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In addition to the testimony contained in the previous bills of exceptions and which is incorporated in this, the defendant on his part further to maintain the issues joined, proved by Samuel S Donnin that he was a surveyor, and that he knew the lines of "Slack Water" but never surveyed it, the land sued for in this action, and that it lay between the branch turning Galloway's Mill and on along the river west toward Crows lands and that it is timber land and that he knows where the cultivated land called "Luckett's fields" and that this timber land lies between it, and the Potomac river that land at the west end is about ninety perches wide and at the east about fifty perches. And further proved by Marmaduke W Boyd that he was the surveyor that laid off "Slack Water" and that the part sued for lies between the branch turning Galloway's Mill then Youngs and westward towards Crows and along the river and that it was timber land and that it lay between the cultivated lands and the river; that it was unenclosed, that there was a fence separating it from the cultivated land, but otherwise it was not enclosed and the defence here rested their case. When the plaintiff on his part to maintain the issue joined proved by Andrew Rench that he has known the lands since 1820. That this timber land sued for, lying along the river and between the branch and Crows was never enclosed. That it lay between the river and the cultivated fields called "Luckett's fields" that these fields were unenclosed, and that this timber land lay between these fields and the river. That there was a road running through this timber land ever since he knew it until closed by the Claggetts in 1845 or 46. And further proved by George Grover that he lives on the lands

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where the defendant Newman now lives as the tenant of the Messrs Claggetts in 1845. That before the Claggetts took the fence away around the fields called Luckett's Fields adjoining this timber land lying between them and the river and extended them, the fences at both ends of this cultivated land, to the river cliff and thus enclosing this timber land and making these cultivated fields and this timber land sued for, one enclosure, but leaving it still open along the river where there was no fence and that prior to that time there was no fence at either end of the timber land nor along the river. And further proved by Charles Dillinger that he has known these lands since 1827. That this timber land sued for was never enclosed until the Messrs Claggetts extended the fencing to the river cliffs. That before that time the cultivated lands was separated from them by a fence and lay between them and the river and that this timber land was not enclosed at either end nor along the river before the Claggetts extended this fence in 1844 or 45 and then rested his case.

Whereupon upon all the testimony the plaintiff prayed the Court to instruct the jury as follows:

That if the jury find that the land in controversy and for which this action is brought, was actually enclosed before the fall of the year 1845, but before that time remained unenclosed and outside the fencing enclosing the adjacent cleared land, held and occupied by the defendants, and those under whom they claim, then there is no evidence legally sufficient, before the jury, of adverse possession of said land, by the defendants and those under whom they claim, to defeat the plaintiff's right of recovery in this action.

And thereupon the defendants also prayed the Court to —