets out the original bill and proceedings in the cause in the usual manner, and proceeds states,

3305 a

At December special term 1849, Horace Miller filed his affidavit that it might be necessary for him to visit the Sacketts and E. P. Moulthrop in order to prepare proper answers, and upon that affidavit obtained time until the then next term, and went and obtained their answers. All the answers were filed at March term 19 March 1850. At the hearing complainants insisted that the answers of the Sacketts and E. P. Moulthrop were competent evidence against the Millers and Waterman.

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Horace Miller in his answer set up that up to 24 Dec. 1839, and previous, Levi Moulthrop and Prastus had the joint possession and occupancy of the lands in question, and as he supposed were equally and jointly concerned in whatever improvements had been made, and had a joint and equal interest in them.

3315

G. B. Miller and Waterman in their answer set up that they had been informed and believed, that Levi Moulthrop and Prastus, in the fall of 1839 and for some months previous, had been jointly possessed of some of the lands and that there was an understanding and agreement between them that they should acquire the legal title to the lands or some part of them, for their joint benefit and equal benefit, and that their possessory interests were joint and equal.

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(1241559)

3330 The answer of Crastus P. Moulthrop, procured by Horace Miller as aforesaid, states that it was always understood between him and Levi, and was agreed between them, that Crastus P. should have and hold as his own individual estate, s. e. q. s. 14 t. 43 r. 1, and w. h. n. e. q. s. 14 t. 43 r. 2.

Defendants exhibited in proof a deed of Margaret Moulthrop, executed during her minority; as follows.

3335 "I know all men by these presents, that I Margaret Moulthrop, widow and relict of Levi Moulthrop deceased, have released and quit claimed unto Crastus P. Moulthrop all my right, title, claim and interest in and to forty-three acres and forty-five perches of land situate in
3340 the county of Winnebago in the state of Illinois, being the same tract of land which has been lately sold and conveyed by ~~the said~~ George Brentner to the said Crastus P. Moulthrop. And I do hereby also assign and transfer unto the said Crastus P. Moulthrop his heirs and assigns
3345 all my right, title, claim and interest in the southeast quarter of section fourteen in township forty-three north of base line range one east. Also the north half of the west half of northeast quarter section nineteen township forty-three range two east. And I do hereby authorize and request
3350 Simmons Sackett to make title to the said Crastus P. Moulthrop for the premises herein described according to the tenor and effect of his bond bearing date the 30th day of October 1839. And I do further sell and release unto the said Crastus P. Moulthrop all the rails lying and being around a field near to the barn on the premises lately
3355 occupied by Levi Moulthrop deceased, and agree also

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to sell and deliver unto him one feather bed late the property of the said Levi Moulthrop, also the library book case and one set of bench planes the property late of the said Levi Moulthrop, and I do further authorize and empower the said Prastus P. Moulthrop to collect the debts due the estate of Levi Moulthrop deceased, he agreeing in consideration thereof to pay the debts of the deceased.

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"In testimony whereof I have hereunto set my hand and seal this twenty-fourth day of February 1841.

Best

(Sd.)

Margaret Moulthrop. L.S."

J. B. Miller."

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The cause was submitted and taken under advisement at Sept. term 1851; and at November term, the judge expressed his opinion on some points, and took others under further advisement, and still has the cause under advisement.

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Complainants are advised to introduce into the cause by a supplemented bill the matters connected with the said contract of Margaret Moulthrop given in evidence as aforesaid.

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In the spring of 1839, and until the land sale in October, there was an oral executory contract between Levi Moulthrop and Prastus, by which Prastus was to have some parts of the lands claimed in the original bill, upon the performance of conditions, among which one was that he was to pay up the amount of money necessary to enter them. The agreement was not in writing, and Prastus never performed his part, and complainants claim the benefit of the statute of frauds.

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Prastus P. Moulthrop came to Winnebago county in spring of 1839, and brought no property and but a trifling a-

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mount of money, and did not acquire money or property here, except by his labor, and what he got out of the estate of Levi Moulthrop deceased. He abandoned the oral contract, and for all services he performed for Levi, he indemnified himself out of his personal estate, acting as executor de son tort.

3395

At the Galena land sale, Oct. 1839, George Brentner entered n. e. $\frac{1}{4}$ of s. 14, t. 43 n. 1 e. $110\frac{50}{100}$ acres, embracing the $23\frac{1}{4}$ acre tract conveyed to Sackett. Shortly after, he by a sealed writing bound himself to convey to one Mander bone and Levi Moulthrop deceased, the residue of that fractional quarter section $86\frac{90}{100}$ acres, upon payment of \$400. Levi deceased paid \$100, and left his half \$100 or thereabouts unpaid.

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After the decease of Levi, Prastus paid up that balance out of the effects of the estate, and Bone having paid up his share of the purchase money, Bone and Prastus made a partition, and 1 Feb. 1841, Prastus procured Brentner, without Margaret's knowledge, to make him a deed of one half of that land.

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Afterwards he represented to Margaret, that if she would consent that he should have the Brentner land, and the rails described in the aforesaid contract between Margaret and him, and ^{also section 14} the book case and bench planes mentioned in that contract, besides the personal property he had disposed of, and would also allow him to take s. e. $\frac{1}{4}$ of s. 14, and n. h. w. h. n. e. $\frac{1}{4}$ of s. 19 of the lands in the original bill, he would pay up the part of the money to become due the Sacketts, proportioned to the lands he should take, and all the other debts of Dr. Moulthrop. Supposing the Brentner land was gone beyond her power, and greatly anxious

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that the debts of her deceased husband should be paid, and having a prospect moreover of raising money to pay up the residue to Sackett, Margaret consented to the arrangement, and executed the deed above set out.

At the same time Erastus P. Moulthrop executed and delivered to her the following deed:

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[1215-67]

"Article of agreement made and concluded this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and forty-one, between Erastus P. Moulthrop of the county of Winnebago and state of Illinois of the first part and Margaret Moulthrop widow and relict of Levi Moulthrop deceased of the same county and state of the second part, Witnesseth, that the said Erastus P. Moulthrop for and in consideration of one dollar to him in hand paid and for and in consideration of the covenants hereinafter mentioned, hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said party of the second part, heirs and assigns, all his right, title, claim and interest in and to the following described tracts of land, together with all and singular the appurtenances thereto in anywise appertaining. And the said party doth hereby assign and transfer unto the said party of the second part all his interest in a certain bond for title for the premises hereinafter described, executed by Simmons Sackett on the 30th day of October 1839, by which said bond the said Simmons Sackett covenanted upon certain conditions therein named to deed unto Levi Moulthrop or Erastus P. Moulthrop the premises hereinafter described together with others. And the said party of the first

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part authorises and requests the said Simmons Sackett to convey in fee simple the said premises herein described together with the appurtenances unto the said Margaret Moulthrop her heirs and assigns That is to say, the east half of the southwest quarter of section fourteen, township forty three N. range one east. Also east half of the southwest half of section No. fourteen, township forty three

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range one east. Also south half of the west half of Northeast quarter section nineteen, township forty three range two east. Also one equal undivided half of the east half southeast quarter of section No. twenty in township

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forty three range two east. Also twenty three acres and three fourths, being part of the north west quarter section fourteen, township forty three north of range one east. In consideration whereof the said Margaret Moulthrop by indenture bearing even date herewith assigned

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and transferred unto the said party of the first part all the interest which she may have in the remaining tracts and parcels of land in the said bond mentioned to the said Erastus P. Moulthrop, together with all her interest in certain personal estate of her late husband as by reference to the article of agreement aforesaid will more fully appear.

3465

"In testimony whereof the granting party has hereunto set his hand and seal the day and year first above written.

3470

"Test

"Erastus P. Moulthrop L.S."

"J. B. Miller."

The estate was indebted somewhat over \$200; of which \$100 was due to Bradshaw, \$30 to John Long

3475 P. J. Summway; \$30 to Bradshaw; \$30 to John Long;
\$27 to Richard Rogoboom; \$7 to one Smith; \$8.25 to one
Fuller and \$7 to one Hastings. Erastus compromised and
settled the debt to Summway, by means other than the
property mentioned in the writing of Margaret; induced
Bradshaw to take the feather bed for his debt, although
not worth so much; bought in and left unpaid the
residue; went to Connecticut in summer of 1841, took
all Dr. Montthrop's account books and papers with him;
has kept them and never gave

3480 a. Oct. 12, 1841, shortly after Mrs. George was at Warren, E-
rastus for nominal consideration of \$200, deeded to de-
pendent Kilburn of Stratfield, Conn. the Brentner land; but
no consideration was paid, and it was to put the land
beyond the reach of complainants. When Horace Mide-
ler went to obtain answers in 1850, he negotiated with E-
rastus P. Montthrop for the Brentner land, and a con-
tract was made by which Mide-ler purchased it of him;
but its form complainants have not ascertained. Kimbal
had notice, and Horace Mide-ler was aware of the whole
matter.

3490 In life time of Dr. Montthrop, Erastus never had
exclusive or other possession of those parts of the lands
mentioned in the contract with Sackett, described in
Margaret's deed to him; and complainants insist
that if he ever had any right, he waived or lost it
by neglect and abandonment, or relinquished it
for the benefit of complainants Levi and Margaret.

3495 At filing of original bill and supplement, complain-
ants were not aware that Kilburn had not fully
purchased the Brentner land; nor did they expect

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the writings between Margaret and Erastus P. Montthrop would be brought in question by the defendants; and therefore neither of those subjects was introduced before.

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Complainants charge and insist, that when Mrs. George was at Warren, Erastus gave up his rights in the lands sought, for the benefit of complainants Levi and Margaret; and they also insist that if he surrendered the same to Simmons Sackett, as pretended by the defendants, then the same passed to Mrs. George in trust.

3510

Defendants to answer upon oath, and to set forth the consideration of the deed to Kilburn, and how paid, and as to contract from Kilburn to H. Miller.

Prayer for conveyance of Brentner land to complainant Levi; for the relief before prayed, and for general relief.

Answer of Erastus P. Montthrop to second Supplemental Bill, filed 5 Nov. 1852.

3520

Defendant never made contract with Horace Miller for Brentner land directly or indirectly. His interest in it terminated at the date of his deed to Kilburn. Kilburn paid him \$200; part then, and part afterwards.

Answer of Horace Miller, filed 5 Nov. 1852.

During February 1850, defendant made an agreement

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with Kilburn to purchase the Brentner land for about \$260; and took a bond for conveyance on payment. It was for the benefit of Mander bone and J. B. Miller. They have paid the money, and conveyance has been made to bone, with consent of defendant. Denies knowledge of the transactions with between Brentner and E. P. Moulthrop, or that complainants had interest.

3530

Defendant denies knowledge of partition; and as to other matters has no information.

Answer of Gardner B. Miller and
Hiram Waterman, filed 5 Nov. 1852.

Defendants have no knowledge whatever of the matters and things in bill.

They state they ~~informa~~ have been informed and believe of the purchase of Kilburn, substantially as Horace Miller states it.

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They purchased the lands of Simmons Sackett with the knowledge that the contract between him and the Moulthrops was joint, in the full belief that their interests were joint, equal and undivided, and never had notice of partition between Margaret and Prastus.

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They discovered the deed of Margaret to Prastus long after they had bought and paid for the land, and introduced it in evidence for the purpose of shewing that Margaret admitted that said Prastus had some interest in said land. They had no notice of the said conveyance from said Prastus to said Margaret until they saw it in the bill. But they submit that as the

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deed which was the consideration for it was wholly nugatory and ineffectual, and had been disaffirmed by the complainants claiming the whole premises in controversy, they are now precluded from claiming any right under the same.

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Defendants deny that they ever had any notice whatever of the dealings of the Mouthrops, bone and Brentner with regard to the Brentner land, and they insist that the questions arising in that behalf are not shown by the bill to affect their interests, and that they ought not to be made use of to prejudice their rights; and they deny all information in respect to other matters.

Answer of Miriam G. Hilburn, filed 5
Nov. 1852.

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When he purchased the land of Erastus P. Mouthrop, he had no knowledge how Mouthrop got his title. He sold the land to Horace Miller when Miller was in bankruptcy in February 1850, and gave him a bond for a quitclaim deed on payment of \$270 or thereabouts, which was paid him in January 1851, and the deed was executed.

EVIDENCE FOR COMPLAINANTS.

Deposition of John George, taken before
C. H. Spafford, 11 Feb. 1853.

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The original of the release signed by Margaret Moulthrop and witnessed by Jacob B. Miller, annexed to the deposition of Mauder Bone, and set out in last supplemental bill, is shown to the witness, and she is interrogated concerning it, [Defendants object to examination of witness and to interrogatory.] I was present when the writing was executed, and saw it delivered. It was signed by Margaret, and witness saw it delivered to Crastus by her. It is in the hand writing of Jacob B. Miller.

3585

The witness is then shown the original deed from Crastus P. Moulthrop to Margaret Moulthrop, set out in the last supplemental bill, and made an exhibit, marked A, and being interrogated, says she was present when this writing was executed. It was written by Jacob B. Miller, signed by Crastus Moulthrop and delivered to Margaret Moulthrop by him.

3590

Mr. Miller was a lawyer, and was considered smart.

3595

Crastus P. Moulthrop had the featherbed mentioned in the release from Margaret. She had not any other feather bed. It was the only one she was possessed of. He had the rails mentioned in that release.

State if you know how Crastus Moulthrop understood the clause in the aforesaid deed signed by him, purporting to assign and transfer to the said Margaret

3600 all his interest in a certain bond therein mentioned, executed
by Simmons Sackett. (Objected to.) He understood it as
releasing his rights or interest in the bond. By what means
do you know that such was his understanding of the effect
of that clause? (Objected to.) It was understood and talked
3605 over between us before we went to Mr. Miller, that he should
release his interest in the bond. He was present when the
instructions were given to Mr. Miller. (Question objected to)

3610 State whether he subsequently and before going to Con-
necticut said any thing, and if any thing what, about his
making out part of the money going to the Sacketts? (Objected
to.) He said he did not expect to be able to raise any part
of the money, and if he did not, the widow and heirs might
have the benefit of the whole.

3615 The witness is shown the power of attorney annexed
marked B, and is interrogated concerning it. (Objected to.) It was
executed by Margaret and given to me, and I showed it
to Crastus Moulthrop when I went to Connecticut. ~~State whether~~
~~a conversation ensued, and if there did, what it was. (Ob-~~
~~jected to.) I asked him if he had been~~ [This paper is a
3620 power of attorney from Margaret Moulthrop to Ann George,
dated 19 Aug. 1841, authorising her to receive a deed or conveyance
of Simmons Sackett in Margaret's name and for her use,
of the lands described in the deed of Crastus to her.] State
whether a conversation ensued, and if there did, what it was
3625 (Objected to.) I asked him if he had been able to raise the
money. He said he had not. I asked him if he was
willing the widow and heirs should have the benefit of
it. He said he had no prospect of raising the money now
or at any other time, and he was willing they should have
3630 the benefit of it. State if you remember whether that con-

3635 conversation was about rights which he was supposed to have under the bond from the Sacketts, or whether it was about rights he was supposed to have under the release from Margaret. (Objected to.) It was on his inability to make the money on the part made over to him by Margaret.

Erastus P. Moulthrop told me he had got a deed for the Parenter land, in his own name; that he never expected to get any thing under the Sackett bond, and he meant to secure this land any way.

3640 State whether you ever heard him say any thing, and if any thing what he intended to get out the property of Dr. Moulthrop. ^(Objected to.) He said he meant to get all he could out of the property, as he never expected to get any thing under the Sackett bond. He said he did not mean to come

3645 from Connecticut at the invitation of the Doctor and not get any thing. State whether he mentioned a conversation between him and Dr. Moulthrop about his having any thing out of the property, and if any thing what did he say about it? (Objected to.) He said he had had a

3650 quarrel with the Doctor, and the Doctor gave him fifty dollars, and said that would be all he would get from his property; and that that would amply compensate him for all he had ever done for him. He said he would not go, but that he would stay and get all he

3655 could from the Doctor's property. The conversation between myself and Erastus occurred after the Doctor's death. ~~He told me he~~

3660 Do you know whether Erastus had any money when he first came to this country? (Objected to.) He told me he borrowed fifty dollars of his sister to come into the country with.

3665

Crastus took ~~Dr~~ Moulthrop's books ~~in~~ account books immediately after his death, and afterwards took them to Mr. Bond's house. What became of them afterwards, I do not know.

Mr. Broadshaw took the feather bed on a debt the Doctor owed him.

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When Crastus went to Connecticut, ~~the~~ Dr. Moulthrop and he expected to get the money of Mrs. Griswold amount to both of them. She brought the Doctor up. (Question objected to.)

The letter of Margaret Moulthrop attached to Simmons and Sackett's deposition, is her writing and signature.

Deposition of William Swagood, taken before C. H. Shafford, 10 Feb. 1853.

3675

Witness held notes, he thinks three, on which he recovered judgments before H. B. Potter in 1840. The consideration of the notes was a wagon and harness, and he thinks one horse; there might have been two horses. They were sold by me to Dr. Levi Moulthrop. I requested security, and the Doctor said he would get Crastus P. Moulthrop to sign with him. Delivered the property to the Doctor. Thinks those notes were given in April or May 1839.

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Deposition of George Brentner, taken at same time.

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Witness gave a bond to one of the Moulthrops ~~and~~ ~~Mander bond~~, but does not recollect which, and Mander

3690 bone. The land was to go to Prastus Moulthrop. I objected to ^{by contract} go into responses, and interests and giving out evidence of the contents of a writing. Received one hundred at the time, but cannot state positively from whom. The three were together, and could raise among them \$100. Don't know where the bond is, and thinks he never took it up. I think according to the bond, Prastus was to have the land.

3695 Conveyed the land to Prastus P. Moulthrop and Mander bone. Bone paid up, but there was a balance of about \$25 for which I took Prastus' note. He paid in cash. I think the price was \$4 per acre. Never made Prastus any other deed. The money paid subsequent to the first was after Dr. Moulthrop's death.

3700 Examined.

Cross-examined. Land on section 14, bordering on east side of Rock River, below land of Sovereign and above land of McBomb.

3705 The deed of the Barentner land to Prastus P. Moulthrop from Barentner, is dated 1 Feb. 1841, and the consideration expressed is \$200. To Kilburn from E. P. Moulthrop, dated 12 Oct. 1841. Consideration \$200.

~~[The deposition of E. P. Moulthrop under oath
supplemental bill is not taken.]~~

Evidence For Defendants.

Deposition of Eaduis P. Moulthrop, taken
16 Sept. 1853, in behalf of Miers and
Waterman.

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Witness deposition has been before taken. He did not understand the instrument of 4 Feb. 1841, executed by him to Margaret Moulthrop, as releasing all his rights and interest in the Sackett bond. Don't think he ever had any conversation with Mrs. George about his understanding of the clause. Never told her it was his understanding that he should release his interest. It was his understanding that all the land named in the bond belonged to me.

3715

Left those particularly described in that agreement, and that those so described embraced whatever rights she had to the lands mentioned in the bond. Never had any such conversation with Mrs. George or any one in her presence, as that he did not expect to be able to raise any part of the money to pay for the lands; and that if he did not, the widow and heir might have the benefit of the whole. Never had any such conversation with any one to his recollection. What did you tell her about your having secured a deed of the Brewster land, and that you never expected to get anything under the Sackett bond?

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3720

I never told her any thing of the kind. Did you ever have a conversation with Mrs. George, or in her presence, in which you spoke of having had a quarrel with Dr.

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Moulthrop, and that he gave you \$50, and ^{paid} that was all you could get from him? I never had any such conversation with her, or made any statement to her on that subject. Did not tell Mrs. George that he borrowed \$50 of his sister to come into the country with. Witness and Dr. Moulthrop had no particular person in view from whom they effected to obtain the money in Connecticut.

3750

Abstract of Supplemental Bill for injunction, filed 5 Jan. 1853.

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This bill was filed against Horace Miller, J. C. Miller and Waterman. It states the ~~original~~ former bills and proceedings in the usual way, and proceeds to state that when the judge gave leave to file the last supplemental bill, he expressed his opinion that the evidence tended to prove that the Millers and Waterman were entitled to specific parcels of the land, and remarked in substance that if the cause were ready for final decision, he should make a decree accordingly; and that the undivided half quarter section, and the south half quarter quarter section of the wool land, were not of those parcels; that since that expression of opinion, Waterman had professed that he abandoned all hope of holding any but such specified parcels, and had declared his intention to abandon them; and preparatory to such abandonment, had committed divers acts of waste on different parts

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[24/5-67]

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thereof, some of which he did in haste, and under the expectation that he should be restrained from doing them by injunction; and that the Millers had likewise abandoned hope. It states the wood and timber growing on the above tracts at filing of original bill, and that the 40 acres north of the quarter quarter section above mentioned was mostly covered with heavy timber, nearly all of which had been cut down and destroyed by defendants, and that some years ago, they cut off and destroyed the larger part of the timber on that quarter quarter section; and that the Millers and Waterman had made a partition of it for the purpose of completing the settlement, and that they had sold and disposed of large quantities of the wood and timber, although Waterman did not reside on the lands, and Horace Miller never has; and that Norman Waterman intended to make rails of the timber to fence a farm lately purchased by him; and that the defendants had cut a considerable quantity of trees on the undivided half quarter section. The bill prays for an injunction against the defendants' cutting ~~more~~ or removing timber, wood or trees from the undivided half ^{quarter} and south quarter quarter section and for general relief.

The injunction was issued, and served.

This bill was taken as confessed.

The cause was argued upon the ~~second supplemental bill and preceding bills~~, and the answers and proofs, at Sept. term, 1853, and taken under advisement.

Decree.

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The cause was decided at November term, 1853. By the decree, the court declared, that the lands in question were conveyed to Simmons Sackett in the manner stated in the original bill, to secure the

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payment by Levi Montkroff deceased, together with Erastus P. Montkroff, to Simmons Sackett of \$650 and interest from 1 Oct. 1839, and of \$30, or before 1 Oct. 1841; that the conveyance was in the nature of a mortgage, and was in equity a mortgage security;

3810

that by death of said Levi Montkroff, 12 Sept. 1840, and the subsequent birth of ~~Levi Montkroff~~ complainant Levi Montkroff, his right to the lands, being an undivided half thereof, as tenant in common thereof with the said Erastus P. Montkroff, descended to said complainant Levi Montkroff, subject to

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the right of dower of complainant Margaret M. Smith; that the mortgage money and interest being wholly unpaid, the defendant Horace Miker, 27 May, 1846, and after the filing of the original bill, obtained from Simmons Sackett, a deed of conveyance of the lands in fee simple, in consideration

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of \$1200; that at the same time he executed a mortgage in fee of the lands, excepting the $2\frac{3}{4}$ acre piece, to Simmons Sackett, to secure the payment of \$414 of said purchase money, with interest from said 27 May, 1846; that on 10 November 1846, Horace Miker executed a deed of conveyance, of the lands to J. L. Miker and Waterman;

3825

3830 The decree declares, orders, adjudges and decrees
that the complainant Levi Moulthrop is entitled as
heir, to redeem, have and recover, one equal undi-
vided half of all the lands by payment of one half
of the \$650 and \$80, with interest, subject however
3835 to all just allowances for rents and profits, use
and occupation of the said lands, and for any
waste or damage to the lands done or suffered since
the Millers and Waterman entered. And it ap-
pearing that 10 May 1846, the Millers and Waterman
entered upon the lands, and have occupied them ev-
er since, and have committed waste, particularly
3840 by cutting and destroying timber trees, it is referred
to the master, to inquire and report what amount
of waste has been committed by them upon the lands
and premises, since they took possession, including
damages by reduction of the soil by their tillage and
3845 cultivation, or their neglect or bad management there-
of; and also what is a reasonable sum to be allow-
ed as an equivalent for the rents and profits, use
and occupation of the lands and premises, since they
entered upon the same; and it was ordered that
3850 the master ascertain as near as may be, the a-
mount for rents &c. waste and damage, for each
year separately, and not including rent of any
improvements made by those defendants. And it
was also referred to said master to compute the prin-
3855 cipal and interest of the \$650 and \$80, making
annual notes ~~from~~ for the time since these defend-
ants [entered] as aforesaid, and from the amount
of [half] such principal and interest, from time to

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time deduct one half the amount of waste, damages and rents, during each year since the said time.

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And it was referred to the master to report whether the mortgage from Horace Minkner to Simmons Sackett had been satisfied and discharged, and costs the question of dower, costs, and all other incident matters were reserved. And the motion to suppress the depositions of Benjamin Sackett and Erastus P. Moulthrop, having been reserved to the hearing, it was overruled.

OBJECTIONS TO DEPOSITIONS.

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On 6 Oct. 1851, before any hearing, the complainants filed a motion to set aside the depositions of Simmons Sackett, Benjamin Sackett, Erastus P. Moulthrop and Ben Newton, for the following reasons:

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1. Because the ~~commissioners~~ distinct names of the commissioners does not appear in the commission.

2. Because the commissions were directed to two commissioners, and executed by one only.

3. They were directed to two persons in the alternative.

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4. Because the commission for depositions of S. Sackett and Newton was addressed to two persons in the alternative and not jointly.

5. It was addressed to E. J. Stebbins or Shaddens Lake, whereas the notice had Shaddens ~~Lake~~ Poole.

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6. Because the depositions of Benjamin Sackett and E. P. Moulthrop were not certified under seal of the commissioners, as the commission required.

7. Because it does not appear that the commission were sworn, according to the statute.

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On turning to the commission, ^{and} notice ~~for~~ ^{and} depositions of Simmons Sackett and Norton, it will be seen that the commission was directed "The People &c" to E. J. Steph. Esq. or Thaddens Cook Esq. or either of you, of " &c. and that the notice was for a commission directed "to E. J. Steph Esq. or Thaddens Cook Esq. or either of them." ~~The certificate of S. Sackett's deposition, there is no seal.~~

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3900

The commission to take the depositions of B. Sackett and E. P. Moulthrop was directed "to J. H. Kistler Esq. & O. S. Seymour, Esq. or to either of you" of " &c. The notice was for a commission directed "to J. H. Kistler Esq. or O. S. Seymour Esq. or to either of them, of " &c. It required the depositions to be certified "under your hand and seal," but no seal appears to the certificate.

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At the same time, the complainants filed a motion to suppress the depositions of the Sacketts and E. P. Moulthrop, because

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1. The Sacketts were interested.
2. They and Moulthrop had fully answered.
3. They had fully answered at the instance of Horan Miller, and their answers were filed by him, as his answer and affidavit show, as well as ~~he~~ is shown by his answer and affidavit, and depositions of B. J. Kirt, and of the Sacketts, and the answers of the Sacketts, Miller and Waterman.

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4. Leave of court for taking them had not been obtained, although there was opportunity.

5. The deposition of E. P. Montthrop tends to establish an interest in himself.

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The complainants at the same time filed exceptions to the depositions of the Darketts and Montthrop, conditionally, that they were not set aside.

The first 14 exceptions referred to the deposition of Simmons Darketts, which was afterwards set aside.

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The complainants made the following exceptions to the deposition of B. Darketts,

15. To third interrogatory, and answer, because it seeks to make him deny an interest which appears in the pleadings and other evidence; (Interest in west of sixth)

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16. To the sixth interrogatory, and answer, because it is leading, and captions, and seeks an evasive answer, instead of inquiring about the fact to which it relates.

~~This interrogatory, and the answer, appear in the deposition as follows:~~

~~"Interrogatory 6th. Did said Mrs. George offer to pay you any money in payment or satisfaction of an amount due from Dr. Levi Montthrop and Erastus P. Montthrop on a contract concerning some lands in the state of Illinois? If so did you refuse to receive the same and say to her that you would have the whole State particularly all that was said by you to Mrs. George on that occasion about paying for said land, or about your extending the time of payment."~~

17. To the ninth interrogatory and answer, because it

- 3935 is leading, and refers a question of law to the witness.
18. Do 10th interrogatory as leading.
19. Do 12th as leading and captions.
20. Do answer, because it does not answer the interrogatory.
21. Do 13th (and last) because leading and captions, and seeking an answer of law.

complaints made following exceptions to deposition of E.P. Montmaro.

- 3945 22. Do 5th interrogatory and answer, because it is leading, and refers a question of law to the decision of the witness. [This interrogatory and answer appear above lines 2943 to 2952.]

- 3950 23. Do the ~~sixth~~ interrogatory answer to the sixth interrogatory, because it proposes to prove a title to or interest in land, by parol, and that from the opinion of the witness, and not by a statement of the facts which constitute that title or interest. [This answer appears above lines 2953 to 2958.]

- 3955 24. Do that part of the answer ~~the 17th answer~~ which seventh interrogatory which seeks to set up a title by parol to the lands in question, and is not responsive to the interrogatory. [This answer appears above lines 2959 to 2973.]

- 3960 25. Do the eighth interrogatory and answer, because the interrogatory is leading, and refers a question of law to the witness, instead of inquiring of the facts, and seeks an answer to matters in the witness' answer already answered. [This was sustained. The interrogatory and answer do not appear in the abstract.]

3965 26. To interrogatory 9 and answer, because leading, and refers question of law to witness. [Sustained. Neither interrogatory or answer appears above.]

3970 27. To interrogatory 12 and answer, because the interrogatory proposes a question of law, and proposes to establish a title to land by parol, and to the answer for the latter reason.

On 7 October 1851, the court overruled the motion to set aside ~~the deposition of S. S. S. S.~~ ^{the deposition of S. S. S. S.} reserving question of interest of Sackett and E. P. Moulthrop to hearing; sustained exceptions 5, 25 and 26, and overruled the rest.

3975 The cause having been argued at the same term, the court at the next term, 20 Nov. 1851, set aside the deposition of Simmons Sackett on ground of interest, and overruled the setting aside of those of B. Sackett and E. P. Moulthrop.

3980 At April term 1853, the complainants moved to amend their 27th exception, to so as to read: "The complainants except to the twelfth interrogatory ~~put to the~~ ~~twelfth~~ interrogatory put to the said Erastus P. Moulthrop, because the said interrogatory proposes a question of law; because it unlawfully assumes that to be proved which was not proved; because it is not pertinent to any issue joined between the parties; and because it proposes to establish a title to land by parol; and they except to the answer to the said interrogatory for the ~~same~~ last said reason."

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This motion was overruled.

Proceedings before Master.

At April term, 24 April 1854, the master filed his report of the reference under the original decree.

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The report stated that the parties attended before him 24 Feb. 1854, by their solicitors, and that the hearing was continued until 20 March; that he had made no allowance for ~~the~~ the rent of the 230 acres of land cultivated by defendants; the breaking and fencing having been

4000

done by the defendants, he had treated it as improvements made by defendants, on which rent was not to be charged; that he had allowed \$2 per month, or twenty four dollars per year rent of the house, barn and garden, from the time defendants took possession, until the first day of the term; that he had

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made no allowance for reduction of soil by cultivation; that Waterman had removed a fence once extending east from near the old Monkthorp barn, near the north line of the west part of the premises, two years ago this spring, and that he

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had allowed \$50 for it; that Waterman had set out apple and other fruit trees, and shade trees and some shrubbery, on the portion of the prairie lands he occupied; that a year ago

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last fall he took up and removed from the premises the apple orchard he had planted, as well as some other fruit trees and shade trees; that

4020 he had allowed \$1.00 each for 200 apple trees of
 ple trees, making \$200; that he had allowed
 for 30 or 40 cherry trees, \$8.00; and for the
 shade trees, nothing; that he had made no allow-
 4025 ance for timber ~~cut~~ taken from W. 1/2 N.E. 1/4 S.
 19 to 43; nor for timber cut upon it by defend-
 ants; that he had made no allowance for
 waste or damage done to the undivided half
 of E. 1/2 S.E. 1/4 S. 20, by cutting timber thereon by de-
 4030 fendants; that he had allowed \$16 for trees cut
 by defendants upon the 23 3/4 acre piece, and \$4 for
 the log house sold from that piece; that defend-
 ants have paid \$165.61 taxes on the land, and that
 he had made no allowance therefor.

The master then stated the account as follows:

4035	Rent of house, barn and garden from 27 May 1846, to 24 April 1854, 7 y. 10 m. 27 d. } \$189.80
	Fence removed by Waterman, 50.00
	Apple trees removed by him 200.00
	Cherry trees removed by him, 8.00
	For the log house 4.00
	Ten trees cut on 23 3/4 acre piece, 16.00
4040	<u>\$467.80</u>
	Half of which is \$233.90.
	Half of principal and interest on \$650 and \$30 \$635.80
	Half of above \$467.80, deducted <u>233.90</u>
	Still due, \$401.40

4045 There is no evidence of the satisfaction or discharge
 of the mortgage.

4050 The master ~~for~~^{certifies} reports, on suggestion of complainants ~~counsel~~, solicitor, that immediately after the closing of the evidence, and before it was submitted on the part of defendants, Mr. Barnard left for the east, and did not return until the report was made out; that on arguing the matter before the master, he had made reference to the pleadings and evidence before taken in the cause; and that

4055 upon his return, and being informed that I had not considered the pleadings and evidence before taken as before me, he expressed his surprise, and declared it was his intention, and that he considered the pleadings and prior proofs as in evidence before me, and that he considered them so at the time he made reference to them.

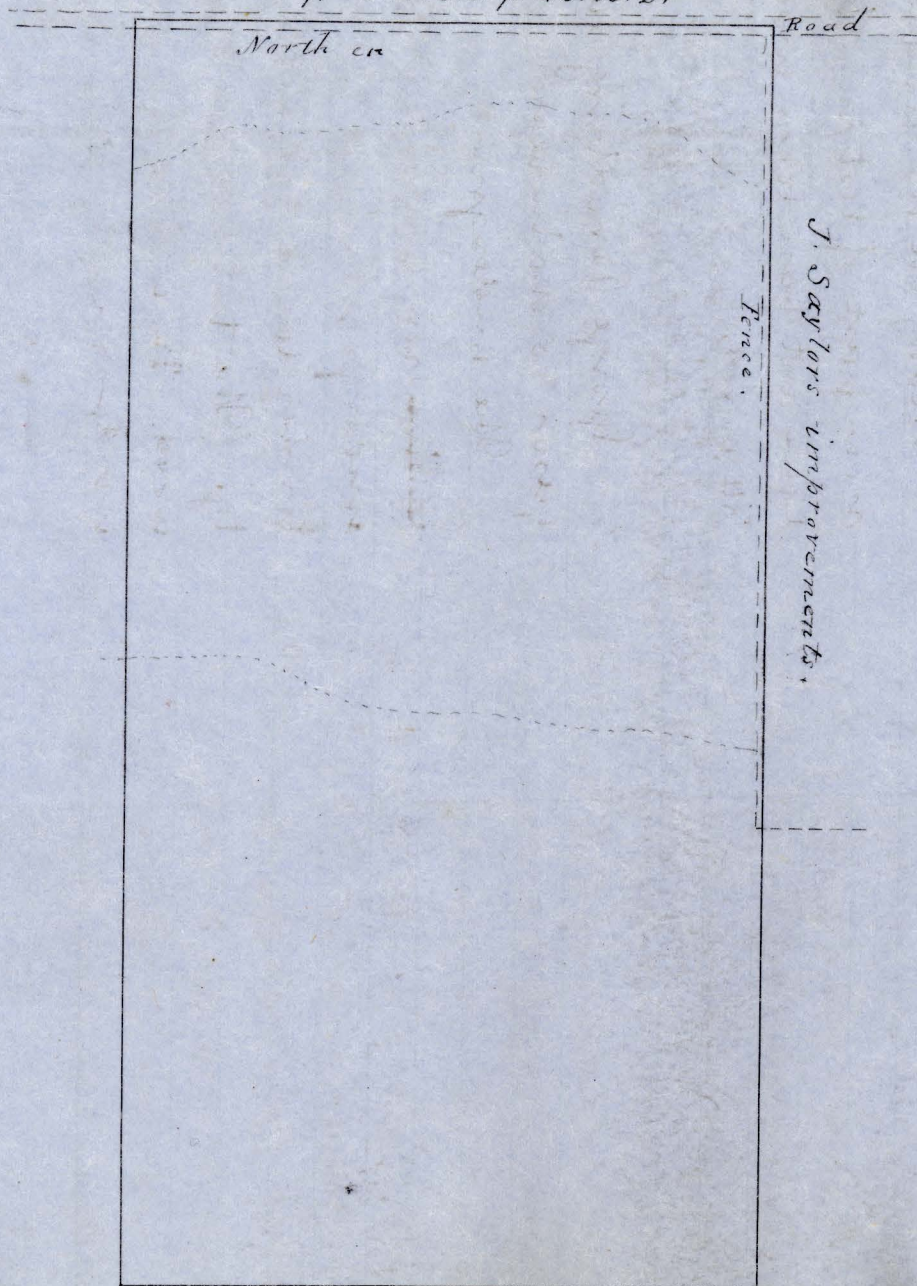
4060

Evidence reported by the master

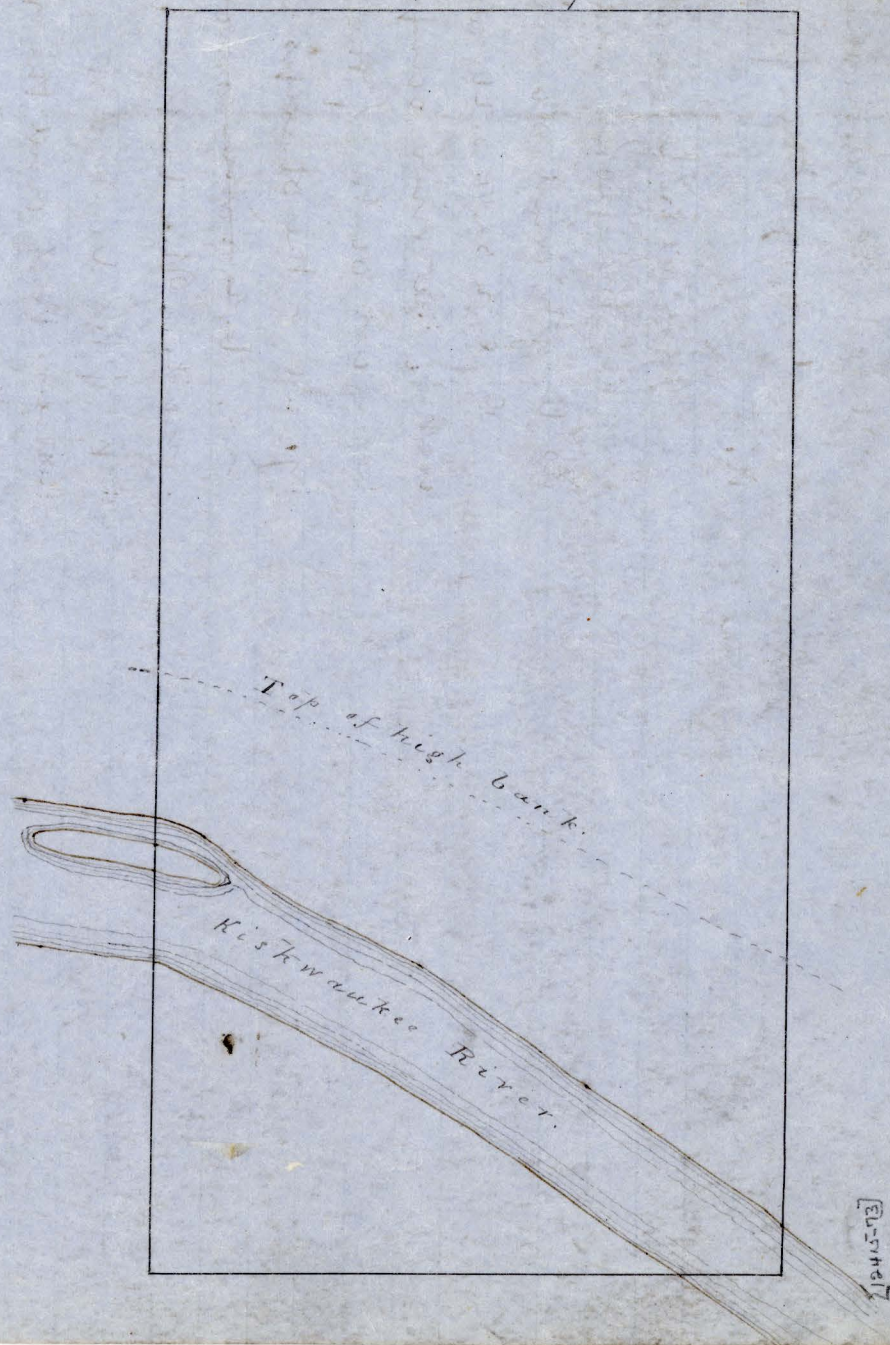
4065 Duncan Ferguson, county surveyor, sworn. Surveyed the timber lots last Monday, and made annexed map. That part of $2\frac{1}{2}$ s.e. $\frac{1}{4}$ s. 20 north of the bluff bank of the Kishwaukee is good timbered land. Between the top of the bank and the river is broken land with very little timber growing on it. South of the river very broken, and the timber rather sparse.

4070 The north part of w. $\frac{1}{2}$ n.e. $\frac{1}{4}$ s. 19, has been good timbered land, but a large part of the timber has been cut down and carried away. The south part is rather poor timbered land. The broken lines across

West $\frac{1}{2}$ of North East $\frac{1}{4}$ of
Section 19, Township 43, R. 2.



East $\frac{1}{2}$ of South East $\frac{1}{4}$ of
Section 20, Township 43, R. 2.



EL-57617

4075

half quarter section on the map, indicate nearly the boundaries of the portion where a large part of the timber has been cut away off. Thinks about 35 acres. The stumps show that the timber must have been good, standing pretty close together, mostly oak. Taking an average of that portion, I would think fully two thirds of the timber trees had been

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cut. In some places not so much, but in the places where the timber was heaviest, more. ~~About the middle part of the portion.~~ The timber stood thickest

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about the middle part of this portion, should think — a ridge in about the middle part. The stumps stand thickest on the ridge. There is considerable young undergrowth on the north part of this portion, and to a less extent on the southwest part. Did not observe that any of the undergrowth was cut. Many of the trees standing are as large in diameter as the stumps of those cut. His attention was not particularly called to the timber. He did not expect to be called as a witness.

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About 12 acres lie north of the broken lines. It was timbered land, but not so heavily timbered as that south of it. One acre is occupied by a road on the north line of the tract, and about one half acre by an angling road across the northwest part. There is considerable undergrowth on the 12 acres. Witness passed only along the ends of it. Observed some trees had been cut.

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The whole tract contained only a little over 80 acres. That part lying south of the broken lines is rather poorly timbered. A large part of it approach-

4105

ed to what is denominated barrens. As far as he observed, very little of the timber had been cut upon it.

4110

There is a fence along the east side, along commencing on the north end running about three fifths of its length, and standing about one rod on the wt.

4115

Of 2.112 22.14 5.20, about 8 acres lie south of the Kishwaukee; the river confines about 6 1/2. Some timber had been cut south of the river, this winter quite recently. Saw the stumps of 8 or 10, from where he ran the line, but rather small. Principally oak, but rather small. The broken line on the map indicates the top of the bank north of the river. About 15 acres lie between that and the river. Think no trees had been cut there. A number of trees have been cut this winter, north of the top of the bank.

4120

Charged \$3.50 not including chainbearer.

Nearly all the timber has been taken away. On n. w. part of last mentioned wt are some cut which have not been taken away. It contains some over 80 acres.

4125

George Bradbury, born. 1843, assisted Mr. Bergeson as chain bearer. Was ~~not~~ engaged by Mr. Smith. Resides in Rockford city.

4130

The undergrowth on the latter wt was is not ~~as~~ extensive very extensive. Near the north line was some undergrowth and light timber. The south forty is timber land, but lighter timber than the north forty. The timber on the whole is principally hard wood. In a state of nature it was principally hard wood, mostly oak. Should judge from appearances

4135

that the best rail and sawing timber had been taken. I paced one acre where the stumps were very thick. counted on it the stumps of about 50 trees. The stumps were of such trees as are generally cut for rails or sawing timber: from 18 inches to two feet and over in diameter. Did not measure the

4140

stumps. This acre was on the ridge. Witness has been a farmer ten years, and in the habit of cutting timber for rails and sawing and clearing land. Should think from the stumps, the value of the trees on the acre if now standing, would be some 75 cents, some \$1.25.— on an average \$1.00 per tree. Estimated the quantity of timber taken from the balance of the north forty, compared with the acre, as 14 to 50. Estimated the damage to the whole north forty for timber, taken off at \$14 per acre.

4145

4150

There was not a vast many trees cut on the south forty— not more than on the above one acre. Estimated the value of the timber at about \$50.

4155

On the lot extending over the Kishwaukee, there had been some timber cut promiscuously all through it. Some seemed to have been cut a number of years ago, and some more recently. Some had been made into rails, not yet taken away. The trees cut were smaller than on the other lots but judging from the trees standing, they were tall. Should judge the trees cut were worth from 75¢ to \$1.00.

4160

Estimated the value of the trees ~~cut~~ in question, by the value of timber here for fire wood or timber. Has not been used to purchasing timber in this county, and farther than what he has used for fuel.

4165

Could not make an ~~estimate~~ ^{estimate} of the ~~exact~~ quantity of ~~timber~~ ^{timber} ~~exact~~ estimate of the average quantity of lumber the trees would produce. Estimated the trees by the quantity of fire wood they would make. ~~Is not acquainted with~~

4170

On n. w. corner of the further tract there is some timber cut recently, and not removed.

On the 22 acre piece, observed the stumps of two large trees, cut he should think three or four years ago. Some of them were 2 1/2 feet, some 1 1/2 feet across the top—they might average about 2 feet. Estimated their value at \$20; \$2 per tree.

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Cross examined. The acre he pared off is about 30 rods from the east line. Selected it because there had been a vast amount of timber cut on it, as much as any acre on the forty. It had the appearance of being the best quality of timber. There is no timber of any consequence remaining on it. The trees standing on this forty, are generally short, and will not as a general thing furnish more than one saw log to a tree. Did not count the stumps on the forty, except the acre. Estimated the quantity cut, by traversing over the lot different times. Did not count the stumps on the south forty.

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In his opinion, if no trees had been cut on the north forty, it would be worth \$30 per acre. For 1 1/2 years he has lived in Rockford; 5 1/2 months before in Peoria, and ten years before that he carried on a farm in Indiana, of 80 acres of timber and 40

4200

of barrens. Has not dealt in lands since he resided in Rockford. Has not had particular conversation about price of woodland in this country. Has asked different individuals about its price.

§205

Did not count stumps on east eighty. The cutting seems to have been promiscuously done, about equally, wherever there was timber.

§210

Direct. When trees are thick, they grow taller. Oak timber does not have so many limbs as short timber. Should not consider timber with limbs on the body very valuable for sawing. In its present situation, estimates the north forty at \$16 per acre.

§215

Cross. Distance of this land from Rockford is five miles certain.

§220

Benjamin J. Kait sworn. Is acquainted with the prairie lands in question, and the 23 are here called timber, though there is not much timber on it, but a great deal of undergrowth. The prairie land is good.

§225

Horace Miller took possession in the spring, (admitted of 1846.) Thinks the whole west field, called 120 acres, was all broken that season. It was unbroken when he took possession. No crop that season. The Montthorp house and barn stood on the north west part of this field. The field was cropped in 1847, principally of wheat. There was a garden previous-

\$230

ly cultivated. The house, barn, yard and garden combined should think two acres. There has been a crop raised on that field every year since 1847.

The rent for wheat lands until quite recently, has been from \$1.00 to \$1.50 annually. For last year, thinks it has been worth \$2.00.

\$235

There is a piece adjoining the 120, which J. L. Miller of ~~the~~ informed witness obtained 110 acres. In 1847, a small piece of it was broken up (admitted 10 acres),

\$240

and sown to wheat in spring of 1848. Believes the first crop on this, ~~except the ten acres~~. His impression is, that this field, except the ten acres, was all broken in 1848, and the first crop harvested in 1849.

\$245

The crops on the 110 acres have been he thinks every year corn, wheat and oats. Has never known any distinction of rent, whether for wheat, oats or corn. Farmers generally consider corn less detrimental, and oats more exhausting than other crops.

\$250

The two large fields are separated by a sod fence. When Mr. Miller took possession, the house was rather an old concern, but they made out to live in it, and have since patched it up considerable.

\$255

The barn he thinks a good frame, but never finished off; thinks the floors and doors were not finished. It was probably about 26 by 36. The garden was good enough, but not much fence ~~about~~ around it. There were no fruit trees of any consequence.

Judging from what I have had to pay recently for a house near there, I should think the house, barn and garden were worth \$2.00 per month. I do not know but I have put the rent too low.

4260 I should call it that if I wanted to hire a house and garden.

4265 At the west end of the prairie land there is a sod fence upon the land of McComb - built by McComb. There is a fence along the south line of the west field. A part of this fence was made a new sod fence by Waterman. The balance of the way it is an old sod fence, which has been patched up with rails by Waterman. We do not now call a sod fence a good fence. On the south side of the 110 acre piece, there is a good rail fence most of the way. On the north side of it, the last time I noticed it, there is a three rail fence. On the north side of the west field, there is not much fence, but near the house there is some considerable, made of stakes set in the ground.

4275 There have been a few trees cut on the $2\frac{3}{4}$ acre piece, since Mike took possession. There were but few large trees then on it. Thinks there are none now, but there may be one or two. There were trees which if now standing, would be worth \$2.00, and some not more than \$1.00. On an average the trees cut if now standing, might be worth \$1.50; would not call them higher.

4280 It is generally considered that taking off a series of crops is exhausting to fresh prairie. I should rather have the land if it had never been but once cropped. Don't know that he should rather have the land unbroken prairie, than as it is. If he owned the whole farm, he should rather have one half broken than all broken.

4290

[2415-18]

4295

cross examined. Thinks the farm would sell for more in its present situation, than if wholly uncultivated. How much more an acre would the lands bring, than if they had never been broken or cultivated? (Objected to as irrelevant.) It is his opinion the farm would sell for \$5.00 an acre more.

4300

There is a stake fence on the east side of the ^{quarter}, which he has not before spoken of. That and the fences he has ~~spoken of~~ before spoken of, inclose the whole quarter, except a small piece at the southeast corner.

4305

Reexamined. ^{The reasons for his} ~~his~~ opinion that the farm would bring \$5 an acre more, &c. are from observing tracts of land about in the neighborhood, which are uncultivated, and the prices which people set upon them, and the price at which cultivated farms about there are sold for. He has reference to sales to people coming into the country, and also to those that live here, and who buy farms about there. Supposes the reason of purchasers preferring cultivated lands to wild, is the cost of fencing and breaking, and being able to put in crops immediately on cultivated lands.

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The cost of breaking prairie is \$2.00 per acre. It is generally calculated that the first crop of wheat after breaking is the best. The second crop is considered good for corn. Two or three crops for ~~wheat~~ after breaking for wheat, are considered better than the subsequent crops.

4320

Judging from the price offered for other lands

should call the value of the prairie land somewhere between 20 and \$30 an acre.

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cross examined again. Remembers the first or second crop on the east field was a very poor crop and was not all out.

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John H. McBomb sworn. Miller took possession in spring of 1846. There were 120 acres broken the first year and crops were sown upon most of it the next fall. There was a crop ^{raised} upon the whole of it the next year season. Ten acres were broken the next season adjoining the 120. In the spring of 1848, there was about 100 acres broken on the east of the 120 acre field, and was put into crops in the spring of 1849. Both fields have been cropped every year since, with corn, wheat, oats and some barley and some buckwheat. The old Monttroph house and barn stand in the west field. Should think there is about one acre about the house and barn, which has not been cultivated.

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4340

Should now consider the annual value of good land \$1.50 to \$2.00 per acre — more now to rent than two or three years ago. Should not think the rent of the Monttroph house and barn worth more than \$24 per year, or \$2.00 per month, including the acre of garden.

4345

On the 23 $\frac{3}{4}$ acre piece, there was an old log house. Miller or Waterman sold it to one Webster, in 1846. ~~also~~ worth above 3 or \$4. It was moved off in 1846.

4850

There have been ten trees cut and taken off from that piece since 1846. Nine white oaks all good sized but one. The tenth was a black oak — and a poor tree, good for nothing but wood. The white oaks all but two were cut into saw logs. The value of the ten trees if now standing, he should estimate at \$16.

4855

4860

Examined. On the east side of the east field, (the 110 acre piece) there is a stake fence of about 170 rods. On the north side, about one half the way is a good rail fence, the balance of the way is a three rail fence, staked and ridged. On the west side is a good sod fence, about 160 rods. On the south is a good rail fence, about 160 rods in length.

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The west field is fenced on the west side by a sod fence of witness, and on his land. On the south side there is about 50 rods of sod fence, and the balance about 70 is sod and rail fence together. On the north side there is no fence except about the house, where there is some stake fence, he should think 100 rods. Don't recollect whether there was any fence when Miller took possession.

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Examined. He built the sod fence on his land. One end is two rods on to his land, the other about 8 feet. In 1845, there was inclosed on the land a field of about 15 acres. On one side and one end of it was a fence of rails, and on the other side a sod fence, staked and ridged, with ~~slat~~ ~~one~~ stakes and one rail. Part of the rails were burnt before Mr. Miller

took possession, and he cannot say there were any rails on the place.

4380

George George sworn. Became acquainted with premises as early as 1839 or 1840. Is a farmer 25 years old. Used to live near the $2\frac{3}{4}$ acre piece, in the Montthrop house. It is in sight of the house. When Mr. Miller took possession, there

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were some large trees on the piece which have disappeared, some of them in his judgment if now standing, would be worth \$3 per tree, and the smaller ones \$1.00. Would not venture to average them. Is sure there were more of the larger

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class ~~than~~ of the smaller, smaller class than the larger. There was a log building ^{about 14 by 14} on this piece, of rough logs cut there.

4395

Waterman lived in the old Montthrop house for a few years past, but not since the last winter. Some rails have disappeared from about the house.

4400

Whereas there were no fruit trees when Miller took possession. There had been. Witness lived on the place in his mother's family.

Understood the greater part of the materials of the Montthrop house, came from Kiker's mill. Some part of them came from Kent's mill in Rockford.

4405

At time Miller took possession, some timber had been cut upon either 80 — part of a set of house logs for a small house of soft wood, and some oak

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Trees. Does not know of more than dozen good hard wood trees being cut. We cut the greater part of the dozen when we lived on the premises, on the north part, for a well on the premises, — they were good fair sized trees. Dr. Moulthrop caused the soft wood trees to be cut. There might have been 12 or 15 of them. They were 11 or 12 inches in diameter at the stump. Don't know that he cut any other trees on that 80. I was frequently over that 80, and do not remember to have seen stumps, except of the trees of which I have before spoken. ~~Part of it was well timbered. There~~

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4420

Part of it was well timbered. There was not an equal growth all over it. The best timber was in the north part. The south part was more thinly timbered — the timber was scattered. There was scarcely any undergrowth on the north part, where the timber was heavy. There is a ridge crossing it east and west, where the best timber grows ~~lower down~~ nearer the south line than the north. There was some undergrowth towards the north end of the forty is 80, and some where the timber was scattering on the south forty.

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4430

Left the premises ten years ago this spring. Believes there had not then been any other timber cut on that 80. Has never counted the trees now cut, but has a number of times looked over the timber.

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Has counted the stumps on portions which he judged to contain about an acre. Should judge some acres contained about 45 stumps. He counted along the ridge, where the timber was best. Perhaps

five acres would be as good as that counted. Measured a great many of the stumps on the north forty.

4440

Made examination last Saturday, 25 Feb. as to quantity of timber cut from it, went through among the stumps. His opinion is between 5 and 800 trees were cut, the greater part on the north forty. Found some of the stumps full three feet in diameter. The stumps averaged ~~two feet high~~ about two feet high. Should think the value of a tree of three feet stump would be \$5.00. There were not many of that size; probably not more than 25 or 30. Thought the average size about 20 inches. Measured a good many with a square. The smallest would be something less than a foot. Should think the average value of the ~~timber~~ trees would be about \$2.00—of the trees cut on the whole 80.

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The north forty would not make good farming land if the timber was all cut off. The stumps where the timber was thickest would be such an obstruction, that the land would not be valuable for farming.

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He estimated the trees at what he supposed their value for wood, because he could not tell from the stump whether it would answer for sawing. From what he saw however of the timber before it was cut, it was a good sample of sawing timber. The best of the timber he thinks would be worth more for sawing than for wood, but he cannot say how much.

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If I owned the whole Monthorn property, I would not have had the timber stripped off as it

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has been, for the value of the timber. He considers the damage on the north forty acres at least \$20 per acre. Thinks the timber which has been cut would be worth \$20 per acre. If he owned the property, Moulthrop property, he does not know that \$1000 would tempt him to have the same destruction made.

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He thought \$50 would make the south forty good, for the timber cut. Does not think there were more than 20 trees cut upon it.

4485

His estimating the damage at \$20 per acre was not the result of any precise calculation. Has no doubt there were 500 trees cut on the north forty, and thinks they were worth \$2.00 per tree. He means besides the trees cut before Miller took possession.

4490

The reason he would not have the timber strip is, he thinks the day near at hand when timber land cannot be had. It is difficult now to purchase timber for the supply of a farm; does not know as it can be done without farming land with it.

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The road along the north line of the eighty, runs on the south line of the prairie land.

4500

Is acquainted with the farther timber. Made an examination of it when Mr. Bergeson surveyed it, a week ago. Counted 574 stumps on it; cannot say how many more there were, they were very low most of them; thought they had been cut low to avoid their being seen; counted some that were almost entirely covered over with grass and leaves. Some of the trees were cut this winter, some last; thought some had been cut two years ago, and that the trees

4505 had been cut from year to year for probably five years. Some trees cut south of the Kishwaukee, he did not count, and they were not included in the 574. Most of these trees were hard wood, all perhaps but 20. The stumps were scattered all over the eighty north of the river. Measured some of them, but they varied so in size, that it would be difficult to get at an average. Some stumps were two feet across. Some of the trees would be worth \$4 if standing, the smaller ones probably 50 cents each. Some were not hardly large enough to split in two for rails. He would not estimate the average over 50 cents. About a fifth of the smaller trees were dry. This timber is $3\frac{1}{2}$ miles from the prairie, by the road.

4520 Does not think the prairie land worth as much as if it had not been broken at all. Farmers consider the first few crops the best, the greatest yield with the least labor. Supposes the prairie land worth about \$20 per acre. The rent for such lands for a few years past has been as low as \$1.50; for the past year it has been worth more—thinks about \$2.00 an acre. Would call the rent \$1.50 per acre for a few years past until last year.

4530 Cross examined. Did not observe that the timber had been more cut on the west side than the east side of the farther eighty.

Joseph Jones sworn. Has been in charge of this farm since three years. R. A. Marsh had the mill

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the first year Mr. Grant since. I got two or three trees from Waterman, about two years ago, from the land west of Sailors [Litter 80]. Took the trees from the land myself. Thinks they made about a half dozen logs. There were three small trees, thinks the logs would make about 150 feet each. These trees would average about 18 inches in diameter. The lumber was worth \$1.00 per hundred. It ~~is~~ Does not think it would be worth more now; it might be \$12.00 per thousand. It is worth \$1.00 per thousand to cut logs for lumber. Should think those trees if now standing, would be worth \$1.25 to \$1.50 per tree. There are trees of two feet diameter worth \$3.00.

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The first time he saw the lot, there had ~~agreat~~ been a great deal of timber cut off. Should not think it the very best quality of timber that grew on that lot. Should think the timber rather short. There were trees there which would make two logs. The general character of the timber is, it grows rather scattering, and with large tops. When trees grow thick the tops are not large. There were some clusters where the trees grew thick.

4560

There had been great cutting there before I saw it. In the places where the trees grew thick, I should think there were trees of two feet in diameter which would make 500 feet. I think there had been trees there which would make three 12 foot logs; that the trees of two feet in diameter would average two 12 foot logs. The quality of lumber made from such trees I should think would be worth

4565 \$12.00 per M. It has been heretofore worth \$12.00 per M.

4570 Such trees as grew there of two feet diameter if now standing, would be worth \$1.50 per tree. On an average through the whole tract, would think the value of the trees in clusters, of 2 feet diameter, would be \$2.00 per tree. Should judge the average value of those scattered around out of the clusters, of two feet diameter, would be \$1.00 per tree. It would be of three feet growing in a cluster, he should estimate at about \$5.00. You cannot estimate the value of the tree from seeing the stump, in that timber particularly.

4580 Does not know that Waterman has taken other logs from that land to the mill. He has ~~brought~~ not brought any logs to the mill for the last 18 months, until quite recently. He has recently taken lumber from the mill. He did not say where the logs came from. witness cannot tell the amount he had recently.

4585 Waterman made a contract with witness to saw the logs he had on the eighty; this was in December 1852. I was to draw the logs, and give him a share. The reason witness did not, Waterman informed him there was an injunction issued. 4590 The logs have been taken away from the lot the most of them. I cannot say how many logs were cut at the time of making the contract, most of these logs were on the north part of the lot.

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gross. examined. The general character of the trees on this lot is, that they are large bodied, I think there are trees enough standing, and taking the general range of the country there through there, to come to a tolerable correct estimate of the value of those trees.

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Direct. The trees growing in clusters on that lot were not large bodied.

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Harvey Jones sworn. Saw Waterman taking timber from the lot, about two weeks ago. He was loading up a load of tops, near the road running by Saddle. Don't know where he carried it to. Met him the same day, with his sled, going towards the woods.

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Thoms Waterman has logs at the Milford saw mill. Cannot say how many. Does not know where they came from. He now lives in the village of New Milford.

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Bradford Jones sworn. Resides at New Milford. Is 69. Has spent most of his life at mechanical business, but has been acquainted with farming business, and has done more or less at it all his life. Lives within half a mile of a part of the premises, on the land immediately north of the east part of the prairie, and adjoin fences with it.

4620

Witness has been over the latter tract of timber frequently. Does not know of any timber having been cut there before Morane Miller took possession in 1846. Last passed over the tract 1 1/2 or 2 years ago. If he owned the Mouthrope property, he would not have the timber taken from the place as it has been, for the present value of the timber. Should not like at this time to sell standing timber for one third more than its present value. I consider timber to keep standing is worth more than forty per cent more than its present value means he would rather have standing timber, than to have its present market value in money at 40 per cent annual interest as an investment. His reason is the scarcity of timber in this section of country. There was not so great a supply as is desirable to have for the property.

Before any timber was cut on this tract, he considered it of a better quality than the timber on the lands immediately about it. On some parts it stood pretty thick, on some thinner. Would not give more than a third as much for the land than if the timber were all standing.

The fence on the south side of a field near the old Mouthrope house and barn has disappeared. On the northeast quarter of the Mouthrope claim, at the time of his death, there was a tract of 12 to 16 acres inclosed on

4655 three sides by a fence belonging to Mountbarn. About that time a fire burnt a large portion of the fence, but there were enough rails left to build 40 or 50 rods of fence. They were laid up so as to inclose a smaller field on three sides on the Mountbarn premises. Witness assisted in putting up the fence. The rails about that field were afterwards taken by ~~Waterman~~ or Miller or Waterman, and used in a line fence between Mr. Miller and myself.

4660 I have noticed that the doors of the Mountbarn barn or some of them gone or badly to pieces, and some of the coving off.

4665 Part of the 16 acre field has been taken into a larger field, and a part of it has been left without cultivation.

4670 Has not been over the land very frequently. It has been so cultivated as to get good crops. Has seen land better cultivated, and land worse cultivated. Those fields and others about them have a great many too many weeds. My opinion is, and I have always ~~said so~~ so said, that I would rather have the prairie land in a state of nature, than as it now is with the fences.

4680 Cross-examined. Cannot recollect particularly, but according to his recollection, when defendants took possession, the house was in a good comfortable condition for summer or winter. He should consider the barn a pretty fair comfortable barn.

He knows of no fruit trees on the premises when defendants took possession, except some wild plum trees on the west side of the garden.

4685

On the line between my son and Miller, there is 40 rods of fence or thereabouts, which has been built by Miller out of the rails about the 12 or 16 acre piece, left after the fire, or from other rails furnished by Miller.

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David S. Shumway sworn. Resides in the town of Norwich, Is 52.

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There had been some timber cut on w. 1/2 n. w. 1/4 s. 19, before Miller took possession — not much — had helped cut some himself. The doctor was saving of the timber, could give no idea of the number of trees cut. Trees had been cut for fire wood and for rails, and I cut two or three hophlars for saw-mill carriage sides. The rails were carried to the company field between Mr. Jones and Dr. Moulthrop.

4700

Cannot tell how much together they had inclosed. Thinks they had inclosed partly by sod and partly by a rail fence, some forty or fifty acres. There was but little soft wood on the place. Does not know there was any standing when Miller took possession. Does not know of the doctors cutting any timber on the land, except for rails or fire wood.

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That eighty has a pretty large growth of

4710

strutish timber, and rather scattering. There would be a pretty large growth on the ground, because the trees were large and big tops; but would not be much hewing or sawing timber, because the trees were short. There is a glade of thick and tall timber through there, but he thinks this eighty does not touch it.

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After Miller took possession, Mr Bushnell in company with witness applied to Waterman for timber for knees to a sloop Bushnell was building. Waterman told him if he could find any on the eighty, he could have them. We found some; cannot say how many; thinks not more than 8 or 10. We found some trees that made more than one. The knees were taken out of the tops, and hardly ever injured the body for logs or rails. Cannot tell their value. A tree would be none the more valuable because it would make a knee.

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At that time there was not much timber cut on the lot. There was some down which had not been taken away, and there were logs cut I supposed for rails. They were at this time cutting timber on the place.

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Witness lives about a mile and a half from the prairie lands, and about three from this piece of timber.

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At the present time it ~~would~~ is difficult to buy timber land separate from prairie land. If he owned the Mouthrope farm and was able to keep it, I should not probably be willing to.

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have the timber cut from that eighty for the present value of the timber in the market. His reason is that there is so much prairie land in the county without timber, that it would be worth more for me to keep it.

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As he came along, he noticed about the house some picket fence, some broken down and ~~out~~ of repair, rather out of repair, as fences will get in the spring.

Has not observed much of the cultivation of the prairie. Only knows the land about there is very weedy.

4755

If I was poor and needed the use of the land right along, I should rather have this prairie land as it is, than in a state of nature. If I was able to make the improvements myself, and get the first year of the land, I should rather have it ~~than~~ in a state of nature. I consider the first use of land the best. In my opinion prairie land for the first four crops after breaking is enough more productive compared with the second four crops, to pay the extra expense of breaking over common ploughing.

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The lumber of which the house and barn on the Mouthrop premises were built, came from my mill. I furnished the lumber, and sold it to Dr. Mouthrop.

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~~The stoop was~~ Has the log cabin. Webster who leased witness tavern, got the cabin of Miller. Thinks the value of the cabin about \$6.

4775-86

Joseph H. Jones sworn. Resides in New Milford.
Is 22. Has had charge of the only saw mill
there most of the time since 1851. Waterman
has drawn logs there. The first were drawn in
by our team, under an agreement that Water-
man was to have one third of the lumber
when sawed. These logs made 1402 feet, which
was measured out 2 June 1852. Cannot tell where
they came from.

Between 20 Feb. and 1 March this year, I have
sawed 25 logs for Waterman. Do not know
where they came from. Waterman and his
son brought them to the mill. They were sawed
into fence posts and some railing. Thinks three
or four are on the log way not sawed. Does
not know anything about the agreement, for-
ther than he had orders to divide the lumber
as he has stated.

David Milford sworn. Has labored for
Horace Miller and J. C. Miller on the eighty
west of Sailor's first about two years ago 2 1/2
days cutting up wood sled lengths and carry-
ing it off. Supposes it was all carried to their
house. He rode down on one load, and that
was taken to the house of ~~Horace Miller~~ young
Horace Miller. Horace Miller and Clark Mil-
ler lived in one house, but not on the Mount
Knap property. Young Horace lived on it,
I heard Clark Miller speaking about the wood,

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and saying they were getting up the wood for the winter and summer use of both families, he means for Horace and Clark Miller and young Horace Miller. Defendants Horace and Gardner B. Miller lived together as one family. A young man in the employ

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of Horace Miller worked with us. Two teams belonging to Horace and G. B. Miller and young Horace drew off the wood, thinks three loads each per day from the northern part of the eighty. Should think part of

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this wood might have made rails. Most of the trees were large top trees, and ^{short} ~~small~~ bodies. They calculated to cut such timber as would not make rails. You could not find many trees but might have made a cut of rails or posts by getting it sawed. There was snow on the ground. Could see paths in the snow where there appeared to have been wood drawn, and places where wood had been cut. Should think they cut enough for the supply of the two families for a year.

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I labored for G. B. Miller some a year ago this winter, on that eighty. Horace G. Miller was the man who came after me and paid me. They were both getting wood there together. They were both drawing, and part of the time had another man help chop. They were taking wood home to both families. Worked at that time a day and a half. Thinks it was in Dec. 1852. It was at the time the injunction was served. Don't know how much they carried away. They stopped when the injunction was served. Don't think they have taken off any since.

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(12415-82)

Should think they were cutting near the south

end of the piece. Saw some trees that had been recently cut down. Cannot state what became of them. Then or a day or two afterwards I saw men butting off the logs of those trees. Heard black Miller say Waterman was getting more than his part of the timber. This was in reference to timber then lately cut, the bodies of which were lying upon the ground, or most of them. Should think this remark made in reference to some 20 or 30 trees. Some of these 20 or 30 looked as though they would make pretty good logs, and some as though they would make pretty poor ones. He left off work when the injunction came. The bits of those 20 or 30 trees were then lying there. Does not know what has become of them.

While he was at work there just before the injunction, black Miller and Waterman paced the land off as near as they could, and divided it in the middle by a line running north and south, so that each could get their part of the timber. Waterman chose the west side, and black Miller took the east.

Helped George Miller cut some logs on that night. They were taken to the Milford saw-mill. This was in the fall of 1852. Should think 8 or 9 logs. George Miller had them, and used them in the erection of his house. They were mostly old, from timber down all but one tree; should call them poor logs.

cross-examined. The calculation was to cut only such timber as was good for nothing but wood. Thinks

4865

the first day some were cut that might have made rails; Whely they might not have been very nice to split. As the timber now stands on this sight, it would come pretty near being the poorest quality of timber in the Big Woods.

Does not know by what authority George Miller took the trees. He is a nephew of Horace Miller.

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Volney & Marsh sworn. Formerly owned and carried on the saw-mill at New-Milford. He sawed logs there for Horace Miller and J. B. Miller, and also, his impression is for Waterman. Sawed eight logs for Horace Miller in fall of 1846. In fall of 1848, sawed nine logs for him; in Feb. 1849, two; some time in 1850, one; This was all he sawed for

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Horace Miller. From July to Nov. 1849, sawed for J. B. Miller 8 (9) logs. In Aug. 1851, has charged Horace Miller with sawing 182 feet without reference to the number of logs sawed, but which is no part of the logs above spoken of. In 1850, I have an entry against Waterman of 1446 feet of lumber,

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but from his book he cannot tell whether I sawed the lumber for him or sold him the lumber; but it is his impression he sawed it for him. In Nov. 1849, has an entry of ~~154~~ feet, against Waterman of 154 feet, which he sawed for him.

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Saw some of the logs which he sawed for defendants. Should think they were pretty good logs. They were all hard wood. Speaks more particularly

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of the logs of Mr. Miller. Says he sawed for Horace Miller produced 5202 feet of lumber. Those he sawed for J. B. Miller produced 1844 feet.

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Could hardly swear that the logs he has mentioned were all the logs drawn defendants drew to the mill. His impression is they were. Horace Miller was in possession of other timber land than that belonging to the Montross estate. Does not know that J. B. Miller and Horace Waterman were. Does not know where the logs were obtained. The timber land of Miller lies in New Milford, on Rock River, n. w. of the saw mill.

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Cross-examined. Is acquainted with the timber lot of the Montross estate, had a timber lot lying near it. Means the lot near Sailer's. In 1846 this lot was not any such timber as the best timber lots in what we call the Big Woods. The timber was scattering, and as a general thing short. The large trees were generally short, and as a general thing would not make more than one saw log. There would of course be exceptions. Thinks a majority of the timber would be called oak openings.

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From what he knows of the timber on that lot from 1846 to 1850, he should estimate the average value at that time at 50 cents per tree—means such trees only as were fit for sawing. Comparing with other timber he bought about there, should think 50 cents per tree high. Has purchased a good deal of timber. His experience was that logs he cut on his own were not worth at the mill more than the expense of

4920 cutting and drawing. Has purchased a good many trees in that section, and never paid over \$1.00 per tree, that he now recollects. Never has noticed ~~any~~ any such trees on this lot as those he paid \$1.00 for.

4925 His recollection is that the house and barn were considerably out of repair when Miller took possession. Should think they required considerable repairs to be comfortably tenable.

4930 Supposes the prairie land is more valuable for the improvements which have been put upon them, than they would be in a state of nature.

4935 Saw G. L. Miller drawing some of the logs from a different direction than from the timber lot in question; from the direction of his house and the timber lot of Horace Miller.

4940 Crossed the ridge to get at his own timber. Crossed it east and west, he thinks a little south of the middle, and crossed it quartering on the north end. Believes there is a ridge running through it east and west, where he should think the timber rather thicker than elsewhere.

4945 The price of hard-wood lumber from 1846 to 1847 was from 9 to 10 - generally about \$10 per M.

Andrew Bachon sworn. Worked on the land next of Saylor's three quarters of a day for Maternum. Thinks it was in December a year ago. He believes

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off one tree, cut a saw log out of it, and dropped the top into sled length wood. Then I cut down one tree and cut the top off. Thinks the place he worked north of the ridge. Waterman said the wood was for his own use.

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Jacob Lavan sworn. Resides in the city of Rockford. Was on the land yesterday. Counted 633 stumps on it. Counted none east of Sailor's fence. The method he took was, he commenced at n.w. corner, and marked every stump with white chalk as he counted it. Went from there to s.w. corner, then to s.e. corner, so as to know where the lines were, thence to Sailor's fence. Then we went east and west until we passed over the whole pretty much.

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The stumps were principally white and red oak; some hickory, but small. Did not notice any soft wood stumps. A small soft wood stump with not last but a few years in the ground. Should think not over four or five years.

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There were old stumps which I did not count at all. Thought they had been cut a good many years. They were rather small, and not many of them. Should think a good many of the stumps were cut a year ago ~~last winter~~ this winter. The balance of the stumps should think had been cut along at different times for the last six or seven years. His

His impression is, but a small proportion of this number were cut on the south half; ~~The~~

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not more than 150. The largest part stood on the ridge. Something like 500 on the ridge. The timber on the ridge is pretty much all cut off. A few trees stand at the east and west end of it.

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The largest stumps we measured were 2 feet 10 inches across, and from that down to six inches. The trees along the ridge were just about a medium size. But a small portion were down to six inches; and there were not a large number of the largest class.

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As timber land is now sold about town here, should think the whole eighty, if the timber cut was now standing, would be worth about \$35 per acre. There would be some difference between the value of timber here and about town. Intended to make an allowance for this difference. Should estimate the lot now at \$15 per acre.

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Thinks there are no butts of trees lying ^{left} on the south part. The tops of some still remain. Has been acquainted some with the prices at which timber lands have been bought and sold about this town the last few years.

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The stumps were a good many cut low, but generally 18 inches or 2 feet high.

Oliver F. Holt sworn. Resides in the town of Rockford.

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(12415-20)

Assisted in carrying chain for Mr. Ferguson's survey. Was on the land yesterday with Mr. Evans and counted the stumps, 633, principally white

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oak, a very few red oak, and a few small hickory. At least he should think had been cut about a year, and part longer. Saw but one or two fresh cut stumps. Should not think we counted any stumps which had been cut more than five or six years. The older ones we did not count at all. There were not many of them. Saw no soft wood stumps. A small soft wood stump will not last more than 5 or 6 years in the ground.

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Observed the ridge on the north half; cannot say ~~how~~ an extending across the eighty rather quartering. From the stumps should judge the ridge a good strip of timber. Should call the balance openings. Timber as thick as that along the ridge, grows taller. Should think near 400 of the stumps were along the ridge—might not have been more than 350.

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The trees standing on the south forty are rather scrubby; grow more to top. There may be a body or two lying on the south forty; should judge not more; is not certain there are any. Thought the stumps on that forty would average about a medium size; should call such a tree a foot through.

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The trees along the belt were not so large. There were some that would answer for sawing. Measured some of the stumps along the belt. Some were 2 feet 10 inches across; thinks not more than two or three of them. We measured some two feet across.

cross examined. Probably not ten acres in the ridge. The stumps there would not average a foot

5045 Richard Montague sworn. Resides in town of Rockford. Is a farmer.

2100 Has been over the eighty by Saults. In a state of nature he should think it was what would have been called a fair lot of timber for this country, but not the heaviest of timber. It was white oak principally, interspersed with other kinds of oak.

5050 I was on the lot yesterday. Should think the average diameter of the stumps from 12 to 18 inches—say 15 or 16. Should hardly think they would amount to 18 inches; but it would be difficult for him to say precisely. Should judge the average value of the trees that have been cut upon the lot, if now standing, would be \$2.50. There are some now standing which are worth \$4 per tree. From appearances, he should judge the best timber had been cut.

5060 If I owned the Montkroff property and wanted to keep it, I would not have the timber cut as it has been on that lot for what the timber would bring in the market, unless I could replace it by purchasing elsewhere for less.

5070 As timber lands are now selling, if the timber was all standing, I think the land would now sell at \$35 per acre. As the lot is, I should think it worth about \$15.

Noted the ridge, upon which was the bulk

of the timber. Saw quite a number of bodies scattered about, but cannot tell how many. The tops had been removed.

5080 Has the impression that the west part of the prairie land is inclined to sand.

5085 As land in this country has generally been cultivated, I should rather have the virgin soil, than land which has been cropped three years. Land that has been cropped for seven or eight years, I should consider worth one third less for farming purposes than unbroken prairie. This is upon the supposition that there has been no returns made to the land, no manure. It is not a general custom here to manure lands, but people are getting into it some.

5090 Has seen fields that have got weeds and foul grass into them, that I would not give half price for, for farming purposes. This condition of lands is the result of negligent ploughing farming, generally I think. Cropping of small grain every year may have a tendency to produce it.

5095 We were in sight of the east end of the field. The fence there is stakes driven into the ground. After sink fence has been made a few years, should not think it of much value in buying a farm. Thinks it might be kept up for a time to secure a crop.

5100 I have resided in Winnebago county since 1886. The settlers began to come in 1885.

5105 Complainants made no inquiry of him relative to his opinions prior to his examination.

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cross-examined. Has of late known of frequent sales of cultivated farms in this section. Cannot call to mind a recent instance of the sale of lands entirely unimproved.

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Should consider ^{it} an object if coming into the country with a family, if I could get a farm partly cultivated and some improvements upon it, but the great body unbroken, in preference to a farm entirely unimproved. But rather than to take a farm which had all been cultivated for eight or ten years, I would buy a wild farm and ~~hire~~ hire land to work until I had made the necessary improvements upon the land I had bought.

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I should not consider a farm that had produced for the last year 30 bushels of wheat, 50 of corn and 70 of oats, and had been cultivated 8 or 10 years as valuable as the same lands if they had never been cultivated at all.

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5125
It takes from one to two years to bring prairie land into cultivation and thoroughly subdue it. Has broken prairie in June, and the next year raised as good wheat on it as ever he raised; the best in fact. Has raised as good corn that way as he ever raised; but as a general rule the second crop for corn is the best.

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[12415.92]
Wier was on the land until yesterday. Did not measure the stumps. Noted a good many so decayed and burnt that there was but little left of them. Did not notice whether many of the stumps were hollow.

His estimate of \$2.50 per tree was based upon what I supposed would be the value of the tree for sawing and fire wood.

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Dirat. It is nothing uncommon for with large trees to be hollow at the bottom.

LeRoss. Has frequently experienced that a tree hollow at the butt cut off a few feet is sound.

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Melzer Barnum sworn. Resides in Winnebago county. Is 35, and a farmer.

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Was with Mr. Montague yesterday on the timber land west of Sallross. A part of it was a tolerable piece of timber, not first rate, and the balance about second quality. The timber that grew on the ridge was white oak principally. Should think the stumps would average from 15 to 18 inches across. Thinks if the trees were standing they would not be worth over \$2.00 per tree. Should

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think from the make of the timber around that this timber was rather short. That on the ridge might have been a little taller. Should think the best grew there. The trees were thicker there. Trees are taller where they grow thick.

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If he owned the Montmarck property and intended to keep it, and owned no other timber, he should want the timber to go with it. Should probably rather have it than the price the timber would bring in the market. Considers that

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If the timber cut on that eighty were now standing, it would be worth as much as the present value of the land and the timber which is now standing.

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Has bought some timber land within a few years, and has seen some sold. Has cut off considerable timber and sold it. Has cut more or less timber into wood and sold it every year since he has been in the state.

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If there had been no timber cut from that eighty, thinks it would be now be worth from 25 to \$38 per acre—hardly \$30. In its present condition should think it worth from 12 to \$15. Should not think there was timber enough to remaining to keep it for a timber lot.

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Has resided in this county near 16 years. No inquiries were made of him previous to his examination about the matters he testified about.

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Cross-examined. Should think land which has been cultivated a few years will bring the highest price. (Objected to)

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We noticed considerable many stumps near n.w. corner. Ridge where timber was thickest thinks contains 10 or 12 acres. On other parts thinks there are more trees than stumps. Except 12 or 14 acres, where the stumps are thickest, should think the value of the balance 17 or \$18 per acre. If there had been no timber cut on the balance, would think the present value about \$20 per acre.

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Direct. For his own use he would rather have land that had not been cultivated, than land that had been worked seven or eight years.

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Thatcher Blake sworn. Resides in the city of Rockford. His occupation has been farming. Has not done much of it the last two or three years.

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Was on the piece of timber land yesterday with Messrs. Turner, Montague and Smith. Thinks the average of the stumps would be about 18 inches across. Should think the average value of the trees that have been cut upon the lot if now standing, would be not far from \$2.00 per tree. Should quicker think less than more. The timber belonging to the farm would be worth more for the purposes of the farm than the market value of it. Should judge that if the timber was now standing, the tract would be worth about double its present value. Should call its present value from 12 to \$15 per acre.

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Observed very few trees lying. Thinks they were on the north half, on the westerly side.

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Should rather have unbroken prairie than prairie that has been cultivated 6, 7 or 8 years. When it has been cultivated so long, it is not generally so productive, and takes much more labor to cultivate it. In this country, farms cultivated so long almost invariably become weedy, but that depends in a great measure upon the cultivation. Has never seen a piece cultivated, but that the weeds did

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work in, in a greater or less degree. A piece of land overrun with weeds, would be reduced in value by it. The general course of cultivation in this country has been superficial. There has been but few exceptions.

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Has resided in Winnebago county since 1884. Was one of the first settlers here. There were no inquiries made of him about his opinion of the matters of which he has testified, previous to his examination of the premises.

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has examined. Perhaps English grasses will do better on lands that have been cultivated 3 or 4 years, than on fresh broken land.

Jacob Wheeler sworn. Resides in Milford. Is 49. Has worked upon the prairie of the Mouthroth farm, and lived half a mile south of it two years.

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Waterman's son ~~brought~~ drew him two loads of wood, ~~from the direction of Sailer's~~ cannot tell where it came from. They brought it from the direction of Sailer's. Has not known of Waterman's claiming to own any timber land other than that belonging to the Mouthroth. About two years ago, Waterman drew a load of wood for me to the school house.

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When he worked on the prairie for Waterman, there were fruit trees growing upon the land. There was about a half acre set out to trees thick enough for an orchard. Waterman said they were all

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[2415-92]

grafted. There were some fruit trees about the old garden place.

There was once a rail fence along the north line of the premises—thinks about 50 rods. Has not seen it there for some time. It is gone.

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James L. Fountain sworn. Resides in Milford. Is 40. Owns a foundry and machine shop there.

Had five or six sticks of Waterman, 7 or 8 feet long, and 8 inches square, 3 or 4 years ago. They came from the timber land in question. Is not sure but these sticks might have been obtained of Horace Miller Jr and not of Waterman.

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Edgar James sworn. Is 27. Owns eighty acres north of the east eighty acres of the Mouthrop prairie, and has lived on it the last eight years.

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On the Mouthrop property there was a good many years ago, some fruit trees, set out by Dr. Mouthrop; and two or three years ago there were some set out there by Waterman. Does not know what became of those set out by Mouthrop. Waterman told me the trees he set there belonged to him, and he had removed them to Mr. Miller's garden.

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There was once some rail fence on the north line of the Mouthrop prairie, 80 or 100 rods. It has all been removed. It commenced at the north-east corner of the field tilled by Waterman, and ran west to near the barn. Thinks the value of

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the fence standing, was some \$50. Saw Waterman hauling fencing from that course. He was taking it to his place called the Root farm. Thinks it was worth about 50 cents per rod. From the appearance of the rails and stakes, he thought they came from this fence.

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Part of the Waterman field has been very badly cultivated for the last two or three years. That part which he has planted to corn, witness does not think he has tended as he should have done. Waterman two years ago this spring planted about 70 acres to corn, so he told me. I do not think he tended more than 20 or 30 acres of it any where near as he ought. He let it grow up to weeds; a good many of the weeds grew higher than the corn.

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Saw Melanthes Waterman 4 or 5 weeks ago, wading a log on the eighty near Sailor's, 9 or 10 feet long. Saw him going towards the saw-mill with it.

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John Moore and witness each drew a load of logs from this eighty to Mr. Hinman, who had been long sick. Waterman was present.

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Has seen newly sawed posts on Waterman's land, which he supposed were the same he saw at the mill. Cannot swear they were the same.

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Waterman dug and stoned up a cellar near the Monmouth house. Witness is pretty sure the wall has been taken down.

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Examined. Thinks there was no fire on the north line of the prairie when Miller took pos-

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session. Thinks the little garden place ~~was~~ near the house was fenced, but is not certain. There was an inclosure on the east eighty in common with my field. Do not know whether all the rails about this inclosure were put into the line fence between Mr. Miller and myself or not. A good many of them were burned, and a part were drawn to the house—cannot say how many—before Mr. Miller came into possession.

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Horace Miller, by agreement of parties sworn on the part of the complainants, tending the cutting of timber and trees on the farther timber land, and the removal of the same.

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He and J. L. Miller have cut a small portion of that which has been cut there. Three years ago, we cut what made between 100 and 150 rails. They were put upon the lands in question, and form part of the line fence between the premises and Mr. Leone, on the east quarter of the prairie. Cannot say how many rods they made. They were laid up six rails to rod, upon posts, and staked. Is quite sure the stakes did not come from this land. Those rails would make from 20 to 25 rods of fence. This fence is still standing.

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Three years ago, we cut from 20 to 30 of the smaller sized trees, selecting those that were dry or dead, and from 5 to 7 inches in diameter, for common board fence posts, ~~on~~ on the premises where we reside, and not on the lands in question.

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Two years ago we cut trees for girts and sleepers for a barn, cannot give the exact number. They were generally about six inches in diameter at the butt. We cut four trees for the partition plats for the barn. They were spliced once, and the whole length 42 feet. Thinks they were ~~from~~ six by seven inches. We also cut smaller trees for the joists of the barn.

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Does not know of any other trees being cut by us, or with our consent.

Is not able to state the value of this timber by the foot. Does know of no market price for it, but it is worth less than larger lumber.

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Does not know but the tops are on the ground. Some of these trees made two girts; others a girt and joist. There are about twenty of the joists.

Has no idea Waterman has cut any timber there, or allowed any cut. The trees they cut were white oak.

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O. Daniels and M. Parker are or were until quite recently the owners of what was originally the undivided half of that eighty. Six or seven years ago, they came to us claiming under Parly J. Shumway, and proposed a division. We examined the lot together, and

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discovered that the only chance for a division equal or near equal, was by a line in the middle north and south. We agreed that the east half was worth 24 or \$25 the most. They paid it and took the east half. The other party entered upon the west half, and have since cut the timber at their pleasure.

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~~We cut~~ The trees we cut were upon the east half. Knows of no other trees being cut there.

~~The rails were~~

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Cross-examined. Quit-claim deeds were passed. Thinks the timber by them taken was not equal in value to the 24 or \$25. (Objected to.) Not more than three fourths. Several years ago the fire ran through the lot, and very much damaged it. But dead and dying trees mostly; would not say all.

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Direct. The difference in value consisted of the timber standing thicker on the east half and being more thrifty.

Evidence for Defendants.

5375

Allen Miller sworn. Resides in Butler, and was about 84 years. His land corners on the northeast corner of the land by Sailors. First became acquainted with this land in 1839. Examined it with a view of purchasing, and made a bargain for it, but upon looking over the lot more particularly, gave it up on account of the poor quality of the timber. It was mostly very thin on the land, and very short.

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Went east in 1839, and returned in 1842. Should think there had been timber taken from this eighty during that time, mostly on the west part near the road.

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He moved to this country in the spring of 1848, and has resided ever since upon the adjoining lot, except two years, when he resided with his son Jonathan, a half mile west from this lot.

5390 Has been^{as} familiar with the lot several years, as with his own farms. It has been his cow and sheep pasture a good deal. From the appearance of the stumps there, should think more than half the trees had been out since 1848. Has examined the stumps recently, most all of them were marked with chalk. ~~From the~~ Should think a good many of them so marked had been out from 10 to 15 years. Between 90 and 100 of them I judged had been out over eight years.

5406 Has cleared and worked one oak opening thirty years. Should think this land what is called oak openings. Did not consider there was much sawing, hewing or rail timber on it. Hardly a tree would make a good 12 feet rail out. Hewing timber was very scarce, if any, which would run any length.

5405 Thinks he knows most of the fence put on the prairie lands by the defendants. State whether all the timber cut from the lot since 1846, would be sufficient to make the fencing timber that the defendants have put upon the premises? Question objected to. Thinks it would not much if any more than put the fences in the repair they now are.

5420 Examined the stumps with Mr. Basham and his son. The young man carried the square while we were examining the stumps, and measured a great many of them. We made up our minds that they would not average far from one foot in diameter. Should think if her tree would be more than he should be willing to ~~give~~ pay for the trees that have

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been cut if now standing; thinks that is ~~worth~~ as much as they would be worth in the market.

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Understood the defendants got fencing timber from this land in 1848. What was the value of the trees cut from those stumps in 1848? (Question objected to.) Had I owned the land at that time, I should be ~~willing~~ have been willing to have had them taken off to have got rid of them.

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Witness is 66. Has been a farmer all his life, and been in the habit of buying and selling lands for the last forty years. Thinks ~~ten~~ \$10 as high as this land could now be sold for and as high a price as this land ever would have brought, with the timber all standing. If all the timber was now standing which has been cut since 1846, it would not add much to the present value, except to about 10 acres, from which the best of the timber has been taken off. If all that has been taken off from the 10 acres since 1846 was now standing, don't think it would add more than \$50 to the present value of the 10 acres.

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Besides the ten acres, should call the balance oak openings. Places of ~~one acre~~ as much as an acre, and one of as much as three or four acres never had any timber on, that is not since he has known the land. All this lot, except the 10 acres is, and for several years has been more valuable for cultivation than for a timber lot.

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The two lots east were considerably originally considerably heavier timbered than this. They are cultivated and improved, and the timber principally

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partly taken off from the parts under cultivation.
(arguing objected to.)

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Thinks the prairie lands in question are worth a good deal more than they would be in a state of nature. Should think they would readily sell to most men that want to buy for 6 or \$7 an acre more.

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cross examined. Is a brother of defendant Horace Miller. I do not know who has cut the timber from that half section, but have heard Clark Miller say that he cut some trees, pointing out the stumps; should think some 4 or 5 stumps. I do not know how much of this timber has been cut since 1848, any more than we could judge from the appearance of the stumps. Probably the trees that have been cut were a little better than those standing. They might have been a little longer bodied, but they were all very short.

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Did not count the number of stumps that had not been chalked. Was across this lot several times in 1842. Took notice that some trees had been cut, about the average size.

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Should think from the appearance of the stumps that they had been cut different years along. I can tell from the appearance of a stump about how long it has been cut. There seemed to be a wide difference distinction in the appearance of those stumps as to the time when they were cut. Some of them were very much decayed, so that I could kick them over. Should think they had

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Σ 12415.70

been cut from 12 to 15 years. Almost all of these old stumps were marked with chalk.

5495 I should think there was no probability of mistaking one of those stumps for one that had not been cut more than 7 or 8 years. A white oak stump not cut more than 7 or 8 years, is generally dry and hard on the top, and the bark still adheres. Two or three years afterwards they become brown, or what I should call decay. At that time the sap becomes rotten, and the bark falls off, or is easily knocked off.

5500 The said 90 or 100 stumps were more decayed than the others, and showed more distinctly the impression of age. There was a broad line of distinction between them and those that have been cut later. I could strike my cane into those old stumps, and sink them to pieces; and those that had been cut more recently were solid, and the cane would make no impression upon them.

5510 I think there was a difference in the time when the 90 or 100 stumps had been cut; some of them he thinks had been cut from 12 to 15; others from 10 to 15 years; the greatest share from 12 to 15. All of them were oak. Does not know who cut any of those ~~these~~ old trees.

5515 There is a sod fence on the south end of the Waterman prairie. I think there are ^{some} rails on the east end of this fence. On the north line there is a rail fence all the way from the northeast corner to house. I have not been there since last spring, and may be mistaken about the fence.

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On the south side of the east quarter, there is a rail fence he should think pretty much all the way. Is not certain there is any stake fence on the east end of the south line. There is not much if any. Some board fence about the house where Norane Miller lives, on the southwest corner of the east ~~quarter~~ of quarter. On the south side it is a stake fence, of stakes sharpened and set into the ground. Thinks there was a trench dug for the stakes. To split such stakes, it wants good timber. Saw trees lying there, where there had been taken just about enough of the butt to make a length of these stakes. I thought it was a rail fence on the north line of the east quarter. At part of the way it is a partition fence between the premises and farms, and part of the way between those premises and bone.

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Cannot say who built the sod fence on the south side of the Waterman part. My brother and his folks built the rest of the fences he has described. ~~The north~~

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According to my rule it is 21 rails to two rods of fence of two feet rails. The common length of rails in this country is from 10 to 11 feet.

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Cannot tell how many stumps he and Mrs. Basham measured. We went all about among the stumps, and measured almost every one we came to. We had an iron square, and laid it upon the stumps lengthwise.

[12415-99]

He estimated the value of the trees for fire wood.

5555

Estimates a cord cut there on the ground worth \$1.00. Probably the trees might average about a cord and a half. The expense of cutting a cord of 4 feet wood is about 50 cts. Thinks \$1.00 a cord as high as the wood could be sold on the land.

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Last he commonly paid from 6¢. to \$1.00 per 100 for splitting rails. Does not know the price here; thinks it higher.

5565

If he had owned all the land in question in 1848, does not know as he should have been willing to have all the timber cut on the 80 to get rid of it. If all the timber was standing does not know that he should be willing to have it cut for what it would bring in the market.

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The stakes were set about 2 to a foot. With the exception that some of the stakes may be rotting off, don't know but it is as good as when first up. The rail fence is in a tolerable state of preservation. The rails are not much the worse for age yet.

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A tree a foot through will when it works well make from 8 to 10 rails; 18 inches through from 16 to 20; 2 feet through, he has had them make forty rails; 2 1/2 feet a tree 2 1/2 will make 40 or 45 rails, when it works well.

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~~The~~ One reason why he thinks prairie land is worth 6 or \$7 more than wild land is, an ordinary crop of the coming season would more than pay the difference. Land getting weedy he does not know as it would damage it any, if thoroughly killed afterwards.

5585 Waterman owns a piece of prairie land immediately east of the prairie land in question. He has not had any other timber land than those in question to my knowledge. G. B. and Horace Miller have a piece of timber on the old farm.

5590 The way we numbered the 90 or 100 stumps, we went to every stump and examined it, and cross marked it with a piece of chalk, when we thought it had been cut more than 7 or 8 years. Clark Miller came along to some of the stumps and told us how long they had been cut. Some of them he said had been cut 7 or 8 years, and some 5. This is the way he came to know that Gardner Miller had cut any trees there.

5600 I have not taken any warm interest in the event of this suit, and have no particular feeling in the matter. I do not remember even to have had any conversation with my brother in relation to the matter until that morning he came after me to go with Mr. Basham and examine the stumps.

5610 Ezra M. Miller sworn. Has lived in Butler the last fifteen years, and till within four, on the land next north of Sailor's, cornering on the timber lot in question, and has been acquainted with it since 1839.

[2415-100] The timber would be between second and third

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quality, because it is white instead of burr oak. You could get a rail cut to a tree from some of the trees, but does not think there was a half dozen trees on the 80 from which you could have got two rail cuts. There was more suitable for sawing than rail cuts. There were some very good sized trees, from which you could have got a saw-log, and from some two. This lot was never considered very valuable for timber. Until quite recently it has been considered more valuable for ~~timber~~ cultivation than for timber. It is not such land as he should want to buy for fencing a farm. Rails could be got out of the timber, but it would be saving the rails to split them.

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Knows of persons cutting and taking timber from that land prior to May 1846. The Milford Mill company did, could not tell to what extent. Has seen timber lying provisionally about the lot, which had been flattened for rafters to the dam. Also saw some large timber lying there which had been cut. Cannot say how many of those large sticks there were. Should think the large sticks were for the mud-sills for the dam. Cannot give any estimate how many trees were cut. Came across there in fall of 1843 or 1844, thinks, (it was the fall the dam was built) - saw as many as a dozen of these flattened rafters that had been cut and flattened. Knows other timber than that cut by the company was cut there prior to 1846. Saw timber cut there in 1841, the tops cut into wood, and a rail cut left. Has seen this land almost

5645 weekly, and been over it, for the last 14 or 15 years, except the years 1846 and 1847. There has more or less timber been cut on it every year since I knew it.

5650 From his knowledge of the timber cut upon the place, he should judge if the trees were now standing, they might be worth 75 cents on an average, but not more.

5655 I know of a Mr. Taylor splitting the stakes on this land for the defendants of which the stake fence on the east line of the prairie was built. This was in 1848. It would have been difficult to find timber that would have split into rails. There might have sawing timber been obtained. The stakes were about as long as the timber would split conveniently. Such fence could be made with less waste of timber than any other.

5660

cross-examined. Is nephew of Horace Miller, and son of Allen Miller the last witness.

5665 You can use timber for saw logs that you cannot split. This timber would be difficult to split into rails, because it is short, knotty, winding and curving. Has seen rails split on the place, perhaps a dozen times. The first he saw split there was by a man ~~working~~ I think working for Dr. Montford. It was in 1844. He might have split 2, 3 or 4 trees. It was in the portion where the best timber grew, about 25 rods from n. w. corner, and 8 or 10 rods from the west line. The rails were rather full of splinters, rough. Thinks they were drawn and put

5670

[12415-161]

5685 around the doctor's cabin, on the north side of the road (defendants admit cabin was on the $2\frac{3}{4}$ acre piece). Don't know what ultimately became of those rails. Those trees might have been two feet at the butt. Did not count the rails, but from the timber would think probable there might have been 25 to the tree. Is pretty certain this was in 1841. The same man went with me to get a large hollow log for Dr. Montmarph with a pair of cattle I had sold in 1841. Upon reflection the witness thinks those rails must have been cut in 1839.

About 5 or 6 years ago thinks he saw rails split on the land, but it might have been the stakes.

5690 Thinks he knows the bounds of the land. The down company were Jason Marsh, W. A. Marsh, Charles H. Shafford, George Field, Shafford Field and one Bastwick. They cut more on the south half of the lot than on the north, nearer the east line than the west, and nearer the middle of the land than the south ~~end~~ line. Cannot give an estimate of the number of trees they cut. Thinks they were all on the south forty.

5695 Thinks there were no trees cut in 1846 and 1847. There might have been one or two. Thinks timber was cut in 43, 44 and 45, but cannot state any particular number of trees, but it was less than previous years. It was his opinion it was plundered timber.

5700 Don't know there were any logs on the south half that lay over ~~summer~~ the last summer.

5705

There were some on the north half.
• Computed value 75 cents per tree, because they
were not fit for rails, and he has sold in that
neighborhood better timber for 75 cents per tree,
about 5 years ago.

5710

Asa H. Norton sworn. Is acquainted with the
lot west of Sailer's. Has been across it occasional-
ly for the last ten years, and some of the time every
day. Talked with defendants about purchasing it.
Wished it for cultivation. Did not consider it a
good timber lot. There was a streak of 10, 12 or
15 acres, which if it had extended all over it, he should
have called it a pretty fair timber lot for this coun-
try. The road passes through a corner of the lot.
~~Never~~ Never saw any rails made on the land,
nor made any himself out of the timber. Some
of the timber might have made rails, but
the timber is not such as would have been called
rail timber.

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5725

Witness worked for Horace Miller more or less
every season from 1844 to 1849. He split the
rails put on the old sod fence on the south line
of the west quarter, except a few rails that were
drawn from some other place. The logs were
drawn along the ~~fence~~ and sod fence, and I
split them there.

5780

Cross-examined. Is not a connection of any of the
defendants.

5735

James S. Gonschus, sworn. Is acquainted with the eighty west of Sailor's, and has known it 16 years, and has passed over it frequently during that time. Has lived in the immediate neighborhood most of the time, and still owns timber land there.

5740

Some parts were quite decent timber, and some parts quite open. It was not first quality of timber by any means. ^{The ridge was quite decent timber.} The best part of the timber extended from near the n.w. corner in a s.e. direction, down to the south half. In answer

5745

to the question objected to, what would the land now sell for if the timber cut since 1846 were standing, the witness says, he thinks in that case the land now would be worth \$15 or \$20 per acre. In its present situation from 10 to \$15. To some it would be worth \$15, to others not more than \$10.

5750

Stephen Basham sworn. Is 55, has resided in the neighborhood of the Moulton property 8 years. 2 1/2 miles distant 7 1/2 years. Examined the premises in 1845, with view of purchasing.

5755

Thinks there were then no improvements upon the place, except a sort of house and barn now there. Looked upon the house as in a very poor condition, and not worth much for any one to occupy; did not think it ordinarily comfortable or decent for a family. The barn was a good deal the same, unfinished. After Mr. Miller took possession, the house looked in a great deal better con-

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5765

dition. There had been places for windows, but not much glass.

The improvements about the house since Mr. Miller took possession, consist in fencing up, and setting out fruit trees and shade trees and the like.

5770

Do you know of a house being built on the premises by the defendants? (Objected to.) I know of a house being moved on to the premises and used as a dwelling since; thinks in 1849 or 1850.

5775

The improvements about this house have been, building a stable; some door yard fence, and setting out some fruit trees, apple, and peach. There is probably more than an acre in the yard and orchard, enclosed on two sides by a board fence, if not three, and on the fourth by a rail fence. There is also a barn yard enclosed, of rail fence. There are at S. W. corner of the east quarter of the prairie. (In this was objected to.)

5780

5785

The fence on the south line of this quarter, commencing at the door yard, is a rail fence, staked and ridged. In this country, it would be considered a good fence. The fence on the south ~~so~~ east side is of stakes put into the ground endwise, of about the ordinary size used for sink fence, some of them a great deal longer. On the west side of this quarter is what he should call a good soil fence, with a ditch on each side. (Objected to.)

5790

Should consider the premises worth more than if uncultivated. If the prairie were naked, he should think it would be worth \$10 per acre. According

5795

to the price at which lands are now selling, it would fetch \$20. per acre.

5800

Upon recent examination of the stumps upon the lot west of Barber's, between 90 and 100 appeared to have been cut much longer than the balance; they were all marked with chalk. Measured quite a number, largest, smallest and medium sized. Formed opinion the average would be less than a foot. Some of the stumps marked were very much decayed, and loose, so that by putting his foot against them, he pushed them out of the ground. Some you could stick a walking stick into 2 or 3 inches from the top. Some of the tops were so decayed that you could stick a walking stick into them readily.

5805

5810

Cross-examined. Examined the stumps with or in presence of Horace Miller Jr. Waterman, J. black Miller, Ralph Cochran, and I believe Horace Miller was present part of the time. Did not all keep together all the time.

5815

From some of these stumps the bark had fallen off and he does not think it was whole on any of them. Some with the bark off, were in a sounder state than others with the bark on. Concluded some of the trees had been cut when dry and the bark off; and many of the stumps of these were in a sounder state than the stumps of green trees cut at the same time. Some where the bark was off, looked decayed, white and punky; others dark. These took for red oak. Concluded those

5815

5820

badly decayed had been out more than eight years. His best opinion is formed by comparison with stumps cut eight years ago, when he first came into the country.

5825

Measured a great many stumps, and saw others measured. The largest he saw measured 3 feet, and was hollow in the middle. The smallest marked one was 5 inches. Measured others, 7, 8 or 9 inches or thereabouts. Concluded that those that measured from ten inches to a foot were about the

5830

medium size. Measured two or three of 2 feet 8 inches; others of 15 inches. Does not ~~recall~~ remember he measured one of 18 or 20 inches.

5835

He had the square one third of the times. The trees were about as thick about some of these large stumps as any where on the lot. Counted in one place 14 stumps pretty near together averaging about 15 inches. They were the most sizeable of any he noticed on the same amount of land. Did not count the stumps on any other particular

5840

piece. In averaging the stumps, did not add the diameters and divide the amount by the number of trees. Came to his conclusion from measuring, and a general survey.

5845

Did not see any floor in the barn in 1845; went into it. Thinks there had been plastering done in the house. A great portion of the windows were without glass, and hats, coats, &c. were stuffed in them.

5850

Σ1241021047

The rail fence on the south line of the east ~~for~~ quarter section may not extend to the east

line by some 8 or ~~10~~ rods 12 rods. From where it leaves the line it runs in a n.e. direction until it strikes the east line. The fence across s.e. corner is half rail, and part stake.

5855

There is ~~along~~ on the north line of the west quarter, a stake fence in front of the house extending from the n.w. corner of the quarter, to nearly opposite the barn.

5860

There may be about 12 rods of board fence on the south line of the east quarter in front of Horace Miller's house.

5865

Has not heard of any wild prairie being offered for sale just in that neighborhood. Come to the conclusion that the prairie land in question would be worth \$10 per acre in its natural state, by counting the cost of what it would be worth to fence so as to secure crops, and to break the land. This land at this time could not be fenced for less than \$1.00 per rod, of board fence, which is the cheapest.

5870

Horace Miller is married with one daughter.

5875

Direct. Of stumps not decayed he noticed a good many hollow, of all classes except the very smallest; could not state and definite number. It great many fair looking stumps were hollow. Does not know as there are more than are general in this country.

5880

Mander bone sworn. Since adjoining the Mank
trunk farm, and has since 1838, except eight months
he lived on it. Is a farmer.

5885

In spring of 1846, the house was not plastered,
finished; some of it was plastered, and some not.
Some of the windows had sash and glass, and
some not. Don't think there was any fence on
the place at all. There was no more broken than
a little garden, of the lands now cultivated.

There has a well been dug since, thinks 40 feet
deep, ~~and~~ it is lined with sawed lumber. (Ob-
jected to.)

5890

considers the prairie land ~~worth~~ would be
worth about \$12 per acre in its native wild state,
and in its present condition about \$25.

5895

Has known the 80 west of sailors since 1838, and
before any thing was cut from it. crosses it when
he goes to his timber. Taken together it was a very
poor piece of timber. It was openings or barrens. If
the timber all stood which has been cut since 1846,
should not think it would be worth more than
10 or \$12 per acre.

5900

Bought timber land a year ago for \$10 an acre,
which averaged better than this would with all the
timber standing which was in 1846. (Objected to.)

5905

There is a stake fence ~~about~~ around about two a-
cres including the house. There is about 12 or 15
rods of rail fence on the north line of the im-
provements on the west quarter.

cross-examined. This 12 or 15 rods commences at the gate in front of the barn, and runs n. e. The fence north of the house stands on the 23 3/4 acre piece.

Thinks this land would be worth \$12 per acre in its wild state, because there is adjoining on the south a quarter and an eighty that can be bought for that. Has heard a number of persons say so. It is good prairie land. Does not know why the title is not good. Should not be afraid to buy it. Does not know whether there is any timber connected with it.

Bought the timber a year ago of Goudens, 3/4 of a mile east of the piece by Sailors, and farther into the big woods.

East of the barn, there is no line fence on the north line of the west quarter. Witness owns the land north of the west quarter.

Horace G. Miller sworn. Resides on the Mendon property.

About three quarters of the south line of the east quarter of the prairie was built of rails bought of Mr Baird—about 1000 rails. It has an alternate length of long and short rails—the long about 11 feet and the short 4 or 5. It is staked and raised. The short rails came from his father's home place. Believes the riders of the whole of this south fence came from the 80 west of Sailors; the stakes about half from the home farm, and the balance from the

80. The reason for buying them was, there was no timber on the 80 ft for rails; and the timber on the east 80 was thrifty young timber.

5940

The stakes in this fence, and also of the fence on the east line were cut the same winter that the rails were bought of Baird — in the winter and spring of 1848. The reason for the stake fence was the scarcity of long rail timber on the 80 west of Saylor's.

5945

The rails and stakes used on the south line of the west quarter for topping out the sod fence were from the timber on the home farm. There were from 250 to 300 rails; thinks about 100 stakes.

5950

On the north line of the west eighty of the east quarter, the fence is a three rail worm fence, set up from the ground on crotches, staked and rived. It part, thinks about a third, of these rails came from the east forty of the timber in section 20. The balance from the home farm. Judges about a third of the stakes came from the east forty of the timber, and the balance from the home farm.

5955

About the house on the southwest corner of the east quarter where witness lives, is a board fence inclosing the orchard, garden and door yard together. (Objected to.) Three sides, and about half of the fourth is inclosed with posts and boards. Inclosed is from $1\frac{1}{2}$ to $1\frac{3}{4}$ acres. About 50 apple trees are set in this inclosure. (Objected to.)

5960

5965

[24 10 1867]

There is a barn yard inclosed with rails mostly, but joins the orchard and door yard fence on the east. (Objected to.) There is a well on these premises cased with sawed lumber.

5970

The house where witness lives was bought by defendants, came from old Ishwaukee, and was moved upon the premises five years ago. This fact. It is a story and a half high, thinks 18 by 20, divided below into kitchen, bedroom, pantry and stair way; above into two rooms, and is letted and plastered throughout. There is a cellar under the whole house, stoned up. Should think the value near \$300. (Objected to)

5975

Thinks he knows all the timber defendants have taken from the eighty west of Sailor's, and for what it has been taken. There has been fire wood taken from time to time, since 1846, which has been chiefly used by defendants. Cannot say how much has been stolen. I have seen persons there taking timber.

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5985

The principal part of the timber which has been taken by the defendants from this 80 has been used on the premises.

5990

Defendants Norane Miller and J. C. Miller have got fire wood from there, but not all they have used. Has never known defendants to sell any timber from this lot, except a load or two of wood by Watterman. There were logs taken from it which made 18 fence posts, used on the home farm, and also some short stakes on the top of the sod fence on the home farm. Could not tell the number; there were a good many, and were between two and three feet long. Thinks there were about two wagon loads of them. From what he has heard from the defendants, he should think there were three or

5995

6800

four legs taken which were used in the house on the home farm, for struts and joists.

6805

This is all the timber he knows of being taken from this lot, and used by defendants off the Munkthorp premises. If there had been other, thinks he should have known it, from the fact that I lived there, and have done most of the hauling, until within the last three years.

6810

Previous to cutting stakes for the east fence, in 1848, thinks Waterman cut timber for a few rails on that lot; and that then there had been no others cut there by defendants.

6815

Cross examined. Is son of defendant Horace Miker. The south fence on the east quarter cuts across the corner, leaving out 2 or 3 acres. This fence across the corner is about half of stakes and half of rails. These stakes are about seven feet long and some under that. About 150 of them came from the lot west of Bailon's.

6820

The fence on the north line of the west eighty of the east quarter was built by my father. Mr. Bone owns the land north of it. Bone did not build any of this fence, but afterwards furnished 100 rails ^{which} are ~~around~~ now around the barn yard where I live. He agreed to furnish half but did not furnish more than the 100 rails.

6825

In front of the house on the south line there is about eight rods of board fence.

The cellar walls go up to the sills of the house. He thinks he knows all the timber taken by defend-

6034

out from the lot west of Sailor's, because he lived with them and worked for them at the time the timber was taken. Lived with Horace and J. B. Miller, who lived in one family until about four years ago, but have all the time worked on the place, and with the defendants; all the time he lived in the family, and since that time. Lived on the Mouthrop place since three years ago last spring.

6035

Waterman took fire wood from this lot west of Sailor's, and used it at his house on the Mouthrop property; presumes 10 cords a year. Thinks he has got his wood from there for six years.

6040

Witness has used wood from this lot about 8 1/2 years, from 8 to 10 cords a year. We have generally used for wood, tops of trees which would not make any thing else.

6045

Horace and J. B. Miller, he thinks got all their wood from this lot for two winters, besides a load occasionally. Some years they have not drawn any, and some years 3 or 4 loads; generally half to three quarters of a cord to a load.

6050

Waterman moved from the premises in the fall of 1852. A year ago the past winter, he got some wood from this lot; cannot say how much. More than half his fuel was from this lot.

6055

There has been a family in the old Mouthrop house since Waterman moved out. They have had their wood not from this lot.

Waterman has cut some logs on the lot saw logs on the lot. The principal part of the lumber

6060

he thinks is still on the premises. Some was used for floor for barn, and the stable in the barn where I live.

6065

I cannot say where Waterman got the logs he has been drawing to the mill this winter. He owned prairie east of the prairie in question. Has this spring seen him draw one load of sawed posts from the Milford mill to this prairie. I cannot tell where the timber for these posts came from. Waterman has another piece of prairie land east of these. Waterman has used this prairie about three years.

6070

I cannot say where all the fence on the north line of the ~~west~~ west quarter east of the barn went to. I do not know that Waterman took it away.

6075

Does not know ~~that~~ Waterman has not taken other timber from this lot. About the time the injunction was served, he cut down a good many trees. The tops have been mostly removed. Does not know of his taking any away since the injunction.

6080

The defendants introduced the receipts.

Pay receipts for 1845, prairie and 23 $\frac{3}{4}$ acres	\$ 7.33
1846, on all the lands	11.49
1848	6.62
dated 21 March 1850,	9.95
18 July 1850	9.46
10 Feb. 1851	21.40
16 Feb. 1852	13.91

6085

Day receipt dated 13 Feb. 1852

\$ 14.40

11 Jan 1852

6.85

5 Feb. 1853,

8.40

7 Feb. 1854,

17.75

Duncan Ferguson, county treasurer was produced, and said he had examined the tax lists. His evidence was objected to, and it was agreed that the master should examine the tax lists, and should insert the taxes paid. He reports the following:

Taxes for 1847,

\$ 11.33

1848

4.28

1850

6.50

1851

21.85

1852

20.48

Evidence for complainants.

John M. Saylor sworn. Is 34; a farmer. Resides on S. 1/2 N.E. 1/4 S. 19 T. 43 N. R. 2 E. and his house and barn are on n.w. part of it, and the field he cultivates south of the house and barn. The fence on the west side of it extends 120 rods, along the line of the Moulthrop timber land. He shall have resided there eight years next July. His land is divided by a fence running east and west, as near on a line between the two forties, as near as he could measure with a pole.

The timber on my lot was different from that on

6415

the Mouthrope lot. Don't know as I could answer which had the most timber. Thinks the timber on north ~~part of~~ forty of the Mouthrope lot was better than on the north part of mine—taller and better for rail timber and saw logs.

6420

The timber is better on the south forty of his lot, than on the south forty of the Mouthrope lot—more of it, and more rail timber.

Comparing the south forty of mine, and the north forty of the Mouthrope lot, they differed in kinds of timber: on mine there was some red and yellow oak; on the Mouthrope it was mostly white oak. On the south part of the north forty, there was a strip of pretty good timber; it was better than any on the south forty of mine; better timber, less knots and taller. There was not so much difference in straightness, but he considers oak better than red or yellow.

6430

~~Don't know as he could tell the portion of his timber that would make rails. Thinks what he called trees on his were~~

6435

Has cut the most of the timber on the north sixty acres of his, and converted the timber into rails, wood and saw logs. Can't tell the proportion that would make rails. These he called trees were as large or larger than the ~~all~~ trees on the Mouthrope lot at the bottom. Did not get as many rails as he wanted, because the timber would not make them. Made some rails of half the trees he cut; made nearly all into rails that would make rails.

6440

There were a large number of trees on the strip on the Mouthrope lot that I thought would make

6445

rails. Should think two thirds would, but may be mistaken.

A tree 18 inches through would make from 16 to 20 rails.

6454

South of the Dishwaukee is a large tract of prairie, commencing about three quarters of a mile from this lot. He has been 20 miles on it, and they say it extends 80. Thinks timber is not easy to be had about this Northrop land, but he is not very well posted up on that point.

6455

Thinks Horace Miller, Gardner B. Miller and Waterman commenced cutting timber on this land soon after they took possession. Does not know what they did with it.

6460

~~Has been cutting the timber from his from the time he took possession, until the present~~

Has been cutting the timber from his ever since he took possession. They have been cutting on the eighty east of mine ever since he came, ten years ago. There ~~was then~~ were then 20 acres inclosed.

6465

Cross examined. Has made in the neighborhood of 5000 rails on his land, not all of them a good sample of rails, half of them are. A good deal of the timber split pretty hard. The rails are generally 10 feet long. A man would cut and split from 50 to 100 rails per day on his timber.

6470

Is not sure defendants commenced cutting the year they took possession.

Witness has cultivated 20 acres of his south forty, but there are a few scattering trees on it.

6475

Direct. The north 60 acres of his 80 are mostly cleared.

6480

Francis Barnard, solicitor of complainants, affirmed. For the purpose of ascertaining with certainty the matter of the stumps, he and complainant induced the witness Jacob Laram to go and make a reexamination of them yesterday. Mr. Laram, Mr.

6485

Smith and witness made an examination of which the result is mostly marked down in the schedule produced. Mr. Smith carried a two foot rule and measured the stumps across the top in view of myself and Mr. Laram. Mr. Laram carried a tape

6490

line and hatchet, and examined the stumps with the hatchet and otherwise, in regard to their soundness, and estimated the number of years they had been cut. When the body was still lying, Smith and Laram measured the length which would make timber suitable to use; and when the top was lying, or piles of chips or indentations in the ground indicated where lengths of timber logs had been taken out, they measured the apparent lengths of the logs so taken out. (Objected to.)

6495

I carried sheets of paper and pencil, and marked down the diameter of the stumps, the number of years Mr. Laram estimated they had been cut, the length of the logs, and some other particulars which appear in the schedule, and the schedule was made out from those minutes.

6200

6205

We went upon the lot about the n.e. corner. On going south to where we made a general measurement, we found three stumps near the fence, which are the first marked in the schedule. We then went to the end of Sailor's division fence which he has mentioned, at s.e. corner of the north forty, and measured five chains north. We then ran the line west, in the direction of Sailor's fence, to a place where there was a space running north and no stumps. Smith and Brown measured this, and said there were 13 chains.

6210

Observing a locality a little south of this on the south half, where were a considerable number of stumps cut, and extending east from this place, we measured there, and they compose the second list of 16.

6220

We then measured from the end of the 13 chains, north five chains, and observed the line from thence to the end of the five chains first measured. The stumps measured there compose the third list of 19.

6225

We then examined some of the rest of the stumps on the south forty, but had not time to measure them particularly and mark them down.

6230

We then went to the west end of the ridge, and measured the stumps south of a path leading obliquely across the northerly part of the eighty, towards the Milford mill. We measured the stumps regularly along eastwardly from the west line, as long as we had time, and until I thought we had got a fair average of all the stumps on the north half.

The stumps measured there compose the fourth and last lot in the schedule

6235

Cross examined. The tops and limbs left were very. There were a considerable number where the bodies of the tops had been trimmed out and taken away, and the body left, because it was too knotty to work, I suppose. Cannot estimate the number. Places of chips and indentations might be ten or twelve.

6240

Nearly if not all the stumps along the ridge were in our sight. Did not take a particular view of the stumps in any other part.

6245

The Schedule.

6250

No.	Diameter of Stumps.		Years since cut	Length of Stems.
1	1	10	5	
2	2	6	6	12
3	2	8	6	20
13				
15				
11				
10				
8				
1	1	6	3	10
2	1	9	5	12
3	1	6	1	
4	1	4	5	12

Trees cut on south forty acres, on extreme old line of fence, about midway from east to west, on a small locality there.

6255

[124452.111]

6260	5	3		1	26	
	6	1	3	1		Part decayed (heartless)
	7	1	7	1		
	8	2		1		
	9	2		8		Burnt.
6265	10	2	1	1	10	2 feet at top.
	11	2		1		Hollow.
	12	1	6	1		Hollow
	13	2	3	8		Hollow
	14	1	10	5		Hollow
6274	15	1	7	1		
	16	3		1	10	Still lying

Trees cut on piece measured **5** by 13 chains,
—5 ch. north from sailor's division fence, and
13 westward.

6275	1	2		1	20	Taken this winter.
	2		9	5		
	3		9	5		
	4	1	1	8		
	5	1	9	8		Partly rotten
6280	6		8	6		
	7	1		7		
	8	1	6	6		Partly rotten.
	9	1	8	6	14	
	10	1	5	8		
6285	11	1	4	1	8	
	12	1		5		
	13		9	5		

6290

14

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18

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7

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1

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1

1

7

6295

21

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22

11

8

23

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8

24

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25

1

9

7

6300

26

1

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7

27

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28

1

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6305

31

1

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7

32

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33

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1

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1

4

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6310

36

1

4

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37

1

1

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38

1

2

4

39

1

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8

40

1

9

7

13

6320

41

2

8

14

42

1

11

3

43

1

8

3

25

44

2

1

3

15

beheaded.

Decayed.

	45	1	7	1	
6325	46	1	6	1	
	47	1	10	1	
	48	2		1	12
	49	1	6	7	
	50	2		5	
6330	51	1	5	5	
	52	1	5	6	
	53	1	2	6	
	54	1	8	1	
	55	1	1	6	
6335	56	1	4	6	
	57	1	2	8	
	58	1	10	8	
	59	1	2	6	
	60	1	2	6	
6340	61	1	5	6	
	62	1	1	7	
	63		11	8	
	64	1	6	8	
	65	1	3	8	
6345	66	1	3	8	
	67	1	1	8	
	68	1	6	8	
	69	1	1	8	
	70	1	4	6	
6350	71	1	6	8	
	72		11	8	
	73	1	4	8	
	74	1	2	8	
	75	1	4	8	

Part rotten
Rotten.

6355

77

1

4

8

78

1

9

8

79

1

6

8

80

1

4

8

81

1

3

8

6360

82

1

6

8

83

1

1

8

84

1

8

85

1

2

8

86

1

10

8

6365

87

1

5

8

88

1

6

8

89

1

11

8

90

1

2

8

91

1

1

8

6370

92

1

5

8

93

1

2

8

94

1

5

8

95

1

7

8

96

1

3

8

6375

97

1

3

8

98

1

11

8

99

1

7

8

100

1

8

0

101

1

3

6380

102

1

1

8

103

1

7

10

105

1

11

10

105

1

5

5

106

1

10

5

6385

107

1

1

8

[12 4 11 11 11]

Hollow.

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

Rotten.

Probably counted before.

Probably counted before.

Probably counted before.

Hollow.

Hollow.

Rotten.

6394

108 1 4 8

109 1 8

110 1 10 7

111 1 6 8

112 10 8

113 1 2 8

114 1 4 8

115 10 8

116 7 8

6395

107 2 2 1 18

108 11 8

109 1 5 8

120 1 1 8

121 1 3 8

6400

122 1 4 8 12

123 1 4 8

124 1 4 8

125 1 10 4 14

126 1 8

6405

127 1 10 3

128 1 10 1 11

129 1 11 6 14

130 10 8

131 1 1 8

6410

132 1 6 8

133 1 10

134 1 8

135 1 4 8

136 1 3 8

6415

137 1 4 8

138 1 4 8

Taken this winter.

Probably counted before.

Now.

6420

139	1	1	7
140	1	7	8
141	1	5	8
142	1		8
143	1	7	8
144	1	1	5
145	1	3	6
146	1	4	7

6425

147	1	2	6	10
148		11	6	
149	1	5	8	
150	1	10	4	11
151	1	11	4	14

6430

152	1	10	5	
153	1	9	8	
154	1	10	8	14
155	1	6	3	
156	1	1	9	

6435

157	2		2	18
158	1	9	4	
159	2	4	3	11
160	2	10	4	16
161	1		9	

6430

162	1	2	7	
163	1	1		
164	1	7	7	
165		11	8	
166	1	2	8	

6435

167	1	2	7	
168	1		8	
169	1	4	7	

{12435=112}

Hollow

25	1	0	3	
21	5	1	1	
20	5		1	
21	1	11	1	
22		1	2	
21		1	1	
20	1	2	0	1
22		0	2	
21	1	2	0	
28	1	2	2	
25		10	2	
21	1	3	2	
20	5		1	5
21	1	3	4	
22		2	4	
21	5	3	3	
20	1	0	0	
22		1	1	

Taken this winter.

2 feet at top.

2 feet 3 inches at top.

20		11		
21	1	3	2	
22	1		1	
21	1	2	2	
20	1	2	2	
21		2	2	
21	1	1	1	
21		1	1	

Hollow.

Hollow.

	171		11	8	
	172		9	8	
6444	173		7	8	
	174		9	8	
	175	1	1	8	
	176		7	8	
	177	1	1	8	
6445	178	1	1	8	
	179	1	1	8	
	180	1	10	8	
	181	1	2	8	
	182	1	2	8	
6450	183	1		8	
	184	1	5	8	17
	185	1	3	8	
	186	1	4	8	19
	187	1	4	4	
6455	188	1	8	6	
	189		9	9	
	190	1	6	8	
	191		7	8	
	192		10	8	
6460	193		10	8	
	194		9	6	
	195	1	3	7	
	196	1		8	
	197		8	8	
6465	198		7	8	

Hollow.

Breeds and southerly from path to Milford Mills, on west
bank of water hole, across and along ridge

6470

1	2	10	1	20
2	2		2	
3	2		1	28
4	1	10	2	8
5	2		2	8

6475

6	1	4	2	
7		9	2	
8	1	6	2	
9	1	7	2	
10	1	5	2	

6480

11	2	8	1	25
12	2	8		17
13	1	9	4	
14	1	10	2	20

6485

15		10	8	
16	1	2	2	9
17	1	2	4	20
18		10	2	

6490

19	1	1	4	
20	1	6	5	
21	1	9	4	
22	1	8	1	12
23	1	6	8	

6495

24	1	11	1	24
25	1	4	7	
26	1	6	7	
27		10	2	
28	1	4	2	

29	1	6	2	
30	1	5	6	
31	1		6	

Hollow

Lying

Lying

Rotten

Lying

Lying

Taken this winter

14 feet still lying

	32	1	6	6	
6504	33	2	1	5	22
	34		9	8	
	35		9	8	
	36	1	5	8	
	37	1	5	8	
6505	38	1		8	
	39	1	3	8	
	40		11	8	
	41	1	2	8	
	42	1	3	8	
6510	43	2		1	25
	44	1	6	1	18
	45		9	7	
	46	1	6	6	
	47	2	3	3	
6515	48		8	4	
	49	1	3	4	
	50	2		1	21
	51	1	3	5	
	52		10	5	
6520	53	1	8	7	
	54	1	5	6	
	55		6	5	
	56	1	5	6	19
	57		9	7	
6525	58		9	5	
	59	1	11	1	17
	60	2		1	10
	61	2	1	1	17
	62	1	6	3	

Still lying.

Still lying.

Still lying.

Taken this winter.

6530

63 1 3 5

64 1 6 4

65 1 1 4

66 1 3 3

67 1 4 2

6535

68 2 3 4 11

69 1 8 6 21

70 1 4 6

71 1 3 6

72 1 4 6

6540

73 1 7 8

74 1 8

75 1 9 5

76 1 4 6

77 1 10 8 24

6545

78 1 1 8

79 1 4 8

80 1 6 10

81 1 5 5

K. Now

R. then.

6550

John J. McComb called again. Saw Waterman and his boys loading rails of the fence one extending east of the barn on north line, ~~and~~ upon a wagon, and starting with it towards his other farm east.

6555

There was one a fence around the orchard set out by Waterman, which is all there that has not rotted down.

~~Thinks it was a year ago last fall Waterman was running fence away. It might have been spring before.~~

At year ago last fall, the apple trees Waterman had set out were removed. They were dug up and the roots buried in the ground in piles, with the tops out,

6560 The fence was removed before the trees were taken up. The fence he ~~is now confident~~ now feels confident was moved a year ago last spring.

6565 Witness saw Waterman digging up the apple trees. There were no apple trees on the place when he took possession, unless a sprout ~~grew~~ came up where witness had dug up trees. Mrs. Montrose had given me the trees on the place.

6570 Thinks Waterman had nigh 200 apple trees on the place, but is not positive. At first were put out the spring after Waterman took possession. Thinks they had stood there about three years. If the trees had been upon ~~the land~~ my land, I would not have had the largest of them taken up for ~~five~~ \$5.00 per tree.

6575 Waterman said he had put the trees there, and he had paid too much money for them to lose them. That he expected an injunction, and he wanted to move them while he could; that he expected to lose the land.

6580 I would not have had that orchard removed, if I had owned it, for \$5.00 per tree; but I could buy such trees out of the nursery for 25¢ per tree - such trees as there were when first set out.

6585 Cross examined. Waterman built the fence which he removed.

6585

Reckled by complainants. Waterman afterwards dug up some locust and shade trees about the old Moulthrop house which he had set out; 30 or 40, also 30 or 40 cherry trees, which might have been worth 25 cents per tree. Don't think he dug up a tree he did not put out. He left a great many trees he had set here; did not take up any of the peach trees. Thinks he took up 30 or 40 locust and other shade trees. Witness would not have had the shade trees about his house; has no taste for such things.

6590

6595

Jack Brown. Yesterday made a re-examination of portion of stumps.

6600

Witness has chopped more or less for last seven years. Day before yesterday he went into the woods and ~~examined the stumps there~~ where he chopped seven years ago. People who use a great deal of timber, want it cut in February, because it lasts better if cut then than later. The rail road company make have their contracts so as to finish cutting in February. Timber does not last so well cut after the sap starts in the spring. The stumps he cut seven years ago, are just about like those on the trees in question.

6605

~~which he estimated to have been cut seven years ago~~
Does not think the falling of the bark a good test of the time since a stump was cut. Some of the stumps I cut ~~the bark from~~ six years ago, the bark is all off from. The most reliable indication of the age of a stump is its soundness. After a stump has been cut about four years, from its general appearance you cannot tell it from one cut five or six

6610

6615

years, after that time they do not alter but very little in color until they commence rotting.

Went with Mr. Burroughs and Mr. Smith. We proceeded in the manner stated by Mr. Burroughs. (Defendants admit this.) Saw Smith measure across the stumps.

6624

I examined the stumps with a hatchet. Of the stumps he estimated to have been cut eight years or less, some were sap-rotten, and the heart was perfectly sound. Where the heart of the tree was decayed when cut, the heart was still decayed—and more.

6625

A good many of the stumps which I estimated to have been cut eight years, were cut smooth, and appeared to have been cut by the same person, and by a man who understood chopping.

6630

The chalk marks were not all gone. On some they showed plain; on some the mark was quite dim. Some of the stumps marked, upon examination I think had been cut more than eight years. There were some stumps among those we did not measure, that I concluded had been cut more than eight years; and they were in about the same proportion as those we did measure.

6635

We saw three, and he thinks four, with chalk marks, that had been pushed over. The bodies of three of these stumps were sound, and the roots were rotted off.

6640

We saw most rotten stumps on the n. w. corner; near the road running towards Milford. Saw a good many logs lying about there, some sawed most in two, and some quite, and some were sawed in two and taken away, and some were marked off.

6645

Some were marked off the length for fence posts.

Thinks the stumps measured would give a fair average of the stumps on the north forty.

6650 Remembers measuring two stumps about west from the northeast corner of the south forty. One of them had been cut two or three years, and the other a good deal longer. Southwest of those we measured about 15 stumps near together. Thinks they would average over 20 inches. Thought they had been cut six or seven years, he cannot say but they had been cut longer. Does not remember finding on the south forty any stumps more than eight years cut.

6660 There were some stumps that looked as though they had been cut more than eight years, they were more rotten than the others a good deal.

6665 Noted but a very few trees standing on the place yesterday, but you could get a cut from long enough for posts or a ten foot log. Did not yesterday go across the north end of the lot. The best timber on the north end has been cut out.

The trees were cut above the swell of the roots. The timber that is now standing holds its bigness very well.

6670 He observed some places where logs had been taken away this winter, and directed Mr. Barnard to mark them down so. The trees did not appear to have been cut this winter. The chips on the ground were new, and the logs had been raised by driving wedges under them, to raise them up when they had been frozen down.

6684 There were places on the south forty where logs seemed to have been taken this winter. The trees cut on the south forty seemed to have been larger than on the other.

6685 Saw new pests lying along the line of Waterman's field; the large end 5 by 5 inches, and the top 2 by 5, and from 5 to 6 feet long. We counted in one place 106, and in another 69; and there were two piles in which we thought there were 150—probably more. Most of them were cut of large timber, and appeared to have been sawed the past winter or this spring.

6686 Cross examined. We did not go generally among the stumps where we did not measure.

6695 Thatcher Blake called again. He took notice of the timber when he was on the land. Some of the trees would make saw logs, and some would not. The trees were short. There would but a small part of the trees make rails, and but a small proportion would make saw logs. Speaks of all the trees on the lot, large and small.

6696 When he was there, he did not observe the trees particularly with reference to making rails or saw logs, not expecting the question to be asked.

Exceptions to Master's Report.

The complainants ~~filed~~ ~~object~~ ~~submitted~~ the following objections before the master, and they were ordered to stand as exceptions.

6905

1. Master has not allowed for rent or use of productive lands,

2. Nor made allowance for damage to soil.

3. Nor enough for 200 apple trees dug up by Waterman.

6910

4. Nor enough for the cherry trees dug up by him.

5. Nor any thing for removal of shade trees.

6. He has not allowed any thing for waste by defendants upon w. 1/2 n. 2 1/4 s. 19, nor for rent or use of it, nor for the wood and ^{timber} taken therefrom in any ~~shape~~ form.

6915

7. He has made no allowance for timber or trees cut on 2 1/2 s. w. 1/4 s. 20. or

8. He has virtually allowed defendants for a partition of that tract.

6920

9. He did not allow sufficient for trees cut on 23 1/4 acre piece, nor for log house taken from it.

10. He made his report without reference to the pleadings and original evidence.

Defendants excepted in same manner.

6925

[12445-187]

1. Master allowed \$50 for fence removed by Waterman,

2. And \$200 for fruit trees removed by him.
3. And \$8 for cherry trees.
4. And \$16 for wood at and \$4 for log house.
5. He disallowed \$165.61 cents taxes paid by defendants.

6730

The court ~~sustained~~ allowed exceptions 1, 7 and 8, and overruled 2, 3, 4, 5, 6 and 9, of complainant.

Allowed 2, 3 and 5, and overruled 1 and 4, exceptions of defendants.

6735

And it was referred again referred to the master to state an account between the parties; and ordered that in taking it, he inquire what was the additional cost of breaking the prairie, over the cost of subsequent ploughing; whether they were ploughed a second time before a crop; and if they were, whether such ploughing were necessary; and if in that case the master was to deduct the interest of the cost of the breaking from the rent annually; and if they were not ploughed the second time, the master was to deduct the interest of the additional cost of breaking above a subsequent ploughing from the rent annually; and that the master inquire what was the original value, and what is the present value of the inclosure fences put upon the prairie lands by the defendants, especially of such of the said fences as were necessary to inclose the said cultivated lands and that he deduct the value of the use of said necessary inclosure fences in such manner that no rent be allowed therefor.

6740

6745

6750

Master's Second Report.

At same term, May, 1854, the master reported, that from the testimony of Horace J. Miller, taken before him on the reference, it appeared that defendants had built on the prairie, about 295 rods of rail fence; 230 of stake fence; 200 of sod fence; 47 of board fence, and have used about 200 rails to top out 80 rods of sod fence.

That the cost of splitting the rails and drawing them to the premises is about \$20 per thousand; of making sod fence $4/$ or $4/6$ per rod. (allowed 50 cts) of putting up board fence was about 87 cts per rod; laying up rail fence about 3 cts per rod, and of topping sod fence with rails, about 1 cent per rod; that it requires fourteen rails to the rod for rail fence, and that cost of preparing materials and constructing rail fence is about the same.

He has allowed defendants

295 rods rail fence 14 rails per rod,	4130 rails
200 rails used on sod fence	200 "
230 rods stake fence, equivalent to rail fence	<u>3220</u> "
Equal in cost to	7550 rails.
at \$20 per thousand	\$151.00
200 rods of sod fence @ 50 cts	100.00
47 rods board fence @ 87 cts	40.89
Putting 295 rods rail fence and 230 stake fence @ 3 cts	<u>15.75</u>
Whole cost of fencing	\$308.44

That it appears to be the usual course of mobocracy to cross-plough breaking before first work; that the

6785

lands in question were so treated, except a very small part, and the master is of opinion it was necessary; that the cost of breaking prairie was then \$2 per acre. He has allowed for breaking

1846, 120 acres, 1st crop in 1847, @ \$2.	\$240.00
1847, 10	20.00
1848, 100	200.00
1849,	<u>\$460.00</u>

6790

That cost of subsequent ploughing has been from 75 cents to \$1.00 per acre.

6795

Miller went into possession about 10 May 1846, and he has made rents 10 May.

6800

That he has allowed defendants interest at 6 per cent on one half the cost of breaking the lands, for the time they are charged with rent for the same; and one half the taxes paid. Has charged defendants rent on 1/2 of lands under cultivation at \$1.25 per year until last year at \$1.75; with half value of old house, and the timber removed from 23 3/4 acre piece; half the value of timber cut from east 40 acres of timber, and half the value of fence removed by Waterman.

6805

That he finds due complainants for rents, waste, rents and profits, \$145.82.

Statement.

6810

Interest on \$325, (half of \$650) from 1 Oct. 1839 to 10 May 1847.	\$148.86
on \$15 (half of \$30) from 1 Oct. 1841, to 10 May 1847,	5.04
Half of taxes for 1845 and 1846	<u>9.53-5</u>
	162.93.5

		\$162.935
	Deduct half value of log house	<u>2.00</u>
6815	Interest due 10 May 1847,	\$160.935
	Interest on \$340 loan of \$325 and \$15 for	
	year ending 10 May 1848,	20.40
	Interest of half cost of breaking 120 acres,	7.20
	Interest on half cost of breaking 120 acres, for	4.827
6824	year ending 10 May 1848,	
	One half taxes for 1847,	<u>5.665</u>
		\$199.027
	Deducting half rent of 120 acres @ \$1.25 for	
	year ending 10 May 1848,	<u>75.00</u>
6825	Balance due of interest, &c 10 May 1848,	\$124.027
	Interest on \$340 to 10 May 1849,	20.40
	Interest on half cost of fencing 130 acres for	
	year ending 10 May 1849,	5.23
	" " " " breaking 130 acres "	7.80
6830	Half taxes for 1848	<u>5.45</u>
	Balance interest, &c due 10 May 1849,	\$162.907
	Deducting rent of 130 acres for year ending 10 May 1849,	<u>81.25</u>
	Interest &c, due 10 May 1849,	\$81.657
	Interest on \$340 to 10 May 1850	20.40
6835	Interest for half cost of breaking 230 for year end-	
	ing 10 May 1850,	13.80
	Interest on \$154.22 half cost of fencing 230 acres	9.25
	Half taxes for 1849,	<u>12.955</u>
	Interest, &c. 10 May 1850,	\$138.062
6840	Being less than rents, &c. and principal,	<u>340.00</u>
		\$478.062
	Deduct rent of 230 acres for year ending 10	
	May, 1850,	<u>143.75</u>
		\$334.312

	Amount due 10 May 1850	\$334.31 2
6845	Interest on same for year ending 10 May 1851,	20.06
	^{plus} Interest on cost of breaking for year ending 10 May 1851	13.80
	Half interest on cost of fencing,	9.25
	Half taxes for 1850,	<u>13.955</u>
	10 May 1851,	\$391.37.7
6850	Deduct half rent of 230 acres for year ending 10 May 1851,	<u>143.75</u>
	Amount due 10 May 1851,	\$247.62.7
	Interest on same to 10 May 1852,	14.86
	Interest on half cost of breaking	13.80
6855	Interest on half cost of fencing	9.25
	Half taxes for 1851,	<u>24.835</u>
	10 May 1852,	\$310.37.2
	Deducting half value of timber cut on east 40a. \$9.00	
	half fence removed by Waterman 25.00	
6860	and rent of ^{230 acres} land for year to 10 May 1852,	<u>143.75</u>
	Due 10 May 1852	\$132.62.2
	Interest on same to 10 May 1853,	7.96
	half cost of breaking	13.80
	half cost of fencing	9.25
6865	Half taxes for 1852,	<u>14.47</u>
	10 May 1853	\$178.10.2
	Deducting rent sent for year ending 10 May 1853, for 230 acres of land,	<u>143.75</u>
	Due 10 May 1853,	\$34.35.2
6870	Interest on same to 10 May 1854,	2.06
	half cost of breaking to 10 May 1854,	13.80
	fencing	9.25
	Half taxes for 1853,	<u>3.97</u>
		\$63.43.2

6875

10 May 1854.

\$63.432

Half rent of 230 acres @ \$1.75

\$201.25

Half of present value of timber cut on
23 1/2 acre piece,
$$\begin{array}{r} 8.00 \\ \$209.25 \end{array}$$

6875

Deedship balance above

63.43

Making due complaints 10 May 1854, \$145.82

Master has not made distinct allowance for rent of house and garden. Cannot state present value of inclosure fences: no testimony.

6880

Evidence on reference.

Charles H. Shafford.

Witness lived near premises in 1846. His recollection is that defendants cross ploughed the land broken that year. His own opinion is, that it is better to cross plough. It is practiced both ways.

6885

The usual price for breaking in 1846 was \$2 per acre. Don't know of any variation for 2 or 3 years after. Paid that in 1848 and 1850.

6890

Thinks sod fence was made in 1846 for 4/6 per rod. Has always paid \$10 per thousand for splitting rails, and thinks it worth about the same to draw them from the timber to this machine.

Wheat examined. Has seen good crops of fall and spring wheat raised by harrowing without cross ploughing. It makes the sod lighter and bet-

6895 ter for the crop. Has known ploughing subsequent to breaking, done for 75 and for \$1.00; thinks a fair price a medium between these.

6900 Thinks sod fence will last about eight years; and that white oak rails, if properly attended to will last 20 years; oak rails used 8 years, thinks would be worth ~~less than~~ one third less than new rails. Fence to last wants to be relaid occasionally.

6905 Horace J. Miller. All the lands broken were cross ploughed for first crop, except about 12 which the bugs had rooted over. Lands are usually so cross ploughed. Would not consider it good husbandry to harrow in crop without it.

6910 The general price of breaking was \$2.00 per acre. Defendants built about 200 rods of sod fence; 40 of it on the boundary line, and the balance was on the east line of the west lot first broken. The usual price for making sod fence was 50 cents per rod.

6915 Fourteen rails to the rod is the usual number for worm fence; worth 3 cents per rod to lay it up.

There is about 260 rods of rail fence put on by defendants, and 160 rods of stake fence. (Objected to because witness has been examined about fences.)

6920 There is no particular difference in expense of preparing material and putting up stake and rail fence.

Defendants topped out about 80 rods of sod fence with rails, worth 1 cent per rod to put up.

Besides the outside fence there is ~~about~~ around the

6925 the barn about 20 rods of rail fence. (Objected to.)
About the old Moulthrop house and barn, there
is about 15 rods of rail fence, and about 70 rods of
stake fence, 40 rods of it outside fence. This is not in-
cluded in the 160 acres. The board fence on the
place is ^{fine} ~~boards fence~~. It cost between six and seven
6930 shillings to put it up. There is about 40 rods of it
on the place.

It is worth from \$20 to \$25 per thousand to
split and draw the rails on to the ground.

6935 Cross examined. Cross-ploughing after breaking
is more practiced than sowing without. Sometimes
good crops are raised without it, but it is un-
certain.

6940 The 260 rods of rail fence is part of it on the
south line of the east quarter. There is a board
fence commencing near the southwest corner of
that quarter, extending east six or eight rods, then
the rail fence commences and extends nearly a-
cross the south line of the quarter. If straddled
out, it might lack 12 or 14 rods of extending across
the quarter.

6945 On the north line of this east quarter, there is
120 rods of rail fence built by defendants. It is a
partition fence between defendants and Mr. Jones
and Mr. Bone. Don't know whether there were rails
on the place, put into this fence, Bone owns 50 acres
adjoining. He did not build any of the fence, but
6950 afterwards furnished defendants 100 rails. It would
take about 500 rails for the 50 rods. The balance of the
260 rods is yard fences.

6955

The stake fence on the east line is a little less than 160 rods.

6960

~~This~~ ~~see~~ Thinks it worth from 30 to \$4 per thousand to lay up rails into fence. Never knew them laid up by the thousand. Thinks a man might lay up from 30 to 40 rods per day.

The 40 rods of rail fence is about the house and orchard on the east quarter. He does not include in it the 6 or 8 rods in front of the house.

6965

Mander bone. Thinks Horace J. Miller's testimony in ~~the main correct~~ substance correct. Knows what it costs to build a fence, and thinks he put it low enough, and he should not want to put up the fence at the price he stated.

6970

The usual price for breaking was as he stated.

6975

The annual rent of cultivated land has been from 6¢ to \$1.25 per acre in the neighborhood since 1847. \$1.25 is the highest price he has ever known paid. (Inquiry about rent was objected to as not within the reference.) Witness is a farmer, and his farm joins the premises. He has lived there since ~~1807~~ 1839.

6980

Philip M. Marsh. Thinks the testimony of Horace J. Miller in the main correct. During the several years since 1847, rent in the neighborhood has ranged from 6¢ to 10¢ per acre. Is a farmer, and has lived near the premises since 1845.

Evidence for complainants.

Edgar James. The usual price for ploughing cultivated land is from 6¢ to 8¢ per acre.

6985 The usual price for cutting and splitting rails is 40¢ per thousand. It is worth \$2.00 a day for a team and hand to draw rails. Should judge three loads per day drawing from the timber by Saylor's to the prairie a fair day's work—about 40 rails to a load. A man will lay up about 80 rods a day six rails high, without staking or riding, wages \$1.00. It takes a little over 1000 rails for 80 rods.

6995 Should not think a stake fence as valuable as a rail fence. The stake fence on this place, was built 5 or 6 years ago. It is now pretty badly used up.

7000 A good white oak fence with repairing ought to last about 15 years. Should not think white oak rails would diminish in value half in eight years. About one fifth of the rails at the end of eight years would be useless in a fence.

7005 The sod fence made by defendants has been built eight years. Sod fence will last about eight years, but one a road hardly thinks it will last that length of time and be a good fence.

Its a general thing land is cross-ploughed after breaking. It is calculated grain will do better.

The stake fence will last a year or two longer by repairing.

cross examined. A man can lay up and

7014

stake and rider 2.0 was per day. When he says a man can lay up 80 rods, he judges from what he has done himself.

7015

The complainants moved to strike out that part of the deposition of Mander Lane, and of P.M. Marsh, which relates to the rent of lands. The motion was overruled, and exception taken.

7020

The defendants objected and excepted to the master's report;

1. That he had not allowed defendants the price of making the fences, to wit \$308.44,
2. Over the price of breaking to wit \$460,
3. He should have allowed 12 per cent interest,
4. The master has allowed \$788.75 rents,
5. He has allowed \$44. for waste.

7025

The complainants objected and excepted;

1. That the master had allowed for partition fences.

2. He has allowed for inclosure fences not necessary to inclose cultivated land.

7030

3. He has allowed for too many rods of rail fence,

4. And for too many rails to the rod.

5. And for too many rails on the sod fence.

6. And for too many rods of stake fence.

7. And too much a rod for &c.

9035

8. And too many rods of board fence.

9. And too much a rod for it.

10. He has allowed for the original cost of the fences, for every year, notwithstanding the fact is, that all of them are greatly diminished in value, and some of them are nearly worthless.

9040

11. He has not reported the present value of any of the fences.

12. He has reported cross ploughing necessary.

13. He has allowed too much for the breaking.

9045

14. He has not allowed sufficient rent per acre.

15. He has not allowed sufficient for waste ~~on~~ $2\frac{1}{2}$ $2\frac{1}{4}$ $2\frac{1}{2}$.

9050

16. In stating the account, the master has not allowed any thing for rent of Marlborough house, barn and garden, although in his original report he had allowed \$24 per year, and it stood confirmed by the exception to it being overruled.

All the exceptions were overruled, and the parties accepted, and the report was confirmed.

9055

Final Decree May, 1854.

9060

That complainants recover against Horace Miller, Gardner L. Miller and Hiram Waterman, \$145.82 ~~reported by master~~ balance reported by master and have execution, and that money be paid into court, subject to its order; that Margaret M. Smith is entitled to recover an undivided one third part of

the lands as dower, to be settled upon her by her present
husband complainant Benjamin Smith, to her sole
and separate use, according to the rules of equity; sub-
ject to such charges and dispositions as this court
may order, for the costs and expenses of litigation,
in this behalf; that Simmons Sackett, the Millers, and
Waterman, by 1 Sept. next, by suitable deed or deeds,
to be settled by master if parties disagree, release and
convey to complainant Sir Moulthrop, all their right,
title and interest in the undivided half of the lands,
subject to the said right of dower; that the question
of waste ^{or damage} by defendants upon will 2 n.e. 1/4 S. 19, be consid-
ered so far open and undetermined, as ^{not} to preclude
the same from being raised, in case a partition of
the lands should be sought; the claim for the same
having been overruled upon the ground that the
defendants had made improvements upon the said
lands of at least equal value with the amount
of the said waste and damage. The bills are dis-
missed as to Benjamin Sackett, Lucius P. Moulthrop and
Riram J. Kilburn, and they recover their costs, and
have execution. Complainant recovers against ~~Horace~~
the Millers and Waterman, their costs, and
have execution.

Complainants appealed.

Issues assigned.

~~The Circuit Court erred in the following manner:~~

Errors assigned.

The Circuit Court erred in the following particulars:

7890

1. In overruling motion to set aside depositions of Benjamin Sacket, Erastus P. Moulthrop and Eben Norton, for irregularities in taking.

7895

2. In overruling motion to suppress the depositions of B. Sackett and E. P. Moulthrop, on ground that Sackett was interested, and that they had fully answered at instance of Horace Chicker.

3 and 4. In overruling complainants exceptions 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 to depositions.

7900

5. In overruling complainants motion to amend their 27th exception.

7905

6. In declaring that the right of Levi Moulthrop deceased to the lands was to an undivided half as tenant in common with E. P. Moulthrop, and that complainant Levi Moulthrop is intitled to recover and redeem that undivided half; whereas the Circuit Court ought to have decreed the whole to the complainants.

7910

7. In not decreeing that defendants should amount for the \$100 paid by Mrs. George to B. Sackett.

8. In directing master to deduct half of waste damage and rent from principal and interest of \$650 ~~more~~ \$30, instead of from principal and interest of half those sums.

7915

9. In overruling complainants exceptions 2, 3, 4, 5, 6 and 9, to master's first report.

10. In allowing defendants' exceptions 2, 3, and 5 to
stand,

0920 11. Upon referring again to master to state account
ordering that he inquire what was an additional
cost of the first breaking of the prairie cultivated by
defendants over the cost of a subsequent ploughings
and whether they were ploughed a second time before
crop and necessarily; and if they were, to deduct
the interest of the cost of breaking from the rent
annually.

0925 12. In overruling complainants' motion to strike
out parts of the depositions of M. Bone and P. Marshall
taken on the reference.

0930 13. In overruling complainants' exceptions to mas-
ter's second report.

14. In confirming that report.

15. In leaving Margaret M. Smith dower in half
instead of all the lands.

0935 16. In not allowing complainants compensation
for waste, damage, rent, severer construction of the
will under S. 19.

17. In allowing defendants in any form for im-
provements made upon the lands.

0940 18. In dismissing bills as to B. Sackett and Jas-
tes P. Marshall.

~~12/65~~

1124/5